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The draft Treaty establishing a European Constitution: Parts II and III

The Convention on the Future of Europe presented the draft European Constitution to the European Council in Thessaloniki on 20-21 June 2003.

This will be the basis for further discussion at an Intergovernmental Conference (IGC) that is to be launched in October 2003. The final text agreed at the IGC will be signed in May 2004, when new states are expected to accede, and the ratification process in all the Member States will follow.

This paper looks at Parts II and III of the draft Constitution. Part II contains the Charter of Fundamental Rights and Part III contains detailed provisions on policies and voting mechanisms in all areas of EU activity.

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Summary of main points

- The Convention on the Future of Europe, which began its deliberations in February 2002, has adopted a draft European Constitution. This was presented to the European Council in Thessaloniki on 20-21 June 2003 at the end of the Greek EU Presidency.

- The draft Constitution is a lengthy document, divided into four Parts. Part II incorporates the *European Charter of Fundamental Rights* proclaimed in Nice in December 2000.

- Part III contains the detailed provisions on policy and procedure for many articles in Part I of the draft Constitution.

- The Convention held its last meeting in June 2003, but the Praesidium has asked for more time to finalise part IV of the draft Constitution.

- The draft Constitution will be the basis for discussion at an Intergovernmental Conference (IGC) to be launched in October 2003. The IGC is expected to end in December 2003.

- It is generally agreed that the IGC should not unpick the text agreed by the Convention, but there will be renewed discussion of some of the more controversial articles. The ten accession states will be fully involved in the IGC and the final agreement will not be signed until they become full EU Member States on 1 May 2004.

- Contributions to this paper have been made by subject specialists throughout the Library, as follows: Vaughne Miller (Convention on the Future of Europe, the EU Constitution, EU institutions, EU law and procedures), Grahame Allen (economic policy), Christopher Barclay (agriculture and fisheries), Christopher Blair (competition), Brenda Brevitt (civil protection), Sally Broadbridge (criminal justice), Lorraine Conway (consumer protection), Grahame Danby (sport), Tim Edmonds (employment), Catherine Fairbairn (civil justice), Christine Gillie (education), Donna Gore (civil protection), Steven Kennedy (social security), Steve McGinness (environment), Fiona Poole (transport), Ed Potton (economic and monetary policy), Patsy Richards (economic and trade matters), Jo Roll (health policy), Antony Seely (taxation), Alex Sleator (Public health), Pat Strickland (police cooperation), Claire Taylor (Common Foreign and Security Policy, defence), Arabella Thorp (asylum and immigration), Philip Ward (space), Dominic Webb (employment), Wendy Wilson (housing)

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I Introduction and terminology

The Convention on the Future of Europe agreed on 12 and 13 June 2003 more or less final drafts of two volumes containing the proposed European constitution.[1] Parts I and II and three protocols (on the role of national parliaments, subsidiarity and proportionality, European Parliament seats and weighted votes in the Council of Ministers) are contained in CONV 797/1/03, which can be accessed at http://european-convention.eu.int/docs/Treaty/cv00797-re01.en03.pdf. Parts III and IV are contained in CONV 805/03, which can be accessed at http://european-convention.eu.int/docs/Treaty/cv00802.en03.pdf. A revised version of Parts I and II was presented to the European Council in Thessaloniki on 20-21 June 2003, but this paper generally refers to CONV 797/1/03 as its basis. Where it has been possible, the later version (CONV 820/1/03, at http://european-convention.eu.int/docs/Treaty/cv00820-re01.en03.pdf) is used.

The paper looks at a range of articles in Parts II and III of the draft Constitution, which include the Charter of Fundamental Rights and articles on the various policy areas in which the Union will be involved. Many of these articles contain the detailed provisions of more general articles in Part I of the constitution. Another Research Paper will look at Parts I and IV of the draft constitution and consider legal and constitutional issues arising from them.

The following acronyms are used in the Paper:

TEC = Treaty establishing the European Communities
TEU = Treaty on European Union
QMV = Qualified Majority Voting

The draft constitution also uses new terms for legislative instruments which are contained in Part I. **Article I-32** sets out six categories of acts: **European laws, European framework laws, European regulations, European decisions, recommendations and opinions**. These correspond roughly to the instruments set out in current Article 249 TEC, but the 'European regulation' is new. 'European law', 'European framework law', and 'European decision' replace the present 'regulation', 'directive' and 'decision' respectively. 'Recommendations' and 'opinions' remain unchanged.

The definitions of European laws and European framework laws are similar to those in Article 249 TEC for regulations and directives, but are now both expressly classified in Part I of the draft constitution as being 'legislative acts'. Under **Article I-33** a legislative act is one adopted "on the basis of proposals from the Commission, jointly by the

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[1] The Praesidium named the document the "Draft Treaty Establishing a European Constitution", but this paper uses the looser term 'draft constitution'.

European Parliament and the Council of Ministers under the ordinary legislative procedure as set out in Article III-298".[2]

European laws will be, like the present regulations, directly applicable.[3] The main difference is that while the Commission is currently authorised under the Treaty (Article 211 TEC) to make regulations, it will not be able to make European laws. The Commission will, however, be able to make 'delegated regulations' under draft Article I-35 and 'implementing acts' under draft article I-36. European regulations will have the same legal effects as European laws (general application and being binding in their entirety and directly applicable in all Member States), except that they are 'non-legislative acts', under **Article I-34**.

The **ordinary legislative procedure** under **Article III-298** is the co-decision procedure (currently Article 251), which gives the EP a role in the legislative process and allows it to veto the proposal in certain circumstances. Co-decision almost always means QMV, so if unanimity is not given as the basis for agreement in areas where the EU can legislate, QMV can be assumed.

II Part II The Charter of Fundamental Rights

Part II of the draft constitution contains the text of the Charter of Fundamental Rights as it was proclaimed in December 2000, except for the amendments to the "general provisions" agreed by Working Group II and some technical adaptations.[4] The Charter has been incorporated virtually as it stood, except for a change to the language that was agreed by the Working Group (with the exception of Article II-42, see below). The text now refers to powers and tasks conferred / defined 'in', rather than 'by', the Constitution. This corresponds to the general line the Convention has taken in Part I, implying that power is conferred by the Member States and not by the constitution itself.

A. British Government views on the Charter

The British Government has been against making the Charter legally binding by incorporating it into the EC Treaty or any future constitutional text. The Government's position on the status of the Charter was set out in its White Paper, *IGC: Reform for Enlargement: the British Approach to the European Union Intergovernmental Conference 2000*,[5] and in a number of parliamentary answers since.[6] In its view the Charter was a proclamation and should not be given a legally enforceable status. In his

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2 CONV 820/03

3 i.e. they will have the force of law without national legislatures normally having the need or the right to use further implementation measures.

4 For example changing 'Treaty' to 'Constitution', 'Community' to 'Union', 'chapters' to 'titles'

5 Cm 4595, February 2000.

6 For example, HC Deb 23 January 2001 c554W

account of the Brussels European Council in October 2002, the Prime Minister, Tony Blair, said: "we have made it absolutely clear that [the Charter] should not extend the legal competence or jurisdiction of Europe in any way at all".[7]

The Government later accepted incorporation, but within the boundaries of EC/EU competence, as the Government representative on the Convention, Peter Hain, said in the Convention Plenary debate on the Working Group Report on the Charter on 3 October 2002. He welcomed the

> … real progress on the adjustments necessary to change the Charter from a political text to a legal text, with which everyone, including the British government can work. We are approaching this matter to try to incorporate it into the Treaties. I wish to stress that it is not just a difficult political issue, but also a technical one.[8]

He emphasised the need for the Charter to be based on, and to be harmonious with, the constitutional traditions of the Member States, indicating that the lack of a written constitution in the UK could be problematic if the horizontal articles[9] were not strong enough.

Addressing an audience in Cardiff in November 2002, the Prime Minister said:

> On the Charter of Rights, I repeat our clear view that though we welcome, of course a declaration of basic rights common to all European citizens and have ourselves incorporated the European Convention on Human Rights directly into British law, we cannot support a form of treaty incorporation that would enlarge EU competence over national legislation. There cannot be new legal rights given by such a means, especially in areas such as industrial law where we have long and difficult memories of the battles fought to get British law in proper order.[10]

Mr Hain told the European Scrutiny Committee:

> [So] the working group unanimously came up with a proposition which was, essentially, British ideas to strengthen the horizontal articles in the Charter that, effectively, in simple terms, stopped it reaching down into our domestic courts and changing our domestic law. That position was endorsed almost unanimously in the plenary. So I do not think that can be unpicked. We still have to see exactly how that might, as it were, come out on the night in terms of its full incorporation into the new constitution, which would have to be the case. We would need to be

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7 HC Deb 28 October 2002 c 546

8 3 October 2002, at: http://www.europarl.eu.int/europe2004/textes/verbatim_021003.htm

9 These are the articles dealing with the limitation of the scope and application of the Charter, Articles 51 and 52, for example. Vertical articles focus on particular rights.

10 Tony Blair, speech in Cardiff, "A clear course for Europe", 28 November 2002, FCO website at: http://www.pm.gov.uk/output/page6709.asp

> absolutely clear that, for example, you could not change our strike laws, you could not change our employment laws and you could not enable an individual citizen who felt they were not getting the housing opportunity they wanted from their local authority to take that local council to court and, ultimately, to the European Court of Justice under the Charter because that is not a role for Europe, that is a matter for national decision-making and, ultimately, for local authorities. We could have had a situation, if the Charter had simply been incorporated wholesale and unamended into the treaties, which would have been a matter of national veto for us. We are still very far from being certain that our concerns in that respect have been fully accommodated, but we have got a major part of the way and a significant change of stance by other European countries and their parliamentarians. So we are in a much more encouraging position than we were.[11]

In the December 2002 House of Commons debate on the Convention one of the UK representatives on the Convention, David Heathcoat-Amory, questioned the Government's intentions with regard to the Charter, to which Mr Hain replied that the Government had achieved a key aim of securing in the draft report "a series of horizontal articles that stop the charter being enforced to change our domestic law."[12]

The Charter has been incorporated into Part II of the draft constitution, although the Government would have preferred it to have been attached as a protocol to the constitution. It is not clear what difference this would make, since protocols are considered to be integral parts of EC Treaties. The Government hopes that the insertion of additional 'horizontal' clauses into the Charter will prevent it from 'seeping down' into domestic laws and that the 'Explanations' to the Charter in 2000, which would supposedly moderate its use, will be legally binding.[13] The *General Provisions Governing the Interpretation and Application of the Charter* in Articles II-51 and 52 concern the field of application and the scope of interpretation of the Charter and give further emphasis to the constitutional traditions of the Member States.[14] The *Explanation* of Article 51 states:

> As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Community law (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, ERT [1991] ECR I-2925). […]
>
> Paragraph 2 confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Community and the Union. Explicit mention is made here of the logical consequences of the principle

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11 Minutes of Evidence to ESC, 20 November 2002, 16 December 2002, HC 103-I, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm

12 HC Deb 2 December 2002 cc 702-3

13 The Explanations can be accessed on the Europa website at http://ue.eu.int/df/default.asp?lang=en., following link to Full Text.

14 http://european-convention.eu.int/docs/Treaty/cv00820-re01.en03.pdf

> of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaty.[15]

Article II-52 provides that, insofar as the Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights shall be the same as those laid down by the Convention.

B. Opposition views

The Conservatives oppose inclusion of the Charter in any future EU treaty. According to the Shadow Foreign Secretary, Michael Ancram, "the ways in which human liberties are protected through the ECHR and our national courts are adequate. We therefore believe there is no need for further protection".[16] He continued:

> In particular, the incorporation of a legally binding charter of fundamental rights into a new treaty would lead to a vast increase in the power of the European Union over the member states and of European judges over the political process.[17]

The Liberal Democrats firmly support incorporation of the Charter into a constitutional text "as that is the clearest way of ensuring that citizens understand their relationship with those who govern them, at whatever level".[18] On 21 October 2002 the UK Liberal Democrat MEP, Andrew Duff, an enthusiastic Charter supporter,[19] presented to the EP Plenary a Motion for Resolution which, he said, would be the EP's official contribution to the Convention.[20] The Charter, he maintained, was already much used by the European Ombudsman, the EP, the Commission and even, on occasion, by the Council. It was also an important source of reference for the courts, alongside the ECHR, and for the Member States. However, he thought EU citizens remained uncertain about its scope as a solemnly proclaimed instrument. Furthermore, national constitutional tradition was already broad and with enlargement would become "improbably broad". Inclusion of the Charter in the Treaties was imperative, so that what was currently an important source of reference would become a central source.

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15 http://ue.eu.int/df/default.asp?lang=en

16 HC Deb 2 December 2002 c 688

17 Ibid

18 Michael Moore, HC Deb 2 December 2002 c 695

19 He was a member of the Convention on the Charter of Fundamental Rights in 1999-2000 and co-rapporteur for the EP at that time.

20 The EP Resolution was submitted to the Convention as a written contribution by Méndez de Vigo, Hänsch and Duff (CONV Doc. 368/02).

C. House of Lords

The House of Lords Select Committee on the European Union considered the Charter in its Sixth Report, *The Future Status of the EU Charter of Fundamental Rights*, published in February 2003. The Committee concluded, amongst other things, that the Charter should not extend EU competence:

> 95. What is clear is that the Charter was not, and is not, intended to extend the competence of the Union or the Community. That appears from Article 51(2): "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties".
> Further, as Statewatch has pointed out, there is a line of cases in which the ECJ has refused to rule on human rights issues where there was no link with EC Treaty rules or EC legislation. There was nevertheless much discussion of competence issues in the Convention Working Group, leading to the proposal that Article 51(2) should be strengthened.
> **96. The position must be as certain and free from argument, legal or political, as possible. We support the stance being taken by the Government in this context as regards both the horizontal clauses and the commentary. The latter currently states: "Paragraph 2 confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Community and the Union". That should be amended to make clear that the Charter is not intended to extend the competences of the Community and the Union and does not in fact do so.**[21]

In its Conclusions the Committee stated:

> 157. Any new constitution for the Union should be accompanied by a bill of rights.
> 158. The Charter, preferably appropriately revised but if that is impracticable then as it stands, could be incorporated into the new constitution so as to constitute the requisite bill of rights.
> 159. If this Charter option is adopted great care must be taken via the "horizontal" clauses to ensure that Union and Community competences are not thereby enlarged and that the Charter rights are enforceable only in respect of the acts of the EU or its institutions within their respective competences or the acts of Member States in relation to the implementation of EU law.
> 160. An alternative course would be for the Union to accede to the ECHR so that the ECHR became the Union's bill of rights. Here, too, however, the accession should not enlarge Union competences or the competences of Union institutions.
> 161. The main difficulty with accession by the Union to the ECHR is that the necessary changes in the ECHR Treaty would have to be agreed upon by all its

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[21] House of Lords Select Committee on the European Union Sixth Report *The Future Status of the EU Charter of Fundamental Rights* HL Paper 48, 2002-3 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/48/48.pdf

signatories. This unanimity might be very difficult, politically, to achieve. The difficulty would be enhanced by the need to obtain unanimity also on the reservations or derogations to accompany accession.

162. There is no conceptual reason why the Charter option and the accession to the ECHR option should not be combined. The combination, if it could be brought about, would provide maximum protection to individual citizens in respect of any alleged breach of fundamental rights by the EU or its institutions.

163. The extent of the practical benefits to be brought to individual citizens either by incorporation of the Charter, or by accession of the Union to the ECHR, or by both, is likely to be limited and disappointing unless there is at the same time a reform of the remedies obtainable by citizens from the Community courts. Without this reform the new bill of rights may take on the appearance of a false prospectus. A review of the jurisdiction of the ECJ and the rules governing and limiting the ability of individual citizens to obtain remedies from the Community courts should be put in hand immediately, with a view to implementation of any necessary reforms at the same time as the coming into effect of the new bill of rights.

Specific/detailed

164. (a) The Charter—horizontal clauses and commentary

The horizontal clauses provide significant advantages for legal certainty as regards the definition of competences. It is essential to ensure that the horizontal clauses are as clear and unambiguous as possible (paras 91, 92). They may need to be strengthened to ensure that the Charter does not extend the competences of the Community and the Union (para 96, 99, 101).

If the Charter is to be incorporated into the Treaty there is a need for an authoritative commentary or "interpretation", which should be published and be readily available to the citizen and the courts (para 94). It should include a statement to the effect that the Charter is not intended to fetter the powers of Member States outside the field of Community/Union law to pursue whatever policies they choose (para 98).

165. (b) Accession to the ECHR

The EU should have legal personality (para 119).

If the Union were to accede to the Convention, the Member States should be able to agree any qualifications or reservations (paras 122, 123).

The autonomy of the Community legal order would not be endangered by EU accession to the ECHR. The position of the ECJ would be analogous to that of national constitutional or supreme courts in relation to the Strasbourg Court. But any uncertainty as to the application of the domestic remedies rule should be clarified in the instrument of accession (paras 126, 130 and 131).

166. (c) Remedies

If incorporation of the Charter is to confer any real benefit on individuals, the rights that will have been created will need effective remedies in order to give those rights substance and make them meaningful (para 142).

No matter within the scope of the Charter and within EU competences should be outwith the jurisdiction of the ECJ. The Court should have jurisdiction over Second and Third Pillar matters, and over all EU institutions and bodies (paras 146, 148, 150).

> The standing rule in Article 230(4) TEC should be re-examined. We urge the Government to press the Convention to do so as a matter of urgency, working in close conjunction with the Community Courts (para 156).
> The resources of the Community Courts and the Strasbourg Court need strengthening to enable cases to be decided within a reasonable time (para 133).[22]

D. The impact on business

The Economist Intelligence Unit has commented on the possible impact of the Charter on business:

> **Business concerns**
> The prospect of the charter of rights being made legally binding is truly worrying for executives. The key Title IV includes workers' rights to information and consultation; a right to collective bargaining, including the right to take collective action and to strike; protection in the event of unjustified dismissal; and fair and just working conditions. To many executives this extensive list of rights suggests an extensive and unwarranted increase in EU social rights.
>
> In fact, the charter is very misleading. The convention aimed to give the EU a sophisticated 21st century bill of rights. In this they succeeded. However, most of the rights in the charter will never be exercised. This is because the EU only has competence in certain areas. For example, the EU has no direct control over a police force or an army; it is thus difficult to see how the charter's prohibition on torture is really relevant. Clearly this provision could have been left out, but to draft a bill of rights without a torture provision, but with, say, a provision on data protection, would have seemed odd, at best.
> The fact that many of the charter rights cannot be used in the EU context is vital in understanding its real impact. If there is no right in the substantive EU treaties then whatever the charter says it cannot apply. Hence despite the EU charter expressly providing for a right to strike, the existing Article 137 of the EC Treaty excludes that right. The charter in fact explicitly states that it can only be applied in the context of the existing treaties and in relation to the EU institutions. Hence those labour unions representing employees of the EU institutions might be able to rely directly on the charter's social provisions, but they would be the only unions in the EU who could do so.
>
> **A sting in the tail**
> There is, nonetheless, no denying that for business there is a real downside to the charter. The only other European bill of rights is the 50-year-old European Convention of Human Rights (ECHR). The ECHR is short, venerable and does not take account of significant modern developments. By contrast, the charter is much more comprehensive in scope. The danger for business is that the charter

[22] HL 48 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/48/48.pdf

> will be used by lawyers and judges in member states to reinforce national social rights. Because of its superiority over the existing ECHR, its origins in the earlier convention, and the fact that it is part of the EU constitution, it is likely that national courts will take an argument drawn from the charter seriously.
>
> In effect, therefore, the charter will become a source of strong persuasive authority in national legal systems. Consequently, there is a real risk that social rights -- such as the right to strike -- will be significantly strengthened by judicial reliance on the charter at national level. If applied by national courts, the effect of the charter will be to broaden existing national social rights.
> There is still likely to be a battle over the legal status of the charter in the forthcoming IGC.
>
> Some member states -- including the UK and Ireland -- will only accept the charter if it is made clear that it creates no new rights. If that battle is lost, the social rights genie will really be out of the bottle.[23]

E. Health and social security

Article II-34 on social security and assistance does not appear to create any new powers, but merely states that in exercising its functions in the areas specified, the Union must have regard to and respect certain principles. Article II-34(1) refers to entitlement to social security benefits and 'social services' for particular contingencies. The list of contingencies is not exhaustive. In the case of benefits and services in respect of loss of employment, the Union must recognise and respect entitlement "in accordance with the rules laid down by Union law and national laws and practices".

Article II-34(2) refers to social security benefits and 'social advantages' for people moving within the European Union. The existing Community provisions in this area are Council Regulation 1612/68 on the free movement of workers within the Community, and Council Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (see Article III-18 below).

Article II-34(3) is concerned with measures to tackle social exclusion and poverty; it refers to the Union's recognition of, and respect for, the right to 'social and housing assistance.' The current EU role in this area is set out in Article 137 TEC,[24] which makes no specific reference to the provision of housing assistance in Member States. The question therefore arises as to whether paragraph (3) would create additional rights to housing.

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[23] *Economist Intelligence Unit*: *Business Europe* 23 June 2003

[24] Article III-99 in the draft Constitution

The issue of whether there is a 'right to a home' has already been tested in the case law of the European Court of Human Rights. Its rulings have established that Article 8 of the *European Convention on Human Rights* or ECHR (the principal Convention right relied upon by occupiers) does not create a right to be provided with a home.[25] It is a question of interpretation as to whether, by recognising and respecting a 'right to social and housing assistance', the incorporation of the Charter of Fundamental Rights would create a right to housing. The fact that any such 'right' would be recognised and respected in accordance with 'Union law and national law and practices' appears to introduce a qualifying factor.

Article II-35 provides a "right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices". Existing Article 152 TEC contains various provisions on public health and for the adoption by QMV of recommendations for the purposes set out in Article 152. Article 152 does not directly refer to medical treatment and is framed only in terms of Community action, rather than individual rights.

Various international agreements contain provisions on rights in relation to health, although not in these precise words. For example:

- Article 25.1 of the 1948 United Nations *Universal Declaration of Human Rights* affirms that:

  > Everyone has the right to a standards of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.

- The UN's *International Covenant on Economic, Social and Cultural Rights* contains provisions on health in Article 12, which states:

  > 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
  > 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  > (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  > (b) The improvement of all aspects of environmental and industrial hygiene;
  > (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  > (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

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[25] *X v Federal Republic of Germany* (1956) 1YB 202, EComHR.

- The Council of Europe's *European Social Charter*, Article 11, has the following provisions on the right to 'protection of health':

  With a view to ensuring the effective exercise of the right to protection of health, the Contracting parties undertake, either directly in co-operation with public or private organisations, to take appropriate measures designed inter alia:

  1. to remove as far as possible the causes of ill-health;
  2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
  3. to prevent as far as possible epidemic, endemic and other diseases.

The ECHR, incorporated into UK law by the *Human Rights Act 1998*, does not include explicit provisions on health protection or health treatment, although health issues may arise indirectly through some of the other provisions, such as the right to life or the right to liberty.

Apart from Article 152, the EU has played a role in health matters as a result of the general Treaty provisions on the free movement of persons, services and capital and the specific provisions within these on social security (which in this context has been interpreted to include health). The provisions on the free movement of persons, services and capital have impinged on health services in two ways in particular. One is through EC Regulation 1408/71 on the application of social security schemes to employed people and families moving within the Union. This covers, for example, the E112 scheme, under which people may be sent abroad by the NHS for treatment. The other is through judgments of the European Court of Justice (ECJ) on the interpretation of the Treaty, the latest of which was in May 2003.[26] It is sometimes argued that these judgments, which relate to the provision of health services, could have potentially far-reaching effects on the UK National Health Service, despite the fact that there is no specific competence for the EU to act in this area.[27]

F. Access to documents

The only substantive amendment to the Charter is **Article II-42** on access to documents. This right was merely restated in the Charter with the scope approved by the Treaty of Amsterdam. However, the Convention wanted to extend this right to the documents of the institutions, bodies and agencies generally. The right of access to documents is already contained in Part I, "Democratic Life", but was considered by the Convention Praesidium

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[26] Case C-385/99 – VG Muller-Faure v Onerlinge Waarborgmaatschappij OZ Zorgversekerigen UA and Eem van Riet v Onderlinge Waarborgmaatschappij OZs Geraers-Smits and Peerbooms (heard together), ECJ case C-157-99, and Vanbraekel, ECJ caseC-368-98. Judgements in 1998 in the cases of Decker, case C-120/95, and Kohll, C-185/96.

[27] See, for example, "EU patients are entitled to primary care in any member country," *British Medical Journal*, 24 May 2003, p 1106

to merit not only rules on the modalities, limits and legal bases for transparency and data protection, but also a statement of the right itself. It thought this would emphasise that the right of access belonged to the "genuinely *fundamental* rights of the Union".[28]

There is further duplication with Part I of the constitution. For example, the references to the rights of EU citizens and to non-discrimination on the basis of nationality, in Part I are duplicated in the Charter. In the view of the Praesidium this is justified on the grounds that:

> these rights are constitutive of the very notion of European citizenship as introduced by the Treaty of Maastricht. They (or at least some of them, such as freedom of movement or voting rights of EU citizens in the country of residence) are special to the Union, and, by definition, cannot be guaranteed at national level. That distinguishes them from the other Charter rights, such as freedom of expression, of religion, etc., which are analogous to fundamental rights protected in national constitutions.[29]

G. Justice

Article II-53 (Level of protection) provides that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union laws and international law and by international agreements to which the Union or all the Member States are party, including the ECHR.

Article II-47 draws on ECHR **Articles 13** (Right to an effective remedy) and **6(1)**(Right to a fair trial). These are all shown in the table below.

ECHR	Draft constitution
Article 13 **Right to an effective remedy** Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. **Article 6 – Right to a fair trial** 1 In the determination of his civil rights and obligations or of any criminal charge against him,	**Article II-47** **Right to an effective remedy and to a fair trial** Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and

[28] CONV 726/03 26 May 2003 at http://european-convention.eu.int/docs/Treaty/cv00726.en03.pdf
The Praesidium notes ECJ case law to this effect in the argument made by Advocate-General Léger in Case 353/99 P, *Council v Hautala*.

[29] CONV 726/03 26 May 2003 at http://european-convention.eu.int/docs/Treaty/cv00726.en03.pdf

everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.	impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

The main difference is that **Article II-47** applies to a wider range of rights and freedoms, and guarantees the effective remedy before a tribunal, as opposed to a "national authority".

Articles II-48 to **II-50** broadly parallel part of **Article 6(2)** and **(3),** and **Article 7** of the ECHR and **Article 4** of its Seventh Protocol, but with some differences. The presumption of innocence, in **Article II-48(1)**, applies to "everyone who has been charged", and does not follow **Article 6(2)** of ECHR in going on to specify "charged with a criminal offence". This may be to reflect that in some jurisdictions certain offences have been decriminalised, and are dealt with in "administrative proceedings".[30]

Article II-48(2) is to guarantee "respect for the rights of anyone who has been charged". It does not specify any such rights, but **Article 6(3)** of the ECHR does specify five minimum rights which anyone charged with a criminal offence has.

Article II-49 effectively reproduces **Article 7** of the ECHR, with two additions. As well as prohibiting the imposition of a penalty more serious than was applicable at the time of the offence (as does **Article 7**), **Article II-49(1)** also provides that, if subsequent to the commission of a criminal offence, the law provides for a lighter penalty, the lighter penalty shall be applicable. This is not, at least not expressly, limited to cases where the offender had not been sentenced before the law was changed, so it may affect offenders who are already serving sentences when the law changes the applicable penalty. It could even be argued that an offender who had been sentenced to less than the maximum penalty would be affected. The argument would be that, even if his sentence was less than the reduced maximum sentence, he was sentenced on a scale capped by the old maximum, which is no longer appropriate.

[30] For an explanation of "administrative proceedings", see Library Research Paper 03/30 28 March 2003 The *Crime (International Cooperation) Bill*

Article II-49(3) also provides that the severity of penalties must not be disproportionate to the criminal offence. This is enshrined in the common constitutional traditions of the Member States and in the case law of the ECJ.

Article II-50 reproduces that part of **Article 4** of **Protocol 7** ECHR, which provides that no-one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has been finally acquitted or convicted. It does not reproduce the proviso, in Article 4(2), allowing cases to be reopened if there is evidence of new or newly discovered facts, or there was a fundamental defect in the original proceedings. That is the proviso which appears to allow exceptions to the double jeopardy rule, as are now being made by the *Criminal Justice Bill*, Part 10 and Schedule 4. Another relevant agreement is the UN *International Covenant on Civil and Political Rights*, Article 14(7) of which provides:-

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The Law Commission has considered both existing articles and did not consider itself constrained from recommending an exception to the double jeopardy rule on the ground of new evidence.[31] It pointed out that Article 14(7), read literally, would prohibit an appellate court from quashing a conviction and ordering a retrial, and drew attention to the United Nations Human Rights Committee's view that reopening criminal proceedings "justified by exceptional circumstances" did not infringe the principle, but also to the Committee's distinction between "resumption" of criminal proceedings, and "retrial" which was expressly forbidden. The word "finally" qualifies "acquitted or convicted" in the draft article as well as in the existing articles, confirming that the prohibitions are not concerned with a conviction or acquittal which could yet be reversed.

III Part III

A. Clauses of General Application

Articles III-0 – III-3 lay down aspects to be taken into account in the formation and implementation of all EU policies and action. They include consistency between policies; taking the Union's objectives into account; eliminating discrimination generally and inequalities between men and women in particular, and combating discrimination on a wide range of grounds. The present Article 13 TEC allows the EU to take action to combat discrimination, whereas the constitution would make an anti-discrimination element integral to the defining and implementing of all EU measures. Environmental

[31] "Double Jeopardy and Prosecution Appeals", Law Com No 267, Part III.

protection and consumer protection are similarly required to be integral to the law-making process.

B. Non-discrimination and citizenship

Articles III-4 – III-10 deal with the principle of non-discrimination, and whereas the present Treaty provides that the Council may adopt rules to prohibit discrimination (Article 12 TEC), the Constitution states that the Council shall lay down rules to prohibit discrimination on grounds of nationality. Other articles are similar to existing provisions under the *Principles* and *Citizenship of the Union* headings.

C. Internal market

Article III-11 states that the Union shall adopt measures with the aim of establishing the internal market. The word 'progressively' has been dropped, as has the old target date of 31 December 1992. Other general provisions relating to the distortion of the internal market remained unchanged.

D. Free movement of persons and services

Articles III-15 – III-17, in the area of employment law and workers' rights, propose very few changes. The provisions on the free movement of persons and services are on the whole almost identical to those of Title III TEC. The few notable differences are highlighted below, and concern mostly legislative procedures rather than substance.

1. Social security for migrant workers

Under Article 42 TEC the Council has to act unanimously throughout the co-decision procedure when adopting the social security measures necessary to provide freedom of movement for workers and their dependants. **Article III-18**, however, will be subject to the adoption of European Laws or Framework Laws by QMV.

At present, Article 42 TEC is given effect by Council Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, which was adopted when there were only six Member States of the European Economic Community.[32] The provisions are complicated, but two features in particular are worth noting:

- The Regulation does not cover all categories of person. Reflecting the fact that Article 42 is concerned with freedom of movement for workers, coverage is

[32] For a detailed description of the purpose and scope of Regulation 1408/71, see Wikeley, Ogus and Barendt, *The Law of Social Security*, 5th edition, 2002, pp 62-88

limited (broadly speaking) to people who have worked or been insured under the social insurance legislation of an EU Member State, and their dependants.

- Only certain categories of benefit come within the scope of the Regulation. Significantly, the provisions do not apply to means-tested benefits.[33]

In December 1998 the Commission published proposals for a new Regulation to replace 1408/71 which would simplify and clarify the rules on the co-ordination of social security systems.[34] At the Barcelona European Council on 15-16 March 2002 a timetable was established for agreement on a new Regulation by the end of 2003.[35] It remains to be seen whether this timetable will be adhered to.

The case for extending QMV to areas of social policy where unanimity is required at present was examined by the House of Lords European Union Committee in its report, *The Future of Europe: "Social Europe"*.[36] The Government is opposed to the extension of QMV to social policy areas, and notes that the Convention Working Group on Social Europe did not reach a consensus on this point. The following extract from the Government's memorandum to the Committee summarises the official position:

> 12. The final report of the working group notes that the group could not agree whether to extend qualified majority voting (QMV) in the social policy field. The Government does not believe that any extension of QMV in this area is necessary. It is not convinced that more QMV will create more and better jobs, or help further alleviate social exclusion. The Government also considers that unanimity has not been a bar to the adoption of necessary legislation in the social field. Unanimity allows proportionate legislation to be adopted which respects the diversity of national traditions in EU Member States.
>
> 13. New decision-making arrangements in the social field under the Nice Treaty only came into effect on 1 February 2003. The new rules allow the Council to decide unanimously to move to qualified majority voting in some areas of social policy. The Government considers that it would be premature to consider changing these arrangements at this stage. Given that they have not yet been properly tested, the Government believes that the arrangements should be preserved in the new Treaty.[37]

The Committee commented that, while the Government's concerns about the extension of QMV in the social policy field were understandable, it was doubtful whether unanimity

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33 'Workers' for the purposes of EU law may however be able to establish entitlement to means-tested benefits under the provisions regarding access to 'social advantages' in Regulation 1612/68 on the free movement of workers within the Community.

34 COM(98) 779 final

35 *Presidency Conclusions: Barcelona European Council, 15 and 16 March 2002*, para 33

36 House of Lords Select Committee on the European Union 14th Report HL 79 2002-03 7 April 2003 http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/79/79.pdf

37 Lords EU Committee 14th Report Minutes of Evidence, 2002-3 12 March 2003, p 2 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/79/3031202.htm

would be a viable basis for making decisions following enlargement of the European Union. It also argued that any discussion about extending QMV in social policy should be accompanied by an attempt to clarify the EU's competence in this area.[38]

2. Freedom of establishment

Article 44 TEC sets out the legislative duties of the Council and the Commission in the area of freedom of establishment (for business people, the self-employed, agencies, branches and subsidiaries etc). **Article III-20** would clarify that the European Parliament also has duties in this regard.

3. Professional qualifications

Existing Article 47(2) provides that:

> "The Council acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. In other cases the Council shall act by qualified voting".

Article III-23 would remove the requirement of Article 47 TEC for the Council to act unanimously under the co-decision procedure, where a directive would require a Member State to change its legal requirements on professional training and conditions of access.

E. Free movement of goods

Article III-36 (ex Article 26)

General provisions relating to the Customs Union are unchanged.

Articles III-38 – III-41 Customs cooperation

These provisions are all unchanged, except that a European law or Framework law is now envisaged to strengthen customs co-operation, rather than simply the Council 'taking measures'.

F. Capital and payments

Articles III-43 – III-46 deal with the movement of capital and payments. **Articles III-42 – III-45** (ex Articles 56-59) relating to the movement of capital, including the provision of financial services, real estate establishment and the admission of securities to capital markets, remain substantially unchanged, although now the EP is given a role in adopting

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[38] HL79 2002-03 para 19

measures. As at present, where movements of capital threaten to cause serious difficulties for the operation of economic or monetary union, safeguard measures lasting up to six months against third countries may be implemented, after agreement with the ECB.

Article 60 TEC has been removed. This dealt with unilateral measures against a third country by Members States for urgent and serious political reasons. The Commission and other Member States had to be informed, and the Council, by QMV, could have decided that the Member State should amend or abolish such measures.

Article III-46 is new and also relates to the Union's objective of creating an area of freedom, security and justice. Where necessary to achieve the objectives regarding the prevention or fight against organised crime, terrorism and trafficking in human beings, a European law may define a framework for measures relating to capital movements and funds. Measures might include the freezing of funds or financial assets or economic gains belonging to, owned or held by natural or legal persons, groups or non state entities.

G. Rules on competition

The present Article 81 TEC prohibits agreements, decisions and concerted practices ('anti-competitive agreements') which prevent, restrict or distort competition. As this represents one of the EU's two main competition provisions, a substantial body of case law surrounds the interpretation of the article. Only minor changes have been made to the wording of **Article III-47**.[39] There has been a change to the layout of Article 81(3), which sets out criteria for exempting some anti-competitive agreements from the prohibition. A change to subparagraph (c) does not appear to, and is presumably not meant to, affect the scope of the exemption. The four criteria for exemption have always been expressed in a slightly convoluted way but the change to the lineation has arguably made the sub-paragraph more, rather than less, obscure.

Article 81 forms the basis in the *Competition Act 1998* for the Chapter I Prohibition of the UK's domestic competition regime (ss.2, 9). The minor changes to the article do not appear to require consequent changes to UK legislation. Section 9 of the *Competition Act 1998* already expresses the exemption more clearly than in its source.

Article III-48 (ex Article 82)

Article 82 TEC is the other main competition article, prohibiting abuse of a dominant position (i.e. monopolistic abuse). There are no significant changes to this article, which forms the basis for section 18 of the UK's *Competition Act 1998*.

Article III-49 - 51 (ex Articles 83-85)

[39] For example, the 'common market' becomes the 'internal market'.

Article 83 TEC makes provisions for the legislative framework to implement the EU's competition regime. The wording changes to these articles are minor.

Article III-52 (ex Article 86)

Article 86 TEC makes the state sector and nationalised industries subject to the EU competition regime, with a narrow exception for services of general economic interest and revenue-producing monopolies.

H. Fiscal provisions

Articles III-56 – III-60 concern taxation. They incorporate the existing tax provisions in the Treaty, set out in Articles 90 to 93 TEC. The one substantive change made in the draft text is to provide the Council with the opportunity of adopting legislation relating to indirect taxes and company taxation by QMV, *provided* that in each case the Council has agreed *unanimously* that the measure relates to administrative cooperation or combating tax fraud. To date it does not appear that this change has proved controversial.

Articles III-56 and **III-57** reproduce Articles 90 and 91 TEC. The first prohibits both fiscal discrimination and fiscal protectionism against foreign products. The second prevents tax subsidies on exports to the territory of other Member States by the repayment of any internal taxation. There is no change in wording.

Article III-58 reproduces Article 92 TEC, under which the Council may approve the limited use of charges – other than indirect taxes – by a Member State to discriminate in favour of exports or against imports.[40] The draft text proposes that any such provision be approved by a decision of the Council.

There is a considerable body of European law concerning the harmonisation across Member States of indirect taxes: that is, VAT and excise duties on alcoholic drinks, hydrocarbon oils and tobacco products. At present the Treaty base for this legislation is Article 93 TEC, which states:

> The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.[41]

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[40] In 1998 a standard legal text noted "no proposal has even been made formally for [this Article's] use" (David Williams, *EC tax law*, 1998 p 33).

[41] Article 14 refers to the establishment of the single European market on 1 January 1993.

This provision is set out in **Article III-59** with two substantive changes. First, legislation for harmonising indirect taxes may be adopted (emphasis added) "provided that such harmonisation is necessary for the functioning of the internal market *and to avoid distortion of competition*." Second, although the Council must act unanimously to approve legislation of this type, if it agrees that a particular measure relates to "administrative cooperation or to combating tax fraud", it may act "by a qualified majority when adopting the European law or framework law adopting these measures."

Harmonisation in the sphere of direct taxes is much more limited than indirect taxes. In this case the available legislative power is Article 94 TEC, which states:

> The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

Although directives introduced under Article 94 TEC may be approved under the 'co-decision procedure', this does *not* apply to fiscal provisions.[42] The draft constitution maintains this requirement for unanimity on any fiscal provision introduced under this article. The wording in both cases is fundamentally unchanged.[43]

Article III-60 is a new provision relating to company taxation – more specifically, measures relating to administrative cooperation and combating tax fraud. Provided that the Council agrees unanimously that a particular proposal meets this criterion, it may be adopted by a qualified majority. Notably, any legislation must meet the same test as measures to harmonise indirect taxes – that is, they are "necessary for the functioning of the internal market and to avoid distortion of competition." The draft constitution states:

> Where the Council, acting unanimously on a proposal from the Commission, finds that measures on company taxation relate to administrative cooperation or combating tax fraud, it shall adopt, by a qualified majority, a law or framework law laying down these measures, provided that they are necessary for the functioning of the internal market and to avoid distortion of competition. The law or framework law shall be adopted after consultation of the European Parliament and the Economic and Social Committee.

The possibility that all taxation measures might not be subject to unanimity at some point in the future has been a controversial issue for some time.[44] It is clear that the amendments proposed in these parts of the Treaty do not remove this requirement. The

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42 One of three exclusions from the co-decision procedure established under Article 95(2).

43 Articles 94 and 95(2) TEC are reproduced, largely unaltered, in Articles III-61 and III-62(2) of the draft text.

44 For example, see "Britain will veto common EU tax", *Times*, 2 December 1998, and, "Blair fights for EU tax veto", *Sunday Times*, 15 June 2003.

Government's position on the issue has been stated many times, recently in answer to a parliamentary question:

> **Mr. Mitchell:** To ask the Chancellor of the Exchequer what amendments to the draft EU constitution he will propose in order to protect the rights of the UK Government to determine its own tax regime.
>
> **Dawn Primarolo:** Any changes to the provisions of the existing EU Treaties require the unanimous agreement of all member states. The Government have made it clear that it will not accept any changes that move away from unanimity on tax matters.[45]

The Foreign Secretary, Jack Straw, reiterated the Government's position in the debate on European affairs on 18 June 2003:

> Let me reassure the House about some things that will not happen [as a] … result of any new constitution … We will not accept qualified majority voting on tax, social security or criminal law and procedures, and "federal" will not feature as either a word or a concept.[46]

Although during the debate many Members were critical of certain parts of the draft text, these provisions were not commented on specifically.

I. Approximation of legislation

The general aims under **Articles III-61 to III-64** are unchanged and European framework laws will establish measures for the approximation of laws, regulations or administrative provisions of the Member States that directly affect the internal market.

A new Article **III-65** has been inserted. This deals with setting "uniform intellectual property rights protection" throughout the Union. A European law or framework law will establish this and central Union-wide authorisation, coordination and supervision arrangements. The Council will make the language arrangements for the instruments through the unanimous adoption of a European law.

J. Economic and monetary policy

1. Economic Policy

In **Article III-68** QMV has been dropped from Article 99 TEC concerning a Council decision based on a Commission recommendation on formulating broad guidelines of the

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45 HC Deb 9 June 2003 c 602W
46 HC Deb 18 June 2003 c 396

economic policies of the Member States. The Commission may now "address a warning" to Member States if they are not following the broad economic guidelines. This is in addition to the Council being able to make recommendations to the Member State in question, a right which currently exists. The vote of the Member State being considered will not be counted and a qualified majority will be defined as the majority of the votes of the other Member States, representing at least three fifths of their populations.

2. Excessive deficits

Article III-73 covers excessive deficits. Part 5 has been changed to the effect that, if an excessive deficit occurs, the Commission can address an opinion to the Member State concerned. Previously, the Commission would address this opinion to the Council. In parts 6 and 13 of the Article "acting by a qualified majority" has been removed.

This article has been clarified in general. The text now states that "within the scope of this paragraph", the vote of the Member State running the excess deficit will not be taken into account and a qualified majority will be defined as the majority of the votes of the other Member States, representing at least three fifths of their populations.

3. Monetary Policy

Under **Article III-80** a European law can be adopted to introduce measures necessary for the use of the euro as the single currency of the Member States.

Article III-81 has been significantly changed, as it previously covered exchange rate movements. The article now requires Member States whose currency is the euro to act to secure the euro's place in the international monetary system, and to defend and promote common positions.

4. Institutional Provisions

Under **Article III-82** the Governing Council of the ECB is made up of the Executive Board and Governors of Central Banks from Member States who are part of the eurozone. At present all Member State Governors are represented on the board.

An additional task for the Economic and Financial Committee (formally the Monetary Committee) is to report on financial relations with third countries and international institutions. **Article III-84(3)** has removed the need to act by QMV in the arrangements to set up the committee.

5. Transitional Provisions

This section sets out the arrangements for Member States "with a derogation".[47] This has changed substantially in format but the content has been for the most part simply re-arranged. Under **Article III-86** present Article 99(2), which covers the adoption of broad economic guidelines in the euro area, does not apply to Member States with a derogation. Under this Article, the "following provisions of the Constitution shall not apply to Member States with a derogation":

> (a) adoption of the parts of the broad economic-policy guidelines which concern the euro area generally (Article III-68(2));
> (b) coercive means of remedying excessive deficits (Article III-73(9) and (11));
> (c) the objectives and tasks of the European System of Central Banks (Article III-74(1), (2), (3) and (5));
> (d) issue of the euro (Article III-75);
> (e) acts of the European Central Bank (Article III-79);
> (f) measures governing the use of the euro (Article III-80);
> (g) monetary agreements (Article III-223);
> (h) external representation of the euro (Article III-81);
> (i) appointment of members of the Executive Board of the European Central Bank (Article III-82(2)(b)).[48]

K. Employment policy

Articles III-92 – III-97 are essentially unchanged.

L. Social policy

Article III-99 states:

> 1. With a view to achieving the objectives of [ex Article 136], the Union shall support and complement the activities of the Member States in the following fields:
> (a) improvement in particular of the working environment to protect workers' health and safety;
> (b) working conditions;
> (c) social security and social protection of workers;
> (d) protection of workers where their employment contract is terminated;
> (e) the information and consultation of workers;
> (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;

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47 i.e. those Member States which do not fulfil the criteria for adopting the euro

48 http://european-convention.eu.int/docs/Treaty/cv00802.en03.pdf

> (g) conditions of employment for third-country nationals legally residing in Union territory;
> (h) the integration of persons excluded from the labour market, without prejudice to [ex Article 150];
> (i) equality between men and women with regard to labour market opportunities and treatment at work;
> (j) the combating of social exclusion;
> (k) the modernisation of social protection systems without prejudice to point (c).

Under the draft Constitution the Council would no longer have to act unanimously on items (d), (f) or (g).

There is no change in **Articles III-108 – III-110 (ex Articles 146-148)** on the European Social Fund**.**

M. Agriculture and Fisheries

The proposed revision to the passage on agriculture and fisheries is mainly tidying up. There are almost no changes to Treaty articles concerning farming in the draft constitution. **Articles III-117 - III-123** reproduce virtually the same wording as Articles 32 to 38 TEC. Much of the wording goes right back to the Treaty of Rome in 1957.

The only substantial change relating to farming comes in **Article III-122**, which rewrites Article 37 TEC. The surprising thing about this Article is not the proposal to rewrite it, but that it has stayed the same for so long. Until the Treaty of Nice, it retained the paragraph from the Treaty of Rome calling for a conference of Member States "with a view to making a comparison of their agricultural policies". It then called for proposals for working out and implementing the Common Agricultural Policy (CAP), within two years of the entry into force of the Treaty. In other words, it was a passage whose relevance has long since passed.

The Treaty of Rome did not mention a common fisheries policy (CFP), but it did contain the same definition of "agricultural products" to include fisheries. This formed the legal basis of the Common Fisheries Policy and attracted criticism from those in the UK who argued that the CFP had no proper Treaty basis. They argued, therefore, that the CFP should not have been adopted and that the UK should retain the right to fish in UK waters. That argument never found favour with the UK Government; nor would it have been likely to succeed with the European Court of Justice. However, it did offer some encouragement to critics of the CFP. The position changed with the Treaty of Amsterdam, which stated in Article 3 that the activities of the Community shall include: "a common policy in the sphere of agriculture and fisheries".

Probably the most important matter for fisheries in the draft constitution is in **Article III-12** where the Union is given exclusive competence for (among many other things) "the conservation of marine biological resources under the common fisheries policy". That article would allow the Union to introduce any new policy regulating catches or banning

fishing altogether in certain areas. This is not really different from the current position, but opponents of the CFP might consider that it would make that policy more permanent. At least one amendment was tabled, which would remove the Union's exclusive competence in this area.[49] The consequence of that amendment, however, would not be to remove the legal basis for the CFP itself.

Article III-118 contains one new sentence: "References to the common agricultural policy or to agriculture, and the use of the term 'agricultural', shall be understood as also referring to fisheries". This was already implicit in the TEC, but the explicit statement does raise one issue. The definitions of the objectives of the agricultural policy date back to the Treaty of Rome, and were obviously drafted with agriculture, not fisheries, in mind. Thus, the first objective of the CAP in Article III-118 is "to increase agricultural productivity by promoting technical progress…" This might be used as the legal base for a policy involving, for example, subsidising new and more efficient fishing vessels. Yet such a (hypothetical) policy would make little sense in the current context of declining fish stocks and the closure of some fishing areas. Of course, the objective in Article III-118 1(c), "to assure the availability of supplies", could be interpreted as favouring conservation. However, that would seem a tortuous way of arguing, rather than providing the common fisheries policy with its own appropriate objectives.

N. Common Commercial Policy

Article III-121 sets out the general aims of establishing the customs union, which include the harmonious development of world trade and the lowering of customs and other barriers. To this is added the progressive abolition of restrictions on foreign direct investment.

The common commercial policy (CCP) would be based on uniform principles, particularly with regard to changes in tariff rates and the conclusion of tariff and trade arrangements. This is expanded to specify "relating to trade in goods and services and the commercial aspects of intellectual property and foreign direct investment…". A European law or framework law would set out measures to implement this policy.

Where the Commission entered into negotiations on agreements with one or more States or international organisations, it would need to report regularly to the European Parliament, as well as to a special committee established by the Council.

There are new provisions relating to the negotiating and concluding of agreements on trade in services (involving the movement of persons) and intellectual property rights, where the Council shall act unanimously "where such agreements include provisions for

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49 http://european-convention.eu.int/Docs/Treaty/pdf/11/Art%2011%20Duff.pdf

which unanimity is required". The Article on commercial policy shall not affect the competencies of Member States insofar as the constitution excludes this.

Specific derogations for certain services have been removed from the existing Article 133 (paragraph 6.2) TEC. Agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services currently fall within the shared competence of the Community and its Member States, so the conclusion of such agreements require the unanimous agreement of the Member States. The French Government had insisted on this remaining subject to the agreement of all Member States during the Nice Treaty negotiations and they are likely to try to reinstate the derogation at the forthcoming IGC.

O. Science and Environment Policy

Articles III-124 - III-125 replace Articles 174 to 176 TEC. Apart from some textual changes removing explicit reference to the use of QMV, which is now the presumed voting procedure, these articles have not been changed.

P. Consumer Protection

1. Overview

Section 6 of the draft constitution deals with consumer protection. **Article III-127** is almost identical in its wording and purpose to existing provisions under Article 153 TEC. In both the consumer protection section of the present Treaty and the draft constitution, the stated aim is to contribute to safeguarding the health, safety and economic interests of consumers, in addition to ensuring a high level of protection through legislation, information and education initiatives.

Both the present Treaty and the draft constitution include a statement that consumer interests must be taken into account in all EU policies and activities. This underlines Article 153 TEC, which states that: "consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities".

Both texts state that in implementing European law, Member States are not prevented from maintaining or introducing more stringent protective provisions. However, in the draft constitution there is the caveat that such provisions must be compatible with the constitution.

2. Implications for the UK

The draft constitution does not advocate a consumer protection policy that is drastically different from the domestic consumer protection policy already adopted in the UK. Consumer interests are already at the forefront of UK policy. Whether implementation of future EU consumer protection legislation will present a particular issue for the UK in

terms of amending existing UK legislation or practice can only be determined on a case by case basis.

In the last twenty years a significant number of the UK's consumer protection laws have been derived from EC law. The most important legislative measures are those adopted under single market legislation. There are also several non-binding Council recommendations and resolutions.

3. Future priorities for EU consumer policy

The draft constitution reinforces the European Commission's Consumer Policy Strategy, adopted on 7 May 2002, and the most recent EU Action Plan setting out priorities for consumer policy. The new Consumer Policy Strategy has three objectives:

1. to achieve a high common level of consumer protection;

2. to achieve effective enforcement of consumer protection rules; and

3. to promote the involvement of consumer organisations in EU policy.

These objectives will be implemented through a set of actions over a five-year period (2002-2006). The objectives are designed to help achieve integration of consumer concerns into all EU policies, to maximise the benefits of the internal market for consumers, and to prepare for enlargement. Consumer policy in this strategy covers safety, economic and legal issues relevant to consumers in the market place, consumer information and education, and the promotion of consumer organisations.

4. Criticisms of EU consumer protection policy

At a time when the EU is promoting consumer protection provisions as part of its draft constitution, there are some who would argue that the problem is not one of promoting consumer protection policies, but of enforcing them.

It is argued that there is increasing EU consumer protection legislation but the monitoring and enforcement of consumer legislation is inadequate. Currently, Member States are not required to provide systematic feedback on the impact of EU legislation, including the practical enforcement problems encountered.

The National Consumer Council (NCC) in the UK has suggested that one solution would be for all Member States to be required to specify enforcement arrangements when EU legislation is transposed into domestic law.[50] The NCC has also argued that Member States should be under an obligation to give assistance to the enforcement bodies of other

[50] National Consumer Council, contributions to the EU consumer policy forum, 23 September 2002

Member States on the activities of companies whose headquarters or main place of business is in their jurisdiction. The NCC would also like Member States to be required to provide systematic feedback on the impact of EU legislation, including any practical enforcement problems encountered.

Another argument put forward on the failure of EU consumer protection legislation is the preference for more legislation, instead of other forms of regulation. Various organisations (including the Advertising Association in the UK) have said that divergent national legislation is not, in itself, a sufficient reason for greater EU legislation.[51] Adding to existing legislation imposes burdens on industry that hinder market development and consumer choice.

The NCC has called for a clear legal framework for self-regulation at EU level. Schemes should meet basic standards of independence, stakeholder representation, monitoring, sanctions and transparency. However, the NCC also acknowledges that statutory regulation will always be necessary in a number of situations where the use of self-regulation would be unacceptable (for example, where competition alone cannot deliver essential services to consumers who are not of commercial interest to suppliers, or where regulation is needed to make fair competition work).[52]

Some maintain that EU policy-making in this area has been fragmented, with no consideration of its impact outside the immediate policy community. Contributing to an EU consumer policy forum on 23 September 2002, the NCC said that it would like to see the full implementation of Article 153 TEC to ensure that all consumer policy becomes an integral part of all other EU policies.

The NCC welcomed the setting-up of a new permanent Inter-services Committee on consumer policy, but stressed that the Committee had to be an effective body which would ensure that consumer integration became an integral part of the development of all EU policies. Consumer impact assessments would be an important tool for the new Committee.[53]

The NCC thought that the needs of disadvantaged and vulnerable consumer groups should be highlighted in the new Action Plan. It argued that strategies based on providing consumers with better information may fail to help the most vulnerable groups.[54]

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51 Position of the Advertising Association on the European Commission (EC) Green Paper on European Union Consumer Protection [COM (2001) 531 Final], December 2001

52 National Consumer Council's input to the White Paper on European Governance, 2002

53 National Consumer Council, contributions to the EU consumer policy forum, 23 September 2002

54 Ibid.

Q. Transport

With the exception of Article III-129 (see below), there are no significant changes to articles on transport and trans-European networks (**Articles III-129 – III-140**). **Article III-129 (ex Article 71)** contains the only significant change, namely the deletion of the second part of article 71, which read:

> 2. By way of derogation from the procedure provided for in paragraph 1, where the application of provisions concerning the principles of the regulatory system for transport would be liable to have a serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities, they shall be laid down by the Council acting unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee. In so doing, the Council shall take into account the need for adaptation to the economic development which will result from establishing the common market.

R. Research and Technological Development and Space

Articles III-141 to III-151 replace Articles 163 - 173 TEC. **Article III-150** is new and provides for the Union to draw up a "European space policy", to be underpinned by a European law or framework law which "may take the form of a European space programme". The vague wording of the paragraphs describes only what is already happening under the aegis of the European Space Agency, the coordinating body through which the UK's contributions to space research and exploration are channelled. UK press coverage of this article has been negative, viewing it as a diversion from more important matters:

> Are secure supplies and new sources of energy less relevant than space exploration or tourism, which the convention proposes to enshrine as EU competences?[55]

And:

> Whatever the arguments in favour of space research, or indeed sending Giscard on a one-way trip to Alpha Centauri, does it really need a constitutional avocation?[56]

In January 2003 the European Commission issued a *Green Paper on European Space Policy*,[57] with a public consultation period ending on 30 May 2003. The Green Paper asked how far Europe should aim to compete in the global space industry, given that Europe's current spending on space activities is only 15 euros per head of population, while the US spends 110 euros per head (p 17). At the latest meeting of European space

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[55] Francois Lamoureux, "Giscard could do with a burst of energy", *Financial Times*, 14 May 2003, p 13
[56] Boris Johnson, "Our freedom costs less than a Mars bar", *Daily Telegraph*, 15 May 2003, p 26
[57] 5707/2003, sent to Council 21.01.2003

ministers on 27 May 2003, they called for a framework agreement formalising institutional relations between the ESA and the EU to be completed by the end of 2003.[58] The UK published its own draft "space strategy" in January 2003, strongly focused on research likely to have an immediate economic and research benefit.[59] A final version of the UK strategy is promised for late 2003.[60]

S. Energy

Article III-152 stipulates that the Union's policy on energy shall aim to

> (a) ensure the functioning of the energy market,
> (b) ensure security of energy supply in the Union, and
> (c) promote energy efficiency and saving and the development of new and renewable forms of energy.

European laws or framework laws will be adopted on the necessary measures but these "shall not affect a Member State's choice between different energy sources and the general structure of its energy supply".

The new Article would introduce policies based on existing proposals and Directives, including those pertaining to security of supply, renewable energy sources, and energy efficiency. The British Government's energy policy, as set out in the Energy White Paper of February 2003, largely fits in with the objectives in the Article. These are stated as:

- to put ourselves on a path to cut the UK's carbon dioxide emissions - the main contributor to global warming - by some 60% by about 2050, as recommended by the RCEP, with real progress by 2020;
- to maintain the reliability of energy supplies;
- to promote competitive markets in the UK and beyond, helping to raise the rate of sustainable economic growth and to improve our productivity; and
- to ensure that every home is adequately and affordably heated. [61]

In the foreword to the Energy White Paper the Prime Minister states that the UK will continue to maintain competitive markets in the UK and press for further liberalisation in Europe. Section Two of the White Paper deals with achieving a low carbon economy through environmental measures, energy efficiency, and low carbon (renewable) generation and transport.

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[58] http://www.esa.int/export/esaCP/SEMEGDS1VED_index_0.html

[59] British National Space Centre, *UK Draft Space Strategy: 2003-2006 and beyond*. For an overview of UK activity, see the Library Standard Note *UK Space Policy* (SN/SC/1633)

[60] HC Deb 29 January 2003 c 932W

[61] Chapter One: Cleaner, smarter energy. Energy White Paper: *Our Energy Future – creating a low carbon economy*, Cm5761 DTI February 2003.

By 2010 the UK is expected to become a net importer of energy[62] as our own indigenous oil, gas and coal supplies decline. Supplies from other EU Member States, as well as from further afield, such as Russia, Algeria and Norway, will influence our energy mix and security of supply. The efficient functioning of the internal energy market will depend on how successfully rights to access and transit gas and electricity transmission networks are negotiated, both internally and externally, and with new EU member states.

The energy policy will ultimately depend on good foreign policy and diplomatic relations in an increasingly unstable global political system. The Energy White Paper states that the UK will work internationally to promote regional stability, economic reform, open and competitive markets and appropriate environmental policies in the regions that supply most of the world's oil and gas, Russia, the Middle East, North Africa and Latin America. It also notes that the UK has been active in securing a commitment to energy liberalisation in the EU for industrial customers by 2004 and overall by 2007.

The ability to pursue a balanced energy policy in Member States will also be dependent on potentially conflicting factors, such as air quality control measures, which will lead to the phasing out of older, inefficient plants; local opposition at the planning stage, which may delay the implementation of renewable energy schemes, particularly in rural areas; and national and international environment protection measures designed to protect wildlife species and designated areas of special scientific or aesthetic status.

Measures that promote energy efficiency, particularly in relation to new buildings, may impose unnecessarily complex certification and regulatory burdens on Member States and affect the profitability of small businesses.

The new article makes no mention of protection for those on low incomes. The UK Fuel Poverty Strategy aims to reduce the number of fuel poor households through a range of measures designed to ensure that every home is adequately and affordably heated. In some regions of Europe adequate heating is not an issue, although the affordability of energy efficiency measures and cooling systems may equally apply. Energy prices in a market economy need to operate within a framework that balances the relative objectives of the overall policy, but reliance on market signals and incentives alone may be insufficient to protect the more vulnerable groups in society.

By 2020, all nuclear power stations in the UK will have shut down, with the exception of Sizewell B. No new nuclear building is anticipated at this stage, although the option to review this position in five years' time is built into the Energy White Paper. The freedom of Member States to choose their own sources of energy will not be affected by any new laws introduced under this article. Although certain European countries have decided to phase out nuclear power completely, the option to retain nuclear power, and the knowledge base associated with it, will be of strategic importance, as will the ongoing

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[62] Of gas by 2006

issue of the safe disposal of radioactive waste. In view of recent market factors affecting the financial status of British Energy, leading to the enactment of the *Electricity (Miscellaneous Provisions) Act 2003*, and the application of European rules on state aid to industry, it is uncertain what the future might be for nuclear power in the EU.

The use and supply of nuclear materials for the generation of nuclear power in the EU is regulated by the EURATOM Treaty, which was signed on 25 March 1957, establishing the European Atomic Energy Community. This provides that only a public authority can own nuclear material, while allowing a free market to operate for the implementation of supply, unlimited right of use and consumption of nuclear materials. The new Article makes no mention of the EURATOM Treaty; it is assumed that the Treaty will continue to apply for the foreseeable future to existing EU Members and new member states upon accession. Revisions to specific Chapters of the Treaty can be made by the unanimous Treaty revision procedure without going through a complete treaty revision procedure, which has to be ratified by each Member State. According to Bouquet,[63] the Treaty has been implemented over the years in a flexible and simplified manner, and it should be possible to adapt it to meet new market conditions within its existing structures.

T. Area of freedom, security and justice

In its Explanatory Note on **Article III-153 (General Provisions)** the Praesidium commented that, in the field of police and judicial cooperation in criminal matters and judicial cooperation in civil matters, the Convention Working Group, following the Tampere European Council Conclusions in October 1999, decided that the principle of mutual recognition of judgments should be explicitly enshrined in the constitution and that it was considered appropriate to add the reference to access to justice.

The House of Lords Select Committee on the European Union commented on an earlier draft of this section of the draft constitution, approving of the change in Part 1 of the Article but raising concerns about the financial implications of the statements on access to justice:

> 19. Article 1 reproduces the main elements that constitute an 'area of freedom, security and justice' found in the current Treaties. But some changes have been made. First, there is an express reference to the need to respect fundamental rights and to take account of "the different European legal traditions and systems". **This is welcome.**
> (…)
> 21. Third, Article 1 also makes express reference to the Union facilitating 'access to justice'. The Praesidium justifies its inclusion by reference to the Tampere Conclusions. We note that Chapter VI of the EU Charter of Fundamental Rights may be relevant here, especially Article 47 which

[63] Andre Bouquet, *How current are EURATOM provisions on nuclear supply and ownership in view of the European Union's enlargement*? http://www.nea.fr/html/law/nlb/nlb-68/007_038.pdf

> contains a broad statement relating to the provision of legal aid. The phrase "access to justice" also appears in Article 12(2), where it seems clear that it is not restricted "in particular" to the free movement of documents and judgments as in Article 1. The implications (most notably financial) of these statements on access to justice may be considerable…[64]

The earlier draft upon which the House of Lords Select Committee commented has subsequently been amended. The Praesidium explains the amendments, which are largely of a drafting nature:

> Article [III-153] reflects the content of the other provisions and defines the general area in which European action may be taken. It was on the whole well received and the amendments submitted were more of a drafting nature. A number of Convention members suggested adding "prevent racism and xenophobia" (Duhamel + 10; Voggenhuber; Michel + 5; Dybkjaer; De Rossa; Carey and Gabaglio). This suggestion was adopted. It also seemed appropriate to indicate expressly that these provisions also apply to stateless persons. In the rest of the text the phrase "third-country nationals" therefore implicitly covers stateless persons without it being necessary to say so explicitly.
>
> Articles [III-154] and [III-155] have hardly been amended. Some members wanted them deleted, but most were in favour of maintaining them, in line with the conclusions of Working Group X. It is proposed that the content of Article [III-154] be included in this Chapter and not in Article [I-20] of the Constitution concerning the European Council. As for Article [III-155] on the role of national parliaments, the only change proposed was the transfer to the Protocol on the principles of subsidiarity and proportionality of the provision which was originally in paragraph 2.[65]

Article III-155 requires that EU measures in this area must comply with subsidiarity, in accordance with the Protocol on Subsidiarity. It also provides that national parliaments may participate in evaluation mechanisms and in the political monitoring of Europol and Eurojust. **Article III-156** sets out a procedure for adopting European regulations and decisions on the arrangements for the Member States and the Commission to "conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Chapter by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition".

Under **Article III-157** a new Standing Committee would be established within the Council "to ensure that operational cooperation on internal security is promoted and strengthened within the Union". The Committee will "facilitate coordination of the

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64 Lords EU Committee 16th Report, *The Future of Europe: Constitutional Treaty – draft article 31 and draft articles from Part 2 (Freedom, Security and Justice)* HL 81 2002-3 28 March 2003 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8103.htm

65 http://european-convention.eu.int/docs/Treaty/cv00727.en03.pdf

action of Member States' competent authorities". It would involve the Union bodies and agencies, while the EP and national parliaments would be "kept informed of the proceedings".

Article III-158, like present Article 33 TEU, states that it will not "affect the exercise of the responsibilities incumbent upon Member States with regard to maintaining law and order and safeguarding internal security". **Article III-159** provides for European regulations to be adopted to ensure "administrative cooperation between the relevant departments of the Member States in the areas covered by this Chapter, as well as between those departments and the Commission". **Article III-160** states that acts in these sections shall be adopted either on a Commission proposal or on the initiative of a quarter of Member States. There is no provision for the adoption of conventions, as in current Article 34 TEU.

U. Border checks, asylum and immigration

1. Introduction

The proposed new common policies on border checks, asylum and immigration are contained in **Articles III-161 - III-164**. These encompass, with some significant changes and additions, the present Title IV TEC ('Visas, asylum, immigration and other policies related to free movement of persons'). The new general provisions on the Area of Freedom, Security and Justice contained in Articles III-153 to III-160 apply to this area.[66]

Title IV TEC was created by the 1997 Treaty of Amsterdam, which came into force in 1999.[67] It gave the European Union powers to adopt Community legislation on immigration and asylum for the first time, by moving these areas out of the inter-governmental 'third pillar' into the EU 'first pillar'. Immigration and asylum are therefore no longer matters for inter-governmental coordination. The draft constitution now proposes further changes regarding QMV in this area.

The following table shows the articles of the draft constitution that correspond to Title IV TEC:

Draft Constitution	Subject	Title IV TEC
Article III-161	Checks on persons at borders	Articles 61(a) and 62 TEC
Article III-162	Asylum	Articles 61(a) and (b), 63(1)

[66] A previous version of these general provisions is discussed at length in the recent report of the House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003, paras 19-33: http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm

[67] For further background see House of Commons Library standard note SN/HA/1843, *EU Immigration and Asylum Law and Policy*, 27 February 2003

		and (2) and 64(2) TEC
Article III-163	Immigration	Articles 61(a) and (b) and 63(3) and (4) TEC
Article III-164	Principle of solidarity	*New article*

2. Voting procedures

The voting procedure for Title IV TEC was amended by the Treaty of Nice and is contained in Article 67 TEC. It provides for a transitional period of five years (1999-2004), during which Member States share the right to initiate proposals with the European Commission, and actions are then adopted by the Council acting unanimously after consulting with the European Parliament.[68]

After this five-year period ends on 1 May 2004, Member States will lose their right of initiative, and the Council will be able to decide unanimously to change the voting procedure to the co-decision procedure under Article 251 TEC (which usually implies QMV).

Under the draft Constitution there will be a change of legislative procedure. Most measures on border controls, asylum and immigration will take the form of European laws and framework laws made under the 'ordinary legislative procedure' (co-decision and QMV)

3. Opt-outs

The House of Lords Select Committee on the European Union has discussed the background to the articles on border checks, asylum and immigration, and in particular the current system of opt-outs and opt-ins:[69]

> 10. As a basis for the area of freedom, security and justice, and in particular to facilitate the removal of internal border controls, the Amsterdam Treaty incorporated into the framework of the EU the Schengen *acquis*.[6] Some of the acquis went into Title IV TEC, some into Title VI TEU. The Schengen arrangements incorporated into Title IV apply, as EC law, only to 12 Member States. Denmark is outside Title IV, but remains, as a party to Schengen, bound in international law. The UK and Ireland, by contrast, are not parties to Schengen but may, with the agreement of the 13 Schengen States, opt-in selectively.[7]

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[68] Except for the provisions on visas which were governed by co-decision and QMV right from 1999: Article 67(3) and (4) TEC

[69] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003, paras 10-13.

> 11. In addition to the Protocol on Schengen, a separate Protocol to the TEU safeguards the position of the UK and Ireland confirming that the UK is entitled to exercise frontier controls (TEU Protocol No 3).
>
> 12. Further Denmark, Ireland and the UK stand in a special position as regards Title IV TEC (Visas, asylum, immigration and other policies related to free movement of persons). The UK and Ireland can opt-in selectively to (non-Schengen) measures under Title IV (TEU Protocol No 4). Denmark cannot be selective but can opt-in to Title IV *in toto* (TEU Protocol No 5).
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> 13. What is to be the future of these Protocols when the new Constitutional Treaty replaces the TEU? Whether the new Treaty will signify the end of the UK's ability to opt out of, for example, immigration measures waits to be seen. When giving evidence to the Committee on 25 March Mr Peter Hain MP said that the Government did not want to see any change in the UK's position as contained in the current Protocols.
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> Notes
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> [6] Including the 1985 Schengen Agreement, the 1990 Schengen Convention and the decisions of the Executive Committee established by the Schengen agreements. See the Protocol No 2 TEU. The position is explained more fully in our Report *Incorporating the Schengen Acquis into the European Union* (31st Report, Session 1997-98, HL Paper 139). The UK's participation is set out in Council Decision 2000/365/EC of 29 May 2000.
>
> [7] The UK has sought to maintain its border controls and has so far elected to participate in Schengen only in respect of police and judicial co-operation, drugs and the Schengen Information System (SIS-a computerised database). Ireland has taken a similar approach.

In Home Office questions on 16 June 2003, the Home Secretary, David Blunkett, suggested that the opt-outs will remain and are not affected by the Convention's proposals:

> On internal border controls, the Government secured, and have had for some time, an opt-out clause on all those matters, including Schengen. The opt-outs remain and are not affected by the Convention's discussions and proposals.[70]

Indeed, **Article IV-5** of the General and Final Provisions of the draft Constitution states that "the protocols annexed to this Treaty shall form an integral part thereof", and this, according to the Praesidium, should mean that the existing protocols to the TEU and TEC will continue in force:

> The existing protocols, whether annexed to the TEU or TEC or to both Treaties, should continue to be annexed to the new Constitutional Treaty. The Convention may wish to draw the IGC's attention to the fact that it needs to consider what is to happen to the protocols.[71]

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[70] HC Deb 16 June 2003 c16

[71] Comments of the Praesidium, CONV 647/03, 2 April 2003, p12:

However, there is no specific mention in the draft constitution of the present opt-in/opt-out provisions.

4. Article III-161: Border checks

The following table shows the new border control provisions of the draft constitution alongside the equivalent article of Title IV TEC:

Draft Constitution, Art III-161	**Title IV TEC, Art 62**
1. The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders.	The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: 1. measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;
2. For this purpose, a European law or framework law shall establish measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the controls to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.	2. measures on the crossing of the external borders of the Member States which shall establish: (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders; (b) rules on visas for intended stays of no more than three months, including: (i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement; (ii) the procedures and conditions for issuing visas by Member States; (iii) a uniform format for visas; (iv) rules on a uniform visa;
3. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.	3. measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.

The House of Lords Select Committee commented on an earlier draft of this section, noting one major departure from the TEC:

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http://european-convention.eu.int/docs/Treaty/CV00647.EN03.pdf

> [Article III-161] largely reproduces the 'border control' provisions of Title IV (Article 62(1) and (2) TEC). There is, however, one important addition. There is now a specific legal base for the gradual introduction, at an EU level, of a 'common integrated management system for external borders'. This follows a number of EU initiatives in the field, most notably the Commission Communication on the 'integrated management of external borders and a subsequent Council Action Plan.[27] Further political impetus was given by the Seville European Council (June 2002), which called on the Council, the Commission and the Member States to implement a series of steps before June 2003.[28] It is, however, not yet fully clear what an 'integrated management for external borders' will entail and whether it will lead to the gradual establishment of a 'European Border Guard'. This is the subject of an inquiry currently being undertaken by Sub-Committee F and it is therefore something to which we will return in more detail.
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> Notes
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> [27] Doc COM (2002) 233 final and Council Doc 9834/02
> [28] Presidency Conclusions, Doc SN200/02, at paragraphs 31 and 32[72]

The human rights organisation, Statewatch, has suggested that any move to develop a European border guard should only be approved by a unanimous vote in Council, the assent of the EP and ratification by national parliaments.[73]

The Lords Committee was also concerned about the shift in legislative procedures, from unanimity (and EP consultation)[74] to the adoption of measures by co-decision and QMV. It felt that this would be controversial "in view of the close link between border control functions and national sovereignty".[75] It also drew particular attention to the fact that the draft constitution does not make any reference to the protocol referred to above which allows the UK to maintain its own external border controls.

5. Article III-162: Asylum

The proposed new provisions on asylum are compared directly with the existing articles of the TEC in the following table:

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[72] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report 2002-03, 27 March 2003, para 36.

[73] Statewatch, *Submission to House of Commons enquiry on the EU Convention on 'Freedom, Security and Justice'*, March 2003: http://poptel.org.uk/statewatch/semdoc/evidence/conventionMar2003.htm

[74] which, as noted above, applies to Title IV TEC until the Council unanimously changes the procedure to co-decision, which it may not do until 1 May 2004.

[75] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003, para 37

Draft Constitution, Art III-162	**Title IV TEC, Art 63(1) and (2) and 64(2)**
1. The Union shall develop a common policy on asylum and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties. 2. For this purpose, a European law or framework law shall lay down measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries with a view to managing inflows of people applying for asylum or subsidiary or temporary protection. 3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt European regulations or decisions comprising provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.	63. The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: 1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas: (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States, (b) minimum standards on the reception of asylum seekers in Member States, (c) minimum standards with respect to the qualification of nationals of third countries as refugees, (d) minimum standards on procedures in Member States for granting or withdrawing refugee status; 2. measures on refugees and displaced persons within the following areas: (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection, (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons; […] Measures to be adopted pursuant to points 2(b), […] shall not be subject to the five-year period referred to above. 64(2) In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.

The draft article is based on the recommendations of the Convention Working Group X ('Freedom, Security and Justice'):

> That qualified majority voting and codecision be made applicable in the Treaty for legislation on asylum, refugees and displaced persons; - That Article 63(1) and (2) TEC be redrafted in order to create a general legal base enabling the adoption of the measures needed to put in place a common asylum system and a common policy on refugees and displaced persons as set out in Tampere. This legal base should, as in the present Treaty, ensure full respect of the Geneva Convention but enable the Union also to provide further complementary forms of protection not embraced by that Convention.[76]

The Lords Committee highlighted the progress that had been made towards establishing minimum standards for refugees and asylum seekers under Article 63 TEC:[77]

> 38. [Article III-162] goes a step further than the current Treaty by expressly aiming to establish a 'European asylum system' with uniform standards and common procedures. In so doing it reflects political decisions already taken. At the Tampere European Council, Member States decided that a common European asylum system was to be established by a two-stage process. Member States have agreed on a number of matters establishing minimum standards to be addressed in the short (first) term. In the long (second) term a truly common asylum procedure and a unified status for refugees, valid throughout the Union, would be established.
>
> 39. The first stage requires the adoption of a number of key measures, including a Directive on minimum standards in asylum procedures for granting and withdrawing refugee status (the Procedures Directive[29] - still under negotiation), a Directive on minimum standards for reception of asylum seekers[30] (now agreed[31]), a Regulation (replacing the Dublin Convention) on criteria and mechanisms for determining the State responsible for examining asylum requests[32] (now agreed[33]), a Directive on qualification and content of refugee status and on subsidiary forms of protection[34] (still under negotiation).
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> 40. **The references in [Article III-162(2)] to "subsidiary protection" are especially welcome**. In our Reports on the Procedures Directive and the Reception Standards Directive[35] we drew attention to the absence of provision for those claiming such protection status. The draft Directive on qualification and content of refugee status and on subsidiary forms of protection is the only measure in the current asylum package to address the position of those seeking

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[76] *Final report of Working Group X "Freedom, Security and Justice"*, CONV 426/02, 2 December 2002, p4: http://register.consilium.eu.int/pdf/en/02/cv00/00426en2.pdf

[77] See also House of Commons Library standard note SN/HA/1843, *EU Immigration and Asylum Law and Policy*, 27 February 2003

such protection. Union action in this area should take account of all bases for international protection and any common asylum policy should ensure high standards (particularly in relation to procedures and reception conditions) and consistency in application across the Union.[36]

41. The last paragraph of the Praesidium's Explanatory note on this Article states: ""Nationals of third countries" must be understood to include stateless persons". We agree. **The text of [Article III-162] should be amended accordingly**. [78]

Notes

[29] The subject of our Report *Minimum Standards in Asylum Procedures* (11th Report, Session 2000-01, HL Paper 59). A revised text of the proposal is being prepared.
[30] The subject of our Report *Minimum Standards of reception conditions for asylum seekers* (8th Report, Session 2001-02, HL Paper 49).
[31] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. [2003] OJ L 46/18.
[32] The subject of our Report *Asylum applications: who decides?* (19th Report, Session 2001-02, HL Paper 100).
[33] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.
[34] The subject of our Report *Defining refugee status and those in need of international protection* (28th Report, Session 2001-02, HL Paper 136).
[35] *Op cit*
[36] *Defining refugee status and those in need of international protection* (28th Report, Session 2001-02, HL Paper 136, at paras 42 and 43).

Under the draft constitution there is a provision which would allow the Commission to act without using the ordinary legislative procedure, if there is an emergency situation in which a sudden influx of third-country nationals arrives in a Member State. In this situation, according to Article **III-162(3)**, the Commission may adopt regulations or decisions[79] for the benefit of that Member State, after consulting the EP.

6. Article III-163: Immigration

The following table show how Article III-163 of the draft Constitution, on immigration control and the rights of migrants, compares with the equivalent provisions of Title IV TEC:

Draft Constitution, Art III-163	**Title IV TEC, Art 63(3) and (4)**
1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals	63. The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

[78] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003, paras 38-41.
[79] Classed as 'non-legislative acts' under the draft constitution

residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. 2. To this end, a European law or framework law shall establish measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing the freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation. 3. The Union may conclude readmission agreements with third countries for the readmission of third-country nationals residing without authorisation to their countries of origin or provenance. 4. A European law or framework law may establish measures providing incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.	[…] 3. measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion, (b) illegal immigration and illegal residence, including repatriation of illegal residents; 4. measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States. Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements. Measures to be adopted pursuant to points […], 3(a) and 4 shall not be subject to the five-year period referred to above.

The Lords Committee made detailed comments on a previous draft of this article:

> 42. [Article III-163] is a considerably expanded version of Articles 63(3) and (4) TEC. Paragraph 1, which refers to the objectives of the EU immigration policy, mentions for the first time the 'efficient management of migration flows'—a concept which has been used by the Commission in its work on migration[37] and recently in the conclusions of the Seville European Council[38]. Managing migration flows is to be accompanied by fair treatment of legally resident third country nationals and action to prevent and combat, by 'enhanced measures', illegal immigration and trafficking in human beings.
>
> 43. EU competence regarding legally resident third country nationals (TCNs) is considerably extended.[39] [Article III-163] is not limited to defining their right of

residence. Paragraph 1 refers to the general objective of 'fair treatment of TCNs', while paragraph 2 envisages the adoption of EU legislation defining the rights of legally resident TCNs including (but not limited to) 'the conditions governing the freedom of movement and of residence in other Member States'. A further and important innovation is the inclusion of [Article III-163(4)], which gives the EU a competence for 'supporting action' with the view of promoting the integration of legally resident TCNs.

44. Changes are also proposed to the Treaty language on illegal immigration. [Article III-163(1)] refers for the first time to its 'prevention', while there is also a reference to 'enhanced measures' to combat illegal immigration and trafficking in human beings. It is not clear what the meaning of 'enhanced measures' is, and whether it signifies a shift to stricter control measures in the field. [Article III-163(2)] also refers to illegal immigration and unauthorised residence, which is deemed to include 'removal and repatriation of persons residing without authorisation'. This appears to be inspired by the prioritisation of expulsion policies decided at the Seville European Council, coupled with pressure towards the conclusion of readmission agreements between the EU and third countries.[40] In this respect, [Article III-163(3)] provides a broad legal basis for the conclusion of such agreements enabling the readmission of TCNs residing without authorisation to their countries of origin or provenance.

45. In our Reports and day-to-day scrutiny **we have repeatedly emphasised the need for a 'common' EU approach to immigration**. It remains to be seen whether [Article III-163] will provide a basis for a balanced EU approach to immigration which this Committee has consistently advocated,[41] combining the opening up of avenues of legal migration with the effective control of illegal immigration. The reference to more 'inclusive' measures on legally resident TCNs is a welcome step in this direction. A further impetus towards the enhancement of EU action in the field, in particular as regards more 'inclusive' measures, will be provided by the shift from unanimity and consultation to qualified majority voting and co-decision ('the legislative procedure') provided for by [Article III-163(2)]. **This is a positive step to avoid legislative paralysis in an EU of 25, but will be controversial in view of Member States' reluctance to relinquish power in sensitive matters such as the treatment of TCNs**.

46. On the other hand, [Article III-163] contains no specific references to positive policies to encourage lawful routes for the admission of migrants currently outside the Union. Further, the broad wording relating to illegal immigration ('enhanced measures') and the specific reference in the Article to removal and repatriation may lead to a greater emphasis on stricter control measures.

Notes

37 For example in the recent Communication on integrating migration issues in the EU's relations with third countries (COM (2002) 703 final) currently held under scrutiny by Sub-Committee F.

38 Presidency conclusions (paragraph 27).

39 Article 63(4) TEC is a legal basis for the adoption of measures defining the rights and conditions under which legally resident TCNs may reside in other Member States. A proposed

Directive under this Article has been the subject of a detailed inquiry by this Committee. See *The Legal Status of Long-Term Resident Third-Country Nationals* (5th Report, Session 2001-02, HL Paper 33).

40 Presidency Conclusions, paragraphs 30 and 33-36.

41 See our Report *A Community Immigration Policy* (13th Report, Session 2000-01, HL Paper 64) and our latest Report *A Common Policy on Illegal Immigration* (37th Report, Session 2001-02, HL Paper 187). [80]

7. Article III-164: Solidarity

Article III-164 of the draft constitution is new and has no equivalent in Title IV TEC:

> The policies of the Union set out in this Section and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to the provisions of this Section shall contain appropriate measures to give effect to this principle.

It was welcomed by the Lords Select Committee, which set out the background to the concept of solidarity in this context:

> The need for solidarity and the fair sharing of responsibility between Member States has been raised in the context of the negotiations of the 'Dublin II' Regulation[42] as well as, and perhaps most prominently, in the context of the debate over the need to have an integrated EU management of external borders[43]. The explicit reference to the 'financial implications' of solidarity is noteworthy, though it is not clear what it will entail in practice.
>
> Notes
>
> 42 The Committee examined this proposal in detail: *Asylum Applications-Who Decides?* (19th Report, Session 2001-02, HL Paper 100).
>
> 43 Sub-Committee F is currently examining the issue in the context of its "European Border Guard" inquiry. [81]

V. Judicial cooperation in civil matters

Article III-165 derives from Articles 61(c) and 65 TEC but has significant changes and additions.

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80 House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003, paras 42-46.

81 House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003, para 47

Draft constitution Article III-165	**Existing Articles**
1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. To this end, a law or framework law shall lay down measures aimed inter alia at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) a high level of access to justice; (f) the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff. 3. Notwithstanding paragraph 2, measures concerning those aspects of family law with cross-border implications shall be laid down in a European framework law by the Council. It shall act unanimously after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a European decision determining those aspects of family law with cross-border implications which may be adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.	Article 61 In order to establish progressively an area of freedom, security and justice, the Council shall adopt:…. (c) measures in the field of judicial cooperation in civil matters as provided for in Article 65; Article 65 Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include: (a) improving and simplifying: — the system for cross-border service of judicial and extrajudicial documents, — cooperation in the taking of evidence, — the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

The Praesidium's Explanatory Note stated:

> "This provision is based on Article 65 TEC. The only amendments to Article 65 TEC which emerged from the Working Group's final report are the following:

> -- enshrining of the principle of mutual recognition of judgments and decisions in extrajudicial cases (end of page 6 of the report);
>
> -- development of measures of preventive justice and alternative methods of dispute settlement;
>
> -- training of the judiciary and judicial staff;
>
> -- the codecision procedure for measures concerning parental authority, which would be the only sector of family law in which unanimity would not apply (see pages 6 and 7 of the report).
>
> The Praesidium felt that there was no longer any justification for keeping the current reference to "the proper functioning of the internal market" (Article 65 TEC) in the new provision. The phrase is included in existing Article 65 TEC partly because this provision is an element of Community policies and is linked to the free movement of persons in the context of the internal market.
>
> Once the new Treaty contains a separate title on the area of freedom, security and justice, the reference to "the proper functioning of the internal market" can be considered redundant. Moreover, the most important aspect to be to emphasised in this context is that the envisaged measures under judicial cooperation in civil matters have a "cross-border impact", reference to which is included in the proposed provision.
>
> Finally, in line with the Tampere conclusions, it seemed important to add the explicit statement that the Union must also take measures aimed at ensuring a high level of access to justice. This could have consequences for the future establishment of minimum standards guaranteeing an appropriate level of legal aid for cross-border cases throughout the Union, and special common procedural rules in order to simplify and speed up the settlement of cross-border disputes concerning small commercial claims under consumer legislation or to establish minimum common standards for multilingual forms or documents in cross-border proceedings."[82]

The Lords Select Committee on the European Union commented on an earlier draft of this section, preferring the new “cross-border implications” test which would replace the “internal market” criterion, and calling for clarification of the term ‘extrajudicial’ and also of ‘support’ in the context of training of judges:

> 48. Article 14 largely replicates Article 65 TEC. The changes are listed in the Praesidium's Explanatory note printed above. It is noteworthy that the current limitation in Article 65 TEC (that measures can be taken only "in so far as necessary for the proper functioning of the internal market") has been replaced by a "cross-border implications" test. The "internal market" criterion has sometimes

[82] http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8107.htm#a12

> seemed rather artificial and strained, for example, in the context of measures relating to the recognition and enforcement of judgments in matrimonial matters and to matters of parental responsibility. The new test is preferable, being more apposite to closer cooperation in non-economic matters. What is important is that there should be a genuine and proven need for action at the European level and that in future the Commission will take full account of the need to respect different legal systems, and their values and traditions (as envisaged by Article 1 above).
>
> 49. The opportunity should also be taken to clarify the meaning of "extrajudicial cases" and "extrajudicial documents". Further, we note that the eighth indent of paragraph 2 of this Article refers to "support" for the training of judges, while the third indent of Article 15(2) (criminal matters) refers to encouraging judicial training. What is the significance of the different wording? Does "support" imply making money available?[83]

The earlier draft has been amended. The Praesidium explains the amendments, including whether, in relation to family law matters, the Council should act unanimously or in accordance with the ordinary legislative procedure, as follows:

> Section 2: Judicial cooperation in civil matters
> In the case of Article [III-165] (judicial cooperation in civil matters), it was thought appropriate to add the words "having cross-border implications" in paragraph 1 (de Vries + 1 Convention member, Teufel, Roche, Hjelm-Wallén + 4, Haenel and Hübner). This principle should of course apply to the measures envisaged in paragraphs 2 and 3 of this provision.
>
> Concerning the third paragraph, some Convention members pointed out that the Union should legislate in matters of family law only with respect to cross-border aspects (Voggenhuber + 2; Duhamel + 10; Borrell + 2). This suggestion was adopted in order to avoid any misunderstanding, even though paragraph 1 already states that the Union shall legislate in this area only if there are cross-border implications.
>
> The Praesidium noted that the Convention was divided as to whether, in matters of family law, the Council should act unanimously or in accordance with the ordinary legislative procedure. Many members maintained that here the Council must decide unanimously (Teufel, de Vries and de Bruijn, Roche, Hjelm-Wallén, Hain, Fini, Lopes, Queiró and Schlüter). Others consider that the ordinary legislative procedure should apply (Duff + 19, Farnleitner, Santer + 3, Voggenhuber + 2), some going as far as to argue that family law should not be treated separately and therefore proposing that paragraph 3 be deleted (Michel + 5, Haenel + 1, Fischer and Meyer). The Praesidium therefore decided to maintain unanimity as provided for in the Treaty of Nice.

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[83] http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8107.htm#a12

> As to whether an exception could be made for parental responsibility, making it subject to the legislative procedure, a number of Convention members were opposed, and others argued that the distinction would be a difficult one to make in practice (Teufel, de Vries and de Bruijn, Roche, Hjelm-Wallén, Hain, Lopes, Queiró, Wuermeling, Schlüter). In the light of these comments, the Praesidium preferred to delete the reference to "parental responsibility". On that basis, the Praesidium thought it necessary to add a final paragraph, enabling the Council, acting unanimously, to make the legislative procedure applicable to some aspects of family law covered by this article. Such a clause would make it possible to avoid having to amend the Constitution, thus avoiding the full-scale revision procedure.[84]

W. Judicial cooperation in criminal matters and criminal procedure

Article III-166 replaces current provisions in Articles 61(e) TEC and 31(1) and 34 TEU. The two paragraphs of **Article III-166** derive from two separate articles in the earlier draft, namely **Article 15** (Judicial cooperation in criminal matters) and **Article 16** (Criminal procedure). The Praesidium explained the merger, saying that approximation of criminal procedural law might prove necessary in order to facilitate the full mutual recognition of decisions. The first paragraph starts by restating the principle of mutual recognition of judicial decisions as one of the ways in which the Union is to ensure an area of freedom, security and justice,[85] and goes on to a new provision for a European law or framework law on measures to:

> (a) establish rules and procedures aimed at ensuring the recognition throughout the Union of all forms of judgments and judicial decisions;
> (b) prevent and settle conflicts of jurisdiction between Member States;
> (c) encourage the training of the judiciary and judicial staff;
> (d) facilitate cooperation in criminal matters between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.[86]

The wording has not changed in any significant way from the earlier draft on which the European Committee commented:

> It is our experience that the difficulties and sometimes controversy (e.g. the European Arrest Warrant) lie not in the existence of such a power but fears about the way in which it may be exercised.

The second paragraph, on criminal procedure, is derived from previous draft **Article 15** and goes much further than the existing **Article 31(1)(c) TEU**, which merely includes in the list of common actions:

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84 CONV 727/03 27 May 2003 http://european-convention.eu.int/docs/Treaty/cv00727.en03.pdf
85 Presently Article 31 TEU
86 CONV 836/03 27 June 2003 http://european-convention.eu.int/docs/Treaty/cv00836.en03.pdf

> -ensuring compatibility in rules applicable in Member States as may be necessary to improve [judicial] cooperation

Article III-166.2 states:

> 2. In order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, a European framework law may establish minimum rules concerning:
> (a) mutual admissibility of evidence between Member States;
> (b) the rights of individuals in criminal procedure;
> (c) the rights of victims of crime;
> (d) any other specific aspects of criminal procedure which the Council of Ministers has identified in advance by a European decision. The Council of Ministers shall act unanimously after receiving the approval of the European Parliament.
>
> Adoption of such minimum rules shall not prevent Member States from maintaining or introducing a higher level of protection for the rights of individuals in criminal procedure.[87]

This is a new and potentially controversial provision, which has undergone some modification since the Lords Committee criticised some aspects of it. Most significantly, it has been modified to be restricted to cases having cross-border implications. It would now permit a European framework law to establish minimum rules relating specifically to mutual admissibility of evidence, the rights of individuals in criminal procedure, and the rights of victims of crime. This follows from the Working Group's recommendation for:

> the creation of a legal basis permitting the adoption of common rules on specific elements of criminal procedure to the extent that such rules relate to procedures with transnational implications and are needed to ensure the full application of mutual recognition of judicial decisions or to guarantee the effectiveness of common tools for police and judicial cooperation created by the Union. The Treaty legal basis could specify as one domain of action common minimum rules on the admissibility of evidence throughout the Union. The Council could subsequently by unanimity identify all elements of procedure on which minimum rules are required to facilitate mutual recognition.
>
> This legal base could also provide for the setting of common minimum standards for the protection of the rights of individuals in criminal procedure, building on the standards enshrined in the European Convention of Human Rights as reflected in the Charter of Fundamental Rights and respecting different European legal traditions.[88]

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87 CONV 836/03 27 June 2003 http://european-convention.eu.int/docs/Treaty/cv00836.en03.pdf

88 WG X Final Report 2 December 2002 at http://register.consilium.eu.int/pdf/en/02/cv00/00426en2.pdf

The Lords EU Committee considered that the then reference to "the [definition of the] rights of individuals in criminal procedure" was unexceptionable, but noted evidence that weight was being placed on maintaining security, to the perceived exclusion or neglect of freedom. Moreover, they doubted the need for this provision, in the light of the Commission's recently published Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.

They expressed particular concern about the power to adopt measures relating to the admissibility of evidence, pointing out that:

> Rules on the admissibility of evidence may be closely related to the mode of trial (for example, in England and Wales, to trial by jury). That such rules could be changed without the consent of a Member State is, we believe, unacceptable.[89]

They recognised that, even with a restriction to cases having cross-border implications, any EU legislation under this draft article "would most likely have substantial effects on procedure in purely domestic criminal cases". In practice, it could be difficult to apply different standards in purely domestic cases, on the one hand, and those with a cross-border dimension, on the other.

The Praesidium has emphasized that:

> it in no way seeks to harmonise admissibility or indeed taking into account of such evidence, which are matters wholly and exclusively for national courts.[90]

and the word "mutual" has been inserted to clarify this.

The Committee's concern, mentioned above, that the power was not, but ought to be, restricted to cases with cross-border implications, was shared by a number of members of the Convention, and has been reflected in a modification to the draft. However, it might still be argued that a framework law could legitimately establish minimum rules which would apply to purely domestic cases, if doing so would (or was intended to) facilitate cooperation etc in cases which had a cross-border dimension.

Extension to other aspects of criminal procedure would be limited to those identified in advance by the Council, acting unanimously with the approval of the European Parliament.

The current substantive provisions on criminal law are contained in Articles 29, 31(1)(e) and 34 TEU and the existing power to adopt framework decisions for the approximation of criminal law requires unanimity. **Article III-167.1** would allow for approximation by a

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89 http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm

90 CONV 727/03 27 May 2003 http://european-convention.eu.int/docs/Treaty/cv00727.en03.pdf

framework law (QMV) setting minimum rules for the definition of and penalties for offences, initially in areas of crime which correspond with those now particularised in the objective of Article 29 TEU. Racism and xenophobia, the prevention and combating of which are specified in Article 29 TEU, are not in the list in paragraph 1, but there is currently a proposal for a Council framework decision on combating racism and xenophobia, so they may in due course be covered by paragraph 2 (see below). Other areas of "particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis" may be identified by a unanimous European decision, so that (implicitly) framework laws could also include them.

Article III-167.2 also allows for approximation by framework law if it proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. This is a narrower extension than would have been made by the previous draft. The procedure for adopting these framework laws is to be the same as was followed for adopting those harmonisation measures. The Praesidium's comment was that it made sense to provide for matching procedures.

Article III–168 on crime prevention provides:

> A European law or framework law may establish measures to promote and support the action of Member States in the field of crime prevention. Such measures shall not include the approximation of Member States' legislative and regulatory provisions.

Although Article 61(e) TEC currently provides that the Council shall adopt measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security *by preventing* and combating *crime* …, **Article III-168** would provide a legal base (European or framework law, not requiring unanimity), limited to incentive and supporting measures for the prevention of crime.

Article III-169 is on Eurojust (European Judicial Cooperation Unit), which is an agency of judicial cooperation for the investigation and prosecution of serious cross-border crime. Each of the Member States is represented either by a senior prosecutor, judge or police officer. It was confirmed and established by Council Decision in February 2002, but had been preceded by a provisional unit, Pro-Eurojust, operative from March 2001, and before that by the European Judicial Network, which replaced more informal arrangements for cooperation.

The 2002 Council Decision emphasised the need for Eurojust to act in a co-ordinated way with the other European agencies, and provided that Eurojust and Europol should maintain close co-operation. The offences covered by Eurojust include the types of crime and offences within the scope of Europol as set out in Article 2 of the Europol Convention dated 26 July 1995, and other specified crimes, such as computer crime, money laundering and environmental crime.

Eurojust's remit is currently governed by Article 29 and Article 31(2) TEU, which provide that the Council shall encourage cooperation through Eurojust. This involves coordination between prosecuting authorities, support for investigations, and cooperation in execution of letters rogatory and extradition requests.

Its remit and powers would be substantially increased by **Article III-169**. Paragraph 1 sets out its 'mission', which is to support and strengthen coordination and cooperation between national prosecuting authorities "in relation to *serious* crime affecting two or more Member States or requiring a prosecution on common bases". Paragraph 2 provides that a European law (QMV) is to determine its structure, workings, scope of action and tasks, which may include:

> (a) the initiation and coordination of criminal prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
> (b) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

It is therefore envisaged that Eurojust may *initiate* a prosecution, although the prosecution would be conducted by the national authority. The Praesidium stated:

> It is a matter of strengthening Eurojust's competences in this regard. As matters now stand, Eurojust can already ask the national authorities to undertake a criminal prosecution on the basis of specific evidence. the latter may, however, decide not to comply with the request … As the Article is now worded, they could be obliged to do so if the law so requires.[91]

However, the Article is silent about the national authorities' powers to discontinue prosecutions.

A previous draft had provided that Eurojust could be tasked to supervise Europol's operational activities, to take account of the fact that in most of the Member States' legal systems, the police authorities conduct criminal investigations under the instructions or supervision of judges, magistrates or public prosecutors. This was removed, as being unnecessary and perhaps unclear. But Europol's tasks are to be, "where appropriate, in liaison with Eurojust".

The House of Commons European Scrutiny Committee published a Report on 3 July 2003 entitled *The Convention's proposals on criminal justice* (26th Report HC 63-xxvi-I 2002-3), which looks at these areas in detail. This Report can be accessed at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxvi/6302.htm.

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[91] CONV 727/03 27 May 2003 http://european-convention.eu.int/docs/Treaty/cv00727.en03.pdf

X. European public prosecutor

Article III-170 would allow the Council to establish a European Public Prosecutor's Office. This is a new provision, having no equivalent in the existing Treaty documents. There has been an unenthusiastic response to similar proposals made several times during the last six years. The British Government has been, and continues to be, amongst those opposed to this proposal, which is said to be one of the four "red lines" which the UK will not cross.[92]

1. Previous proposals for a European Public Prosecutor

Creation of a new authority, the office of a European Public Prosecutor, was one of the proposals of a research report, *Corpus Juris*, which was published in April 1997. It also proposed a uniform code of criminal offences to deal with fraud against the Community's finances, and that for the purposes of the investigation, prosecution, trial and execution of sentences relating to an act which constitutes an offence under the code, "the territory of the Member States of the Union" would constitute "a single legal area". In May 1999, the *Corpus Juris* was the subject of a report by the House of Lords Select Committee on the European Communities.[93] They were not persuaded that the *Corpus Juris* offered, at the time, a practically feasible or politically acceptable way forward having regard to the state of the Union and public opinion. In particular, the creation of a separate prosecution authority with no accountability to Parliament would raise very difficult issues.

The European Commission then presented an outline of its proposal to establish a European Public Prosecutor at the Nice Intergovernmental Conference in 2000, but the proposal was not taken up by the European Council. In the following year, the Commission published a Green Paper on "Criminal Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor".[94] The Commission believed that the IGC had not been given the necessary time to examine the proposal. Its press notice explained:

> In this Green Paper the Commission fleshes out its contribution to the Nice Intergovernmental Conference. It suggested there that the EC Treaty should provide for the establishment of a European Public Prosecutor (new Article 280a) who would be responsible for the criminal-law protection of the Community's financial interests. In the Commission's view, the EC Treaty should govern solely the appointment and removal from office of the European Public Prosecutor, his functions and the salient features of his office. All other rules such as those governing the European Public Prosecutor's status and his modus operandi, would

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92 "Hain in trouble over EU blunder", 28 May 2003, *The Guardian*

93 Select Committee on the European Communities, Session 1998-99, 9th Report, HL Paper 62, 8 May 1999

94 COM (2001) 715 final 11 December 2001 at http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0715en01.pdf

be laid down in secondary legislation. These are the questions considered in the Green Paper.

The Green Paper looks at the legal status and organisation of the European Public Prosecutor, the offences covered, procedural law, judicial review of the European Public Prosecutor's activities and relationships with other parties concerned. It sets out various options for discussion but indicates the Commission's preferences as things stand.
(…)
The tasks of the European Public Prosecutor would be the following:

- He would gather all the evidence for and against the accused, so that proceedings can be commenced where appropriate against the perpetrators of common offences defined in order to protect the Community's financial interests. He should also be responsible for directing and coordinating prosecutions. He would have specialised jurisdiction, prevailing over the jurisdiction of the national enforcement authorities but meshing with them to avoid duplication.

- He would have recourse to existing authorities (police) to actual conduct the investigations but would direct investigation activities in cases concerning him. He would further reinforce the judicial guarantee as regards investigations conducted within the European institutions.

- Action taken under the authority of the European Public Prosecutor, whenever it could impinge on individual freedoms and basic rights, must be subject to review by the national judge performing the office of "judge of freedoms". This review, exercised in a Member State, would be recognised throughout the Community so as to allow the execution of authorised acts and the admissibility of evidence gathered in any Member State.

- He would have authority, subject to judicial review, to send for trial in the national courts the perpetrators of the offences being prosecuted.

- When cases come to trial, he must prosecute cases in the national courts in order to defend the financial interests of the Communities. The Commission considers it essential that the trial stage remain in national hands. There is no question of creating a Community court to hear cases on the merits.[95]

When the Commission gave a presentation of its proposals to the *Justice and Home Affair*s *Council* early in 2002, the Council -

[95] COM (2001) 715 final 11 December 2001 at http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0715en01.pdf

> considered that the time had not come to take such a radical step. It was generally felt that newly created institutions such as Eurojust and OLAF needed time to affirm themselves in the fight against offences committed against the financial interests of the Communities. Misgivings were also voiced about the idea that the European Public Prosecutor remit, if such an institution were to be set up, should be limited to the narrow area of the protection of the Community's financial interests. Finally, the discussion highlighted the extremely complex constitutional implications raised by the Green Paper.[96]

The Commons European Scrutiny Committee considered the Green Paper in June 2002 and -

> did not think that any sufficient case had been made out for the Commission's proposals, and agreed with the Government that the establishment of Eurojust made these proposals unnecessary. We identified a number of concerns of principle, such as the ready assumption by the Commission that the function of prosecuting offences should be combined with that of investigation, the notion that the European Public Prosecutor would have the power to commit a person for trial, and to determine the Member States in which the trial is to be held and the creation of differing standards of criminal responsibility for fraud according to whether or not the offence concerns the Community's financial interests. We were particularly concerned that the proposals had the effect of putting the prosecution function completely beyond the reach of democratic accountability. [97]

They also commented on, and strongly supported, the points made in the Minister's reply, which pointed out that the detailed questions posed as to how the office might be set up were based on a presumption that the establishment of the office had been agreed, which it had not. The proposals appeared to conflict with the subsidiarity principle, the EPP would not be accountable to national law officers or Parliament, and there were numerous practical concerns. They concluded:

> 14.12 We continue to believe that this proposal is impractical and that it raises serious issues of principle. We see no reason for creating an institution at EU level, which will have the effect, on the one hand, of diluting the responsibility of Member States to deal with fraud and, on the other, of putting the function of criminal prosecutions beyond the reach of democratic accountability.[98]

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96 2411th Council Meeting, 28 Feb 2002 press release 6533/02. (Eurojust is a permanent unit to facilitate criminal judicial co-operation between prosecutors and magistrates in the EU member states)

97 Commons European Scrutiny Committee, 34th report 2001-02, 26 June 2002

98 Ibid

2. The EPP in the draft Constitution

Nevertheless, the proposal was brought forward again in the Praesidium's draft articles (published in March 2003) on judicial cooperation in criminal matters. **Article III-170** provides:

> 1. In order to combat serious crime having a cross-border dimension, as well as crimes affecting the interests of the Union, a European law of the Council of Ministers may establish a European Public Prosecutor's Office from Eurojust. The Council shall acting unanimously after approval by the European Parliament.
> 2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, *where appropriate in liaison with Europol*, the perpetrators of and accomplices in serious crimes affecting more than one Member State and of offences against the Union's financial interests, as determined by the European law provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.
> 3. The European law referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.[99]

There are some changes of wording since the previously published draft article 20: the amendment of substance is the addition of the words shown italicised in paragraph 2. The Praesidium conceded that a large number of Convention members opposed the idea of creating a European Public Prosecutor's Office, some saying that there was no need for it, others pointing out that Eurojust had only recently begun to operate and that it was necessary to wait before assessing the need to create a European Public Prosecutor's Office. But "many other members" were in favour of creating a European Public Prosecutor's Office and some even wanted the constitution to provide for its creation.

The Praesidium felt that its initial proposal constituted a reasonable compromise: the European Prosecutor's Office would not be *created* by the constitution; nor would the Council be obliged to adopt a law instituting it. Article III-170 states only that the Council may adopt a law (unanimously and after obtaining the EP's assent) creating a European Public Prosecutor's Office 'from' Eurojust. The word 'from' was substituted for 'within', which appeared in the previous draft, apparently in order to avoid misunderstandings.

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[99] http://european-convention.eu.int/docs/Treaty/cv00836.en03.pdf

3. Reaction

Statewatch had urged that the words "through the national prosecutor's office" should be inserted, because it was important that the prosecutor should know the legal system of the member state concerned.[100] *Justice* had said that:

> This model raises serious issues about the possibility of 'forum shopping' so that the Prosecutor could take advantage of different standards in burden of proof, mode of trial, sentencing and admissibility of evidence that apply across the European Union. The notion of prosecuting a case in a national court according to specific rules of procedure and judicial review applicable only to the European Public Prosecutor creates an unjustifiably complex system of European and national criminal laws and procedures. JUSTICE believes that such a model would be unworkable and could present a danger of watering down of procedural safeguards, in particular in relation to admissibility of evidence. The establishment of a European Public Prosecutor's Office must involve strict rules governing the selection of jurisdiction and a provision on double jeopardy that would prevent national prosecutors re-prosecuting an offence that had already been dealt with by the European Public Prosecutor.
>
> 9. The need to establish a European Public Prosecutor's Office has not yet been demonstrated. It is difficult to see how, in the model set out, the European Public Prosecutor would add any practical value to the role of Eurojust. JUSTICE believes that if a European Public Prosecutor's Office were to be established to meet a genuine need, it would need to be accompanied by the establishment of a European Court of Criminal Justice and a coherent set of procedural rules with adequate safeguards for the rights of the defence. [101]

The Times reported:

> Plans to create a supranational European public prosecutor were rejected yesterday by the British Government, which tabled an alternative strategy to prevent criminals siphoning off EU funds.
>
> It argued that the Euro-prosecutor would be unable to tackle the root causes of fraud and would mean a loss of accountability for prosecution decisions that affect individuals' rights. Peter Hain, Britain's representative on the Convention on the Future of Europe, said: "Criminal prosecution should be essentially a national responsibility. Our national prosecutors must be accountable to national courts and ultimately to our national parliaments. The European prosecutor would be accountable to neither."

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[100] The organisation which monitors the state and civil liberties in the European Union. See Joint suggested amendments to draft constitutional articles on justice and home affairs by the standing committee of experts on international immigration, refugee and criminal law, and Statewatch, 31 March 2003.

[101] Justice, the legal and human rights organisation, March 2003 at www.justice.org.uk

> The European Commission, with the support of France and Germany, is one of the strongest advocates of the new supranational body, with the power to investigate and prosecute cross-border EU fraud and other serious crimes in national courts.
> (…)
> With the support of Sweden, Finland, Denmark, Ireland, Austria and Estonia, Mr Hain presented an alternative five-point plan, saying that this would be more effective in tackling cross-border crime, while ensuring that prosecution of individuals remains a national responsibility.[102]
>
> (…) The idea of a European public prosecutor will face intense opposition from many senior legal figures in the UK, as well as some civil libertarians.
>
> Rosalind Wright, the former director of the Serious Fraud Office, has urged that other steps be taken before "a new and expensive structure in the form of the European public prosecutor" is created. The idea is among the most controversial in a package to create a justice system for Europe.
> (…)
> The idea of a European public prosecutor (EPP), and for a common criminal justice system, is seen by some as linked to that of a European arrest warrant, a proposal in the Extradition Bill. The warrant would replace formal extradition procedures with a fast-track process. Critics have said that it may open the door to the arrest and extradition of a British subject to states where there are less rigorous judicial safeguards.[103]

The Independent reported Government and other reactions:

> THE GOVERNMENT vowed to torpedo a proposal for a powerful "European public prosecutor" last night, warning that it would be the "thin end of the wedge" towards interference in Britain's criminal justice system.
> (…)
> Supporters of the plan, led by France and Germany, argue that national police forces do not have sufficient resources, or links with other forces, to pursue the largest international fraudsters. But the proposal looks doomed to failure as it is opposed by eight of the 15 EU members, when the opposition of just one could defeat it.
>
> A spokesman for the Government confirmed last night that Britain was prepared to use its veto on the issue. He said: "This idea would mean setting up a whole new institution, which is the reverse of what the Convention is supposed to be doing.

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[102] *The Times* "Britain rejects EU prosecutor" 23 May 2003
[103] *The Times* "Fierce opposition to public prosecutor" 28 May 2003

> "We already have cross-border judicial arrangements to tackle matters of joint EU interests, such as abuse of EU finances, and we are concerned about what areas of crime this prosecutor, if appointed, would investigate."
>
> He said the proposed powers were not compatible with the variety of legal systems within the EU. Britain also believes that any body that has the power to initiate a prosecution in a member state must be accountable in that country.
>
> "We believe it could be the thin end of the wedge towards what it is covered in national criminal justice systems."
> (…)
> The Tories fear the plan could be the first step towards a single European judicial system. A spokesman said: "These proposals will not make any difference. Fraud is not tackled by setting up some grandiose office. Brussels needs to get its own house in order. Criminal prosecutions are a matter for national governments."
>
> Suzy Alegre, the senior legal officer for Justice, the human and legal rights pressure group, said the introduction of such a system would be "very difficult politically for the British government and probably other governments as well". She added that: "It would be a big leap."[104]

The Guardian stated:

> Britain strongly opposes the convention's call for a European public prosecutor to tackle cross-border fraud against the EU.
>
> The UK position is that this would not tackle the root causes of fraud and could be the thin end of the wedge for interference in national judicial systems. The government says the proposal "would result in a loss of national accountability for prosecution decisions that impact on the rights of individuals under criminal law".
>
> "Criminal prosecution should be essentially a national responsibility," it says. "Our national prosecutors must be accountable to national courts and ultimately to our national parliament. The European public prosecutor would be accountable to neither." [105]

Y. Police Cooperation

Articles III-171 – III-173 contain provisions on police cooperation and police operations on the territory of another Member State. The wording of these articles is based on existing TEU provisions, although it is generally more concise. The draft constitution sets out a brief framework, while the detailed provisions would be contained in secondary legislation. Currently the detail is set out in the Europol (European Police Office)

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[104] *The Independent* "European Convention: Britain to veto plan for powerful EU prosecutor" 28 May 2003
[105] *The Guardian* "New sticking points for Blair in draft text" 28 May 2003

Convention, which is more difficult to amend than secondary legislation. Concern has been expressed that wording of the provisions would extend Europol's remit beyond dealing with serious *organised* crime to serious crime affecting two or more Member States. This is discussed in more detail below.

A number of the provisions would move to QMV procedures, although measures in the more sensitive areas would still have to be adopted unanimously. The final report of Working Group X explained the background to the changes in the following terms:

> If the European Union is to win the maximum support of its citizens, it must show that it can deliver concrete results on issues that really matter. The Convention will be deemed to be a success if it is seen to have put in place means to ensure that freedom can be enjoyed in conditions of security and justice is accessible to all. People have a right to expect the Union to address the threat to their freedom and legal rights posed by terrorism and serious crime.[106]

The following table shows the articles of the draft constitution that correspond to those covering police cooperation in Title VI TEU:

Draft Constitution	**Subject**	**Title VI TEU**
Article III-171	Police cooperation in the prevention, detection and investigation of crime	Article 30(1)TEU
Article III-172	Europol	Article 30(2) TEU
Article III-173	Operations on the territory of another Member State	Article 32 TEU

Currently voting in the Council on police co-operation, except on implementing measures, must be unanimous.[107] The draft constitution changes this to QMV and co-decision, with some exceptions for more sensitive areas. These exceptions are the adoption of legislation concerning:

- "operational cooperation" between national law enforcement authorities under Article III 171(3)

- the rules under which police authorities may operate in the territory of another Member State under Article III-173

In both these cases, the Council must act unanimously after consulting the European Parliament.

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[106] The European Convention Secretariat *Final report of Working Group X "Freedom, Security and Justice"* WG X 14 CONV 426/02 2 December 2002 p.1: http://register.consilium.eu.int/pdf/en/02/cv00/00426en2.pdf

[107] Article 34 TEU

The wording of **Article III-71** is fairly close to that of article 30(1) TEU, although it has been shortened. The table below shows the new police cooperation provisions of the draft constitution alongside the equivalent article of Title VI TEU:

Draft Constitution, Art III-71	**Title VI TEU, Art 30 (1)**
1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences. 2. To this end, a European law or framework law may establish measures concerning: (a) the collection, storage, processing, analysis and exchange of relevant information; (b) support for the training and exchange of staff, equipment and research on crime; (c) common investigative techniques in relation to the detection of serious forms of organised crime. 3. A European law or framework law of the Council may establish measures concerning operational cooperation between the authorities referred to in this Article. The Council shall act unanimously after consulting the European Parliament.	**1. Common action in the field of police cooperation shall include:** (a) operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences; (b) the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data; (c) cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research; (d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.

The Lords Select Committee on the European Union, commenting on an earlier draft, was concerned about the omission of an explicit reference to data protection:

> 64. A striking feature of Article 21—and of the whole chapter on police cooperation—is the absence of any data protection safeguards in the text. This is acknowledged in the Explanatory notes, where it is stated that general data protection provisions, covering the whole Treaty, will be included in the Title on 'the democratic life of the Union'. In view of the vast amounts of data that may be collected, analysed and exchanged under the police cooperation chapter, **we believe that adequate data protection safeguards are essential and should be clearly reflected in the Constitutional Treaty. This is something to which we will return when the Praesidium publishes its proposals on data protection**.[108]

[108] House of Lords Select Committee on the European Union *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)* 16th report of 2002-03 27 March 2003 para 64: http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm

Article III-172 concerns Europol, which is the agency responsible for supporting EU Member States in combating serious organised crime. Background is given on the Europol website, as follows:

> Based in The Hague, The Netherlands, Europol started limited operations on 3 January 1994 in the form of the Europol Drugs Unit (EDU) fighting against drugs. Progressively other important areas of criminality were added. As of 1 January 2002 the mandate of Europol was extended to deal with all serious forms of international crime as listed in the Annex to the Europol Convention. The Europol Convention was ratified by all Member States and came into force on 1 October 1998. Following a number of legal acts related to the Convention, Europol commenced its full activities on 1 July 1999.[109]

The draft constitution aims to define Europol's structure, operating rules and tasks in a new European Law, which would replace the Europol Convention. In its December 2002 report, Working Group X explained its approach as follows:

> The group has considered that rather than trying to "update" the detailed statement of Europol's tasks in Article 30 TEU - which is already outdated today in certain respects - it would be better to replace it by a shorter and more general provision on Europol in the new Treaty. This provision would contain a legal base giving the legislator a greater margin to develop Europol's tasks and powers.
>
> However, this legal base should not be open-ended. It would rather indicate the direction of possible developments and pose basic limits to such developments, which have not been contested within the Group. Thus, the provision could state Europol's central role within the framework of European police co-operation, define its general scope of action (i.e. serious crime affecting two or more Member States), indicate that Europol's tasks and powers shall be defined by the legislator and that they *may* (to the extent defined in the legislation) include powers relating to intelligence, coordination and carrying out of investigations, as well as to participation in operational actions to be carried out jointly with Member States services or in joint teams. Finally, the provision should make clear that any operation action involving Europol would need in any event to be carried out in liaison and agreement with the Member State(s) concerned (analogous formula to current Article 32 TEU) and that coercive measures would always have to be carried out by competent Member State officials.[110]

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[109] http://www.europol.eu.int/ataglance/facts/files/2003/2003-01-01-E-EN-FactSheet.doc
The 1995 Convention is available at: http://www.europol.eu.int/index.asp?page=legalconv

[110] The European Convention Secretariat *Final report of Working Group X "Freedom, Security and Justice"* WG X 14 CONV 426/02 2 December 2002 p18: http://register.consilium.eu.int/pdf/en/02/cv00/00426en2.pdf

The wording in Article III-172 is set out alongside that of Article 30(2) TEU in the table below:

Draft Constitution, Art III-172	**Title VI TEU, Art 30(2)**
1. Europol's mission is to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy. 2. A European law shall determine Europol's structure, operation, field of action and tasks. These tasks may include: (a) the collection, storage, processing, analysis and exchange of information forwarded particularly by the authorities of the Member States or third countries or bodies; (b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust. A European law shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with Member States' national parliaments. 3. Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities.	2. The Council shall promote cooperation through Europol and shall in particular, within a period of five years after the date of entry into force of the Treaty of Amsterdam: (a) enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity; (b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime; (c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol; (d) establish a research, documentation and statistical network on cross-border crime.

The new wording would provide a legal base for the adoption of measures which would enable the scrutiny of Europol's activities by the EP and national parliaments, which the Lords Select Committee welcomed.[111]

[111] House of Lords Select Committee on the European Union *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)* 16th report of 2002-03 27 March 2003 para 69: http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm

Of concern to the Select Committee was the extension of Europol's mandate to cover "serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy".[112] Europol summarises its own mandate as follows:

> Europol supports the law enforcement activities of the Member States mainly against:
>
> - illicit drug trafficking;
> - illicit immigration networks;
> - terrorism;
> - illicit vehicle trafficking;
> - trafficking in human beings including child pornography;
> - forgery of money (counterfeiting of the Euro) and other means of payment;
> - Money-laundering.
>
> In addition, other main priorities for Europol include crimes against persons, financial crime and cyber crime.
>
> This applies where an *organised* criminal structure is involved and two or more Member States are affected.[113]

A previous attempt to extend the mandate of Europol beyond organised crime was made by the Danish Presidency in 2002, but this was abandoned.[114] The Lords Committee was concerned at the re-emergence of this policy:

> 66. Article 22 introduces a number of changes to the existing legislative framework. A potentially far-reaching development concerns the extension of Europol's mandate, in Article 22(1), to cover 'serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy' (wording similar to Eurojust's proposed mandate—see Article 19 above). The proposal to extend Europol's remit to 'serious crime' is not new, but was put forward in 2002 by the Danish Presidency in its proposals to amend the Europol Convention. The Committee strongly criticised such extension as being detrimental to legal certainty, potentially leading to significant differences of interpretation of what constitutes 'serious crime' among national authorities, and leaving the interpretation of the term—and hence the delimitation of Europol's remit—to Europol itself, and ultimately the Court of Justice. We welcomed the abandonment, in the course of negotiations, of the reference to 'serious international crime' in favour of a definition which is similar to Article 2

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[112] http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm

[113] http://www.europol.eu.int/ataglance/facts/files/2003/2003-01-01-E-EN-FactSheet.doc (emphasis added)

[114] See House of Lords Select Committee on the European Union *Europol's Role in Fighting Crime* HL 43 2002-03 28 January 2003: http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/43/4301.htm

> of the Europol Convention and is based on specifically enumerated offences. The re-introduction of 'serious crime' in Article 22 is a matter of concern and somewhat surprising in view of the "general approach" reached in the Council not to extend Europol's remit in these terms. [115]

Article III-173 on operations on the territory of another Member State largely reproduces the wording of Article 32TEU. As set out below, this is subject to unanimity and consultation with the EP:

Draft Constitution, Art III-173	**Title VI TEU, Art 32**
A European law or framework law of the Council shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles III-166 and III-171 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council shall act unanimously after consulting the European Parliament.	The Council shall lay down the conditions and limitations under which the competent authorities referred to in Articles 30 and 31 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State.

Z. Public Health

The main differences between **Article III-175** and present Article 152 TEC are the inclusion of "physical and mental health" in the need to obviate sources of danger to human health, and paragraph 5, which provides for a European law or Framework law to "establish incentive measures designed to protect and improve human health and to combat the major cross-border health scourges", excluding harmonisation of the laws and regulations of the Member States.

AA. Culture, education and sport

Article III-176 of the draft differs only minimally from the existing Article 151 TEC. There was no specific cultural policy until the TEU in 1993, although cultural aspects were taken into account before this. The present Article 151 TEC authorises the EU to make use of instruments supporting cultural activities, such as the 'Culture 2000' programme and the European City of Culture and European Cultural Month actions. An example of topical interest is the European Capital of Culture, because of Liverpool's

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[115] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)* 16th report of 2002-03 27 March 2003 para 65:
http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm

recent nomination for the year 2008. The objective is twofold: to contribute to the "flowering of the cultures" of the Member States, while respecting their national and regional diversity, and at the same time to bring their *common* cultural heritage to the fore.

Under **III-176(5)** there is to be European law or framework law rather than the present "incentive measures". Article 151 TEC requires Council unanimity for the adoption of Commission recommendations and incentive measures.[116] **Article III-176** provides for the use of QMV.

There are few changes to the present education provisions, although sport has a higher profile than at present. The differences between the present Article 149 and **III-177** are:

1. The addition of provisions relating to the promotion of European sporting issues and developing the European dimension in sport. **Article III-177** includes the following:

> The Union shall contribute to the promotion of European sporting issues, given the social and educational function of sport…
>
> …Union action shall be aimed at … developing the European dimension in sport, by promoting fairness in competitions and cooperation between sporting bodies and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.

EU measures already impinge on sport, notably football, in a variety of ways: for example in the transfer of players between clubs,[117] the sale of broadcasting rights[118] and in the listing of sporting events (providing the opportunity for wide TV coverage).[119] The Nice European Council in December 2000 adopted a declaration on the specific characteristics of sport, acknowledging its wider social function,[120] and the draft constitution reflects this.

BB. Civil protection

Article III-179 is new and encourages and supports Member States in their attempts to prepare for a range of natural and man-made disasters at the local, regional and national level. Although the definition of man-made disasters is open to interpretation, it is assumed that this would include the aftermath of terrorist incidents. It is not clear whether the definition would apply equally to the dislocation of vital supplies arising from industrial disputes or protest action.

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[116] Under Article 251 (co-decision) procedure.
[117] Library Research Paper 03/02, *Current Issues in Football*, 7 January 2003
[118] Library Standard Note SN/HA/2192, *Financing Football*
[119] Library standard note SN/HA/802, *Listed Sporting Events*
[120] Nice European Council Conclusions, December 2000 at: http://ue.eu.int/en/Info/eurocouncil/index.htm

Since 11 September 2001 the threat of terrorist attack has heightened the level of preparedness in the Member States, and systems that had largely been left in abeyance since the end of the Cold War are being revived, reviewed and strengthened. In the UK new civil defence legislation is expected soon that will implement such measures. Local authorities will take the lead in dealing with most contingencies, with tiers of support designed to operate at the regional and national levels. Events that threaten the security of the country at a national level will be dealt with centrally.

With regard to natural disasters, certain contingency measures are already in place, or are being strengthened, to alleviate the problems caused by severe weather and climatic events, such as flooding, along with the development of monitoring and alerting systems for those at greatest risk

The new article would introduce, by means of European or framework laws, measures designed to encourage cooperation between Member States in a reaction and response capacity. In practice, anticipating the nature of such attacks and allocating the resources to deal with the aftermath of a range of scenarios is proving difficult, and it is hard to see how consistency might be promoted across countries with differing perceptions and experiences of risk. The expert role of international aid organisations already accustomed to dealing with such scenarios must also be considered. In many cases the financing of civil defence measures may be achieved at the sacrifice of other important local services.

The dividing line of responsibility between the armed forces and local, regional and national agencies is not mentioned in the article. In the UK, the protocol for involving the armed forces in the assistance of civilian bodies in such events is determined by *Queen's Regulations*. The House of Lords Select Committee on the European Union, in its investigation of the ability of the EU to respond to crises,[121] recognised that several aspects of the European Security and Defence Policy (ESDP) are classified as non-military. These include civil protection measures. The main conclusions of the Committee appear to coincide with the aims of the new article, namely:

- Clarify the scope and goals of civilian ESDP
- Ensure that the EU works to fill the gaps in the existing crisis management provision rather than duplicate the work of organisations already active on this arena
- Streamline the chain of command and control
- Set in place workable, long-term financial arrangements

[121] House of Lords Select Committee on the European Union *EU-effective in a crisis*? 11 February 2003 HL 53 2002-03

CC. Administrative cooperation

New **Article III-180** concerns effective national implementation of EU law and provides for the Union to support the efforts of Member States in improving their administrative capacity to implement EU law. It is generally known that at present some Member States have difficulties in implementing EC law and in some cases this is due to administrative practices, rather than any real reluctance to implement. The new article states that EU action may include "facilitation of exchange of information and of civil servants as well as supporting training and development schemes", but adds that no Member State "shall be obliged to avail itself of such support" and that harmonisation would be excluded.

DD. Association of the Overseas Countries and Territories

Articles III-181 – III-187 largely reproduce the present Articles 182-188 TEC.

EE. External Action

Articles III-188 - III-189 define the provisions which have a general application across all matters of external action. **Article III-188** establishes the guidelines and strategic objectives behind the external actions of the EU, including respect for the principles of democracy, human rights and the rule of law. The article refines and elaborates on Article 11 TEC. In particular, several additions on social, economic and environmental development are made in paragraph 2 (subparas d-g).

Paragraph 2 states:

> 2. The European Union shall define and pursue common policies and Union actions, and shall work for a maximum degree of cooperation in all fields of international relations, in order to:
>
> (a) safeguard the common values, fundamental interests, security, independence and integrity of the Union;
> (b) consolidate and support democracy, the rule of law, human rights and international law;
> (c) preserve peace, prevent conflicts and strengthen international security, in conformity with the principles of the United Nations Charter;
> (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
> (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
> (f) develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

> (g) assist populations, countries and regions confronting man-made or natural disasters;
> (h) promote an international system based on stronger multilateral cooperation and good global governance.[122]

The decision-making process in matters relating to external action is set out in **Article III-189**, which reflects the provisions for CFSP in current Article 13 TEU. However, it has been refined to present a clearer framework for the whole area of external action. The article states that "the European Council shall act unanimously on a recommendation from the Council, adopted by the latter under arrangements laid down for each area".[123]

Decisions on external action will retain the current requirement for unanimity. However, the means by which recommendations and decisions on implementation are reached by the Council differ in each area of external action. Those specific decision-making processes are set out in the sections below.

Part I Article 27 of the draft constitution provided for the establishment of a minister for foreign affairs:

> 1. The European Council, deciding by qualified majority, with the agreement of the President of the Commission, shall appoint the Union's Foreign Minister. He shall conduct the Union's common foreign and security policy.

Article III-189(2) is an additional provision that allows for the new Minister for Foreign Affairs and the Commission to submit joint proposals to the Council of Ministers on matters of external action.

FF. Common Foreign and Security Policy (CFSP)

Articles 11-28 TEU outline the framework for the development of the CFSP. The majority of the CFSP provisions in the draft constitution remain unchanged, although a number of articles have been changed to improve clarity. The creation of a Minister for Foreign Affairs and the extension of QMV in CFSP matters, with the agreement of the European Council, are significant additions.

Article III-190 and **Article III-191** reiterate the provisions laid down in Articles 11, 12 and 13 TEU. Article III-191 makes clear that in matters relating to CFSP and in matters with defence implications (CSDP) the European Council shall "define the general guidelines" while the Council of Ministers shall "take the decisions necessary for defining and implementing the common foreign and security policy".[124] The article also lays down a new provision, allowing for the President of the European Council to convene a meeting

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[122] Draft constitution article III-188 (2)
[123] Ibid article III-189
[124] Ibid article III-191

of the European Council when an international situation dictates, in order to define the policy of the EU on this matter. A similar provision exists for the Council of Ministers in draft article III-195.

Article III-192 adapts the text of Articles 18 and 26 TEU in order to take account of the creation of the post of the Minister for Foreign Affairs. Under this Article the newly created Minister would have the right of initiative in CFSP and be responsible for implementing the decisions taken by the European Council and the Council of Ministers. In all CFSP matters the Minister for Foreign Affairs would also represent the Union externally.

A Foreign and Commonwealth Office Explanatory Memorandum on *The Praesidium Draft of the Articles of the Constitutional Treaty relating to External Action*, published on 29 May 2003, stated:

> **European Foreign Minister (Article 5, Part II)[125]**
> The [UK] Government believes that there must be greater clarity about the exact status of any 'European Foreign Minister' in the Commission and that he/she must be clearly answerable to the European Council on CFSP and ESDP. The Government's proposed amendments also make clear that any European Foreign Minister would not replace the right of Member States to speak on their own behalf in international organisations.[126]

Article III-193 reflects the current provisions of Article 14 TEU. Where operational action is required by the Union, the Council of Ministers will take the necessary decisions. Any Member State planning to adopt a national position or take national action prior to such a decision is obliged to consult the Council. This procedure is already established in Article 14 (5) TEU. In its May Memorandum the FCO commented:

> The commitment to prior consultation is not practical. The European Council meets only every three months, and there will be times when CFSP decisions cannot await the next Council meeting. So introducing this time-sensitive element contradicts our overall objective of making CFSP more operational and effective.[127]

Article III-194 and **Article III-195** repeat Articles 15 and 22 TEU respectively, with the addition into the text of Article III-195 of "the Minister for Foreign Affairs". This article defines the right of initiative in CFSP matters: any Member State, the Minister for Foreign Affairs or the Minister in conjunction with the Commission can refer questions or

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[125] Article 5 part II refers to the numbering of the Article in *the Praesidium Draft Articles on External Action*, as presented on 23 April 2003.
[126] FCO EM on CONV 685/03, 29 May 2003
[127] Ibid

submit proposals to the Council of Ministers. On this issue the FCO Memorandum stated:

> The [UK] Government believes that if the Union's Minister for Foreign Affairs has the combined roles of the High Representative and the External Relations Commissioner […] there would be no need for a joint proposal from him/her and the Commission, as his/her role would cover both.[128]

The need for unanimity in CFSP decisions by the Council of Ministers is laid down in **Article III-196**, which reflects Article 23 TEU. Under this Article any Member State may abstain from a decision but is obliged to accept the decision taken by the Council. This constructive abstention could be applicable for the implementation of military operations.

Article III-196 also expands on the areas in which QMV would be applied to CFSP matters. These would include proposals submitted jointly to the Council of Ministers by the Minister for Foreign Affairs and the Commission. It also allows the European Council to unanimously designate other areas in which the Council shall act by QMV. It states:

> By derogation from paragraph 1, the Council shall act by qualified majority:
>
> (a) when adopting European decisions on Union actions and positions on the basis of a European decision of the European Council relating to the Union's strategic interests and objectives, as defined in [Article III-189(1)] of this Title;
>
> (b) when adopting a decision on a Union action or position, on a proposal which the Minister puts forward to it following a specific request to him from the European Council made at its own initiative or that of the Minister;
>
> (c) when adopting any European decision implementing a Union action or position;
>
> (d) when adopting a European decision concerning the appointment of a special representative in accordance with [Article III-198 (ex 11)] of this Chapter.[129]

However, under **Article III-196(4)** QMV is not applicable to "decisions having military or defence implications".[130] Decisions by unanimity will continue to apply to CSDP.

In the FCO Memorandum the Government set out its objections to extending QMV in CFSP, as follows:

> The Government has made it clear that it cannot accept the proposed extension of qualified majority voting in CFSP set out in the draft articles and that we strongly

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[128] FCO EM 29 May 2003
[129] Draft constitution article III-196
[130] Ibid

> prefer the formula in Article 9.3 [Article III-196 (3)] that any decision to move to more qualified majority voting in CFSP should be taken by unanimity on a case by case basis at the European Council. This was inserted in the External Action Working Group report at the UK's suggestion.[131]

In its report on *The Future of Europe: Constitutional Treaty – Draft Articles on External Action*, the Lords Select Committee on the European Union commented:

> First, we are concerned about the apparent freedom of the Foreign Minister to make proposals which would then be subject to QMV. Our concerns about the accountability of the Foreign Minister to the Council… are particularly sharp here […] In addition, the possibility of operating jointly with the Commission would significantly enhance the Commission's power in this field.
>
> Our second comment is on the paragraph attached to the end of Article 9(2) [Article III-196 (2)]. This appears to be a version of the so called Luxembourg compromise, whereby one member of the Council may declare that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority and a vote shall then not be taken. Provision is made for the Council, acting by qualified majority, to refer the matter to the European Council for a unanimous decision. This provision is copied from the existing Treaty16. This is a welcome departure from the Franco-German proposal to the Convention which called for extended QMV in the European Council. We note that a greater use of qualified majority would make it more likely that such provisions would be exercised. This would provide a useful safeguard.
>
> Article 9(3) [Article III-196 (3)] allows the European Council to decide unanimously to act by qualified majority in other areas. We heard evidence from Mr Peter Hain MP, Mr Peter Ricketts and Sir Stephen Wall that the extension of QMV to foreign policy areas would be problematic. This provision, by contrast, appears to provide for possible extension of QMV in the future. This gives rise to anxieties and the need for such a provision to be clarified.
>
> We note that the Government continue to argue that any decisions for ESDP operations with defence or military implications should continue to be taken by unanimity; and that ESDP operations should be able to go ahead even if not all Member States wish to participate. We are grateful for this assurance.[132]

At the European Convention Plenary Debate on 16 May 2003 Baroness Scotland of Asthal, the Government alternate on the Convention, commented:

> I am a bit perplexed by Article 2(2) providing that QMV would apply to joint proposals of the Foreign Minister and the Commission in CFSP. What is the logic of this? If the European Foreign Minister is double-hatted, no proposals should require the Commission's support. What is the justification for that? It seems only

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[131] FCO EM on CONV 685/03, 29 May 2003

[132] Lords Select Committee on the European Union, *The Future of Europe: Constitutional Treaty – Draft Articles on External Action*, HL Paper 107 2002-3, 13 May 2003, p9-10

> further to blur the responsibilities of the Council and the Commission in this area. As you know, the United Kingdom strongly believes that CFSP should retain distinct procedures. We have great difficulty with this proposal and will therefore continue to argue for its deletion.[133]

Articles III-197 and **III-198** elaborate on the role of the EU Minister for Foreign Affairs. In implementing the decisions reached in the Council of Ministers, the Minister for Foreign Affairs is expected to coordinate his/her activities with the Foreign Affairs Ministers of the Member States. The Minister for Foreign Affairs will also have the right of initiative in proposing the appointment of special representatives and will have overall authority over the work of those persons.

Article III-199 amends Article 24 TEU, allowing the Union to conclude agreements on CFSP with one or more States or international organisations, in accordance with Article III-222 of the draft constitution.

Article III-200 replaces the text of Article 21 TEU on the extent to which the European Parliament will be kept informed on CFSP and CSDP matters. Minor amendments to the Article have been made to reflect the role of the Minister for Foreign Affairs.

Article III-201 reiterates Article 19 TEU, allowing for the new role of the Minister for Foreign Affairs. Paragraph 2 (subpara. 3) of the Article, in particular, obliges those Member States on the UN Security Council to request that the Minister for Foreign Affairs present the EU's position on any subject on its agenda. In the draft articles on External Action presented by the Praesidium on 23 April 2003 the Praesidium commented:

> The third subparagraph introduces a new provision aimed at raising the Union's profile within the Security Council. This provision does not entail any consequences for the status or position of Member States in that forum.[134]

However, many have viewed the clause as an obligation on Member States on the UN Security Council to give up their seat when there is a common EU position on an issue.

In a meeting of the Standing Committee on the Convention on 7 May 2003 David Heathcoat-Amory said:

> On the UN issue, French views are fairly opaque at the moment, so I cannot predict them. In general, the French are prepared to make big concessions in order to lead European policy. They see the Union as an opportunity to extend and exert French policy. They might look more sympathetically on giving up or sharing their seat on the UN Security Council if in return they could get a big

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[133] Comments by Baroness Scotland of Asthal at the European Convention Plenary Debate 16 May 2003.
[134] Praesidium to the European Conventions, Draft Articles on External Action, article 14

> lever and influence over Union foreign policy. We see the matter rather differently; we see it as replacing our particular concerns and interests, which are generally of an Atlanticist nature, with a policy that may be against our interests. The draft article states:
>
> "Member States which sit on the Security Council shall request that the Minister for Foreign Affairs be asked to present the Union's position."
>
> It is not that we may do this; it is that we shall do it. We are mandated to give up our seat when there is a Union policy to be presented by the Minister for Foreign Affairs. The French must be uneasy about that, but I cannot predict how it will fit in with their general plans.[135]

In its report on *The Future of Europe: Constitutional Treaty – Draft Articles on External Action* the Lords Select Committee on the European Union stated:

> We can see that the aim is to provide a single voice for the European Union in the United Nations, but there are serious questions about this Article. First, surely who appears before the UN Security Council is a matter for them and not for the European Union. Secondly, the requirement on Member States who are members of the Security Council to defend positions in the interests of the Union, albeit derived from an existing Treaty provision, seems to ignore the fact that discussion in the Security Council is organic. Members' positions develop during the course of discussion and debate and it is inconceivable that one player would be expected to do no more than defend the pre-agreed position which they had no mechanism to adapt.
>
> The Committee was under the impression that Member States who have dissented from decisions taken (perhaps by QMV) in the Council cannot be under an obligation to support and defend the council's position in the United Nations Security Council. The Committee considers that the proposal to give a special status to the proposed Foreign Minister within the UN Security Council would be impracticable in present circumstances. We are also concerned that there is insufficient regard to the need for positions to develop during debate in the Security Council. Member States, and in particular those who are permanent members of the Security Council, must be free to act independently within the Security Council. We seek clarification on this.[136]

The FCO Memorandum reaffirmed the Government's opinion:

> Our proposed amendments make clear that Member States should retain the right to speak in their own right at international organisations. The UK cannot accept

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[135] Standing Committee on the Convention *The Convention on the Future of Europe* 7 May 2003 c19-20

[136] Lords Select Committee on the European Union *The Future of Europe: Constitutional Treaty – Draft Articles on External Action* HL Paper 107 13 May 2003 p.11

> any language which implies that it would not retain the right to speak in a national capacity in the UN Security Council.[137]

Article III-203 defines the role of the Political and Security Committee (PSC) in CFSP and CSDP matters as originally set out in Article 25 of the current EC Treaty. Under this article the PSC would retain responsibility for monitoring the international situation, deliver opinions to the Council and monitor the implementation of agreed policies. It will also retain political control and strategic direction over crisis management operations.

Commenting on the overall provisions laid down in the area of CFSP, Peter Hain stated at the European Convention Plenary Debate on 16 May 2003 that:

> Europe can only build on its successful Common Foreign and Security Policy if it recognises that freedom to act in foreign and defence policy is at the heart of our sovereignty as national states. There is no neat dividing line between diplomacy on the one hand and security on the other. If diplomacy fails, our soldiers get killed and there is no more important power and responsibility for a government than the ability to protect its fundamental interests as a nation state. That means that initiative and decision-making power must remain in the Council. It also means Member States must not be constrained as to what they can do individually and that where we do not all agree we should avoid invoking the name and reputation of the European Union in a minority cause. CFSP must remain distinct from other tasks; the European Court of Justice should have no jurisdiction over it. Its instrument should be easily distinguishable from those we use elsewhere.
>
> If we are going to create the post of European Foreign Minister, a rather misleading title since we do not have a European government, then let us be clear. As Mr Dehaene has said, he or she must be answerable to the Council on CFSP and on ESDP. The logic must be that he or she would not be subject to Commission collegiality even on First Pillar issues, otherwise they would be forced continually to contradict themselves. Equally within this overarching framework, we need to recognise the importance of the Union's long-standing and widespread relations with the wider world. We need to define a clear objective for a development policy squarely based on the eradication of poverty, and also ensure that this is taken into account in the implementation of the Union's other internal and external policies […]
>
> We already have in the Praesidium draft a good clause, endorsed by the working party and faithfully expressed, that allows us to proceed to more QMV by unanimity. So if there are blockages, if it is not working, we can change that by unanimity. My second point is that we have QMV in implementation already, but it has never been used. So we are actually having a fight which is based in fantasy as opposed to reality. We have to be very realistic; we all know that the key to a more effective CFSP is political will. Just introducing more QMV into CFSP will

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[137] Foreign and Commonwealth Office *The Praesidium Draft of the Articles of the Constitutional Treaty relating to External Action* CONV 685/03 29 May 2003

> not create that will; it will not magic it out of nothing. How could we create that will? A more powerful, single foreign representative minister will help, so will an elected chair of the Council; but ultimately this is a matter of national sovereignty. It goes right to the core of the nation state and can only be determined by unanimity rather than by qualified majority voting.[138]

At the Standing Committee on the Convention on 7 May 2003 Mr Heathcoat-Amory commented:

> The draft constitution is rushing ahead with the institutional arrangements to enforce a common foreign and security policy when such a policy does not exist. That is dangerous because it does not take account of the fact that, if there is no common foreign policy now, it will be even more difficult to have one when we have 10, or perhaps eventually 13, new countries, including a large Muslim country. Each of those countries has a different world-view, a different historical experience, different priorities and different interests. We must rebuild Europe on a different structure that recognises and celebrates that diversity. Instead, we are trying to centralise and consolidate power in Brussels. That is profoundly dangerous.[139]

GG. Common Security and Defence Policy (CSDP)

The current TEU provisions establishing a European Security and Defence Policy are contained within the terms defining the CFSP. Article 17 TEU, in particular, makes provision for "the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide".[140]

Articles III-205 – III-209 concern the CSDP. **Article III-205** sets out the specific tasks, with reference to **Part 1 Article I-40 (1)**,[141] in which European military or civil capabilities could be used. The article states:

> The tasks referred to in [Article I-40(1)], in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking, and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.[142]

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138 Comments by Peter Hain at the European Convention Plenary Debate, 16 May 2003.

139 Standing Committee on the Convention *The Convention on the Future of Europe* 7 May 2003

140 EC Treaty as amended by the Treaty of Nice Title V Article 17 (1)

141 Article III-205 of the draft European constitution refers to Article 32(1). The provisions for implementing a common defence policy are contained in article I-40.

142 Draft European constitution article III-205 (1)

The article expands the remit of EU operations from the original 'Petersberg tasks', which were focused on peacekeeping and crisis management. Decisions relating to the tasks defined under this Article, including their objective, scope and conditions for implementation, will be taken by unanimity in the Council of Ministers. The Minister for Foreign Affairs, in conjunction with the Political and Security Committee (PSC), would be responsible for the co-ordination of the military and civilian aspects of any operation.[143] As previously mentioned, under Article III-203 the PSC would exercise political control and strategic direction over a crisis management operation.

Within the framework of decisions adopted under Article III-205, the Council of Ministers may allocate the implementation of a task to a smaller group of Member States who have both the necessary capabilities and political will to undertake that task.

Article III-206 states:

> 1. Within the framework of the European decisions adopted in accordance with [Article III-205 (ex 17)], the Council may entrust the implementation of a task to a group of Member States having the necessary capability and the desire to undertake the task. Those Member States in association with the Union's Minister for Foreign Affairs shall agree between themselves on the management of the task.
>
> 2. The Council shall be regularly informed by the Member States participating in the task on its progress and, should the completion of the task involve major new consequences or require amendment of the objective, scope and conditions for implementation adopted by the Council under [Article III-205(2) (ex 17(2))], the Member States participating shall refer the matter to the Council forthwith. In such cases, the Council shall adopt the necessary European decisions.[144]

Closer cooperation of this kind could foster a predilection toward "coalitions of the willing" when planning and implementing EU operations. The need for unanimity in the Council, however, would ensure the political support of all Member States for any operation. The ability of a Member State to abstain from a decision, and therefore from the commitment of resources to an operation, would be possible under article III-196.

Article III-207 lays down the framework for the establishment of a European Armaments, Research and Military Capabilities Agency. Under the authority of the Council, the agency would:

- Evaluate the progress made by each Member State in fulfilling its capability commitments;

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[143] Draft constitution article III-205 (2)
[144] Draft constitution article III-206

- Promote the harmonisation of operational requirements and put forward measures to satisfy those requirements, including compatible procurement methods and multilateral projects. Multinational projects would be managed by the agency and specific groups would be set up to bring together Member States involved in those joint projects;
- Support defence technology research and plan and coordinate joint research activities to meet future operational needs;
- Contribute to the strengthening of the defence industrial and technological base;
- Identify measures to improve the effectiveness of defence spending.

Unlike the multinational procurement management agency, OCCAR, membership of the agency, as defined under article III-207, would be automatically available to any Member State wishing to be a part of it. The statute, the location and the operational rules of the agency would be decided by QMV in the Council of Ministers.[145]

The proposal for a European Armaments Agency has been discussed for a number of years, with the establishment of OCCAR by the UK, France, Germany and Italy regarded by many as a possible precursor to a fully fledged armaments agency. The recommendation of the Praesidium to establish a European Armaments and Strategic Research Agency has been welcomed by many, including the defence industry.

The Guardian reported:

> Europe's three leading contractors – BAE Systems, EADS and Thales – yesterday joined forces to demand increased EU military spending to close the technological gap with the US. The British, French and German groups, responding to the political divisions unleashed by the war in Iraq which underlined America's military superiority, urged greater consolidation of Europe's defence industry in land and naval systems.
>
> In an open letter to the EU governments on the eve of today's "old" Europe defence summit in Brussels, their chief executives backed a drive for a European armaments and strategic research agency. They called on governments especially the Germans, to increase defence spending as the gap between European military procurement, now $40bn (£27.6bn) and that of the US, $125bn and rising, widens.[146]

However, many other analysts remain sceptical as to whether a European Armaments Agency (EAA) could achieve its objectives. The harmonisation of equipment requirements and greater co-operation in defence research and technology were two of the main principles of the Six Nation Framework Agreement signed in July 1998. Progress in harmonising equipment capabilities is considered to have achieved some success through

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[145] Draft constitution article III-207

[146] "Defence firms call on EU to close gap with America" *The Guardian* 29 April 2003

NATO's Defence Capabilities Initiative and the European Capabilities Action Plan. However, analysts have argued that there has been limited progress in harmonising defence research and development. Many also believe that the success of multinational procurement, which will form a major part of the EAA, has been limited, mainly due to the lack of funding, the divergence of national interests and requirements, and disputes over industrial participation.

The Lords EU Select Committee suggested in its report on the external action articles that:

> Such an Agency might well help to improve the capabilities of the armed forces of Member States, but care needs to be taken to ensure that it does not become a tool for protectionism or constrain the ability of Member States to order armaments independently.[147]

Article III-208 outlines the operational arrangements for structured cooperation as defined under article I-40 (6). The criteria and capability commitments for Member States participating in this framework of structured cooperation would be negotiated and established by those Member States and set out in a separate protocol as an annex to the constitution. That protocol would also identify those states wishing to participate.[148] Once structured cooperation was established, only participating Member States would be able to take part in adopting decisions on the development of such cooperation and on the launching of, and arrangements for, any operations. However, the Praesidium noted that operations undertaken by this group of Member States would not be Union operations.[149] Paragraph 3 of the article also makes provision for the Council of Ministers to ask the Member States participating in structured cooperation to carry out a task decided on by it.

In the FCO Memorandum the Government outlined its objections to article III-208:

> We have expressed concern at the proposal to create standing inner groups for ESDP operations. These proposals undercut the inclusive and flexible arrangements for operations agreed at Nice. We want to maintain an approach to ESDP which allows groups of States to co-operate flexibly in carrying out operations, but under agreement by the Council and on a basis which values all contributions, whether military or civilian, from large or small States.[150]

The framework for enhanced cooperation set up under article III-208 has drawn criticism from a number of commentators, who have argued that the system would create a two-tier defence policy within the EU. The ability of Member States within the system of

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147 Lords Select Committee on the European Union *The Future of Europe: Constitutional Treaty – Draft Articles on External Action* HL Paper 107 2002-03 13 May 2003 p.13

148 Article III-208 currently refers to this protocol as Protocol X

149 Praesidium Draft Articles on External Action 23 April 2003 p.46

150 FCO EM on CONV 685/03 29 May 2003

structured cooperation to determine its development without consultation with, or the consent of, Member States remaining outside the framework has also raised concerns. The establishment of an EU military command structure outside the NATO operational planning framework is one conceivable development and was one of the main recommendations of the mini-defence summit on 29 April 2003, which advocated the need for greater enhanced cooperation in European defence.[151]

Commenting on the outcome of that summit, an article from *Agence France Presse* reported:

> The proposals have sparked disquiet in Washington and across Europe, despite reassurances from French President Jacques Chirac that they were not intended to undermine the US-European alliance or the 19-nation military alliance. British Defence Minister Geoff Hoon on Tuesday urged the four European states not to disturb the harmony between the EU and NATO, saying a small group of nations could not go their own way […]
>
> Madrid, Rome and Lisbon, which had also sided with Washington over the Iraq war, reacted with dismay at the four-nation proposals. Spain's Foreign Minister Anna Palacio forcefully condemned the initiative, saying that four countries had no right to set EU policy on their own […] Italian Foreign Minister Franco Frattini played down the significance of the summit, calling it "a contribution among others". But his remarks at a press conference during an official visit to Belgrade came as Italian Defence Minister Antonio Martino warned that it would be unacceptable for the four countries to take decisions on EU defence policy without consulting others. Portuguese Defence Minister Paulo Portas said any new EU military command should compliment, and not duplicate, existing NATO structures.[152]

Daniel Keohane, at the Centre for European Reform, argued:

> Belgium, backed by France, Germany and Luxembourg, is hosting a mini-summit on 29 April to agree on proposals to develop ESDP. The Belgians argue that the Iraq crisis showed that ESDP is not working now and will never be effective with upwards of 25 states participating from 2004. Guy Verhofstadt, the Belgian Prime Minister has instead proposed that these four countries should form the core of a European defence union inside the EU. After all, neither the euro, nor the Schengen agreement on common borders, would have come about without the leadership of an *avant-garde* group of states. Participating countries in the defence *avant-garde* would commit to defending each other from external attack, set up a European military headquarters, and pool some of their military resources […]

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[151] The mini-defence summit on 29 April 2003 involved France, Germany, Belgium and Luxembourg.

[152] "Chilly welcome both sides of Atlantic for four-way EU defence proposals" *Agence France Presse* 30 April 2003

> Few defence experts would quibble with the Belgian desire to beef up European military capabilities. But some of the Belgian proposals are sub-optimal choices for European governments. In particular, a new European military structure outside the NATO framework would be financially costly and politically divisive. And it seems an odd move, since the EU reached agreement on access to NATO military assets only last December. This long-awaited EU-NATO agreement, which came after months of political wrangling, allows the EU to use NATO resources to overcome its own capability shortfalls […]
>
> More significantly, the summit takes place at a time when Europeans should be working to overcome their differences with the US […] Washington could perceive a European defence union, led by the Belgians, the French and the Germans, as nothing more than an anti-US alliance. Moreover, if European governments feel they have to choose between NATO and a European defence union, this would greatly harm the EU by making divisions between "old" and "new" Europe more permanent.[153]

Article III-209 sets out the arrangements for implementing the concept of mutual defence, as laid down in Article I-40(7). Closer cooperation on mutual defence would be open to all Member States of the Union and a list of participating States would be set out in a Declaration annexed to the constitution. The article imposes an obligation on participating Member States to inform the UN Security Council of any armed aggression and the measures taken as a result. It also establishes the obligation for closer cooperation between this group of Member States and NATO.

In the draft articles presented to the Convention on 23 April 2003 the Praesidium commented:

> Ten of the European Union's current Member States are members of the Western European Union and are therefore bound by a mutual defence commitment under Article V of the Brussels Treaty. That is undoubtedly a form of cooperation outside the framework of the Union. Given the differences in political will, it is difficult to envisage all Member States agreeing to enter into such a commitment to the Constitution. Hence the need to introduce closer cooperation enabling those wishing to do so to "repeat" the commitment already entered into under Article V of the Brussels Treaty in the Union framework. Repeating the commitment in the Constitution has a number of advantages:
>
> - It would allow mutual defence to be enshrined in the Constitution and would help increase the Union's credibility in the eyes of its citizens
> - Such cooperation would allow participating Member States to use the Union's structures and expertise, for example it Military Committee and its Military Staff.[154]

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[153] Daniel Keohane "Europe needs and *avant-garde* for military capabilities" *Centre for European Reform,* April 2003

[154] Praesidium Draft Articles on External Action 23 April 2003 p.47

However, the establishment of a mutual defence clause, bordering on the security commitment of NATO's Article V, has raised concern among a number of commentators.

In the meeting of the Standing Committee on the Convention on 7 May 2003 Mr Heathcoat Amory commented:

> On compatibility with NATO, it is difficult to reconcile specifically the defence articles with the existing NATO arrangements and treaty. There is no article 5 provision for mutual assistance, but there is something very similar to that. Language about mutual solidarity is certainly moving in that direction. We are definitely seeing the militarisation of the Union, with all that flows from that.[155]

The objection of the British Government to the inclusion of a clause on mutual defence was outlined by Peter Hain at the European Convention Plenary Debate on 16 May 2003:

> You all know that the United Kingdom is committed to the SDP [security and defence policy], you know that our commitment is based on our strong military capability. It is practical, not rhetorical. We support further progress, practical steps in the new treaty to develop the capabilities agency, to update the Petersburg tasks and to make a commitment to mutual solidarity in the face of terrorist and other threats. But we will not agree to a common defence in the European Union, we support the existing guarantee provided to nineteen of the twenty-five Member States through NATO, the agreements reached at Nice and the 'Berlin Plus' arrangements to provide the best way forward.
>
> If we are to improve cooperation in the SDP, we should be inclusive and transparent; we should respect the interests and contributions of all Member States large and small in building a strong European Foreign and Security Policy.[156]

In the FCO Memorandum of 29 May 2003 the British Government reiterated its objections:

> We have made it clear in our comments that we view the introduction of a common defence guarantee, including as a form of enhanced co-operation, as a divisive and unnecessary duplication of the guarantees that 19 of the future 25 EU Member States enjoy through NATO. [157]

Financial provision for CFSP and CSDP activities are contained in **Article III-210.** The terms of funding are largely unchanged from the current EC Treaty. However, sub-paragraph (3) of article III-210 allows for the rapid financing of activities in this area and

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[155] Standing Committee on the Convention *The Convention on the Future of Europe* 7 May 2003

[156] Comments by Peter Hain at the European Convention Plenary Debate 16 May 2003.

[157] Foreign and Commonwealth Office *The Praesidium Draft of the Articles of the Constitutional Treaty relating to External Action* CONV 685/03 29 May 2003

in particular for the preparatory phases of a crisis management operation through a start-up fund based on Member States' contributions. Decisions on the financing of the fund, and in particular the scale of contributions by Member States, will be taken by QMV in the Council. Article III-210 (3) states:

> A European decision of the Council shall establish the specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the common foreign and security policy, and in particular for preparatory activities for tasks as referred to in [Article I-40(1)].
>
> Preparatory activities for tasks as referred to in [Article I-40(1)] which are not charged to the Union budget shall be financed by a start-up fund made up of Member States' contributions.
>
> The Council shall adopt by a qualified majority on a proposal from the Minister for Foreign Affairs European decisions establishing:
>
> (a) the procedures for setting up and financing the fund, in particular the amounts allocated to the fund and the procedures for reimbursement;
> (b) the procedures for administering the fund;
> (c) the financial control procedures.
>
> When it is planning a task as referred to in [Article I-40(1)] which cannot be charged to the Union's budget, the Council shall authorise the Minister for Foreign Affairs to use the fund. The Minister for Foreign Affairs shall report to the Council on the implementation of the remit.[158]

HH. Co-operation with third countries and humanitarian aid

In **Article III-213** on development cooperation, a new emphasis is placed on the focus of Union development policy. The reduction and, in the long term, the eradication of poverty, is now its primary objective. This will be a welcome addition for the British Government, which has generally been critical of the focus of much EU development policy.

Provisions on the general objective of promoting democracy, the rule of law and human rights and freedoms have been removed from here (Article 177(2) TEC), but such aims are included in the constitution's provisions on the Union's founding values.

A European law or Framework law will establish the measures necessary to implement development co-operation policy, as opposed to the present Council 'measures' and multiannual programmes.

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[158] Draft European constitution article III-210. Articles I-39 and I-40 of the draft constitution have replaced article 32 of Part I, as referred to in this clause.

II. Economic, financial and technical co-operation with third countries.

Under **Article III-216**, "without prejudice to the development co-operation provisions, the Union shall carry out economic, financial and technical co-operation measures, including aid in particular, with *third countries other than developing countries*" (the text in italics is new). The measures will be adopted by a European law or framework law. References to the general objective of promoting democracy, the rule of law and human rights and freedoms have been removed from this part of the constitution as they are included elsewhere.

There is a new **Article III-218** on humanitarian aid, which allows for ad hoc assistance, relief and protection for people in third countries and victims of man-made and natural disasters, to meet the resultant humanitarian needs. Operations will be conducted in accordance with international humanitarian law and the necessary measures implemented through a European law or framework law. Agreements may be made with third countries and competent international organisations. Humanitarian tasks are currently mentioned in Article 17 TEU as possibly arising under the CFSP.

A European Voluntary Humanitarian Aid Corps will be set up to provide a framework for joint contributions from 'young Europeans'. The Parliament and Council will adopt a European law determining the rules for this. Efforts will be made to co-ordinate the Union's and Member States' humanitarian aid measures and to co-ordinate any operations with those of international organisations, UN bodies in particular.

JJ. International agreements

Articles III-220 – III-223 concern international agreements and the EU's treaty-making powers.

1. The EU's present treaty making powers

Under present Article 24 TEU the EU Presidency concludes agreements in the intergovernmental areas of the second and third pillars:

> 1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.
>
> 2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions.

> 3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2).
>
> 4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3).
>
> 5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.
>
> 6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.

Under Article 300 TEC:

> (1) Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.
> […]
> (3) Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3), including cases where the agreement covers a field for which the procedure referred to in Article 251 or that referred to in Article 252 is required for the adoption of internal rules. The European Parliament shall deliver its opinion within a time limit which the Council may lay down according to the urgency of the matter. In the absence of an opinion within that time limit, the Council may act.

Mixed competence agreements imply mixed participation of the Union and the Member States. In the *ERTA* case in 1971 the ECJ took the view that the Community had an exclusive power after it had adopted a common rule[159] and subsequent cases extended the powers of the Community in the conclusion of international agreements. The ECJ ruled in ERTA[160] that the prior use of internal competence in adopting 'common rules' was a necessary condition for the origin of the respective external power. In the *Kramer* judgement[161] it was implied that, even if no common rule had been adopted at Community

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[159] Judgment 31 March 1971 *Commission v Council (European Road Transport Agreement- ERTA)* case 22/70 [ECR] 1971

[160] Case 22/70 [1971] ECR 263

[161] Joined Cases 3, 4 & 6/76 Cornelius Kramer and others [1976] ECR 1279

level, the EC may have a treaty-making power flowing implicitly from other provisions of the EC Treaty. Under the Common Commercial Policy provision in Article 133 TEC, the Commission has exclusive competence to negotiate on behalf of the Community. However, the ECJ's Opinion on the Commission's role in the Uruguay Round GATT Agreement negotiations concluded that the Commission was solely competent under Article 113 TEC to conclude multilateral agreements relating to the trade in goods, but that the competence to conclude agreements on the trade in services and on intellectual property rights was shared between the Community and Member States.

Agreements in areas covered by the second and third pillars (the CFSP and JHA, including extradition), are intergovernmental and remain within the competence of the Member States. **Articles III-220 - III-223** set out provisions for the conclusion of international agreements which are the detailed arrangements for **Part I article 11** of the draft constitution.[162] The Union may conclude international agreements where it is necessary "in order to achieve**,** *within the framework of the Union's policies*, one of the objectives fixed by this Constitution, where there is provision for it in a binding Union legislative act or where it affects one of the Union's internal acts." Under **Article III-222** the Commission, or the Minister for Foreign Affairs, if the agreement exclusively or principally relates to the CFSP, would submit recommendations to the Council, which would authorise the opening of negotiations. The Council would nominate the negotiator or leader of the Union's negotiating team and may (para.5) "address negotiating directives to the negotiator of the agreement and may designate a special committee in consultation with which the negotiations must be held". The Council would decide on the signing and any provisional application of agreements before entry into force (para.6). The Council would conclude agreements on the proposal of the agreement negotiator and after consulting the EP, except where agreements related exclusively to the CFSP (para.7).

The Council may authorise the negotiator, possibly subject to conditions, "to approve modifications on the Union's behalf where the agreement provides for them to be adopted by a simplified procedure or by a body set up by the agreement". Under para.9 the Council would act by QMV, but unanimously when the agreement covered a field for which unanimity was required for the adoption of a Union act, for association agreements and for Union accession to the European Convention on Human Rights. Under para.10 the Council could suspend the application of an agreement and establish the positions to be adopted on the Union's behalf in a body set up by an agreement. The EP would be "immediately and fully informed at all stages of the procedure" (para.11).

Under para.12 a Member State, the EP, the Council or the Commission would be able to ask the Court of Justice for an Opinion as to whether an agreement envisaged was

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[162] Lords Select Committee on the European Union 9th Report *The Future of Europe: constitutional treaty – draft articles 1-16* 25 February 2003 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/61/61.pdf

compatible with the constitution. If the Court ruled against an agreement, it could not enter into force unless the constitution were revised.

Article III-223 provides an exception to this procedure, whereby the Council could decide unanimously on a recommendation from the European Central Bank (ECB) or the Commission following consultation with the ECB, to conclude formal agreements on a system of exchange rates for the euro in relation to non-Union currencies. The Council may also formulate general orientations for exchange rate policy, but without prejudice to the primary objective of the European System of Central Banks, which is to maintain price stability. The Council could by QMV "adopt, adjust or abandon the central rates of the euro within the exchange-rate system". Another derogation from III-222 would allow the Council, where an agreement concerned the monetary or exchange rate system between the Union and a third party, to decide the arrangements for the negotiation and the conclusion of the agreements. These arrangements would have to ensure that the Union expressed a single position.

The current Treaty provisions deal mainly with the irrevocable fixing of exchange rates in preparation for the euro.

Article III-223(4) ensures that "Without prejudice to Union competence and agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements". In other words, where the Union does not have competence, the Member States may conclude their own international agreements.

KK. Relations with international organizations and third countries and Union delegations

Articles III-224 – III-225 are concerned with the Union's relations with international organisations. The Union's representation at international organisations and conferences is currently governed by Article 18(1) TEU ("The Presidency shall represent the Union in matters coming within the common foreign and security policy"), Article 19(1) TEU ("Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the common positions in such fora.") and Article 302 TEC ("It shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialised agencies. The Commission shall also maintain such relations as are appropriate with all international organisations"). These provisions allow for separate representation of the Union and the Community.

The Constitution provides for the Union (rather than the Commission, as the Union now has legal personality) to establish "appropriate forms of cooperation" with the United Nations, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The EU Minister for Foreign Affairs would be responsible for implementing the relevant measures and would also be the authority for Union delegations in third countries.

LL. Solidarity Clause

Article III-226 sets out the detail for implementation of the solidarity clause, as defined in article I-42. Regular assessment of the threats facing the EU will be taken by the European Council. However, decisions on the arrangements for implementing the provisions of the solidarity clause will be taken by the Council of Ministers. Joint proposals for action may be submitted by the Minister for Foreign Affairs and the Commission, while assistance to a Member State in the event of a terrorist attack or natural or man-made disaster will be provided at the request of its political authorities. The Political and Security Committee (PSC) will also provide support to the Council. Article III-226 states:

> 1. On the basis of a joint proposal by the Minister for Foreign Affairs and the Commission, the Council shall adopt a European decision defining the arrangements for the implementation of the solidarity clause referred to in [Article I-42].
>
> 2. Should a Member State fall victim to a terrorist attack or a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.
>
> 3. For the purposes of this Article, the Council shall be assisted by the Political and Security Committee, with the support of the structures developed in the context of the common security and defence policy, and by the Committee provided for in [Article III-157 (ex 5, JHA)], which shall, if necessary, submit joint opinions.
>
> 4. The European Council shall regularly assess the threats facing the Union in order to enable the Union to take effective action.[163]

The establishment of a solidarity clause in the event of a terrorist attack was discussed in the immediate aftermath of 11 September 2001. It was also discussed at the Anglo-French summit at Le Touquet in February 2003. The inclusion of a solidarity clause in the draft constitutional text has, therefore, been largely welcomed. However, moves to extend the solidarity clause beyond the campaign against terrorism, in line with article III-209, have met with opposition. Many analysts consider that a solidarity clause along the lines of Article V of the Brussels Treaty could undermine the collective defence commitment of NATO.

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[163] Draft constitution article III-226

MM. Institutions

Articles III-227 – III-276 cover the functioning of the institutions. Institutional provisions and issues are discussed in detail in Library Research Paper 03/56, *The Convention on the Future of Europe: institutional reform*, 12 June 2003.

1. European Parliament

Throughout the draft Constitution the EP is given a greater role in decision-making by means of an extension of acts that would be decided by QMV (using the co-decision procedure) and by an expansion of areas in which the EU would be involved.

Article III-227(3) states that "Throughout the 2004-2009 Parliament, the composition of the European Parliament shall be as set out in the Protocol on the Representation of Citizens in the European Parliament". This Protocol, attached to Part I of the draft Constitution, allocates (in Article 1) the following seats to the current 15 Member States and the 10 accession states, as and when they become full members.

Belgium	24
Czech Republic	24
Denmark	14
Germany	99
Estonia	6
Greece	24
Spain	54
France	78
Ireland	13
Italy	78
Cyprus	6
Latvia	9
Lithuania	13
Luxembourg	6
Hungary	24
Malta	5
Netherlands	27
Austria	18
Poland	54
Portugal	24
Slovenia	7
Slovakia	14
Finland	14
Sweden	19
United Kingdom	78[164]

[164] CONV 820/1/03 REV, 27 June 2003 at http://european-convention.eu.int/docs/Treaty/cv00820-re01.en03.pdf

Most articles on the functioning of the EP contain only minor changes. **Article III-235** provides that the EP shall act by a majority of votes cast, rather than an absolute majority. Although this would make it possible for the EP to act with less than half the support of votes cast, in a Union of 25 members, it would be necessary to facilitate the passage of legislation.

2. European Council

The draft Constitution introduces a new **Article III-239** on voting in the European Council, stating:

> Where a vote is taken, any member of the European Council may also act on behalf of not more than one other member. Abstentions by members present in person or represented shall not prevent the adoption by the European Council of decisions which require unanimity.[165]

European Council voting procedures have not been laid down in the Treaty before. It usually votes by unanimity.

3. Council of Ministers

Under **Article III-240**, the European Council will "adopt by unanimity a decision establishing the rules governing the rotation of the Presidency of the Council formations". Although there would be a European President with a five-year term under the constitution, individual Council formations would function on a rotation basis. The smaller States have welcomed this, as it would compensate to some extent for the loss of the rotating Presidency.

Article 2 of the protocol attached to Part I of the draft constitution allocates weighted votes to the present and future Member States until 1 November 2009, as follows:

Belgium	12
Czech Republic	12
Denmark	7
Germany	29
Estonia	4
Greece	12
Spain	27
France	29
Ireland	7
Italy	29
Cyprus	4
Latvia	4

[165] http://european-convention.eu.int/docs/Treaty/cv00802.en03.pdf

Lithuania	7
Luxembourg	4
Hungary	12
Malta	3
Netherlands	13
Austria	10
Poland	27
Portugal	12
Slovenia	4
Slovakia	7
Finland	7
Sweden	10
United Kingdom	29

The rules governing the voting procedures are set out in the protocol, rather than in the body of the text, as at present in Article 205 TEC. The protocol requires that for the adoption of an act the Council will need at least 232 votes in favour, representing a majority of the members on a proposal from the Commission. In other cases decisions shall be adopted if there are at least 232 votes in favour, representing at least two-thirds of the members.

Article 1 of the protocol provides for an additional check on support for a proposal:

> A member of the European Council or the Council of Ministers may request that, where a decision is taken by the European Council or the Council of Ministers by a qualified majority, a check is made to ensure that the Member States comprising the qualified majority represent at least 62% of the total population of the Union. If that proves not to be the case, the decision shall not be adopted.
> 2. For subsequent accessions, the threshold referred to in paragraph (1) shall be calculated to ensure that the qualified majority threshold expressed in votes does not exceed that resulting from the table in the Declaration on the enlargement of the European Union in the Final Act of the Conference which adopted the Treaty of Nice.

4. The Commission

After 2009 the Commission will comprise 15 Commissioners and 15 associate Commissioners. **Article III-245**, which replaces Articles 213(1) and 214 TEC, provides for a five-year term of office for Commissioners and non-voting Commissioners. The requirement for Commissioners to be independent, competent, impartial and not engaged in any other occupation, remains.

5. The European Court of Justice

The European Court of Justice was founded in the 1950s as the joint court for the three Communities (European Coal and Steel, Euratom and the EEC) that were consolidated into the European Community in 1967.[166] The Court interprets EC Treaties and legislation. It has jurisdiction in disputes involving Member States, EU institutions, businesses and individuals. Although it may attempt to reconcile differences between national and EU laws, ultimately its decisions overrule those of national courts and this has tended to expand the EU's domain. In 1989 a lower court, the Court of First Instance (CFI), was set up to take on some of the Court's workload.

The ECJ operates in a number of different ways. One of its functions is to make preliminary rulings in order to avoid differences of interpretation of EU law by national courts. The concept was introduced by the founding Treaties and, without creating a hierarchy, institutionalised cooperation between the Court of Justice and the national courts.

The draft constitution would extend the general system of jurisdiction of the ECJ to the current 'third pillar'. Jurisdiction of the Court to give preliminary rulings on the validity and interpretation of decisions, framework decisions and conventions is currently governed by Article 35 TEU, which restricts the jurisdiction in a number of ways. These are not reproduced in the current draft articles.

Article 35(2) TEU allows Member States to accept the jurisdiction, by making a declaration which specifies whether requests may be made by any court or tribunal, or only those against whose decisions there is no remedy in national law. The UK is not among the Member States which have done so.

Article 35(5) TEU provides:

> 5. The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Draft **Article III-279** reflects that restriction in part, providing:

> In exercising its competences regarding the provisions of [Sections 3 and 4 of Chapter IV of Title III] concerning the area of freedom, security and justice, the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a

[166] It is sometimes confused with the European Court of Human Rights, which is not a court of the EU, but sits under the auspices of the Council of Europe.

> Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, *where such action is a matter of national law*.(emphasis added)

Draft **Article III-271** provides:

> The European Court of Justice shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of the Constitution;
> (b) the validity and interpretation of acts of the Institutions of the Union.
> (c) the interpretation of the statutes of agencies or bodies established by an act of the Union, where these statutes so provide.
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the European Court of Justice to give a ruling thereon.
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the European Court of Justice.
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the European Court of Justice shall act with the minimum of delay.

Thus Member States would no longer have any choice about accepting the jurisdiction of the Court; nor would they be able to specify which level of courts are to be permitted to refer preliminary rulings to the European Court.

The draft constitution changes the name of the European Court of First Instance to the "High Court" and under **Article III-260** the present "judicial panels" become "specialised courts".

6. The advisory bodies

Articles on the Court of Auditors, the Committee of the Regions and the Economic and Social Committee are similar to existing provisions. However, under **Article III-288** the term of office for members of the Committee of the Regions and the Economic and Social Committee will be five years, instead of the present four.

NN. Provisions common to Union institutions and bodies

1. Ordinary legislative procedure

Qualified majority voting would become the norm under the Constitution. The "ordinary legislative procedure" means co-decision requiring QMV and giving the EP an ultimate right of veto. **Article III-297** does not alter current Article 250, but **Article III-298**, which describes the co-decision procedure, clarifies the stages of the procedure with the terms 'first reading', 'second reading' and 'third reading'. In so doing, it lengthens the

description of the already complex procedure. The following table shows how the two articles compare:

Article 251 TEC	**Article III-298**
1. Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply. 2. The Commission shall submit a proposal to the European Parliament and the Council. The Council, acting by a qualified majority after obtaining the opinion of the European Parliament: — if it approves all the amendments contained in the European Parliament's opinion, may adopt the proposed act thus amended, — if the European Parliament does not propose any amendments, may adopt the proposed act, — shall otherwise adopt a common position and communicate it to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European Parliament fully of its position. If, within three months of such communication, the European Parliament: (a) approves the common position or has not taken a decision, the act in question shall be deemed to have been adopted in accordance with that common position; (b) rejects, by an absolute majority of its component members, the common position, the proposed act shall be deemed not to have been adopted; (c) proposes amendments to the common position by an absolute majority of its component members, the amended text shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments. 3. If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, the act in question shall be deemed to have been adopted in the form of the common position thus amended; however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. If the Council does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee. 4. The Conciliation Committee, which shall be composed of the Members of the Council or their representatives and an equal number of representatives of the European Parliament, shall	1. Where, pursuant to the Constitution, laws or framework laws are adopted under the ordinary legislative procedure the following provisions shall apply. 2. The Commission shall submit a proposal to the European Parliament and the Council. First reading 3. The European Parliament shall adopt its position at first reading and communicate it to the Council. 4. If the Council approves the European Parliament's position, the proposed act shall be adopted. 5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament. 6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position. Second reading 7. If, within three months of such communication, the European Parliament (a) approves the Council's position at first reading or has not taken a decision, the proposed act shall be deemed to have been adopted; (b) rejects, by an absolute majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted; (c) proposes, by an absolute majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments. 8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority, (a) approves all those amendments, the act in question shall be deemed to have been adopted; (b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee. 9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. Conciliation

have the task of reaching agreement on a joint text, by a qualified majority of the Members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. In fulfilling this task, the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament. 5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act within that period, it shall be deemed not to have been adopted. 6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted. 7. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.	10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament within six weeks of its being convened, on the basis of the positions of the Parliament and the Council at second reading. 11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. 12. If, within six weeks of its being convened, Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted. Third reading 13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two Institutions fails to approve the proposed act within that period, it shall be deemed not to have been adopted. 14. The period of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council. 15. Where, in the case specifically provided for in the Constitution, a law or framework law is submitted to the ordinary legislative procedure on the proposal of a group of Member States, paragraphs 2, 6 in fine and 9 shall not apply. The European Parliament and the Council shall communicate to the Commission the proposal of the group of Member States and their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure. The Commission may deliver an opinion on its own initiative. It may, if it deems it necessary, take part in the Conciliation Committee on the terms laid down in paragraph 11.

Under new **Articles III-129** and **III-130** the EP, Council and Commission are required to "consult each other and by common agreement make arrangements for their cooperation" by concluding "interinstitutional agreements which may be of a binding nature". The second of these articles states that the Union institutions, agencies and bodies will have "the support of an open, efficient and independent European public service" and an EU law may be adopted to ensure this.

2. Transparency

A new **Article III-301** calls on the Union's institutions to "recognise the importance of transparency in their work" and provides for them to "lay down in their rules of procedure the specific provisions for public access to documents". The EP and Council are to meet in public when deciding legislative matters and ensure publication of relevant documents.

OO. The Multiannual Financial Framework

A new Article **III-304** covers the establishment of the multiannual financial framework (which already exists). The framework will be established for at least five years and will fix ceilings on appropriations. It stipulates that, where no new framework exists, the last year of the previous framework will carry over. Finally, it states that the EP, Council and Commission will take any measure necessary to facilitate the successful completion of the procedure.

PP. The Union's Annual Budget

1. Procedure for adoption

The Budget procedure has been revised. The procedure specified in the draft constitution is as follows:

- The Budget will be set up through a European law.
- The Commission will submit the budget to both the Council and EP at the same time (it previously went to only the Council).
- The Council will forward its position on the draft budget to the EP by 1 October (was 5 October).
- If within 40 days of this communication, the EP approves the Council decision, or has not taken a decision, the budget law will be adopted (this used to be 45 days).
- If within the 40 days the EP makes amendments to the budget, the budget is sent to the Council and Commission, and the Conciliation Committee is convened. This is a new committee, established in part 5.
- If, within 10 days, the Council approves the EP's amendments, the Committee does not meet. The Committee would be composed of Council members and an equal number of representatives from the EP.
- The Committee would try to resolve differences, with any resolved budget being returned to both the Council and EP.
- If this does not resolve the differences, the EP can adopt its amendments.

Currently, the Council considers the EP's amendments, before adopting or adjusting them. The EP can then choose whether to accept the Council's changes.

2. Implementation of the Budget and Discharge

Article III-309 provides for a European law to establish the control and audit responsibilities of Member States in the implementation of the budget and the resulting responsibilities. Under **Article III-310** the Commission will submit an additional report on results achieved with particular reference to **Article III-311(3)**.

3. Common Provisions

Two new articles, **III-315 and III-316**, ensure that third party financial obligations are met and that the Presidents of the EP, Council and Commission all work to ensure the provisions of this chapter are met.