PART TWO: THE EUROPEAN UNION

Chapter 3: General Aim and Structure of the Treaty on European Union

The General Aim of the Treaty

3-1 In constitutional terms, the aim of the Treaty on European Union[1], was to establish a Union having wider powers than the three European Communities on which it was founded.[2]

The Components of the Treaty

3-2 In the Treaty on European Union there are eleven components, as follows:
- the Preamble[3],
- the Common Provisions[4],
- amendments to the Treaty establishing the European Community[5],
- amendments to the Treaty establishing the European Coal and Steel Community[6],
- amendments to the Treaty establishing the European Atomic Energy Community[7],
- provisions on a Common Foreign and Security Policy[8],
- provisions on Police and Judicial Cooperation in Criminal Matters[9],
- provisions on Cooperation between Member States[10],
- the Final Provisions[11],
- the Protocols[12] and
- the Declarations.[13]

In all, the Treaty contains 53 Articles. The Declarations do not have legal force and do not therefore form part of the constitution of the European Union, as defined in Chapter 1. Individual Articles of the Treaty, other than those amending the three Community Treaties[14], do not have titles or short descriptions; but an Annex to this Chapter sets out the subjects covered by each of the Articles. Protocols do have titles or short descriptions; these are included in the Annex for reference. Most of the legally binding provisions of the Treaty on European Union have some constitutional importance. However, not all the amendments to the three Community Treaties have constitutional implications.

The Preamble

3-3 In theory, the preamble may be referred to in litigation to clarify points in the main text of the Treaty. In practice, this is rather unlikely, since most of the recitals in the preamble are in vaguer and more generalised terms; and, where they correspond to a specific text, they tend to be less helpful than the text itself. For example, the preamble affirms that the Member States are "resolved to establish a citizenship common to nationals of their countries".[15] The text, on the other hand, says that one of the objectives of the European Union is "to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union"[16] ; while the implementing provisions refine the concept still further. "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national

citizenship."[17]

3-4 In one or two instances, the preamble and the text differ slightly. The preamble speaks, for example, of the Member States' desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions".[18] The text, however, speaks of the Community contributing "to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing their common cultural heritage to the fore".[19] The wording differs; but it is arguable that the text is compatible with the preamble.

The Common Provisions

3-5 To some extent, the Common Provisions may be seen as political statements rather than as canons of constitutional law; and the Articles are not subject to the jurisdiction of the Court of Justice.[20] Some of the Common Provisions have much of the generality of recitals in the Preamble; some are important in their own right; while some state in terms which are not justiciable principles which are spelt out in more detail elsewhere. The first sentence of the first Common Provision[21] establishes a European Union and is therefore important in its own right; but the second sentence has other features. It states that "the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe"; and this wording echoes both the first and twelfth recitals to the Treaty and the first recital to the Treaty establishing the European Community. The second sentence speaks of the union, "in which decisions are taken as openly as possible and as closely as possible to the citizen". This is less precise than the corresponding wording of the twelfth recital, which adds the phrase, "in accordance with the principle of subsidiarity". This in turn is less precise than the wording of the implementing provision in the Treaty establishing the European Community[22], which may be interpreted by the Court of Justice.[23] It follows that the Common Provisions have to be looked at according to whether they introduce concepts which are not referred to elsewhere and concepts which are referred to elsewhere and perhaps in a context which gives them a firm basis in constitutional law.

Amendments to the Treaty establishing the European Community

3-6 Since the European Union is "founded on the European Communities", supplemented by the policies and forms of cooperation established by the Treaty on European Union[24], it is not surprising that one of the largest parts of the Treaty is concerned with amendments and additions to the Treaties establishing the three Communities and in particular the Treaty establishing what was originally the European Economic Community. The "Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community" had 86 separate amendments, some of them long and detailed.[25] The 25th amendment, for example, introduced 20 new Articles concerned with economic and monetary policy. The Treaty amending the Treaty on European Union introduced a further 59 substantive amendments to the Treaty establishing the European Community and 81 "simplifying" amendments.[26] The Treaty establishing the European Community exists in a consolidated version.

Amendments to the Treaty establishing the European Coal and Steel Community

3-7 Corresponding to the provisions described in the foregoing paragraph, there are provisions amending the Treaty establishing the European Coal and Steel Community.[27] Although the same general comments apply here, the amendments are far less extensive. Moreover, they are of limited duration, since the amended Treaty is due to expire in 2002.[28]

Amendments to the Treaty establishing the European Atomic Energy Community

3-8 Similar remarks apply to the provisions amending the Treaty establishing the European Atomic Energy Community, except that the amendments are relatively few.[29]

Provisions on a Common Foreign and Security Policy

3-9 One of the ways in which the establishment of the European Union extended beyond the range of the three Communities was in the introduction of a Common Foreign and Security Policy.[30] The provisions governing the operation of this policy vary from vague expectations, like the reference to "the progressive framing of a common defence policy ... which might lead to a common defence"[31], and unilateral pronouncements, like the statement that the European Union will "avail itself of the WEU to elaborate and implement decisions and actions of the [European] Union which have defence implications"[32], to more or less precise mechanisms and procedures designed to formulate and execute a common foreign and security policy.[33] However, although these mechanisms and procedures have a certain constitutional importance, they are not subject to review by the Court of Justice.[34]

Provisions on Police and Judicial Cooperation in Criminal Matters

3-10 Another respect in which the Treaty on European Union gives scope for acting beyond the areas covered by the three Communities is the inclusion of provisions on police and judicial cooperation in criminal matters.[35] The constitutional importance of these provisions is likely to increase to the extent that they are embodied in positive law. In the meantime, subject to some restrictions and exceptions, the provisions are subject to review by the Court of Justice.[36]

Provisions on closer cooperation among Member States

3-11 These provisions, which are relatively new and untried, extend the principle according to which cooperation among the Member States to further the objectives of the European Union is given a procedural framework.[37] Resort to the procedure envisaged under these provisions is subject to eight conditions, described further in Chapter 8.

Final Provisions

3-12 Most of the final provisions of the Treaty, dealing with miscellaneous matters[38], are important in constitutional law. All are subject to the jurisdiction of the Court of Justice.[39]

Protocols

3-13 All the Protocols have the force of law; most are subject to review by the Court of Justice; many have constitutional importance. Almost all the Protocols are annexed to more than one Treaty: this makes the numbering of the Protocols difficult to follow.[40] Some relate to the interests of individual Member States (Denmark, the United Kingdom and Ireland[41]); most relate to the Member States as a whole. Some are concerned with substantive law, whether on a narrow basis[42] or on large matters of policy[43]; some are concerned with institutional law and are in the form of "statutes" of, for example, the European Central Bank.[44]

Declarations

3-14 As Declarations annexed to the Treaty do not have the force of law, are not necessarily made by the Member States as a whole and do not commit those making the Declarations either legally or politically, they are not considered further, except to illustrate certain points of policy.

Conclusion

3-15 In some respects, the structure of the Treaty on European Union is untidy, even after the "simplification" undertaken in the Treaty amending it. Simplification falls a long way short of codification; and it would have made the existing Treaties easier to follow, and the intentions of the politicians and draftsmen easier to understand, if the amended Treaties had been delivered in a codified form. There would, however, have been political objections to proceeding in this way.[45]

3-16 In one respect, the structure of the Treaty on European Union demonstrates a radical departure from previous Community laws and policies. This concerns the unity of European Union law. Previously, it had been a fundamental characteristic of Community law that, with the exception of the timing of their application to new Member States[46], Community rules applied equally to all the Member States: there were no special derogations in favour of certain States.[47] The Treaty on European Union changed that. Substantive law is embodied in the Articles of the Treaty; but exceptions or derogations are embodied in Protocols. In a sense, this was a necessary consequence of the introduction of special criteria for economic and monetary union, which was bound to leave some countries outside the system.[48] But it also reflected a deliberate decision on the part of one Member State - the United Kingdom - to "opt out" of the substantive provisions.[49]

3-17 Similarly, the provisions on cooperation among the Member States, described briefly above and in more detail in Chapter 8, allow for partial progress towards the attainment of the objectives of the European Union. Opting out, on the one hand, and special forms of cooperation, on the other, are the opposite sides of the same coin. They detract from the principle of integration.

ANNEX A: List of Recitals, Articles and Protocols in the Treaty on European Union

Recitals in the Preamble to the Treaty on European Union

(Note: the descriptions of the recitals given below are not formal or official)

1	European integration
2	Construction of the future Europe
3	Liberty, democracy, human rights and the rule of law
4	Social rights of workers
5	Solidarity and Tradition
6	The single institutional framework
7	Economic convergence, Economic and Monetary Union and a single currency
8	Economic and social progress, sustainable development and the internal market
9	Citizenship of the European Union
10	A common foreign and security policy
11	Free movement of persons
12	Subsidiarity

Articles of the Treaty on European Union

(Note: (i) the title headings are those prescribed in the Treaty; (ii) descriptions of the Articles given below are not formal or official; (iii) the letters in square brackets are the former designations of the Articles.)

		Title I: Common Provisions
1	[A]	Establishment of the European Union
2	[B]	Objectives of the Union
3	[C]	Institutional Framework of the Union
4	[D]	The European Council
5	[E]	Powers of the Parliament, Council, Commission and Court
6	[F]	National Identities and Fundamental Rights
7	[F.1]	Breaches by Member States of principles set out in Article 6
		Title II Amendments to the Treaty establishing the European Community
8	[G]	Amendments to the Treaty establishing the European Community
		Title III Amendments to the Treaty establishing the European Coal and Steel Community
9	[H]	Amendments to the Treaty establishing the European Coal and Steel Community
		Title IV Amendments to the Treaty establishing the European Atomic Energy Community
10	[I]	Amendments to the Treaty establishing the European Atomic Energy Community
		Title V Provisions on a common foreign and security policy

[J.1] Objectives of the common foreign and security policy
[J.2] Methods of pursuing those objectives
[J.3] General guidelines and common strategies
[J.4] Joint actions
[J.5] Common positions
[J.6} Consultations between Member States within the Council
[J.7] Relations with the Western European Union
[J.8] Role of Presidency of the Union
[J.9] Member States' duries to coordinate policies in international fora
[J.10] Role of Diplomatic and Consular Missions of the Member States
[J.11] Role of European Parliament
[J.12] References to the Council by Member States or the Commission
[J.13] Procedure for taking action in Council
[J.14] Conclusion of agreements with non-member states and international bodies
[J.15] Role of the Political Committee
[J.16] Role of the Secretary-General of the Council
[J.17] Role of the Commission
[J.18] Administrative and financial matters

Title VI Provisions on police and judicial cooperation in criminal matters

[K.1] Objectives of provisions on police and judicial cooperation in criminal matters
[K.2] Common action in the field of police cooperation (Europol)
[K.3] Common action in the field of judicial cooperation in criminal matters
[K.4] Conditions and limitations of authorities' rights in other Member States
[K.5] Safeguard for Member States' responsibilities for law and order
[K.6] Consultations among Member States in Council
[K.7] Extent of Court of Justice jurisdiction in this field
[K.8] Roles of the Coordinating Committee and the Commission
[K.9] Member States' Duties in International Organisations and Conferences
[K.10] Conclusion of agreements with non-member states and international bodies
[K.11] Role of the European Parliament
[K.12] Cooperation between two or more Member States
[K.13] Administrative and financial matters
[K.14] Matters covered by the EC Treaty

Title VII (formerly VIa) Provisions on closer cooperation

[K.15] Closer general cooperation among Member States
[K.16] Adoption of acts and decisions for implementation of cooperation
[K.17] Informing the European Parliament of developments in cooperation

Title VIII (formerly VII) General and final provisions

[L] General jurisdiction of the Court of Justice of the European Communities
[M] Preservation of the Basic Treaties
[N] Amendment of the Treaties

49 [O] Applications for membership of the Union
50 [P] Repeals
51 [Q] Unlimited period of operation of the Treaty
52 [R] Ratification and Coming into Force of the Treaty
53 [S] Deposit of the Treaty

Protocols in the Treaty on European Union

(Note: Two different sets of numbering, involving several of the Protocols, are used in the Treaty amending the Treaty on European Union and in the amended Treaty establishing the European Community. The differences are indicated below and in the Annex to Chapter 11 of this book.)

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:

(Note. Protocols 7 to 9 below are numbered 11 to 13 in the Treaty amending the Treaty on European Union.)

- 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)

Articles of the Treaty amending the Treaty on European Union

(Note: all the amendments introduced under this Treaty have been incorporated in the basic Treaties described in this book; and the following list of Articles is purely for reference)

Part One: Substantive amendments

1 Amendments of the Treaty on European Union
2 Amendments to the Treaty establishing the European Community
3 Amendments to the Treaty establishing the European Coal and Steel Community
4 Amendments to the Treaty establishing the European Atomic Energy Community
5 Amendments to the Act concerning the election of representatives of the European Parliament by

direct universal suffrage

Part Two: Simplification

6 Simplification of the Treaty establishing the European Community
7 Simplification of the Treaty establishing the European Coal and Steel Community
8 Simplification of the Treaty establishing the European Atomic Energy Community
9 Repeal of the Convention of 1957 on certain Institutions common to the European Communities and the Treaty of 1965 establishing a single Council and Commission
10 Legal effects of repeal
11 Jurisdiction of the Court of Justice over this Part of the Treaty

Part Three: General and final provisions

12 Renumbering of titles and articles
13 Conclusion of Treaty for unlimited period
14 Ratification of the Treaty
15 Deposit of the Treaty

1. That is, the Treaty on European Union, signed in Maastricht in 1992 and coming into force on 1 November 1993, as amended by the Treaty, signed in Amsterdam in 1996 and coming into force on 1 May 1999, amending the Treaty on European Union. Article 12 of the amending Treaty renumbered all the Articles of the basic Treaties: the new numbering, together with references to the former numbering, are used throughout this book. All references in this book to the Treaty on European Union may be taken to mean, unless otherwise stated, to the amended form of the Treaty. An outline of the Recitals, Articles and Protocols to the Treaty on European Union (the "EU Treaty") will be found in the Annex to this Chapter.

2. See paragraphs 4-18 and 4-19.

3. Comprising twelve Recitals and a Decision. See Chapter 4.

4. Articles 1 to 7 (formerly A to F, with a new Article F.1), EU Treaty.

5. Article 8 (formerly G), EU Treaty.

6. Article 9 (formerly H), EU Treaty.

7. Article 10 (formerly I), EU Treaty.

8. Articles 11 to 28 (formerly J.1 to J.18), EU Treaty.

9. Articles 29 to 42 (formerly K.1 to K.14), EU Treaty.

10. Articles 43 to 45 (new Articles), EU Treaty.

11. Articles 46 to 53 (formerly L to S), EU Treaty.

12. There were 17 Protocols (not formally numbered) in the original EU Treaty. The amending Treaty added one Protocol exclusively to the EU Treaty; four Protocols to the EU Treaty and the EC Treaty; and three Protocols to the EU Treaty and the EC, ECSC and EAEC Treaties. These are noted in the Annex to this Chapter. Four Protocols were added exclusively to the EC Treaty; these are referred to in Chapter 11.

13. There were 33 Declarations in the original EU Treaty. The amending Treaty added 51 and eight unilateral Declarations.

14. That is, Articles 8, 9 and 10 (formerly G, H and I), EU Treaty.

15. Ninth recital of the preamble to the EU Treaty.

16. Article 2 (formerly B), third indent, EU Treaty.

17. Article 17 (formerly 8), EC Treaty.

18. Fifth recital of the preamble to the EU Treaty.

19. Article 151(1) (formerly 128(1)), EC Treaty.

20. Article 46 (formerly L), EU Treaty. The only exception applies to Article 6(2) (formerly F(2)), EU Treaty, "with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty": Article 46(d).

21. Article 1 (formerly A), EU Treaty.

22. Article 5 (formerly 3b), second paragraph, EC Treaty. The Protocol on Subsidiarity is even more precise: see Chapter 25.

23. Article 46 (formerly L), sub-paragraph (a), EU Treaty.

24. Article 1 (formerly A), third paragraph, EU Treaty.

25. Article 8 (formerly G), EU Treaty.

26. Articles 2 and 6 respectively, Treaty amending the EU Treaty.

27. Article 9 (formerly H), EU Treaty; and Articles 3 and 7, Treaty amending the EU Treaty.

28. Article 97, ECSC Treaty.

29. Article 10 (formerly I), EU Treaty; and Articles 4 and 8, Treaty amending the EU Treaty.

30. Articles 11 to 28 (formerly J.1 to J.18), EU Treaty.

31. Article 17(1) (formerly J.7(1)), EU Treaty.

32 Article 17(3) (formerly J.7(3)), EU Treaty.

33 As in Articles 13 and 14 (formerly J.3 and J.4), EU Treaty.

34. Article 46 (formerly L), EU Treaty.

35. Articles 29 to 42 (formerly K.1 to K.14), EU Treaty.

36. Articles 35 and 46(b) (formerly K.7 and L(b)), EU Treaty. See paragraph 8-12 below.

37. Articles 43 to 45 (new Articles), EU Treaty.

38. Articles 46 to 53 (formerly L to S), EU Treaty.

39. Article 46(e) (formerly L(e)), EU Treaty.

40. See the "official" list in the Annex to this Chapter.

41. For example, what are now Protocols 4 and 5 of the EU Treaty.

42. As in Protocol 17 of the EC Treaty (formerly printed as the Second Protocol of the EU Treaty). However, the economic importance of the Protocol was substantial.

43. Such as the convergence criteria for economic and monetary union, in Protocol 21 of the EU Treaty (formerly printed as the Sixth Protocol to the EU Treaty).

44. Protocol 18 to the EC Treaty (formerly printed as the Third Protocol to the EU Treaty).

45. As experience in the preparation of the Amsterdam Treaty showed, the submission to Member States of a consolidated Treaty could have given the Member States an opportunity to reconsider the whole system, a prospect which might have dismayed those anxious to proceed with the current proposals.

46. Under the provisions of the relevant Treaties of Accession.

47. An example of the application of this principle to a specific case was the suggestion that the Community Patent Convention should not have to extend to all the Member States. The Commission strongly opposed the suggestion on the grounds that it ran counter to the whole concept of a single market. In a graphic phrase used at the time: "the Community is not like a Swiss cheese, full of holes".

48. Article 121(1) (formerly 109j(1)), EC Treaty.

49. Protocol 25 to the EC Treaty (formerly printed as Protocol 14 to the EU Treaty).