



## Statewatch analysis

### The proposed “Reform Treaty” for the European Union

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#### Introduction

The German Presidency circulated on 19 June a ‘draft IGC mandate’ to EU leaders in advance of the EU summit (the ‘European Council’) on 21 and 22 June. (An ‘IGC’ is an ‘Inter-governmental Conference’, which would be formally convened to negotiate a treaty if EU leaders agree to call one).

The draft IGC mandate suggests that a very large majority of the changes to the current Treaties which the Constitutional Treaty would have made should nonetheless be retained in what the Presidency calls instead a ‘Reform Treaty’. However, certain provisions of the Constitutional Treaty would not be retained. Some of these changes are purely cosmetic, but others are not.

While the basic approach of the German Presidency appears to have been broadly accepted by Member States, certain details of the planned IGC mandate are still disputed going into the summit meeting. It is not possible to reach a final conclusion on the changes which a Reform Treaty would make until the EU leaders agree on the final text of the mandate - *if* they agree on a mandate at all. It is extremely unlikely that the German Presidency’s draft mandate will be agreed (if it is agreed) without any amendments at all.

This analysis will be updated, if a mandate is agreed by the summit.

The analysis addresses two issues in turn: the structure of the Reform Treaty, and the substance of the Reform Treaty (particularly as compared to the Constitutional Treaty), in the specific areas of Justice and Home Affairs, foreign policy, as well as in all other areas.

## Structure of the proposed Reform Treaty

### *The current Treaty structure*

At present, the basic rules for the EU can be found in the EU Treaty (or TEU), which also contains detailed rules on the EU 'second pillar' (foreign policy cooperation) and on the EU 'third pillar' (policing and criminal law).

The separate, but closely related, Treaty establishing the European Community (EC Treaty) contains the detailed rules on the EU's 'first pillar' (economic and social law, including immigration and asylum law). Both treaties have been amended several times, most recently by the Treaties of Amsterdam and Nice. There is also a separate Treaty concerning atomic energy (the Euratom Treaty), as well as a number of Protocols attached to one or more of the various Treaties. A European Coal and Steel Community Treaty was in force from 1952 to 2002.

The EU Treaty contains the following:

- a) a Title I (Articles 1-7) with 'common provisions' on the establishment of the EU, the EU's objectives, the EU's institutional framework, the European Council, the 'pillar' system, human rights protection, and the suspension of Member States from EU membership;
- b) Titles II to IV (amending the three Community Treaties, back in 1993);
- c) Title V, Articles 11-28 (the 'second pillar', the Common Foreign and Security Policy);
- d) Title VI, Articles 29-42 (the 'third pillar', concerning police and criminal law);
- e) Title VII, Articles 43-45 (general clauses on flexibility, ie allowing some Member States to develop EU integration without the others); and
- f) Title VIII, Articles 46-53, containing general and final provisions.

The EC Treaty contains the following:

- a) Part One (Articles 1-16) on the principles of the EC;
- b) Part Two (Articles 17-22) on EU citizenship;
- c) Part Three (Articles 23-181a), containing twenty-one Titles on different Community policies;
- d) Part Four (Articles 182-188), concerning association with overseas countries and territories;
- e) Part Five (Articles 189-280), concerning the institutions; and
- f) Part Six (Articles 281-314), containing 'final provisions'.

### *The Constitutional Treaty*

The Constitutional Treaty would have replaced both the EC and the EU Treaties, along with all of the Protocols attached to them and the Accession Treaties, with a single 'Treaty establishing a Constitution for Europe'. (The Euratom Treaty would have been amended, but not replaced, by the Constitutional Treaty).

The Constitutional Treaty was structured as follows:

- a) Part I: basic rules on the foundations of the EU (Articles I-1 to 60);
- b) Part II: the EU's Charter of Fundamental Rights (Articles II-61 to II-114); the Charter has existed since 2000 in non-binding form, but the Constitutional Treaty would have made certain changes to it;
- c) Part III: the policies and functioning of the Union (Articles III-115 to III-436), containing the detailed legal powers of the EU (incorporating all three pillars), as well as further rules on the EU institutions; and
- d) Part IV: the general and final provisions (Articles IV-437 to IV-448).

There would also have been a number of Protocols attached to the Constitutional Treaty.

While a significant part of the Constitutional Treaty would simply have repeated the text of the current Treaties, or entailed only technical amendments to the current text, the Constitutional Treaty would also have made a number of changes to the current rules.

### *The Reform Treaty*

The German Presidency suggests instead that the Member States negotiate a Reform Treaty, which would simply amend the current EC and EU Treaties, and some of the attached Protocols (also adding some new Protocols), rather than replacing them (there would also be some amendments to the Euratom Treaty). This is the process which the EU has followed in the past. It will mean that the text of the Reform Treaty will be much shorter than the Constitutional Treaty.

First of all, the EU Treaty would be amended to contain:

- a) a Title I, still containing the 'common provisions', with some amendments, largely derived from the Constitutional Treaty, but with some changes as compared to the text of the latter treaty;
- b) Title II, on 'democratic principles', containing Articles I-45 to I-47 of the Constitutional Treaty, plus a new provision summarising the role and powers of national parliaments as regards EU law;
- c) Title III, on the EU institutions (a shorter version of Articles I-19 to I-29 of the Constitutional Treaty);
- d) Title IV on flexibility: the Constitutional Treaty provisions on flexibility (perhaps just Article I-44 of that Treaty here);

- e) Title V, on EU foreign policy, as amended by the Constitutional Treaty;
- f) Title VI, general and final provisions, including some amendments to Treaty revision procedures and the express power of Member States to withdraw from the EU, as set out in the Constitutional Treaty, plus some changes to the clause on enlargement of the EU (these latter changes were *not* in the Constitutional Treaty).

(There is a serious technical error in the draft IGC mandate: the Presidency seems unaware that Titles II to IV of the current EU Treaty cannot simply be repealed, as its proposed Treaty structure implies, without repealing all of the changes to the Community Treaties made by the Maastricht Treaty back in 1993, including the provisions on monetary union! Presumably this would be corrected if negotiations began).

The EC Treaty would be renamed the ‘Treaty on the Functioning of the Union’, and would include the current ‘third pillar’ (policing and criminal law). The provisions of the Treaty, including the transferred third pillar, would be amended to include most - but not all -- of the changes contained within the Constitutional Treaty.

### **Substance of the planned Reform Treaty**

#### *The starting point: The Constitutional Treaty*

The main changes which the Constitutional Treaty would have made to the current Treaties are as follows:

- a) changes to the composition and functioning of the main EU political institutions (the European Parliament, the Council [Member States’ ministers] and the European Commission), including particularly:
  - i) a large extension of ‘co-decision’ powers for the European Parliament (ie cases where the EP and the Council decide jointly on legislation);
  - ii) an extension of the number of cases where the Council votes by a ‘qualified majority’ instead of the unanimity of Member States’ ministers, particularly (but not only) in the areas of legal migration, policing and criminal law; some of these extensions would however have been subject to an ‘emergency brake’, allowing a single Member State to
  - iii) a change in the calculation of Member States’ votes within the Council, when it votes by a qualified majority;
  - iv) a change to the system of rotation of Council Presidencies, from one Member State holding the Presidency every six months, to a team-Presidency of three Member States holding it jointly for 18 months, with different rules for foreign policy (see below); and
  - iv) a cut in the number of European Commissioners (currently one per Member State) as from 2014, although it should be noted that the current Treaties already require a cut in the number of Commissioners as from 2009,

without specifying the details (the Constitutional Treaty is much more specific);

b) the application of normal EU rules to the ‘third pillar’ (policing and criminal law), entailing a *near*-monopoly on initiative by the Commission (currently the Commission must share the initiative with Member States), a *nearly* full application of the ‘normal jurisdiction of the Court of Justice (currently the Court has limited jurisdiction over these issues), and the application of qualified-majority voting in the Council and co-decision powers of the European Parliament to most issues;

c) the conferring of formal institutional status of the ‘European Council’ (EU leaders), which would have the power to take legally binding decisions as well as retaining its role as a political agenda-setter for the EU;

d) the replacement of the rotating Presidency of the European Council with an individual President of this institution (who would not be a ‘President of the EU’), who would hold this post for one or two terms of 2.5 years;

e) the creation of an EU ‘Foreign Minister’, who would combine the current foreign policy roles of the Council Presidency, the EU’s foreign policy High Representative and the Commissioner for External Relations, with some further powers as well (such as speaking for the EU in the UN Security Council when the EU had agreed a foreign policy position);

f) integrating the EU’s ‘second pillar’ with the other pillars, while retaining the distinct decision-making features of this pillar (no monopoly for the Commission, a limited role for the European Parliament, limited jurisdiction for the Court of Justice); and

g) creating a single ‘legal personality’ for the EU (currently the EC has an express legal personality, as set out in Article 281 of the EC Treaty, which it uses to sign treaties such as the WTO treaty, environmental treaties, association treaties and readmission and visa facilitation treaties. The EU has no express legal personality, but nonetheless there is a treaty negotiation procedure in Articles 24 and 38 EU and a number of treaties have been signed on this basis in the name of the EU. Some have concluded from this that the EU is exercising an *implied* legal personality over second and third pillar matters).

#### *Changes in the proposed Reform Treaty*

The different structure of the Reform Treaty (ie amendments to the current EC and EU Treaties) as compared to the Constitutional Treaty means that the two treaties will look quite different. However, the content, as proposed in the draft mandate is largely the same.

There are two types of changes which the Reform Treaty would make to the Constitutional Treaty: cosmetic changes and substantive changes. These will be considered in turn.

*a) Cosmetic changes*

The cosmetic changes are the following:

- a) obviously, the structure of the Treaty itself;
- b) the name of the Treaty: the word 'Constitution' or 'Constitutional' would not appear at all;
- c) the 'symbols' of the Union, in Article 1-8 of the Constitutional Treaty (flag, anthem, motto, holiday) would be dropped, although it should be recalled that all of these except the motto exist in practice already;
- d) the clause on the 'primacy' of EU law, in Article 1-6 of the Constitutional treaty, would be dropped in favour of a declaration, although the primacy of EU law has in any event been confirmed by the Court of Justice already (although not in respect of the second or third pillars);
- e) the names of legal instruments: the current 'Regulations' and 'Directives', etc. would not be replaced by 'law' and 'framework law', etc., which had largely the same definition; it is clear that the current third pillar would still become subject to first pillar legal instruments in the Reform Treaty (ie Directives and Regulations rather than Framework Decisions, Decisions and Conventions);
- f) the name of the 'Foreign Minister' would change, although no detail of his/her role would change;
- g) the EU Charter of Rights would not be part of the main text, although a revised Article 6 EU would state that the Union would 'recognise' the rights in the Charter, which 'shall have the same legal value of the Treaties', and would confirm (as the Charter already specifies) that the Charter does not extend EU competence; it appears (although it is not clear) that the Charter would be amended by some unspecified process, presumably to introduce the amendments which the Constitutional Treaty would have made to it.

*b) Substantive changes*

The substantive changes are the following:

- a) the procedure for the EU to accede to the European Convention of Human Rights would change, from qualified majority voting in the Council

(ie Member States' ministers) in the Constitutional Treaty, to unanimity and national ratification in the Reform Treaty;

b) the procedure for conferring jurisdiction on the EU courts to rule on patent disputes between private parties would, in the Reform Treaty, remain (as at present) unanimity in the Council and national ratification, whereas the Constitutional Treaty provided for qualified majority voting in the Council and co-decision with the EP;

c) the provisions on foreign policy would be separated from the other provisions of the Treaties to a greater extent, by: keeping them in the EU Treaty, rather than placing them in the main text of the Treaty on the Functioning of the EU (or in Part III of the Constitutional Treaty); more fully excluding the jurisdiction of the Court of Justice; preventing the application of the 'flexibility' clause in Article 308 EC (Article I-18 of the Constitutional Treaty) to EU foreign policy; including a separate clause on foreign policy data protection rather than applying Article 286 of the EC Treaty (as amended by Article I-51 of the Constitutional Treaty) to foreign policy; it is not clear whether some of the general foreign policy provisions in the Constitutional Treaty (Article I-16 on foreign policy competence, and Article I-40 on specific procedures) would be retained (the point is significant because Article I-40(5) contains a controversial requirement for a Member State to consult other Member States before taking foreign policy action); it is also not clear whether foreign policy instruments would be the same as all other EU acts, as the Constitutional Treaty provided for (the point is significant because 'normal' EU acts are generally directly effective or directly applicable under certain conditions, ie they create rights and obligations within the domestic legal system by themselves, regardless of national law);

d) national parliaments would have eight weeks, rather than six, to scrutinise proposed EU legislation, and in the event of objection to a proposal by a third of them to a proposal, the Commission would have to give a 'reasoned opinion' on their objection;

e) the provisions for an 'emergency brake' on certain criminal law measures (allowing a Member State to block decision-making on criminal procedure or substantive criminal law, where voting will take place by a qualified majority) would be altered to make it explicit that EU leaders must act by consensus if the issue is referred to them; new clauses also provide that if there is no agreement on proposed legislation concerning the European public prosecutor or on police operations (issues which have to be decided by unanimity), then a group of Member States (at least one-third) will have automatic approval to go ahead without the others if they wish (this same proviso is retained, as in the Constitutional Treaty, for cases of deadlock over criminal law legislation);

- f) the provision on social security for migrant workers, which would also be made subject to qualified majority voting and which also contains a similar emergency brake (but without a provision for 'flexibility'), would be altered to provide that EU leaders could decide not to take action on a proposal; a declaration would also confirm that the EU leaders must act by consensus if the issue is referred to them;
- g) there will be a 'clarification' on the issue of 'public services' (Articles 16 and 86 EC) but this has yet to be drafted;
- h) the clause conferring competence on the EU to adopt measures on 'supporting, coordinating or supplementary action' in various areas (such as education and aspects of health) will more clearly emphasise the competence of Member States;
- i) the new EU power over space policy will be limited so that the EU will not have power to harmonise national laws;
- j) the new EU power over monitoring, etc. health threats will be limited so that the EU will not have power to harmonise national laws;
- k) the new provisions allowing for legislation to be adopted on passports, ID cards and residence permits will be moved from the 'citizenship' Part to the immigration chapter of the JHA Title; this will mean that the UK, Ireland and Denmark can opt out;
- l) also, the new provision allowing for the freezing of assets of domestic 'terrorists', etc. will be transferred to the JHA Title, although it is not clear what this will mean for opt-outs; and
- m) the power for the EU to adopt measures on diplomatic and consular protection will be altered so that the EU's power is weaker, and so that the EU will have to act by using Directives (which must be implemented by national parliaments), rather than Regulations.

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