

**COVER NOTE**

---

from : Secretariat

to : Members of the Convention

---

Subject: Simplification of the Treaties and drawing up of a constitutional treaty

---

The Praesidium has begun discussing the question of the simplification of the Treaties. Members of the Convention will find attached, for information, a discussion paper prepared for this purpose by the Secretariat, for the attention of the Praesidium.

\_\_\_\_\_

## **DISCUSSION PAPER**

### **SIMPLIFICATION OF THE TREATIES AND DRAFTING OF A CONSTITUTIONAL TREATY**

- I. Issues**
- II. Simplification and modernisation of the Treaty texts**
- III. Codification of the Treaties**
- IV. Merging of the Treaties**
- V. Drawing up a basic treaty**
  - A. Structure and content of the basic treaty**
  - B. Linkage with the existing Treaties**
  - C. Question of the possible hierarchic role of the basic treaty**
- VI. Revising and differentiating the procedures for amending the Treaties**

#### **I. ISSUES**

Simplification of the Treaties is no doubt one of the means of responding to the criticisms often levelled at the European Union. It could help to render the Union more understandable for its citizens, in particular by highlighting its founding values, its tasks, and the broad principles behind its operation. The responsibilities of those involved in the decision-making process would thus be more clearly established. The main objective of the simplification of the Treaties would therefore be to help render the Union more accessible to its citizens, while at the same time making life easier for those who use the Treaties on a daily basis. It would also help to put Europe's house in order so that it can welcome new Member States and new citizens.

In almost fifty years of European integration, there have been many treaties which have revised or supplemented the three original Treaties founding the European Communities, namely, the Treaty establishing the European (Economic) Community, the Treaty establishing the Atomic Energy Community and the Treaty establishing the European Coal and Steel Community (TEC, TEAEC, TECSC). The main subsequent treaties are the Single Act, the Treaty on European Union (TEU – Treaty of Maastricht), the Treaty of Amsterdam and, lastly and more recently, the Treaty of Nice, which has not yet entered into force. Other less significant Treaties have also amended the founding Treaties, such as the Merger Treaty in 1967, or two Treaties amending certain budgetary or financial provisions of the founding Treaties in the seventies.

Moreover, the TEU created a new entity, the Union, which is "*founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty*"<sup>1</sup>. Consequently, the Union's structure is based on what is commonly referred to as three "pillars", on the one hand, the Community pillar (corresponding to the three Community Treaties), and on the other, two broad new areas of action. These are the Common Foreign and Security Policy (CFSP), which transforms the political cooperation introduced by the Single Act, and cooperation in the areas of justice and home affairs (JHA), corresponding to the Union's second and third pillars respectively. The Treaty of Amsterdam subsequently transferred to the Community pillar<sup>2</sup> part of the activities covered by the third pillar, which is now limited to judicial and police cooperation in criminal matters. The main characteristics of the second and third pillars are decision-making procedures and instruments of action which are more intergovernmental in nature than the conventional Community method, and non-existent or limited legal scrutiny.

Primary law concerning the European Union also comprises:

- the Accession Treaties, of which a large number of substantive provisions adapt or supplement the founding Treaties;

---

<sup>1</sup> Article 1 of the TEU.

<sup>2</sup> See new Title IV of the TEC entitled: "Visas, asylum, immigration and other policies related to free movement of persons".

- a number of related Acts or Decisions adopted by simplified procedure, which supplement primary law (for example, Decisions relating to the location of the seats of institutions or other bodies, or the Act concerning the election of representatives of the European Parliament by direct universal suffrage);
- around forty Protocols having the value of Treaties (some of which cover important institutional matters <sup>1</sup>);
- many Joint or unilateral Declarations accompanying each Treaty.

A (non-exhaustive) overview of current primary law is given in Annex I to this paper <sup>2</sup>.

The complexity of primary legislation is above all explained by the number and variety of its sources. The idea of simplifying the Treaties is not a new one and is, to an extent, a continuation of the efforts to simplify the Union's legislation which have been under way for several years.

Notwithstanding the initial progress made by the Treaty of Amsterdam (see *below*), the Nice Declaration on the future of the Union (Nice Declaration) mentioned the simplification of the Treaties as one of the issues for discussion contributing to "*the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States*". The Laeken Declaration places this exercise in a wider context, that of "*Towards a Constitution for European citizens*" <sup>3</sup>. The Declaration raises a number of questions regarding the structure of the Treaties (simplification without changing the current content, basic treaty, incorporation of the Charter, Constitution), the development of the Treaties (distinction between amendment and ratification procedures), as well as the structure of the Union itself (distinction between the Union and the Communities, division into three pillars).

It is true that the simplification of the Treaties involves a number of different operations which are more or less independent of each other and which highlight the different sources of complexity. This paper will start with the simplification and modernisation of the texts themselves, which have developed erratically and inconsistently over time. We will then examine the simplification of the Treaties' "architecture", which has several aspects to it.

---

<sup>1</sup> See for example the Protocol on the application of the principles of subsidiarity and proportionality (Treaty of Amsterdam), and, more recently, the Protocol on the enlargement of the European Union (Treaty of Nice).

<sup>2</sup> Most of these texts can be consulted in the *Selected Instruments taken from the Treaties* published by the Office for Official Publications of the European Communities.

<sup>3</sup> See excerpt from the Laeken Declaration in Annex II to this paper.

The purpose of the codification of the Treaties is to incorporate all successive amendments to the founding Treaties and to repeal the original Treaties and successive revisions. The merging of the Treaties aims to unify and restructure into a single instrument the different founding Treaties on which the European Union is based, mainly the TEU and the TEC. The merging of the treaties in principle also has the effect of repealing the original Treaties and successive revisions.

Then, if the Convention decides to consider the drafting of a basic treaty <sup>1</sup>, it would be appropriate to examine its structure and content, as well as the different possible approaches to linking it up with the current Treaties. This last question leads on to an examination of the possible differentiation of revision procedures for the basic treaty and for the other Treaty texts.

Lastly, one of the reasons for the complexity of the Treaties is the fact that the Union's structure is itself rather complex, in particular the duality of the Union and Community as well as the pillar structure. This matter is currently under discussion in the Convention Working Group on Legal Personality.

## **II. – SIMPLIFICATION AND MODERNISATION OF THE TREATY TEXTS**

A first step towards simplifying the Treaty texts was taken by the Treaty of Amsterdam <sup>2</sup>. The simplification essentially consisted of the deletion of obsolete or lapsed provisions of the three Community Treaties and of their Annexes and Protocols <sup>3</sup>. Notwithstanding certain wording changes, the entire operation was conducted "*à droit constant*" (on the basis of established law), i.e. without changing the legal content of the Treaties and without affecting the Community acquis <sup>4</sup>. In total, the TEC alone was relieved of around fifty Articles and around ten Protocols and Annexes, while a further fifty-odd were partially deleted or reworked. When the operation was completed, the TEC was renumbered for ease of consultation. The TEU, of which Titles V and VI were substantially reworked, was also renumbered. A table of equivalence between the old and the new numbering was annexed to the Treaty of Amsterdam.

---

<sup>1</sup> The Laeken Declaration refers to a "basic treaty".

<sup>2</sup> Second part of the Treaty of Amsterdam (Articles 6 to 11).

<sup>3</sup> In most cases, these related to provisions expiring at the end of a transition period or other time limits, or provisions overtaken by events.

<sup>4</sup> See Article 10 of the Treaty of Amsterdam.

Although the Amsterdam simplification has made the Treaties more readable and more accessible to practitioners and citizens, it seems possible to advance further along this path. Several members of the Convention have already expressed their wish to simplify the language of the Treaties. Moreover, the quality of the drafting of a good number of the provisions could be improved, particularly in the case of overlong provisions with a large number of cross-references<sup>1</sup>. The style in which the successive texts produced over the years are drafted is often inconsistent. Lastly, the wording of a number of the provisions of the Treaties, which sometimes date back to the original versions, has been overtaken by the development of policies, by practice in the institutions or by developments as regards jurisprudence.

Such a modernisation of the texts is certainly an ambitious and difficult task<sup>2</sup>. It is also a sensitive one, in that the Treaty texts are often the result of difficult political compromises, which are sometimes reached only at the cost of a certain degree of ambiguity (this is particularly true of the clauses attributing competence). It is also advisable to avoid inadvertently calling into question in the course of the simplification process certain aspects of the legal order as established by the Court of Justice in its interpretation of the texts of the Treaties.

Simplification of the Treaties also covers another issue, i.e. the rationalisation and standardisation of decision-making procedures, and the establishment of a systematic structure of acts or instruments. This problem, which has been addressed in specific notes from the Convention Secretariat<sup>3</sup>, is one of the important issues facing the Convention and certainly goes beyond the simplification of texts "*à droit constant*".

---

<sup>1</sup> See, for example, Article 61 of the TEC:  
*"In order to establish progressively an area of freedom, security and justice, the Council shall adopt:*  
(a) *within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;*".

<sup>2</sup> Attention is drawn to an interesting study carried out in the past, which attempted principally to consolidate, and even extrapolate, the "acquis jurisprudentiel constitutionnel" (constitutional case-law acquis) (version of the TEC published in the *European Law Review*, 1997, by the *Centre for European Legal Studies* (Cambridge, Faculty of Law).

<sup>3</sup> CONV 162/02 and CONV 216/02.

### III. – CODIFICATION OF THE TREATIES

One of the reasons for the complexity of primary law is that the original Community Treaties, and the Maastricht Treaty on European Union, have been amended on numerous occasions by successive revisions. It has become almost impossible for practitioners to work with all these Treaties, even though they are the only instruments of authentic status. This situation has arisen as a result of the fact that the Treaties have never been "*codified*", i.e. they have never been replaced by a new document incorporating the original content of and the successive amendments to the Treaties, this repealing the previous texts <sup>1</sup>.

The *Selected instruments taken from the Treaties* published periodically include a "*consolidated*" version of the various founding Treaties, i.e. a text which incorporates all the amendments but does not replace the previous Treaties. As stated in the introductory note thereto, the collection of *Selected instruments* "has been prepared for documentation purposes and does not involve the responsibility of the institutions". It does not, therefore, have authentic status. It should also be noted that the consolidated versions of the TEU and the TEC, attached to the final act of the Treaty of Amsterdam, were presented "for illustrative purposes" only <sup>2</sup>. The original and revised Treaties therefore currently remain the only instruments to have authentic value.

---

<sup>1</sup> Within the framework of Community legislation, a distinction may be made between the various operations aimed at reorganising the texts. *Mutatis mutandis*, these distinctions can also be applied to the Treaties. *Consolidation* involves incorporating all the successive amendments into an act. All of the previous texts remain in force until the consolidated act acquires legal value. *Codification*, on the other hand, aims to repeal the initial act and all subsequent amendments to it by conferring legal value on a new act which incorporates all the amendments. *Recasting* legal texts occurs when the process of codification is accompanied by new amendments. The *merging* of texts merges two separate original acts (and any subsequent amendments to them) into a new act which replaces all the previous texts.

<sup>2</sup> These consolidated versions include both new substantive amendments and the operation of simplifying the texts and re-numbering them. On that occasion, all the protocols were listed and classified on the basis of the Treaty or Treaties to which they were annexed, although certain difficulties remain in this regard, particularly as regards the official numbering of the protocols (see Annex I).

By conferring legal value on the consolidated versions of the two main Treaties, which would amount to codifying them, all the original Treaties and the successive revisions thereof could be repealed. Such an operation would radically simplify the Union's primary law. Legal certainty would also be strengthened in that practitioners would be referring to authentic texts. Such codification could take place whatever tendencies were taken by the Convention as regards the reorganisation of the Treaties (merger, basic treaty, etc.). In fact, in the case of a number of these tendencies, codification would be a necessary consequence of the reorganisation of the Treaties (see below).

However, such a process of codification, even if limited to reflecting the existing legal situation, is significant in that it would require the consolidated Treaties to be submitted for fresh ratification by the Member States. This question has been shown to be politically very sensitive at recent Intergovernmental Conferences.

It should be noted, however, that there have already been specific cases of codification, and even recasting, which could serve as a model for the future <sup>1</sup>. The most recent example involves the draft Treaty of Nice submitted for ratification by the Member States: it includes a recasting of the Protocol on the Statute of the Court of Justice which incorporates the reforms made at the Intergovernmental Conference.

#### **IV. – MERGING OF THE TREATIES**

Another source of complexity of primary law is the large number of founding Treaties regarding the Communities and the European Union. The Treaty on European Union ("Maastricht Treaty") entails a particular difficulty in that it was superimposed on the Community Treaties, in the same

---

<sup>1</sup> In this respect, the Convention of 25 March 1957 on Certain Institutions Common to the European Communities (Single Assembly and Single Court of Justice) and the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities were repealed. Their provisions, which remain in force, were simplified, synthesised and regrouped under Article 9 of the Treaty of Amsterdam and were then submitted in that form for ratification afresh by the Member States. Note also the inclusion in Article 190 of the TEC of Articles 1, 2 and 3(1) of the Act concerning the election of representatives of the European Parliament by direct universal suffrage, annexed to the Council Decision of 20 September 1976.



way as the union was superimposed on the Communities. More specifically, the TEU combines new provisions concerning the new entity, the CFSP and JHA, with a set of provisions amending the three Community Treaties <sup>1</sup>.

Aside from the codification of the original Treaties taken individually, simplification of the Treaties could cover another process involving the merging of the Treaties in a new single document without modifying their substance. There have been several attempts at such an exercise in the past <sup>2</sup>. In the course of the IGC leading up to the Treaty of Amsterdam, a group of experts worked on a merger of the Treaties, alongside the process of simplifying the texts. Their work did not reach fruition, but was subsequently completed by the General Secretariat of the Council and published "*as an example of a possible consolidation of the Treaties, in accordance with Declaration No 42 of the Treaty of Amsterdam* <sup>3</sup>".

In fact, two alternatives for merging the Treaties were presented by the General Secretariat, in accordance with the two working hypotheses adopted by the group of experts, one concerning the TEU and the three Community Treaties <sup>4</sup>, and the other limited to the TEU and the TEC. In both cases, such a merger would take place in principle "*à droit constant*" <sup>5</sup>, without modifying the *acquis* and respecting the current legal situation, in particular the distinction between the Union and the Community, and the pillar structure established by the Maastricht Treaty. This is why the

---

<sup>1</sup> Articles 8 to 10 of the TEU. The Single Act of 1986 had already provided for "political cooperation" alongside the Community system.

<sup>2</sup> For example, European University Institute (RSCAS), *Version unifiée et simplifiée des traités régissant l'Union européenne et les Communautés européennes*, Working paper W-9, European Parliament, Directorate-General for Research, Legal Affairs Series, 1996. For a description of these different attempts, see Ch. Schmid, *Ways out of the Maquis Communautaire - On Simplification and Consolidation and the need for a Restatement of European Primary Law*, EUI, working paper RSC no. 99/6 ([http://www.iue.it/RSC/Publications/99\\_6t.htm#15](http://www.iue.it/RSC/Publications/99_6t.htm#15)).

<sup>3</sup> Consolidated version of the Treaties (Vol. I and II), SN 1845/00 and 1846/00.

<sup>4</sup> Under this hypothesis, the legal personalities of the three Communities would also be merged (in accordance with the objective set out in the preamble to the 1965 Merger Treaty), with the European Community taking the place of the other two. In this way, identical or similar provisions in the Community Treaties would be merged, thereby making it possible to remove over a hundred provisions from the EAEC Treaty and over sixty from the ECSC Treaty. Moreover, to avoid saturating the single Treaty, material provisions specific to those two Treaties would be transferred to two sectoral protocols. However, the merger of the provisions of the Community Treaties and the arrangement with the two protocols have, on occasion, raised sensitive questions, which would undoubtedly require political choices.

<sup>5</sup> See Clauses 356 and 357.

structure of the new draft Treaty, divided into books, is based on the structure of the current TEU: the consolidated texts of the TEC replace the three Articles of the TEU which amend the Community Treaties and form part of the structure of the consolidated version of the TUE.

The provisions in the new document were renumbered sequentially (approximately 360 clauses), and are introduced by a preamble, formed from the merged preambles to the TEU and TEC. The new Treaty entitled the "merged version" of the Treaties in question, would look thus:

Preamble

Book I: Common provisions (Articles 1 to 7 of the TEU)

Book II: The European Community (Articles 1 to 311 of the TEC)

Book III: Provisions on a common foreign and security policy (Articles 11 to 28 of the TEU)

Book IV: Provisions on police and judicial cooperation in criminal matters (Articles 29 to 42 of the TEU)

Book V: Provisions on closer cooperation (Articles 43 to 45 of the TEU)

Book VI: Final provisions (Articles 46 to 53 of the TEU)

Annexes and Protocols <sup>1</sup>

It will further be noted that Book II has undergone a measure of restructuring, with the institutional provisions of the TEC (or the institutional provisions common to the various Communities) being brought forward and placed after those on principles and citizenship, and the provisions on the Community's external relations being drawn together into one section. This is just one example of the possible options for restructuring the TEC quite apart from any merger exercise.

This exercise did not bear fruit, partly because the new Merger Treaty – like a Codified Treaty – would have required ratification by the Member States. Some Member States did not want to see the occasion used to reopen discussion on matters that were firmly established: the EAEC Treaty was in this respect a particularly sensitive point. Others were concerned that the substantive amendments introduced by the Treaty of Amsterdam would not stand out with sufficient clarity in a codified or merged text. A further merger-related difficulty was that it involved repealing all the original treaties and their subsequent revisions. Beyond the symbolic aspect of such repeal, some feared that even if it were conducted "*à droit constant*", the merger exercise itself might have unforeseen legal consequences in the future.

---

<sup>1</sup> In the model for the merger of the four treaties, this part includes a Protocol 1 on coal and steel and a Protocol 2 on atomic energy.

Others thought the results obtained by merging the Treaties were still unsatisfactory and did not justify submitting the end-product for further ratification. In particular, the scope for a thematic restructuring of the single Treaty was limited by the retention of two entities (the Union and the Community) and by the strict observance of the "pillar" structure.

## V. DRAWING UP A BASIC TREATY

Whatever the formula adopted for merging the Treaties, the result is still voluminous and relatively complex and in the view of some provides an added value that does not meet current expectations. In any case, the Laeken Declaration raises the question – in the context of a broader "reorganisation" of the Treaties – of "*making a distinction between a basic treaty and the other treaty provisions*" and making "*amendment and ratification procedures*" correspond to this distinction. Initial discussions in the Convention have shown that the Convention's end-product could involve the drafting of a new "basic" treaty or a "constitutional" treaty, or indeed a constitution<sup>1</sup>.

The idea of giving the European Union a "basic treaty" is not new. The European Parliament has twice made the attempt: the first time, in 1984 under the aegis of Altiero Spinelli, a draft "Treaty establishing the European Union", which broadly foreshadowed what was to become the Maastricht Treaty eight years later; the second time, in 1994, a draft "Constitution of the European Union"<sup>2</sup>. The idea has also arisen in circles beyond the institutions<sup>3</sup>. More recently, the European University

---

<sup>1</sup> See also in particular the contributions from Mr H. Haenel (CONV 12/02), Mr A. Duff (CONV 22/02 and 57/02), Mr E. Teufel (CONV 23/02), Mr J. Trzcinski (CONV 34/02) and Mr K. Hänsch and Ms P. Berès (CONV 63/03).

<sup>2</sup> Also known by the name of Fernand Herman, rapporteur of the Committee on Institutional Affairs.

<sup>3</sup> European Constitutional Group, *A proposal for a European Constitution*, published by the European Policy Forum, London, 1993. *The Economist*, 18 October 2000.

Institute in Florence produced a feasibility study for the European Commission on the reorganisation of the Treaties<sup>1</sup>. That study was drawn up in the context of the report of the Group of Wise Men of 18 October 1999 on institutional reforms and it attracted attention insofar as it presented the model of a basic treaty resulting from the reorganisation of the existing Treaties while respecting the current legal situation as far as possible ("*à droit constant*")<sup>2</sup>.

All these projects provide models on which the Convention could base its discussions if it were to opt for the drawing up of a basic treaty. In any case, two questions will have to be addressed: what will the form and content of the basic treaty be, and what will its relationship with the existing Treaties be. These questions are not totally independent of one another. Consideration could then be given to the question of possible differentiation between the procedures for revising the Treaties.

## **A. STRUCTURE AND CONTENT OF THE BASIC TREATY**

The drawing up of a basic treaty means we must identify the most important provisions that should appear in it. This entails sometimes difficult political choices. Certain subjects – such as the foundations and principles of the Union, fundamental rights and citizenship, certain institutional provisions and the usual final provisions – should not give rise to many problems. But there are others – relating to objectives or to competence-conferring clauses – which may prove more

---

<sup>1</sup> See references to the Florence reports in CONV 8/02, ANNEX I, p. 3 (website: <http://www.iue.it/RSC/Treaties.html>) and the Commission communication of 12 July 2000 "A basic treaty for the European Union" COM (2000) 434 final. Cf. the model submitted by the Bertelsmann Group for Policy Research at the Center for Applied Policy Research, A Basic Treaty for the European Union, (<http://www.cap.uni-muenchen.de/>).

<sup>2</sup> The starting-point for the Florence study on the reorganisation of the Treaties is that the existing Treaties already contain constitutional matter. Since that constitutional matter is somewhat "submerged" in the multitude of Treaty provisions, the Florence Institute has specifically sought to produce a new basic treaty that coherently regroups and restructures the provisions of a constitutional nature scattered throughout the main Treaties in force (TEU and TEC), while refraining as far as possible from amending their substance, especially as regards the pillar structure. Insofar as it seeks to identify existing constitutional matter, the model could provide a useful reference point for the Convention's discussions.

delicate. Finally, it is necessary to bear in mind the possible (but not indispensable) correspondence between the drawing up of a basic treaty and differentiation between the revision procedures (see *below*).

In the light of the development of the Treaties concerning the European Union and the ongoing proceedings of the Convention, we may *in abstracto* try to outline the content of a basic treaty <sup>1</sup>.

– *Preamble:*

The Treaties concerning the European Union have a long tradition of containing preambles whose political importance has often been remarked on, and of a rather elevated style. It would be useful if all citizens could be in a position to read easily a new preamble drafted in a summary and straightforward manner <sup>2</sup>.

– *Nature, structure, values of the Union:*

Certain initial ("common") provisions of the TUE concern the nature of the Union, its general institutional structure and the essential values it seeks to embody, in particular the crucial importance of democratic principles. The provisions on structure will have to take into account, in particular, the findings of the working group which is looking at the implications of explicitly granting the Union a single legal personality.

---

<sup>1</sup> The model basic treaty presented by the Florence Institute contains *clauses* (70 or 90 depending on the version) which are all headed according to the subject dealt with. Its structure is as follows:

Preamble

Title I: Foundations of the Union

Title II: Fundamental rights

Title III: Citizenship of the Union

Title IV: Objectives and actions (activities or policies) of the Union

Title V: Institutional provisions

Title VI: Financial provisions

Title VII: Provisions on enhanced cooperation

Title VIII: Final provisions

Special Protocols annexed to the basic treaty

– Common foreign and security policy

– Police and judicial cooperation in criminal matters

<sup>2</sup> Consideration could also be given to the preamble to the Charter of Fundamental Rights, which goes beyond fundamental rights as such and refers more generally to the process of integration.

– *Citizenship and the rights of citizens of the Union*

A number of existing TEU and TEC provisions already deal with fundamental rights <sup>1</sup> or the rights of citizens of the Union <sup>2</sup>. The Convention will have to comment on the advisability of integrating the Charter of Fundamental Rights into the Treaties (or the basic treaty) and on the technical options for such integration; the question is currently being discussed by a working party. A provision defining "citizenship of the Union" might also be envisaged.

– *General objectives of the Union*

A fundamental characteristic of European integration is the teleological – or functional – approach: the Communities, then the Union, were created to achieve general but definite objectives <sup>3</sup>. The formulation of such objectives is in line with the objectives already contained in the preambles.

– *Institutions of the Union, decision-making procedures, typology of means of action:*

The way in which these matters are set out in the basic treaty will depend on the findings of the Working Group on the simplification of legislative procedures and instruments and the Convention's future discussions on the institutions. On this point, the method corresponding most closely to the existing Treaties would be for the basic treaty to contain specific sections for each institution of the Union <sup>4</sup>.

---

<sup>1</sup> See for example Article 6(2) of the TEU and Articles 3(2) and 13 of the TEC.

<sup>2</sup> Part Two of the TEC. See also, perhaps, Articles 12 and 255(1) of the TEC.

<sup>3</sup> Article 2 of the TEU, Articles 2 and 4 of the TEC.

<sup>4</sup> In the Florence model, the provisions in the basic treaty relate for the most part to the composition of the institutions (having regard to their representativeness), their functions (according to the pillar under which they act) and, where appropriate, their internal voting procedures. The other provisions concerning the internal operation of the institutions have not therefore been included. They could be grouped within a statute specific to each institution, as in the case of the statute of the Court of Justice, while bearing in mind those already contained in the rules of procedure of each of the institutions.

– *Union policies and competences:*

There are already a number of principles in the treaties and Court of Justice case-law, which cover relations between the Union and the Member States and could be included in a basic treaty: the principle of allocation of competence, the principles of subsidiarity and proportionality for the exercise of competence, the principle of sincere cooperation, general principles of closer cooperation, the principles of primacy and the direct applicability of the Union's rules, etc.

As regards the actual limitation of competences, the basic treaty could conceivably define the various categories of competence and subsequently list the different policies and fields of action according to those categories of competence<sup>1</sup>. The basic treaty might also include a section on procedures and instruments and their correlation to the different policies and fields of action. It would, however, seem difficult to incorporate the actual legal bases for competence into the basic treaty. In fact, the "negotiation" surrounding the selection of legal bases could prove very difficult, in particular in the event that legal bases which were not included in the basic treaty were covered by a simplified amendment procedure. The idea of including all the legal bases in the basic treaty seems to contradict the very concept of a basic treaty.

– *Final provisions*

The existing treaties always contain a number of final provisions, *inter alia* on the accession of new members, entry into force, the revision procedure, the temporal and geographical scope of the treaty, authentic language versions, etc. Provisions outlining the procedure whereby a Member State can cease to be a member of the Union could be added to these.

---

<sup>1</sup> In this connection, it should be noted that Article 3 of the TEC already briefly sets out the different Community fields of action corresponding to the various policy chapters (or sections) of the TEC and gives an initial indication of the nature of the action.

## **B. LINKAGE OF THE BASIC TREATY WITH THE EXISTING TREATIES**

Certain guidelines regarding content, especially the question of how closely reference is to be made to the texts currently in force and in how much detail, will undoubtedly have an impact on how the basic treaty is linked to the treaties currently in force. This question will also depend on the extent of the substantive reforms proposed by the Convention.

Nevertheless, in general, *two approaches* – with possible variants – to linking the texts can be identified. Whichever approach is adopted, the question of the potential hierarchy between the basic treaty and the other treaties needs to be addressed.

### **First approach: a basic treaty as part of a reorganisation and simplification of the existing treaties**

The first approach consists in making this basic treaty part of a broader reorganisation and simplification of the main treaties currently in force, i.e. the merger and restructuring of the existing TEU and TEC <sup>1</sup>.

Texts not included in the basic treaty and which comprise "Part Two" of the operation could be dealt with in various ways:

---

<sup>1</sup> The issue of the Euratom Treaty (EAEC Treaty) remains open.



- (a) a second separate treaty,
- (b) the second part of a single treaty in which the first part would be the basic part <sup>1</sup> or,
- (c) a series of "special" protocols annexed to the basic treaty.

Whatever variant is chosen, the texts of the existing treaties would be merged and rearranged in both the basic treaty and in "Part Two".

Since the new product would replace the original treaties and the successive revisions (at least where the TEU and TEC were concerned), it should all be subjected to a ratification procedure. For that reason, before embarking on that course, we should bear in mind the concerns of those who have misgivings about submitting to further ratification texts which may already have been accepted. However, given the new context, and the importance of the reforms planned, the result of holding a new ratification procedure for the "two-part" package would be to canvass the support of the Member States and their citizens for the future European project. It would, moreover, make the treaties easier to read in the eyes of European citizens, which is one of the main aims of the Convention.

---

<sup>1</sup> This approach is suggested by the Florence study in particular. The main idea is that the new *Basic Treaty of the Union* would replace the existing Treaty on European Union in its entirety. This operation would be feasible insofar as such a basic treaty would, like the existing TEU, have the same characteristics as a "framework treaty" which unites Community and intergovernmental activities under the same "umbrella". This operation would also be feasible insofar as all the TEU provisions not included in the basic treaty – i.e. a large proportion of the provisions on common foreign and security policy and on police and judicial cooperation (Titles V and VI of the TEU) – would be contained in two special and separate protocols annexed to the basic treaty. Articles 8, 9 and 10, amending the three Community treaties, would be revoked following the merger of those treaties (or following expiry, in the case of the ECSC Treaty). As regards the TEC (or more specifically, its consolidated version), it would continue to exist in its current form, but without the provisions transferred to (or regulated in) the basic treaty. However, as noted in the study, the underlying logic of the initiative would be to turn what remains of the TEC into a third special protocol. The result would be a single instrument comprising two parts: the first part would be the basic treaty and the second part would consist of three special protocols on the subject-matter of the three pillars. In similar vein, a fourth special protocol could cover the subject matter of the Euratom Treaty if it were decided to include that treaty in the reorganisation operation. The number of special protocols could always vary if, for instance, the TEC were rearranged into several special thematic protocols (internal market, EMU, new area of freedom, security and justice, external relations, other common or complementary policies).

However, is the Convention the appropriate forum for carrying out this operation? Given the technical nature of "Part Two", the Convention is faced with *two options*:

- either it concentrates solely on drawing up the basic treaty, leaving "Part Two" to a later stage, and adopts a report setting out the consequences of the basic treaty for the texts of the current treaties; such a report should also outline how "Part Two" would be linked to the basic treaty and its structure. That operation could be undertaken on the basis of such a report by a working group of experts (comprising the legal departments of the institutions and the Convention Secretariat?) who would work under the political auspices of the European Council or the Presidency or the Convention Praesidium, or even the Convention itself. The Convention could then be called upon to endorse the results of the work prior to the Intergovernmental Conference.
- or the Convention draws up the basic treaty and "Part Two"; to draft "Part Two", it instructs a working group of experts (comprising the legal departments of the institutions and the Convention Secretariat?) to undertake in parallel a technical adaptation of the existing Treaty provisions (TEU, TEC and Euratom) to the new basic treaty, including the restructuring of texts remaining in "Part Two". This working group would progress in line with the headway made by the Convention on drafting the basic treaty and would act in accordance with guidelines drawn up by the Convention (or its Praesidium). The activities would culminate in the virtually simultaneous adoption by the Convention of both the basic treaty and "Part Two". This approach might, however, give rise to certain difficulties, such as persuading the Convention members not to touch the substance of certain policies (e.g. agriculture, structural funds, budget) or not to reopen certain questions settled during the accession negotiations.

## Second approach: a basic treaty superimposed on the current Treaties

A second approach consists in drafting a new basic treaty, to be superimposed on the current Treaties. These would remain as they are, or there would, at most, be amendment of particular points specifically to adapt them to the basic treaty, in particular by repealing the redundant provisions. Thus, the drafting of the basic treaty would be independent of any merger or reorganisation of the current Treaties. Only the basic treaty and any adjustments of the current Treaties would require ratification by the Member States.

The two European Parliament drafts referred to earlier (Spinelli and Herman drafts) are examples of this approach and have much in common in this respect. In both drafts the earlier Treaties remain untouched, being neither replaced nor even specifically adapted. Thus the *Treaty establishing the European Union* (Spinelli) or the *European Constitution* (Herman) provide a framework for and are superimposed on the Community Treaties (and the TEU in the case of the Hermann draft) <sup>1</sup>.

Given the significance of the provisions in question, many observers have stressed the considerable threat to legal certainty of linking the new document to the current Treaties and other legislation without first specifically adapting the latter. The coexistence of the old and new systems might well prove a permanent source of conflict as to whether the current treaties have lapsed or been implicitly amended by the basic treaty. If the approach whereby a new treaty is superimposed on the old Treaties were to be implemented, there would, at the very least, have to be concomitant adaptation of the latter.

---

<sup>1</sup> See Article 7 of the Spinelli draft and Article 8 of the Herman draft. In both cases the link with the current Treaties is made by distinguishing between firstly, "*the provisions of the Treaties concerning their objectives and fields of application*" and, secondly, "*the other provisions of the Treaties*". The first form part of the law of the Union insofar as they are not modified by the draft new Treaty or Constitution. They may also be adapted or amended in the future in accordance with the procedure for amendment (or constitutional revision). The second "*shall also form part of the law of the Union insofar as they are not incompatible*" with the new Treaty or Constitution. They may also be adapted or amended in the future in accordance with the procedure for adopting organic laws. Moreover, in both drafts, acts of the Community (or the Union) "*shall continue to be effective as long as they are not incompatible with the Constitution (the Treaty) and as long as they have not been replaced by acts or measures adopted by the Institutions of the Union in accordance with their respective competences*".

There remains, however, the objection that to superimpose a new basic treaty on the current Treaty on European Union (or what would be left of it) would complicate rather than simplify the architecture of the Treaties.

### **3. Question of the possible hierarchic role of the basic treaty**

If the Union acquires a basic treaty, sooner or later the question will arise as to whether or not the surviving treaties (or, in the event of reorganisation, the restructured texts in "Part Two") are subordinate to the new basic treaty. Although assigning treaties a hierarchic order is not common practice in international law, the constitutional or "basic-law" nature of the proposed new treaty does mean that the question has to be raised. Before this question can be tackled, we have to have a clearer picture of the basic treaty's actual content and the techniques for linking it to other instruments or treaties in force. Only a few comments will be made at this stage.

Clearly, this question arises only if the basic treaty is not explicit on this point, either by ruling out a hierarchic order or by making express provision for it. Hierarchy may also be assigned in different ways: for example by stating that only future amendments to the texts of the current treaties (where appropriate, as adapted or reorganised in "Part Two") would be subordinate to the basic treaty, since those texts would initially have been considered in accordance with the basic treaty when the latter entered into force. By the same token, the judicial review and other mechanisms for enforcing the primacy of the basic treaty may be developed to varying degrees. However, the task of assigning the treaties a hierarchical order can hardly be achieved if it is not matched by the effort to differentiate between the decision-making procedures for amending them (see next section).

That being said, it would seem that the process of assigning a hierarchical order to the treaties hinges essentially on the general approach taken to the linkage between them. If, for example, the current treaties were to remain unchanged (and continue to apply subject to implicit amendments, subsequent adaptation, or insofar as they are compatible with the basic treaty), the new basic treaty would tend to acquire a degree of primacy, at least implicitly. If, however, once the reform is complete, the texts of the basic treaty and the other treaties are expressly coordinated among themselves, the issue of primacy among the treaties will not necessarily arise. This would be so, if the current treaties were consistently adapted to the new basic treaty, or if the basic treaty were part

of a broader exercise of reorganising the Treaties into two parts (the Florence study's approach <sup>1</sup>). However, even in these cases, the hierarchical relationship could, in the interests of long-term legal certainty, be expressly established for future amendments. In particular, the current Treaties (if appropriate, as adapted or reorganised in "Part Two") could be to some extent made subordinate to the basic treaty, in order to reflect the idea that they specify the conditions and detailed rules for implementing the principles enunciated in the basic treaty itself.

## **VI. REVISING AND DIFFERENTIATING THE PROCEDURES FOR AMENDING THE TREATIES**

Whatever the scale of reforms recommended by the Convention and whatever approach is adopted for linking the new basic treaty to the current Treaties, even if the basic treaty is envisaged as a "renewed founding pact", it follows on from the current Treaties and should therefore in principle be adopted under the procedure laid down in Article 48 of the TEU. The new treaty would have to be approved by all EU Member States meeting in an Intergovernmental Conference and would not enter into force until ratified by all of them "*in accordance with their respective constitutional requirements*" (approval by national parliaments or referenda). This does not rule out the possibility of the basic treaty and the other texts or treaties being in future governed by an amended or differentiated revision procedure, but Article 48 of the TEU would first have to be amended or procedures laid down to derogate from it.

In this respect, the Laeken Declaration refers to the possibility of distinguishing "*between the amendment and ratification procedures for the basic treaty and for the other treaty provisions*".

---

<sup>1</sup> The Florence study does not establish any formal hierarchical relationship between the basic treaty and other special protocols or the TCE. Admittedly, under a "*droit constant*" approach the coordination of the texts was a more automatic process.

The establishment of different procedures to amend certain of the provisions of the Treaties does not necessarily indicate a hierarchical relationship between the various texts of the Treaties <sup>1</sup>. In this respect, a certain number of special revision procedures may already be observed in the current Treaties (see below), without the provisions of the Treaties to which those procedures apply being hierarchically subordinate to most of the other provisions of the Treaties, which are subject to the general revision procedure.

In the same way, the question of the reform of the procedure to revise the Treaties may also be considered independently of the question of the reorganisation of the Treaties, or of the adoption of a basic treaty. This was the subject of the second report by the Florence Institute on the reorganisation of the Treaties <sup>2</sup>: once the Treaties had been reorganised, how to develop them in future?

The report starts by noting that in an enlarged Union, the principle of unanimity and the lengthy national procedures connected with the ratification of amending treaties would risk paralysing the Union, and preventing amendments which subsequently become necessary. It therefore proposed a progressive replacement of revisions "*by common agreement*" with a vote by a superqualified majority, while protecting the minority with a number of institutional guarantees. It also suggested seeking inspiration from the many current cases of special "autonomous" revision procedures, i.e. those characterised (notably) by the lack of recourse to national ratification procedures <sup>3</sup>. These special procedures, which would also further strengthen the role of the institutions of the Union, could be extended or made the general rule in other cases.

---

<sup>1</sup> On the other hand, such differentiation between revision procedures is no doubt necessary if a hierarchical relationship is established or recognised between the first and the second, see above.

<sup>2</sup> European University Institute, *Reforming the Treaties' Amendment Procedures*, Second report on the reorganisation of the European Union Treaties, November 2000.

<sup>3</sup> For example, changes to the number of Commissioners (second paragraph of Article 213(1) of the TEC), or changes to some of the provisions relating to the operation and organisation of the Court of Justice. The Treaty of Nice provides for amendment to the Statute of the Court of Justice, with the exception of its Title I, by a procedure following which the Council acts unanimously (second paragraph of Article 245 of the TEC). Other "autonomous" amendment procedures apply to certain aspects of the Economic and Monetary Union (Articles 104(14) and 107(5) of the TEC). Others are intended to extend the scope of commercial policy (Article 133 of the TEC), or to make the codecision procedure the general rule in the framework of Title IV of the TEC (Article 67 of the TEC).

Furthermore, given the importance for citizens of the subjects addressed by the Treaties, and their political dimension, the report advocates that the influence of the European Parliament and of national parliaments should be increased, at least in the preparatory phase of the reforms, particularly through use of the Convention model. Such early participation by national parliaments should also have the effect of facilitating the subsequent ratification stage. Similarly, where use is made of a special "autonomous" revision procedure, national parliaments should be able somehow to get involved at the beginning of the revision procedure, rather than at the ratification stage. Could national parliaments be represented within a sort of "Congress" at European level, with or without members of the European Parliament? If, in the long term, what is foreseen is the adoption of a constitution which differs from a treaty by virtue of the procedure for its revision, could such a procedure involving national parliaments be made general?

---

**TREATIES AND RELATED ACTS**  
**CONCERNING THE EUROPEAN UNION AND EUROPEAN COMMUNITIES**

(Non-exhaustive) summary of primary law in force

**MAIN FOUNDING AND AMENDING TREATIES**

- Treaty establishing the European Coal and Steel Community <sup>1</sup>
- Treaty establishing the European (Economic) Community and Treaty establishing the European Atomic Energy Community <sup>2</sup>
- Single European Act <sup>3</sup>
- Treaty on European Union <sup>4</sup>
- Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts <sup>5</sup>
- Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts <sup>6</sup>

**OTHER AMENDING TREATIES**

- Convention of 25 March 1957 on certain institutions common to the European Communities (Assembly and Single Court of Justice) <sup>7</sup>
- Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities <sup>8</sup>
- Treaty amending, with regard to Greenland, the Treaties establishing the European Communities (signed on 13 March 1984, came into force on 1 February 1985)?
- Treaty amending certain budgetary provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities (signed on 22 April 1970, came into force on 1 January 1971)?

---

<sup>1</sup> Signed on 18 April 1951, came into force on 23 July 1953; expired on 23 July 2002.

<sup>2</sup> Signed in Rome on 25 March 1957, came into force on 1 January 1958.

<sup>3</sup> Signed in Luxembourg on 17 February 1986, and in the Hague on 28 February 1986, came into force on 1 January 1987.

<sup>4</sup> Signed in Maastricht on 7 February 1992, came into force on 1 November 1993.

<sup>5</sup> Signed on 2 October 1997, came into force on 1 May 1999.

<sup>6</sup> Signed on 26 February 2001, not yet in force.

<sup>7</sup> Repealed and replaced by Article 9 of the Treaty of Amsterdam.

<sup>8</sup> Repealed and replaced by Article 9 of the Treaty of Amsterdam.



- Treaty amending Certain Financial Provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities (signed on 22 July 1975, came into force on 1 June 1977)?

## **ACTS CONCERNING THE CONDITIONS OF ACCESSION AND THE ADJUSTMENTS TO THE TREATIES (AND RELATED DECISIONS)**

- Accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (1972)
- Accession to the European Communities of the Hellenic Republic (1979)
- Accession to the European Communities of the Kingdom of Spain and the Portuguese Republic (1985)
- Accession to the European Union of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (signed on 24 June 1994, came into force on 1 January 1995)
- Decision of the Council of the European Communities of 1 January 1973 adjusting the documents concerning the accession of new Member States to the European Communities
- Decision of the Council of the European Union of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union

## **OTHER ACTS AND RELATED DECISIONS: ADDITIONAL OR COMPLEMENTARY PRIMARY LAW ADOPTED BY A SIMPLIFIED PROCEDURE**

- Decision of the Representatives of the Governments of the Member States on the provisional location of certain institutions and departments of the Communities (Decision of 8 April 1965) <sup>1</sup>
- Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to the Council Decision of 20 September 1976 <sup>2</sup>
- Decision taken by common agreement between the Representatives of the Governments of the Member States on the location of the seats of the institutions and of certain bodies and departments of the European Communities (Decision of 12 December 1992) <sup>3</sup>
- Decision taken by common agreement between the Representatives of the Governments of the Member States, meeting at Head of State or Government level, on the location of the seats of certain bodies and departments of the European Communities and of Europol (Decision of 29 October 1993) <sup>4</sup>

---

<sup>1</sup> Legal basis: Article 37 of the Treaty of 8 April 1965 establishing a Single Council and a Single Commission.

<sup>2</sup> Legal basis: Article 190(4) of the TEC (former Article 138(3)) and corresponding Articles of the ECSC Treaty and the EAEC Treaty. Adoption by the Member States "in accordance with their respective constitutional requirements".

<sup>3</sup> Legal basis: Article 289 of the TEC (former Article 216) and corresponding Articles of the ECSC Treaty and the EAEC Treaty.

<sup>4</sup> Legal basis: Article 289 of the TEC (former Article 216) and corresponding Articles of the ECSC Treaty and the EAEC Treaty.

- Decisions of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union (Annex 1 to Part B of the Presidency conclusions, Edinburgh European Council, 11 and 12 December 1992)
- Council Decision of 31 October 1994 on the system of the European Communities' own resources <sup>1</sup>.

## **INSTRUMENTS OF SECONDARY LAW SUPPLEMENTING PRIMARY LAW**

- Council Decision of 1 January 1995 determining the order in which the office of the President of the Council shall be held <sup>2</sup>
- Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission <sup>3</sup>

## **INTERINSTITUTIONAL TEXTS**

### **For the record.**

## **PROTOCOLS <sup>4</sup>**

The Treaties relating to the European Union are frequently accompanied by numerous protocols which have the same legal value as the Treaties. It is no easy task to work out an exhaustive list of the protocols currently in force, or to identify the Treaties which those protocols accompany and those to which they are finally annexed.

The Treaty of Amsterdam attempted to tidy up the situation somewhat by dividing the 13 accompanying protocols into four categories according to the Treaties to which they are finally annexed: protocol annexed to the TEU, protocols annexed to the TEU and TEC, protocols annexed to the TEU and the three Community Treaties and protocols annexed to the TEC. Subsequently, the consolidated versions of the TEC and TEU (annexed, by way of illustration, to the Final Act of the Treaty of Amsterdam) incorporated in these categories <sup>5</sup> the list of all the previous protocols still in force, essentially the 17 protocols accompanying the Treaty of Maastricht <sup>6</sup>, together with a number of previous protocols, including the former protocols A and B annexed to the Treaty of Rome <sup>7</sup>. On that occasion, the protocols were renumbered from 1 to 34, and the date of their adoption is given as a reminder of the Treaty to which they relate:

---

<sup>1</sup> Legal basis: Article 269 of the TEC (formerly Article 201) and corresponding Articles of the ECSC Treaty and the EAEC Treaty. Adoption by the Member States "in accordance with their respective constitutional requirements".

<sup>2</sup> Legal basis: Article 203(2) of the TEC (formerly Article 146, as amended by Article 12 of the Act annexed to the Treaty of Accession of 1994) and corresponding Articles of the ECSC Treaty and the EAEC Treaty.

<sup>3</sup> Legal basis: Article 202 of the TEC (formerly Article 145). Replaces the Decision of 13 July 1987.

<sup>4</sup> List presented by the consolidated version of the TEC and TEU annexed to the Final Act of the Treaty of Amsterdam.

<sup>5</sup> A fifth category was created for the Protocol on the privileges and immunities of the European Communities, which is annexed to the three Community Treaties.

<sup>6</sup> Of which 16 are annexed to the TEC and 1 to the TEU and to the three Community Treaties.

<sup>7</sup> Protocol on the Statute of the European Investment Bank and the Protocol on the Statute of the Court of Justice of the European Communities.

## **Protocol annexed to the Treaty on European Union**

Protocol (No 1) on Article 17 of the Treaty on European Union (1997)

## **Protocols annexed to the Treaty on European Union and to the Treaty establishing the European Community**

- Protocol (No 2) integrating the Schengen acquis into the framework of the European Union (1997)
- Protocol (No 3) on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland (1997)
- Protocol (No 4) on the position of the United Kingdom and Ireland (1997)
- Protocol (No 5) on the position of Denmark (1997)

## **Protocols annexed to the Treaty on European Union and to the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community**

- Protocol (No 6) annexed to the Treaty on European Union and to the Treaties establishing the European Communities (1992)
- Protocol (No 7) on the institutions with the prospect of enlargement of the European Union (1997)
- Protocol (No 8) on the location of the seats of the institutions and of certain bodies and departments of the European Communities and of Europol (1997)
- Protocol (No 9) on the role of national parliaments in the European Union (1997)

## **Protocols annexed to the Treaty establishing the European Community**

- Protocol (No 10) on the Statute of the European Investment Bank (1957)<sup>1</sup>
- Protocol (No 11) on the Statute of the Court of Justice of the European Community (1957)
- Protocol (No 12) on Italy (1957)
- Protocol (No 13) on goods originating in and coming from certain countries and enjoying special treatment when imported into a Member State (1957)
- Protocol (No 14) concerning imports into the European Community of petroleum products refined in the Netherlands Antilles (1962)
- Protocol (No 15) on special arrangements for Greenland (1985)
- Protocol (No 16) on the acquisition of property in Denmark (1992)
- Protocol (No 17) concerning Article 141 of the Treaty establishing the European Community (1992)
- Protocol (No 18) on the Statute of the European System of Central Banks and of the European Central Bank (1992)
- Protocol (No 19) on the Statute of the European Monetary Institute (1992)
- Protocol (No 20) on the excessive deficit procedure (1992)
- Protocol (No 21) on the convergence criteria referred to in Article 121 of the Treaty establishing the European Community (1992)
- Protocol (No 22) on Denmark (1992)
- Protocol (No 23) on Portugal (1992)
- Protocol (No 24) on the transition to the third stage of economic and monetary union (1992)
- Protocol (No 25) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (1992)
- Protocol (No 26) on certain provisions relating to Denmark (1992)

---

<sup>1</sup> The Protocol was amended by Protocol No 1 on the Statute of the European Investment Bank, annexed to the Act concerning the Conditions of Accession and the Adjustments to the Treaties (accession of Denmark, Ireland, United Kingdom, 1972), and by the Treaty amending certain provisions of the Protocol on the Statute of the European Investment Bank (1978).

- Protocol (No 27) on France (1992)
- Protocol (No 28) on economic and social cohesion (1992)
- Protocol (No 29) on asylum for nationals of Member States of the European Union (1997)
- Protocol (No 30) on the application of the principles of subsidiarity and proportionality (1997)
- Protocol (No 31) on external relations of the Member States with regard to the crossing of external borders (1997)
- Protocol (No 32) on the system of public broadcasting in the Member States (1997)
- Protocol (No 33) on protection and welfare of animals (1997)

### **Protocol annexed to the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community**

- Protocol (No 34) on the privileges and immunities of the European Communities (1965)

This unofficial renumbering has given rise to confusion with the "correct" numbering of the protocols annexed to the Maastricht Treaty (numbered 1 to 17). Moreover, in the *Selected Instruments* published by the Publications Office any idea of numbering protocols seems to have been abandoned (and the section devoted to them does not even list them in full) <sup>1</sup>. Also, according to the *Selected Instruments*, the Protocol on the Statute of the Court of Justice is annexed to all three Community Treaties (no longer to the TEC alone, as stated in the consolidated version). The Nice Treaty has done nothing to simplify matters on this point. It refers to the "Protocols on the Statute of the Court of Justice annexed to the TEC and the TEAEC", which are replaced by the "Protocol on the Statute of the Court of Justice annexed to the TEU, the TEC and the TEAEC". The latter may apply in the framework of the ECSC Treaty, without prejudice to the Articles of the "Protocol on the Statute of the Court of Justice of the ECSC".

### **DECLARATIONS**

European Union Treaties are also frequently accompanied by a large number of joint declarations adopted by Intergovernmental Conferences. Those declarations are annexed to the Final Act of the Treaty in question. The Maastricht Treaty adopted around thirty, the Amsterdam Treaty fifty or so, and the Nice Treaty a good twenty. Other unilateral declarations of which the Conferences took note are also annexed to the Final Acts of the Treaties. Although technically these declarations are not legally binding, they may have some bearing on the way in which the Treaties are interpreted.

There are other declarations interpreting the Treaties:

- Declaration of 1 May 1992: Declaration of the High Contracting Parties to the Treaty on European Union on the legal interpretation of Protocol No 17 on Article 40.3.3 of the Constitution of Ireland (Protocol No 6 in the consolidated version)
- Declarations of the European Council (Declaration on social policy, consumers, environment, distribution of income, Declaration on defence), and Unilateral Declarations of Denmark to be associated to the Danish act of ratification of the Treaty on European Union and of which the eleven other Member States will take cognisance (Annexes 2 and 3 of Part B of the Presidency conclusions, Edinburgh European Council, 11 and 12 September 1992)
- National Declaration by Ireland and Declaration of the European Council taking cognisance thereof (Annexes III and IV of the Presidency conclusions of the Seville European Council, 21 and 22 June 2002)

---

<sup>1</sup> European Union, *Selected instruments taken from the Treaties*, Book I, Volume I, Office for Official Publications of the European Communities, 1999, p. 355. For example, Protocols Nos 12 to 15 are not listed (unofficial renumbering).

**Extract from the Laeken Declaration**

*Towards a Constitution for European citizens*

*The European Union currently has four Treaties. The objectives, powers and policy instruments of the Union are currently spread across those Treaties. If we are to have greater transparency, simplification is essential.*

*Four sets of questions arise in this connection. The first concerns simplifying the existing Treaties without changing their content. Should the distinction between the Union and the Communities be reviewed? What of the division into three pillars?*

*Questions then arise as to the possible reorganisation of the Treaties. Should a distinction be made between a basic treaty and the other treaty provisions? Should this distinction involve separating the texts? Could this lead to a distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions?*

*Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.*

*The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?*