

CONV 215/02

CONTRIB 74

NOTA DE ENVIO

de: Secretariado

para: Convenção

**Assunto: Contributo de Vytenis Povilas Andriukaitis, membro da Convenção
sobre a simplificação dos Tratados**

O Secretário-Geral da Convenção recebeu de Vytenis Povilas Andriukaitis, membro da Convenção, o contributo que figura em anexo.

Contribution by Mr. Vytenis Povilas Andriukaitis,
Member of the Convention

on Simplification of the Treaties

Background

Simplification of the Treaties aimed at more simplicity and transparency enabling every European citizen to understand them is one of the goals set by Laeken Declaration. However, the latter notes that the Treaty content must not be changed during the process. The focus here falls on the complexity and casuistics of EU fundamental legislation as well as modification of the Treaties following a consistent system by stipulating fundamental provisions. It is noteworthy that this issue cannot be tackled in dissociation with other challenges, raised by Laeken Declaration. It is obvious that even though the Declaration refers to 'simplification of the Union's instruments' without divergence from their essence, note has to be taken of the fact that much broader objectives are expected to be gained in the framework of the Convention. Therefore the simplification of the Treaties should be seen in terms of both their contents (i.e. by retaining the fundamental and most general provisions) and form (i.e. the matter of the consolidation of the Treaties). Beside the challenges identified above there is a need to have a discussion on the European Union to be given a legal personality, on retaining a 'pillar' structure, the shape and content of the basic (constitutional) treaty, as well as the format of secondary legislation and simplification of their adoption procedures.

SIMPLIFICATION OF THE TREATIES AND SECONDARY LEGISLATION

It must be emphasised that when it gets to the necessity to draft the Constitution of the European Union (Constitutional Treaty), the fact of its existence since the date of the establishment of the Communities must not be neglected. The European Court of Justice has noted, on numerous occasions, that the Treaties are more than just ordinary international treaties. National constitutional courts in the Member States are the proof of the latter. This suggests that what we are talking about is not the drafting of a totally new Constitution, but the revision of the structure and the content of currently effective Treaties. The goal pursued by fulfilling this task is drawing up a text, which might be called a Constitution, however it should not be the basic law of a state, as the European Union itself will continue to be a *sui generis* formation.

First and foremost, a question arises as to the consolidation of the legal norms of all the primary legislation in one treaty with its text understandable to all. This brings about quite a few related aspects. In this context, the issue of the European Union as a single legal personality needs to be analysed. While a legal personality of the European Communities is clearly provided for in the Treaties establishing the European Community, the Treaty on European Union has no direct reference to its legal personality, thus the doctrine provides no uniform view on the issue. **The Constitutional Treaty should be expected to contain a clear provision granting the European Union a sovereign legal personality.** All international commitments that were once undertaken by the European Communities then being international legal personalities should be taken over by the EU now.

In order to ensure transparency and simplicity of the system **a pillar distinction should be removed, and grounds for co-operation should be stipulated in a single Constitutional Treaty.** On

the other hand, this does not mean that the same methods should be applied in different fields of co-operation. Just the opposite, the methods should depend on what particular field of co-operation it is, and what goals are set in a particular case.

Constitutional Format of the Treaty

In case a constitutional format is chosen, its choice should depend on the goals to be reached. From that perspective, the majority of proposals that will be submitted may be classified as two sets of proposals.

The first set essentially aims at all the fundamental legislation sources being reorganised into two treaties, the basic (Constitutional) treaty and the other treaty provisions detailing Constitutional stipulations. The advantage of this set of proposals is a possibility of shortening extremely broad and complex provisions of the “*acquis communautaire*” to a text of a clear and simple structure, which would be understandable to European citizens. Nevertheless, there is no certainty whether with such a system in place legal transparency in the light of division of competence between the EU and Member States would be ensured because in order to fully comprehend the Constitutional Treaty, the other treaty should also be analysed. Should that be the case, there would be inevitable collisions as to interpretation of Treaty provisions, thus complexity of framework legislation would not be fully avoided, which really is the final goal of the exercise.

The other set of proposals endeavours to draw up a single text of the Constitution, which would set forth essential provisions, while the ones “remaining” from the currently effective primary legislation could be transferred to a new type of the *acquis* - “organic laws”, which, in the hierarchy of legal norms, would act as intermediaries between the Constitutional Treaty and secondary legislation. Ensuring simplicity as well as flexibility of the system is the key task. The Constitutional Treaty would contain fundamental provisions, while other major standards would be found in legal acts that are easier to modify than the Constitutional Treaty but more difficult to change than secondary legislation.

In our view, **priority should be given to the second set because it is capable of attaining both goals, i.e. the Treaties are simplified in both respects - their form and content.** The context suggests the necessity to stress the fact that only the key most generalised provisions should be placed in the framework of the Constitutional Treaty. A significant part of the provisions currently enforced through the Treaties (e.g. on state aid, environmental protection, etc.) might be transposed to organic laws, and some may even have to go to secondary legislation. It must also be noted that protocols to all the Treaties should be carefully reviewed, and a decision whether all their provisions need to be enforced should be taken. This mainly applies to different derogations granted to certain Member States, which seems to be rather unreasonable in the context of the Constitutional Treaty.

A discussion on “legitimising” the Constitutional Treaty should be undertaken separately and should be seen as a question as to how the Constitutional Treaty would become binding to EU Member States as well as other entities. Two different opinions prevail. One view is that the current system should be retained, which implies that the Constitutional Treaty should be “legitimised” by EU Member States based on the procedures stipulated in their national law. The other proposal is to conduct a general referendum covering all European Union Member States (or referendums in each EU Member State). Even though the latter way seems to be more attractive as it reaches the core of EU democratic legitimacy and brings the EU closer to its citizens, it should also be investigated in a very detailed manner. And that leads to putting and answering numerous questions such as: what if a referendum is not held in a Member State; what if the needed majority does not come to the ballots; what if any one Member State ends up in a negative result of the referendum, etc.?

Elements of a Constitutional Treaty

As far as the content and possible elements of a Constitutional Treaty are concerned, an answer should first of all be given to the question on the function of the Constitution. It is possible to state that in the most general sense, the Constitution establishes (defines), legitimates, organises and simultaneously limits public administration. However, in contrast to national constitutions which enshrine fundamental rights and freedoms of individuals, establish public authorities, their structure and powers, the EU Constitutional Treaty should cover those goals that are pursued by the European Union and those areas where the latter acts in one way or another. Thus, the EU Constitutional Treaty could cover the following elements:

1. EU goals and working methods
2. Fundamental rights and freedoms
3. EU institutions
4. Decision making procedures and forms (of legal acts)
5. European Union competence
6. Financial provisions
7. Final provisions

The first part would highlight **common goals and common values, on which the European Union is built**. These provisions would ground the legitimacy of the EU itself and serve as fundamental principles in interpreting other provisions of the Treaty. Within this context singled out should be the principles of subsidiarity and proportionality, which should be applied in those cases where the EU has no exclusive competence. Moreover, this part could also include provisions on the EU accession of new member states.

The second part should cover **the provisions of the Charter of Fundamental Rights**. It also has to set forth provisions related to **the citizenship of the European Union**, which simultaneously establish the very basis of fundamental rights. In addition, this part should provide for the **principles of supremacy of the EU law and direct application**.

The third part would consistently define **EU bodies, procedure of their institutional arrangements and functions**. It would set forth only the key provisions, whereas the remaining ones would be translated into organic laws.

It is worth reminding that in the area of decision-making procedures and forms of legal acts the proposed framework would eliminate the system of pillars, therefore, all the decision-making procedures should be defined in a single chapter. The general principle should be as follows: in cases where the Community method is applied, **a general rule should be the recourse to co-decision procedure**. This choice could be explained in several ways. First and foremost, such a procedure would ensure the highest level of legitimacy in application of this procedure for decision-making, since the powers of the European Parliament in this case are the biggest. On the other hand, one can hardly believe in a possibility of having a flexible decision-making procedure in the enlarged EU by retaining unanimity. At the same time, there is an opinion that **one article should be left for the sake of flexibility, which would allow for unanimity in decision-making while trying to attain the goals set forth in the Constitutional Treaty** instead of three decision-making procedures defined by the pursued goals (Art. 94, 95 and 308 of the EC Treaty). However, according to the European Court of Justice, the very provisions of a Constitutional Treaty should not be amended with this procedure. Moreover, the role of the Parliament should be strengthened in the area of budgetary procedures. **When it comes to the forms of the EU legal acts, they should be defined in a single article which would be analogous to Art. 249 of the EC Treaty**. The article should cover the forms of legal acts under Pillars II and III and at the same time take into account that a part of the areas covered by Pillars II and III will likely move towards the Community method. Therefore, a part of these forms could be entirely irrelevant. It is important to note that a

significant part of the forms of legal acts which are used in practice or which are only referred to are not clearly defined in the Treaty itself (e.g., adopted guidelines, communications; the term of a framework directive is also used, however, Art. 249 of the EC Treaty contains no provisions on the forms of the said legal acts). Taking this into account, all the forms of adopted legal acts should be reviewed in order to evaluate their legal power. In the same manner, the forms of those legal acts, which will be needed after the reform, should be left and clearly specified. **Moreover, such an article should be supplemented with the provisions concerning organic laws and the right of the European Union to conclude international treaties.** In addition, the hierarchy of legal acts and administrative measures adopted on the EU level should be clearly established. It is important to emphasise that the common principle of limiting the competence of the EU to the adoption of legal acts and leaving their implementation to the Member States should be retained.

The fifth part of the Constitutional Treaty would be devoted to the definition of EU competence. **A general principle which is relevant today would be retained, i.e. the EU acts in those areas where it has been granted competence.** Vertical division of competence should be clearly defined and the kinds of competence, including those exclusive, shared, additional, and common co-ordination of actions, should be specified. This part would also cover the so-called “negative” competence, i.e. the areas where neither EU nor the member states can act (e.g. free movement of goods, freedom of establishment, etc.). At the same time, it should be carefully considered if the Constitutional Treaty itself should clearly establish EU competence in specific areas or should it provide for a general principle about the competence granted to the EU by having the specific areas defined in organic laws. There is an opinion that an analysis should be made on the need for relating the specific form of a legal act to the limits of competence, e.g. to establish that a regulation can only be adopted within the limits of exclusive competence, etc. Adoption and application of non-binding measures and different self-regulation mechanisms should be promoted. Moreover, this part could also reflect provisions on enhanced co-operation if a decision is made to leave this form of co-operation. This form of co-operation is supposed to allow more flexible settlement of different issues and be no obstacle for integration in those areas where some of the states do not favour enhanced co-operation.

The sixth part of the Constitutional Treaty would contain provisions **related to the EU finances**. They would cover the provisions concerning both structural funds and European Union own resources (taking into account the fact that the principle of solidarity should also be established along the general principles).

The last part would basically focus on the procedure for amendment of the Constitutional Treaty. In this case, as it has been mentioned before, different scenarios are possible and they should be examined in more detail.