

Summary of the Preliminary Draft of the Constitution of the European Union

Caption: On 4 December 2002, the European Commission publishes a Preliminary Draft of the Constitution of the European Union, known as the ‘Penelope’ draft, drawn up by a group of experts at the request of the Commission President, Romano Prodi, in agreement with Commissioners Michel Barnier and António Vitorino, which determines the way in which the Community institutions are to operate and the policies to be pursued by the Union.

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Summary

Preamble

The preamble takes over the preamble to the ECSC Treaty with minor adaptations. The ECSC preamble, as amended, is the founding text and merits its place at the head of the Constitution.

I. Principles

This part consists of nine titles and a hundred or so articles. It contains strictly constitutional material that underpins the whole Union edifice.

1. Foundations

This title sets out the principles that serve as the Union's foundations and offers a definition incorporating its two sources of legitimacy – the peoples and the States that it unites.

It establishes the Union's indivisible legal personality and lists the Member States.

It establishes the fundamental principles governing relations between the Union and the Member States, based on mutual loyalty. Respect for national identities and diversity is reaffirmed, as is the primacy of Union law.

It provides for the reciprocal obligations of the Member States and for the possibility for them of establishing forms of closer cooperation going beyond the matters governed by the Constitution. In particular, it contains a mutual assistance clause.

Finally, it recalls that the Union respects fundamental rights and affirms the principle of Union citizenship. There is a blanket reference to the part devoted to Fundamental Rights.

2. Tasks

This title stresses the Union's specific nature. It has to appear among the principles of the Constitution, since the Union can only be justified on the basis of the objectives that are set for it and the policies that it is to devise and implement to attain them. Incidentally, there is no such title in the preliminary draft constitutional treaty presented by the Praesidium of the Convention, which has taken this easy way out of a very difficult question.

The objectives of the various policies are set in concise terms on the basis of the existing treaties. But the presentation has been updated in the light of the general policy orientations recently agreed on in the Union.

This Title contains a provision concerning the Union's general objectives, broadly taking over Article 2 of the Treaty on European Union and Article 2 of the Treaty establishing the European Community. The references to certain basic concepts (European model of society, sustainable development, solidarity principle, competitiveness and cohesion) appear here.

Another provision gives a general presentation of policies, classified in terms of the varying gradations of Union responsibilities and the initiatives needed to perform the tasks provided for.

On the internal front, the following are distinguished:

- Principal policies, which include the policies conducted by the Union as the principal party by adopting initiatives which set the framework or even take the place – partly at least – of action by the Member States;
- Flanking policies, which include the policies to accompany the Member States efforts through coordination and convergence of national policies;
- Complementary actions, which support national policies.

On the external front, there is a general reference to external relations policy.

Specific provisions are devoted to describing the Union's principal objectives in devising and implementing each of the policies. These provisions set out the general guidelines for action by the institutions in each of them. They refer especially to the area of freedom, security and justice; the internal market; competition; economic and monetary policy; agriculture and fisheries; transport; peaceful use of atomic energy; economic and social cohesion; social policy and employment; the environment; research and technological development; consumer protection; trans-European networks; health; and, generally, to areas of complementary action (education; vocational training; culture; audiovisual media; industrial competitiveness; civil protection; utilisation of space). For external relations, the general objectives are set out in overall terms without distinctions between diplomatic relations, economic relations and cooperation. Relations between the Union and neighbouring States receive a special mention, and there is a reference to Additional Act No 1 as regards defence.

3. Powers

As the Method already stated, this Title merely lays down general principles and criteria for the conferment and exercise of the Union's powers.

First, there is the principle that the Union has only such powers as are conferred on it by the Constitution. It is expressly provided that powers not so conferred remain with the Member States and that the Union may not encroach on them.

Secondly, the subsidiarity and proportionality principles are enshrined. All decisions must be taken as closely as possible to the citizen.

Special attention is paid to compliance with the subsidiarity and proportionality principles. The primary responsibility for seeing that they are complied with lies with the institutions. But provision is also made for review by national Parliaments, in accordance with suggestions made by two Convention working parties and supported by a very large majority of the other members of the Convention.

A specific provision seeks to preserve the flexibility of the system and allows action to be undertaken even where there is no specific legal basis in the Constitution. This provision is similar to the current Article 308 of the EC Treaty. Changes have, of course, had to be made in line with the general scheme of the document: unanimity in the Council is abolished and the European Parliament is actively involved through the assent procedure, and the scope of this provision is extended to all the Union's policies.

4. Institutions

This title contains fundamental provisions relating to the Union institutions and bodies, in particular those relating to their respective tasks and composition. The other, secondary, provisions currently appearing in the treaties are transferred to Additional Act No 4.

The tasks of the European Parliament are listed (co-legislator; financial and budgetary responsibilities; participation in the appointment of the Commission; reviewing the Commission).

Members of the European Parliament are elected by direct universal suffrage, and there may be no more

than seven hundred of them.

The general rule for voting in the European Parliament is a majority of the votes cast, but in certain cases the Constitution may require a special majority.

Proceedings of the European Parliament are organised by standing arliamentary committees, the number and responsibilities being determined so as to coincide with Council formations and the division of responsibilities in the Commission. The European Parliament could empower committees to exercise certain of its tasks.

To put an end to the current, rather confused situation, the European Council is no longer regarded as a separate body in the Union's institutional architecture but as the highest formation of the Council, since it brings together the Heads of State or Government. The President of the Commission remains a Member of the European Council but does not take part in the decisions which the European Council must take pursuant to the Constitution.

The main task of the European Council is to give the Union the necessary impetus for its development and to define general policy orientations. And it is to be involved in the major decisions in the life of the Union (revision of the Constitution, determining the financial perspective, appointing the Commission President, the Secretary of the Union and the Commission).

The Council meets in other formations to exercise the other tasks entrusted to it (co-legislator; coordination of national economic policies; decisions in external relations and other areas provided for by the Constitution, including finance and the budget).

The general voting rule in the Council is the qualified majority, which requires the dual simple majority – a majority of the Member States representing at least a majority of the Union's population. In certain cases, the Constitution may require a reinforced qualified majority – three quarters of the Member States representing at least two thirds of the Union's population. A necessary fundamental provision is maintained to preserve the institutional balance of the current treaties: the Council must vote unanimously to amend a Commission proposal against the Commission's will.

Given the general set of proposals made in the Constitution (interinstitutional programming, initiative and representation on the international scene by the Secretary of the Union, disappearance of the pillars), the function of the Council President will be confined substantially to organising and chairing Council meetings. There is therefore no need to provide for a President of the Union or any other special status for the Council Presidency. Consequently no special rules are laid down. Each Council formation elects its own President.

The Commission's tasks are presented more fully than in the current treaties (political and legislative initiative, executive function as regards regulatory and budgetary matters, negotiation of international agreements, decision-making powers in cases explicitly provided for). Attention is drawn to the proposal to give it the function, in its traditional role of guardian of the treaties, of directly recording infringements committed by the Member States, subject to review by the Court of Justice, as was the case in the ECSC Treaty. This innovation would make for better application of Union law in practical situations.

It will be for the European Parliament to designate the Commission President, subject to approval by the European Council. But the European Council then appoints the Secretary of the Union, who enjoys a special status during a transitional period, in agreement with the President of the Commission. The other Members of the Commission are designated by the European Council in agreement with the President of the Commission; the full Commission is then put to the European Parliament for a vote of approval.

The Commission may be forced to resign by a motion of censure passed by the European Parliament or the European Council. The Secretary of the Union may be subjected to an individual censure motion by the European Council. Reinforced majorities apply in these procedures. A Member of the Commission may be required to resign by the President of the Commission.

The President provides political guidance for the Commission, designates the Vice-Presidents, one of whom is to be Secretary of the Union, and allocates responsibilities around each Vice-President within the Commission. For the sake of efficiency, the Commission must be able to empower one of its Vice-residents, in conjunction with one or more other Members, to take certain decisions on its behalf.

The Court of Justice retains jurisdiction to secure the integrity and unity of Union law, special attention being paid to respect for fundamental rights and the allocation of powers between the Union and the Member States. The different types of action provided for in the current treaties are taken over in the Constitution, bearing in mind that with the disappearance of the pillars the limits currently imposed in the second and third pillars will disappear likewise. In addition, as the Commission is given the task of establishing infringements of Union law by the Member States, the procedure currently provided for by Articles 226 and 227 of the EC Treaty is changed, the Court now having to hear and determine the Member State's action against the Commission decision recording the infringement.

The judicial system corresponds to the Nice Treaty, but is given a new nomenclature. The term "Court of Justice" now refers to the whole of the Union's judicial system, which is made up of a Supreme Court (the current Court of Justice of the European Communities) and a Court of First Instance, which may have judicial panels attached to it. No changes are proposed for the tasks of the Court of Auditors in relation to the current treaties.

The tasks and composition of the European Central Bank correspond to the current provisions.

The Committee of the Regions, renamed "Assembly of the Regions" and the Economic and Social Committee, renamed "European Economic and Social Committee", are given the possibility of issuing advisory opinions to the institutions, of their own motion or on request, on all legislative proposals, any other consultation document or any question of political interest. Opinions of the Assembly of the Regions are to pay special attention to the subsidiarity principle.

The main provisions of the current treaties relating to the tasks and status of the European Investment Bank are also taken over.

Lastly, a specific provision is devoted to Agencies that can assist the Commission in exercising its executive function.

Note that the provisions governing the status and tasks of the Ombudsman are to be found in the part of the Constitution devoted to fundamental rights, as supplemented by Additional Act No 4 relating to supplementary institutional provisions.

That Act also contains a provision on the European Public Prosecutor which is in line with existing Commission proposals.

5. Instruments

In view of the present system of Union instruments and procedures – which is especially criticised for its complexity – this Title proposes substantial implications.

First, it offers a classification of the different types of Union instruments, thereby establishing a clear hierarchy of norms, though without using that highly controversial expression. Second, the various instruments are defined according to the institutions that have the power to adopt them and the procedures that are applied. This serves to clarify matters considerably.

In practice the Constitution would be implemented, as appropriate:

- by international agreements, joint actions and declarations, in the field of external relations policy;

- by laws adopted by the European Parliament and the Council under the codecision procedure;
- by decisions of the Council or, in a limited number of areas (e.g. competition), of the Commission;
- by recommendations.

In turn, Council laws and decisions would be implemented:

- as a general rule, by the authorities of the Member States;
- or, where implementing measures have to be adopted at Union level, by the Commission, which thus becomes the institution exercising executive authority at European level.

Finally, reference is made to non-binding instruments that may be adopted by the institutions, and to the possibility of codes of conduct or agreements concluded by the social partners in pursuit of the objectives of the Constitution, without any need for direct intervention by the Union.

The idea of the intensity of Union action is introduced, in connection with the obligation to take into account the principles of subsidiarity and proportionality.

The text states as a principle that action by the Union must be set out in an interinstitutional programme and provides for a specific procedure for drawing up such a programme.

Laws replace regulations, directives and framework decisions as the prime instruments of secondary legislation. A distinction is drawn between Institutional Laws (i.e. those governing the organisation of the institutions and the workings of the Union) and ordinary Laws. The characteristics and basic content of these Laws are spelled out in detail.

The legislative procedure is modelled on the present codecision system, which works reasonably well. The procedure is described in detail in Additional Act No 4, but the Title defines the basic elements:

- laws are adopted under the codecision procedure by Parliament and the Council, on a proposal from the Commission (Additional Act No 4 provides that the Commission may withdraw its proposal if there is a danger that the principle of subsidiarity may be violated, or, more generally, that the nature of the proposal will be altered);
- the various stages in the procedure are clearly identified: first reading, second reading and conciliation;
- precise deadlines are introduced for the first reading, while those laid down by the current Treaty for the second reading and the conciliation procedure are retained. (Additional Act No 4 provides that if either of the law-making institutions fails to take a decision at first reading by the prescribed deadline, but the other institution has approved the proposal with no amendments, the law is adopted. If both institutions fail to act by the deadlines, the proposal is rejected);
- Institutional Laws are to be adopted by reinforced majorities.

Instruments implementing Laws are normally adopted by the Member States, but measures may be taken at European level if this is necessary on grounds of certainty as to the law, effectiveness, or sound use of Union funds. In this case, responsibility always falls on the Commission, which adopts implementing regulations, while respecting certain rules (assistance by agencies, consultation of committees, supply of information to the legislator).

The open coordination method is introduced in a specific provision on recommendations.

6. Democratic life of the Union

This Title is new compared with the structure of the present Treaties. Because of the constitutional nature of the new system, the various aspects of the Union's democratic dimension must be brought together in a specific title in the basic text. The preliminary draft constitutional treaty presented by the Praesidium of the Convention contains a similar title.

To be fully complete, the Title should also include certain provisions that are currently set out in the Charter of Fundamental Rights, in particular those relating to Union citizenship. However, since the Convention seems to have opted to incorporate the Charter into the future constitutional treaty leaving its structure untouched, it is proposed that the relevant provisions of the Charter should not be written into this Title. Nevertheless, in order to grasp the full significance of the Union's democratic dimension, this Title must be read and interpreted in the light of the provisions now included in the "Fundamental Rights" part.

The Title enshrines the principle of equality among Union citizens and the ban on any discrimination based on nationality in Union law.

It highlights the role of European political parties and provides for a uniform procedure for electing the European Parliament by direct universal suffrage.

It establishes the transparency of the institutions' activities by opening up to the public plenary sessions of the European Parliament and legislative meetings of the Council, allowing public access to the documents of the institutions and providing for public information on the Union's activities via the Commission.

It establishes the principle that interested parties must be consulted.

Finally, it deals with the protection of personal data.

7. Finance

Cf. Method.

8. Miscellaneous provisions

This Title comprises essential provisions on the legal capacity of the Union, the gathering of vital information and compilation of statistics at European level, the Union's contractual and non-contractual liability, neutrality as regards the rules on property ownership, public order, and finally the territorial application of the Constitution.

For the most part, these are provisions which already exist in the present Treaties and have been adapted to the new system.

As the question of the territorial application of the Constitution merits particular attention, specific provisions are also laid down in Additional Act No 5.

The articles concerning the seats and languages of the institutions and other bodies, which the Praesidium preliminary draft constitutional treaty appears to have overlooked, have not been incorporated in the constitution itself but in Additional Act No 4 (supplementary institutional provisions). To give a clearer and closer picture of the situation, these articles contain provisions that currently appear in the 1997 Protocol on the location of the seats of the institutions and of certain bodies and departments - as regards headquarters - and Regulation No 1 of 1958 as regards languages.

9. Revision and accession

Cf. Method.

II. Fundamental rights

This Part takes over in full the Charter of Fundamental Rights, preamble included.

Purely formal adaptations have been made to some provisions to facilitate incorporation and ensure consistency in the new system (e.g., "Constitution" replaces "EC Treaty" and "Union law" replaces

"Community law").

The additions and adaptations requested by the Convention working group chaired by Mr Vitorino to consider the incorporation of the Charter into the future Constitution have been taken on board. These are changes to the general and horizontal provisions at the end of this Part which, on the one hand, make clear that the incorporation of fundamental rights does not extend the Union's powers, and, on the other, lay down criteria for interpreting the relevant rights and principles.

The last three provisions of this Part are not included in the Charter. However, two of them are not really new. In fact they contain legal bases already included in the EC Treaty, allowing the Union to adopt measures of secondary legislation to counter discrimination (see Articles 12 and 13 of the EC Treaty) or to enforce rights arising from European citizenship (see Articles 18, 19 and 22 of the EC Treaty).

The only really new provision is one which expressly authorises the Union to accede to international conventions for the protection of fundamental rights, and in particular to the European Convention for the Protection of Human Rights and Fundamental Freedoms. There is a broad consensus within the Convention on the need for such a provision.

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