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The Treaty Establishing a Constitution for Europe: Part I

> "The new constitutional treaty satisfies the conditions laid down in the White Paper on the Intergovernmental Conference"
>
> The Prime Minister, 22 June 2004 c 1329W

This Paper looks at articles in Part I of the *Treaty Establishing a Constitution for Europe* (European Constitution), which was agreed at the Intergovernmental Conference on 18 June 2004 and published in its final, edited form on 6 August 2004.

This is one of a series of Library Papers that will consider the European Constitution, comparing new articles with existing articles in the *Treaty Establishing the European Communities* (TEC) and the *Treaty on European Union* (TEU).

Vaughne Miller

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Summary of main points

- The *Treaty Establishing a Constitution for Europe* was agreed on 18 June 2004 and a consolidated provisional text was published on 25 June 2004. The edited and adjusted text was published on 6 August.

- The Treaty is divided into four parts, comprising in Part I general principles; Part II, the Charter of Fundamental Rights; Part III, detailed provisions on policies and procedures relating to Articles in Part I; and Part IV, General and Final Provisions.

- This Paper looks at Part I, which contains the Preamble and nine Titles concerning:

- the definition and objectives of the Union: values such as democracy, rule of law, peace and security

- fundamental rights and citizenship: absence of discrimination, freedom of movement, election and consular rights

- Union and Member State competences: division of competences between the Union and the Member States

- the Union's institutions and agencies: European Parliament membership capped at 750; one Commissioner per Member State until 2009; thereafter a reduced Commission with rotating membership; European Council President for up to five years; Union Minister for Foreign Affairs

- new categories of Union acts: 'European laws', 'European framework laws', and 'European decisions' replace the present 'regulations', 'directives' and 'decisions' respectively. 'Recommendations' and 'opinions' remain unbinding

- the democratic life of the Union: equality of citizens; political parties; institutional openness and access to documents; social partners; dialogue with the Church

- the Union's finances: budgetary and financial principles; Own Resources; multi-annual financial framework

- the Union's relations with neighbouring states: how the Union will help neighbouring states to achieve peace and prosperity

- Union membership: accession; suspension of rights; voluntary withdrawal

- The European Constitution will be signed in October 2004 and will then be subject to the ratification procedures in all 25 Member States.

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- The European Constitution will be signed in October 2004 and will then be subject to the ratification procedures in all 25 Member States.

I Introduction

The Convention on the Future of Europe (the Convention) drew up a draft constitutional text, which was agreed on 18 July 2003. This was the basis for discussion at the Intergovernmental Conference (IGC), which opened in October 2003. The IGC reached agreement on the outstanding issues on 18 June 2004.

A provisional consolidated version was published as IGC document CIG 86/04 on 25 June 2004.[1] The British Government published the provisional consolidated text as Command Paper 6289 on 19 July 2004.

The text was edited by the Council of Ministers legal and linguistic experts in the 21 official languages of the EU in order to make it authentic within the meaning of Article IV-10 of the Treaty itself. The edited text of the European Constitution was published on 6 August 2004 as CIG 87/04[2] with Addendums 1 and 2[3] containing the Protocols and Declarations annexed to the Final Act of the IGC.

The formal title of the text is the *Treaty Establishing a Constitution for Europe* but it is called "the European Constitution" or "the Constitution" for these purposes. It repeals and replaces the current EC Treaties as amended by the Treaty of Nice in 2000, merging the main EC Treaty, the *Treaty Establishing the European Communities* (TEC), with the intergovernmental elements contained in the *Treaty on European Union* (TEU).

The Constitution is to be signed in Rome on 29 October 2004 and will then be ratified by all 25 Member States in accordance with their constitutional requirements. The Constitution will be re-published as a Command Paper in the UK following signature, and again after ratification as part of the European Treaty Series.

The Constitution is structured in four parts. Part I contains articles of general principle. Part II contains the Charter of Fundamental Rights, Part III the detailed provisions for Articles in Part I, and Part IV general and final provisions. One of the main technical adjustments agreed by the IGC and carried out by the Council experts was to renumber

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1 CIG 86/04 at http://ue.eu.int/igcpdf/en/04/cg00/cg00086.en04.pdf. This was based on the provisional consolidated version (CIG 50/03, 25 November 2003 at http://ue.eu.int/igcpdf/en/03/cg00/cg00050.en03.pdf), together with its corrigenda at http://ue.eu.int/cms3_applications/applications/igc/doc_register.asp?cmsid=576&num_page=3&lang=EN&content=DOC and http://ue.eu.int/cms3_applications/applications/igc/doc_register.asp?cmsid=576&num_page=4&lang=EN&content=DOC and Presidency documents CIG 81/04, 16 June 2004 at http://ue.eu.int/igcpdf/en/04/cg00/cg00081.en04.pdf and CIG 85/04, 18 June 2004, at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81109.pdf. The Protocols were published in CIG 86/04 Addendum 1, at http://ue.eu.int/igcpdf/en/04/cg00/cg00086-ad01.en04.pdf, and the Declarations in CIG 86/04 Addendum 2, at http://ue.eu.int/igcpdf/en/04/cg00/cg00086-ad02.en04.pdf.

2 CIG 87/04, 6 August 2004 at http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf

3 CIG 87/04 ADD 1, 6 August 2004 at http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf and CIG 87/04 ADD 2, 6 August 2004 at http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf

the four parts of the Constitution in a continuous numbering system, rather than numbering each part separately, as in the provisional final text.

The Constitution contains 448 articles and is 349 pages long. The British Foreign Secretary, Jack Straw, who wanted a text that would fit into his pocket,[4] now concedes that a "poacher's pocket" will be needed.[5]

This paper looks at Part I of the European Constitution, which contains the general principles governing the policy areas in which the Union will be involved. The detailed provisions deriving from these articles are contained in Part III of the Constitution. The paper up-dates Research Paper 03/60, *The draft treaty establishing a European constitution: parts I and IV* of 7 July 2003, and is one of a series of Library papers that will consider the four parts of the Constitution and certain Protocols attached to it.

The following acronyms are used.

IGC = Intergovernmental Conference
TEC = Treaty establishing the European Communities
TEU = Treaty on European Union
CFSP = Common Foreign and Security Policy
ESDP = European Security and Defence Policy
QMV = Qualified Majority Voting
OLP = Ordinary Legislative Procedure

II Preamble; Objectives and Values of the Union; Fundamental Rights and Citizenship

This section looks at the Preamble and articles on values, principles, objectives, human rights and citizenship.

A. Preamble

The Preamble contains lofty references to the historical and cultural heritage of Europe. It opens with the declaratory:

> Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and

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4 "A Constitution for Europe", *The Economist*, 11 October 2002, at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1034270166922

5 *Die Welt*, 10 July 2004, British Embassy in Berlin website, at http://www.britischebotschaft.de/en/news/items/040710.htm

> inalienable rights of the human person, democracy, equality, freedom and the rule of law, …[6]

A quotation about democracy from the Greek historian and politician, Thucydides, that had headed the Convention text, was removed on the initiative of the Irish Presidency, giving rise to objections from Greece and Cyprus.

In spite of efforts by the Vatican and the governments of several Roman Catholic Member States, headed by Poland, the Preamble makes no reference to Europe's Christian heritage. The Government's view on this issue was that, although it recognised Europe's Judeo-Christian heritage "as part of our history", it would not advise going down that road "because countries have different views about the nature of that heritage".[7]

Europe is not only "reunited", as under the earlier Convention text, but "reunited after bitter experiences", i.e. two World Wars. There is a general aim of peace, unity and a common destiny, but with respect for diversity. "United in diversity" becomes the Union motto under **Article I-8** (see also below). The Preamble ends by expressing gratitude to the Convention on the Future of Europe for drawing up the draft text on which the Constitution is based.

The British Government found the draft preamble 'nice'.[8] However, it has been criticised over its general content and for the absence of a reference to Christianity. Andrew Duff, the Liberal Democrat MEP and Convention member, found the draft Preamble "too flowery" and possibly "erring on the side of the pretentious".[9] He commented: "The final self-congratulatory sentence is absurd - we are but doing our job".[10]

An article in the *Economist* was also critical:

> Unfortunately, where the Founding Fathers came up with a single, stirring sentence, the Giscard preamble rambles on for six paragraphs. […] The preamble continues with some utterly forgettable sentiments about civilisation, culture, prosperity and other excellent ideas, and ends with a vote of thanks to none other than Mr Giscard d'Estaing and his colleagues. That this emerged above all as a reaction to two world wars is only tacitly acknowledged in a sideways reference to the determination of Europeans to "transcend their ancient divisions".

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6 CIG 87/04, 6 August 2004, at http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf

7 Jack Straw, Standing Committee on the IGC, 10 November 2003, c 51 at http://www.publications.parliament.uk/pa/cm200203/cmstand/other/st031110/31110s02.htm

8 Ibid c 50

9 Press Notice 28 May 2003 at http://www.andrewduffmep.org/Press%20Releases/030528PR.html

10 Ibid

> […] The best suggestion in Naples came from the Finnish delegation. They proposed putting the entire preamble in the bin.[11]

The Union's objectives are presently set out in Articles 2 TEU and 3 TEC. The aim of peace is 'declared' in the Preambles to the TEC and TEU and is contained in Articles relating to the Common Foreign and Security Policy (CFSP). The Preamble to the TEU states that the States Parties are: "Resolved to implement a common foreign and security policy […], thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world", and the TEC Preamble states that the States Parties are: "Resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts". Many Convention members thought peace deserved a higher place in the Union's aspirations that would reflect the post-war spirit in which the then European Economic Community was conceived.

The present Treaties do not refer to the 'well-being' of citizens but to the aim of "raising […] the standard of living and quality of life" (Article 2 TEC). They already provide for an area of freedom, security and justice in Article 2(4) TEU, a single market (called "common market" in Article 2 TEC), sustainable development (Preamble TEU, Article 2 TEU and Article 2 TEC, Article 6 TEC), the promotion of scientific and technological development (Articles 157, 163-166 TEC), social protection (Article 2 TEC), fair trade (Preamble and Article 82 TEC), environmental protection (Preamble TEU, Articles 2, 6, 95, Title XIX TEC), equality (Articles 2, 3, 137, 141 TEC), social cohesion (Article 2 TEU, Article 43 TEU, Title XVII TEU, Article 2 TEC, Article 16 TEC etc), solidarity (Preamble and Articles 1, 11, 23 TEU, Preamble and Article 2 TEC), the protection of human rights (Preamble, Articles 6, 11 TEU, 177 TEC), respect for linguistic and cultural diversity (Articles 149 and 151 TEC), and respect for the principles contained in the UN Charter (Article 11 CFSP and Preamble TEC).

B. Articles I-1 – I-5

The Constitution articles in Title 1, *Definition and Objectives of the Union*, correspond roughly with Articles in the 'Common Provisions' and 'Principles' in the TEU and TEC respectively. **Article I-1** does not refer to the aim of "ever closer union" contained in the present 'Common Provisions', but to the desire "to build a common future". The Member States confer competences (powers) on the Union and the Union coordinates policies in order to achieve the objectives that the Member States have in common. The EU's ability to act and limitations on its competence are already contained in Article 5 TEC, which states that "The Community shall act within the limits conferred upon it by this Treaty and of the objectives assigned to it therein". The Treaties are the basis for

[11] *The Economist.com* 4 December 2003, "God meets the lawyers"

Community competence and there is no suggestion of a 'competence competence' (i.e. the responsibility for deciding who has competence in an area).[12]

The reference in **Article I-1(2)** to membership of the Union is contained in current Article 49 TEU, which states: "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union". Article 6(1) TEU sets out the principles on which the Union is founded ("liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law", the rights guaranteed by the European Convention on Human Rights and "respect for the national identities of the Member States"). This Constitution article contains one of the Constitution's many requirements for solidarity among its Members in making Union membership conditional upon respect for its values and the commitment to "promoting them together".

Human rights elements currently found in the TEC Preamble are contained in **Article I-2** on the Union's values. In this article (and in **Articles III-116** and **III-118**) greater emphasis is placed on the rights of minorities and on promoting equality between men and women than under either the Convention text or the present EC Treaty. In addition, there is a Declaration relating to Article III-2 on the need to combat all kinds of domestic violence, to take measures to punish such criminal acts and protect the victims.[13]

Article I-3 makes the Union's own values (e.g. respect for human rights, democracy, the rule of law, sustainable development) the basis for its external relations. The Constitution gives special emphasis to "mutual respect among peoples", the eradication of poverty, respect for children's rights and the aim of a "social market economy". The last of these was the subject of a debate in the Standing Committee on the IGC in October 2003, when Lord Blackwell asked:

> At the Council, was there any discussion of the EU objectives set out in the opening clauses of the draft constitution? Could the Minister clarify the legal significance of those objectives, which include creating a social market economy? If the EU passed a law that contravened, or was thought to contravene, those objectives, would that law be judicially challengeable? Also, if a national Government attempted to pass a law that contravened those objectives, would that be challenged as an illegal Act?[14]

The Minister for Europe, Denis MacShane, replied:

> I suppose that if a Government passed a law legalising discrimination, it might be challengeable, because it would be against article 3.2. My reading of the article is

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12 From the German *Kompetenz-Kompetenz*

13 CIG 87/04, 6 August 2004, at http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf

14 Standing Committee on the IGC, 20 October 2003, c 14 at http://www.publications.parliament.uk/pa/cm200203/cmstand/other/st031020/31020s04.htm

> that it makes general statements that all liberal-market, rule-of-law democracies would seek to uphold.[15]

The attainment of price stability is added to the Union's objectives under **Article I-3(3)**.

Article I-4 guarantees the four freedoms (movement of persons, goods, services and capital) and prohibits any discrimination on grounds of nationality. The four freedoms are the basis for the internal market, the path towards which is established under Article 3 TEC. Provisions on the four freedoms are contained in Titles I and III TEC, 'Community Policies'. The prohibition on grounds of nationality is contained in Article 12 TEC, which states that within the scope of the Treaty's application, "discrimination on grounds of nationality shall be prohibited".

Article I-5 on relations between the Union and Member States ensures respect for the national identities of the Member States. This is already contained in Article 6 TEU, which states: "The Union shall respect the national identities of its Member States". However, the Constitution expands on this to include regional and local structures, and respect for State provisions to maintain internal law, order and security.

The maintenance of internal law and order is an element of Article 33 TEU, which states that Title VI TEU (Provisions on Police and Judicial Cooperation in Criminal Matters) "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". Article 35 TEU further limits EU action and the jurisdiction of the European Court of Justice (ECJ) in this context, stating: "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". In those former Third Pillar areas that were moved to the First (Community) Pillar under the Treaty of Amsterdam in 1997, there are further reminders that internal law and order are the responsibility of the Member States.

The expectation of "sincere cooperation" (changed from "loyal cooperation" in the provisional consolidated text) under **Article I-5(2)** is not new to the Treaties, although it is now expressed in the Constitution as a guiding principle. Article 11 TEU (CFSP) currently states: "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity". Article 1 TEU obliges the Union to act with "consistency and solidarity". Article 23 TEU requires that Member States: "In a spirit of mutual solidarity", shall not do anything likely to conflict with or impede Union action if they decide to abstain from participation in a CFSP measure.

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[15] Ibid

The general duty to ensure the "territorial integrity of the State" is new, although Article 11 TEU (CFSP) on the objectives of the CFSP, includes safeguarding the "independence and integrity of the Union in conformity with the principles of the United Nations Charter". The new provision could have special resonance for Gibraltar, a British Overseas Territory claimed by Spain.

The requirement in **Article I-5(2)** for Member States to take all appropriate measures to fulfil their obligations under the Constitution is contained in Article 10 TEC.

C. The Primacy Debate

Article I-6 (previously I-10 and I-5a) refers explicitly to the primacy of Union law over national law.[16] It states simply: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".[17] A Declaration annexed to the Final Act of the IGC states: "The Conference notes that Article I-6 reflects existing case law of the Court of Justice of the European Communities and of the Court of First Instance".[18]

This is the first time that the primacy (some prefer supremacy) of EC law is given an explicit legal and constitutional basis,[19] although the principle was established in the early case-law of the ECJ, notably in *Costa v ENEL*.[20] On this occasion the ECJ ruled:

> […] in contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal system of the member States and which their courts are bound to apply. […] The transfer by the States from their domestic legal systems to the Community legal systems of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the

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16 The primacy issue is also discussed in Standard Note SN/IA/3087, *The Draft European Constitution: the primacy debate*, 11 June 2004

17 http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf

18 http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf

19 The 1997 Treaty of Amsterdam came close to stating that Community law has primacy over national law. Its Protocol on the Application of the Principles of Subsidiarity and Proportionality maintains that subsidiarity "shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law". These principles include the primacy of EC law.

20 The principle has also been enshrined in some Member States' constitutions.

> Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[21]

The principle of primacy was accepted by the Labour Government of Harold Wilson long before the UK joined the EEC. The Government White Paper published in 1967, *Legal and Constitutional Implications of United Kingdom Membership of the European Communities*, stated:

> 23. The Community law having direct internal effect is designed to take precedence over the domestic law of the Member States. From this it follows that the legislation of the Parliament of the United Kingdom giving effect to that law would have to do so in such a way as to override existing national law so far as inconsistent with it. This result need not be left to implication, and it would be open to Parliament to enact from time to time any necessary consequential amendments or repeals. It would also follow that within the fields occupied by the Community law Parliament would have to refrain from passing fresh legislation inconsistent with that law as for the time being in force. This would not involve any constitutional innovation. Many of our treaty obligations already impose such restraints – for example, the Charter of the United Nations, the European Convention on Human Rights and GATT. [22]

The White Paper went on to consider the role of national courts and the ECJ in interpreting EC law, stating that, by means of the Court's preliminary rulings, "provisions of Community law raising difficulties in their application to our legal system would in time become clarified by decisions of the European Court".

Consequent upon the ENEL and other similar conclusions, EC law applies in the Member States as part of the distinctive EC/EU legal system, "not just in accordance with the norms by which international law is accommodated within each legal system".[23] Mr MacShane pointed to the obligations of nations under international law to respect international treaties:

> If we sign them, we have an obligation to honour and abide by them. *Pacta sunt servanda* is the old Latin term, and it is honoured and enforced by tribunals and courts. There is no other way in which we can have relationships with other countries in treaty form. When the constitutional treaty is signed, it will be another European treaty.[24]

The significance of the statement of primacy in the Constitution, in view of the established principle of EC legal supremacy, has been a matter of dispute. The British Government has consistently maintained that the Constitution does not fundamentally

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21 *Costa v ENEL* [1964] ECR 585, and confirmed in *Simmenthal*, 1978, *Factortame*, 1990, and *Francovich*, 1991.

22 Cmnd. 3301, May 1967

23 *Oppenheim's International Law*, ed. R. Jennings and A Watts, Vol. 2 pg 70

24 HC Deb 10 December 2003, c 1162 at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/cm031210/debtext/31210-30.htm

change the relationship between the EU and the Member States in this respect.[25] However, there has been parliamentary and public concern about the implications of the primacy article for national sovereignty. In a Lords debate on the Convention on the Future of Europe in April 2003, Lord Blackwell distinguished between the transfer of sovereignty in the (then) draft constitution, compared with the current position under the EC Treaties:

> Under the constitution, the sovereign powers of the European Union would be vested in European institutions, which are given clear legal supremacy over the laws and sovereignty of the member states. We would all, for the first time, become legally bound as direct citizens of that legal entity. We would be legal citizens not only as an honorary title, in the manner of Maastricht, but with rights and obligations direct to the European institutions rather than through our national institutions.[26]

In an exchange on 16 September 2003 David Heathcoat-Amory[27] distinguished between primacy under the present EC Treaties and the draft constitution:

> Article 10 is not just about the primacy of EU law, but the primacy of the constitution. The right hon. Gentleman cannot pretend that the problem is inherited from a previous treaty, because we have not hitherto—before what is currently proposed—had a constitution. How does the Foreign Secretary square the expressed and asserted primacy of the constitution over member state law with the supremacy of the House?

The Foreign Secretary replied that this was inherent in EU membership and he did not distinguish between 'constitution' and 'treaty'in this context:

> The constitution is no more than a treaty labelled "constitution". It is a treaty that we shall ratify in the same way as any other treaty. […] This House, along with the other place, decides to enact legislation through which we join an international organisation. In doing so, we accept key obligations for as long as we remain in membership. If we decide to withdraw, by statute, we withdraw from those obligations. While we are members of the organisation, we accept the obligations.[28]

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25 See White Paper, Cm 5934 p. 24 at http://www.fco.gov.uk/Files/kfile/FoE_A%20Draft%20Constitution%20for%20the%20European%20Union.pdf

26 HL Deb 2 April 2003 c 1320

27 Mr Heathcoat-Amory was one of the UK's parliamentary representatives to the Convention on the Future of Europe which drew up the draft constitution.

28 Debate on the EU Constitution, 16 September 2003, cc 794-6, at http://pubs1.tso.parliament.uk/pa/cm200203/cmhansrd/cm030916/debindx/30916-x.htm

Bill Cash pursued the issue of primacy at the Standing Committee on the IGC in October 2003. Mr MacShane refuted his argument that the Constitution meant a different relationship with Member States than the EC Treaties:

> The notion that there is anything new in the reference to the primacy of EU law is unsustainable. It is a long-established principle of international law that the state may not plead its national law to escape its obligations under international law, including its treaty obligations. The Permanent Court of Arbitration, the Permanent Court of International Justice and the International Court of Justice have produced a consistent jurisprudence upholding that principle, which is also clearly recognised in academic writings. [Interruption.] The hon. Member for Stone (Mr. Cash) mutters "Nonsense." He must have that debate with those authorities. It is a matter of UK constitutional law that international treaties have effect in national law to the extent that they have been implemented in national law.
> […]
> Britain will uphold its treaty obligations. Pacta sunt servanda is an old phrase, and an important principle. If Britain enters into a solemn treaty with 24 other nation states, I hope that it will never resile from or renege on those treaty obligations. If it does, the notion of honour will be stripped from all our international legal obligations.[29]

Until now primacy has been based on a principle confirmed by the ECJ, whereas Article I-6 would make it part of the Treaty. The Government maintains that, as the Constitution (and therefore the primacy Article) can only come into effect by means of an Act of Parliament making it an EU treaty and the effect of that treaty in domestic law would still be determined by Parliament, Article I-6 would therefore not divest Parliament of its legislative sovereignty. Parliament would retain its power to legislate contrary to the UK's Treaty obligations, although this could result in a ruling of incompatibility by the ECJ and the UK would be obliged to remedy the situation.[30]

Bill Cash's *Sovereignty of Parliament (European Communities) Bill*, which was presented on 22 March 2004, purported to:

> Provide that Community treaties, Community instruments and Community obligations shall only be binding in legal proceedings in the United Kingdom insofar as they do not conflict with a subsequent, expressly inconsistent enactment of the Parliament of the United Kingdom.[31]

In other words, as Mr Cash said in a Westminster Hall debate on 24 March 2004, it aimed to ensure that Parliament prescribed and the courts backed Parliament. In his view the

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29 Standing Committee on the IGC, 20 October 2003 at http://www.publications.parliament.uk/pa/cm200203/cmstand/other/st031020/31020s02.htm

30 HC Deb 15 December 2003 c 732W and HC Deb 24 March 2004 cc 310-318WH

31 http://pubs1.tso.parliament.uk/pa/cm200304/cmbills/076/04076.i-i.html

primacy article was more significant than the Government had acknowledged and gave the European Court of Justice new, superior powers over national courts.

> The European Court of Justice, with its ever-increasing arrogation of judge-made law, will, in effect, also have power to strike down Acts of the United Kingdom Parliament that are inconsistent with the vast range of the constitution. […] If the constitution goes through, the situation against national laws will be damagingly aggravated. The practical consequences of the current role of the European Court of Justice are that if it declares an infringement, our courts are bound to give effect to that judgment under section 2 of the 1972 Act. […]. If we do not reassert the obligation of the UK courts to give effect to UK legislation subsequent to and in conflict with European laws, including the European constitution […], [o]ur parliamentary laws and the Westminster law-making system will be deemed to have been absorbed in practice, as events move forward, by the constitution and the assertions of the European cause. […]. The claims made by the European Court in Costa *v.* ENEL and the Internationale Handelgesellschaft and other cases, and the related line of European Court cases in relation to what is called *Kompetenz-Kompetenz*, cannot be underestimated, as the Foreign Secretary sought to do, especially in the light of article I-10(1) of the proposed constitution […]. Furthermore, there is a simple reality: the ever-pervasive and encroaching role of the European Court of Justice, now to be enhanced by the European constitution. It is a case of "Now you see it, now you don't"—it is a world of magical mirrors, engulfed in smoke. It is disingenuous and naive—I would say downright dishonest—to suggest that EU constitutional boundaries have been reached […]. We only have to consider the 1970 White Paper and the evolution of the EU over the past 35 years to get the point. We need to ensure that our courts, without a written constitution, do not stray in the wrong direction. If the Government were sincere in their declarations that they do not want a superstate, they would commit themselves to the proposals that I have outlined.

The Foreign Office Minister, Mike O'Brien, replied to Mr Cash's arguments as follows:

> First, the principle of the primacy of EU law is […] well established […]. The principle has been accepted since at least 1964, when the European Court of Justice ruled in the case of Costa v. ENEL […]. That is what Britain signed up to when the Conservative Government of the day joined the then European Community. This House gave effect to the principle of the primacy of European Community law through the European Communities Act 1972. […] our position has been entirely clear, and we have held it throughout. Parliament already has the power to legislate contrary to our treaty obligations, but we should be in no doubt about what that would mean: withdrawal from the EU, which would be a disaster for the UK.
>
> As far as we are concerned, the draft constitutional treaty explicitly states the principle of primacy, and that makes those on the Opposition Benches nervous. One of the purposes of the treaty is to lay out clearly EU principles and our relationship with the EU. […]
>
> The primacy of EU law is a well-established principle that has sat alongside the principle of sovereignty of this Parliament for 30 years. Nothing in the proposed

> treaty will change that. Most lawyers will be familiar—I am sure that the hon. Gentleman is—with Lord Denning's view expressed in his judgment in the Bulmer v. Bollinger case in 1974. He said:
>
> "When we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law . . . The governing provision is section 2 (1) of the European Communities Act 1972 . . . The statue is expressed in forthright terms which are absolute and all-embracing."
> […]
> In order to give the provisions of the new treaty effect in UK law, they will have to be passed by Parliament. If Parliament so chooses, it can refuse to pass this legislation. Indeed, it could repeal the European Communities Act 1972. As Lord Denning also said in the case of Macarthys Ltd *v.* Smith, it is always within Parliament's power to legislate contrary to the UK's treaty obligations, but we must be clear that to pursue that course would be to breach our treaty obligations, and we would be signalling our withdrawal from the EU.[32]

On 30 March 2004 Richard Shepherd, a Conservative 'Eurosceptic', asked whether the primacy article would allow the ECJ to "strike down an Act of Parliament in conflict with European law or the European Constitution". Mr Straw replied:

> That power has existed within the treaties since we joined the European Union in 1972, and it is reflected in the treaties that gave primacy to European law over United Kingdom domestic law. It is reflected in existing decisions of the European Court of Justice, and it is reflected in section 2 of the European Communities Act 1972, which was pushed through the House by the Conservative party. Article 10 of the draft constitution, which deals with the primacy of European law, has been confirmed and will be confirmed in a declaration as doing no more than restating the existing state of the law.[33]

In the debate on a referendum to approve the EU constitution on 30 March 2004 Mr Straw confirmed UK acceptance of the principle of primacy when it joined the EEC:

> Section 2 of the 1972 Act makes absolutely explicit this Parliament's decision to recognise European law as supreme. That was a condition of our entry to the European Union. We could withdraw from that if we wanted […] but we cannot have our cake and eat it. […] Our judgment in the Foreign Office, and that of the

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[32] HC Deb 24 March cc 310-318WH at http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmhansrd/cm040324/halltext/40324h05.htm

[33] HC Deb 30 March 2004 c 1416 at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040330/debtext/40330-04.htm#40330-04_sbhd0. In fact, the ECJ does not "strike down" national laws, but it has ruled that they are incompatible with EC law. The Member State is then obliged to remedy the situation.

> Council's legal adviser, is that article 1(10) and the declaration alongside it mean that the status of primacy will not be altered.[34]

In Mr MacShane's view the roles of the ECJ and the national courts would not be altered in any way by the Constitution:

> As now, under the new Treaty, the Court of Justice will ensure respect for the law in the interpretation and application of the Constitution in cases that fall within its jurisdiction. Similarly, as now, national courts will apply the Treaty as interpreted by the Court of Justice.[35]

In March 2004 the House of Lords Select Committee on the European Union published a report on *The Future Role of the European Court of Justice*, which looked among other things at the implications of (then) draft Article I-10. Below is an edited summary of the views expressed by academics in reply to the question: **"**Does the draft Treaty merely codify the principle of the primacy of Community Law?"

> ESSENTIALLY A CODIFICATION
> 34. In Professor Schermers' (University of Leiden) view, Article I-10(1) did not extend the doctrine of primacy of Community law. It codified what the Court of Justice had held as long ago as 1964 in the case of *Costa v ENEL*,[36] namely that Community law had precedence over the national laws of the Member States (p 95). A number of other witnesses also took the view that Article I-10 merely embodied the existing case law of the Court. Professor Weatherill concluded that it "therefore appears to change nothing" (p 105). Professor Papier welcomed the fact that Article I-10(1) made clear that primacy only applies in favour of Community law that has been adopted in the exercise of the competences assigned to the Union's institutions (p 88).
> […]
> EXTENSION TO SECOND AND THIRD PILLARS
> 37. The existing doctrine of primacy is a doctrine of Community (not Union) law. It does not extend to Title V TEU (the Common Foreign and Security Policy (CFSP)—"the second pillar") or Title VI TEU (Police and Judicial Cooperation in Criminal Matters—"the third pillar").
> 38. Professor Arnull contended that because the draft Constitution would abolish the Union's pillar structure, the effect of Article I-10(1) would be to make the doctrine of primacy applicable across the entire range of the Union's activities. However, while matters currently falling under the third pillar would for the most part be brought within the jurisdiction of the Court, most of the provisions on the CFSP would remain outside the jurisdiction of the Court. (The extent of the Court's jurisdiction over CFSP is considered under question 4 below.) It was

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34 HC Deb 30 March 2004 c 1498 at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040330/debtext/40330-27.htm#40330-27_spnew5

35 HC Deb 1 July 2004 c430W

36 Case 6/64, [1964] ECR 585

therefore unclear whether a national court would be able to ask the Court for guidance on the effect of Article I-10(1) in relation to CFSP matters. If national courts were left to their own devices, there would inevitably be divergence between Member States. Professor Arnull believed the solution to this problem to be either: (a) to delete the provision excluding the CFSP from the jurisdiction of the Court, or (b) to exclude the CFSP from Article I-10(1). He said: "In a Union which will include the rule of law among the values on which it is based, the former would seem preferable. Regrettably, the latter is likely to prove more politically acceptable" (p 57).

39. Professor Denza (University College, London) identified a more fundamental concern: extending the doctrine of primacy to the CFSP would cause "a significant shift in the balance of power between the Union and the Member States towards the Union". In her view, the Government appeared to be ignoring the extension of primacy issue and had misrepresented the position.[37] Further, Professor Denza believed that it could be argued that the formalising and extension of the doctrine of primacy, when taken together with a number of other specific changes to the rules governing the CFSP, were "sufficiently fundamental to call into question the ultimate independence of the Member States in the conduct of their foreign policy". In international law, loss of such independence would imply loss of the separate sovereign status of the Member States. Professor Denza noted that the draft Treaty was not expressly presented as producing such a fundamental effect and it contained other provisions pointing to the continuance of the Member States as separate sovereign entities. Nonetheless, in her view, it would be reasonable to expect the IGC to determine and make clear the future legal nature of the Union. If the matter were left unclear she thought it would likely fall to be resolved by national constitutional courts and by the Court of Justice (p 70).

INTERACTION WITH NATIONAL CONSTITUTIONAL RULES

40. We asked, in particular, whether, the Constitution and laws of the Union would take precedence over constitutional rules of a Member State.

41. In the *Internationale Handelsgesellschaft* case,[38] the Court stated that the legal status of a conflicting national measure was not relevant to the question whether Community law takes precedence: 'the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.' And the Court made clear in *Simmenthal*[39] that EC law takes precedence over Member States' constitutional provisions. Advocate General Jacobs said: "From the perspective of Community

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[37] The Government had asserted that supremacy of EU law over domestic law ' … has been a fact since the Common Market began and has been in UK law since we joined 30 years ago.' See letter from the Minister for Europe to The Times, dated 6 October 2003. On p. 12 of its White Paper, The British Approach to the European Union InterGovernmental Conference, it is stated that 'primacy is consistent with the principle of international law whereby a State may not plead its national law obligations to escape its international law obligations …' but Professor Denza said that there was no mention of the differences in the principle as applied in international law and in Community law (p 70).

[38] Case 11/70, [1970] ECR 1125

[39] Case 106/77, [1978] ECR 629

law, it has always been the case that Community law prevails even over national constitutions. That does have to be the case as a matter of practice because otherwise the primacy of Community law would depend upon what happens to be included in the particular national constitution. National constitutions do vary widely" (Q 120). But, as Professor Dutheil de la Rochère and Ms Iliopoulou (University of Paris II) reminded us, national supreme/constitutional courts do not necessarily share the same view as the Court on this matter, although they have generally avoided direct confrontation (p 73).

42. As to the effect of Article I-10(1), Professor Pernice (Humboldt University, Berlin) said: "Article I-10(1) does not change, but confirms the law according to the established jurisprudence of the ECJ. The Constitution and the laws of the Union take precedence over constitutional rules of a Member State. This principle—though certainly not recognised by all supreme national Courts—follows from the principle of equality before the law, and it is the very condition for the recognition, validity and functioning of the European legal system" (p 90). Professor Tridimas said that the text of Article 10(1) was "somewhat ambiguous since "law of the Member States" could be taken to mean ordinary law rather than constitutional norms". But his view was that under Article 10(1) Union law would prevail over national constitutions (p 102).

43. That view was not universally held. Professor Papier, President of the *Bundesverfassungsgericht*, did not believe that the doctrine of primacy, Article I-10(1), could override "the inviolable basic structure" of the German Constitution. Dr Papier said: "In Germany the transfer of sovereign rights to international institutions, and also the European Union, is restricted by a guarantee of identity (Article 23.1 sentence 3 and Article 79.3 of the Basic Law (*Grundgesetz*)). A violation of this core of constitutional provisions, which also include, for instance, democracy and respect for human dignity, could therefore be identified by the Federal Constitutional Court as an exercise of supranational sovereign power that is not covered by the Community Treaties and be declared inapplicable in Germany" (p 88).

44. Professor Rasmussen (University of Copenhagen) argued strongly that Danish constitutional law took precedence over Union law: "This has to be so since the Danish Constitution withholds from the Danish institutions any power to issue binding rules that, if in conflict with some constitutional provision, takes precedence over the latter. Section 20 cannot authorize Union law to override Danish constitutional law" (p 94). Professor Biernat (Jagiellonian University, Cracow) pointed to the debate surrounding this issue in Poland. In his view, although EU law had no formal primacy over the Constitution of Poland, the Polish authorities, including the Constitutional Court, should refrain from stressing the supremacy of the Polish Constitution (p 68).

45. Professor Duthiel de la Rochère and Ms Iliopoulou pointed out that Article I-5(1) specifically required the Union to "respect the national identities of Member States, inherent in their fundamental structures, political and constitutional …". They thought that the idea underpinning this Article was "difficult to reconcile with a demand of primacy of EU law over national constitutional rule" (p 73).

The Committee noted in paragraph 51 that the primacy article made clear that primacy only applied to the Constitution and to Union law adopted in the exercise of the competences assigned to the Union's institutions, but thought there remained some

uncertainty as to the scope of the application of the principle. Commenting on the Declaration on the primacy article, the Committee concluded:

> 53. The declaration would be helpful to the extent that it would suggest that Article 10 is merely a codification and is not intended to make any change. The problem is that it presupposes that there is currently no uncertainty as to the meaning and extent of the doctrine of primacy. Second, the declaration does not address the issue of the formal collapse of the three pillars. Primacy is a first pillar doctrine which Article 10(1) would appear to apply generally across all Union business, including the CFSP. **More clarity is needed to address these two concerns.**[40]

The Constitution does not provide more clarity on these points and the potential effects of this Article remain, for the time being, unknowable. However, in so far as UK treaty-making does not permit self-executing treaties, UK legislative sovereignty remains intact: the Constitution, and therefore the primacy article, can only come into effect by an Act of Parliament making it an EU treaty.

Professor John McEldowney, in a Memorandum to the Lords EU Committee 9th Report, *The Draft Constitutional Treaty for the European Union*, thought that the effects of the primacy article on judicial psychology might be a significant factor. Its formulation, giving the Constitution legal authority and primacy,

> … reinforces the argument that interpreting the draft Constitution will be a matter of law- with the subsequent notion that the courts will make every attempt to give primacy to that law and by its nature will seek to uphold the Constitution when there are doubts and uncertainties. This gives rise to the possibility of the development of various Constitutional presumptions as a means of interpreting the European Constitution.
> 3.6 Constitutional interpretation by judges has a long history distinguishing it from ordinary statutory interpretation.[41] Generally a more dynamic or flexible approach is adopted, most likely employing other jurisprudence from other countries and systems.[42] This may give rise to a degree of judicial incremental law making commensurate with the organic growth of the constitution itself that has the potential for developing constitutional rights, immunities and powers beyond the literal meaning of the words adopted. The potential for a possible jump in judicial interpretation towards a more purposive approach to legal rights under the constitution should not be under-estimated.[43]

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40 HL 47, *The Future Role of the European Court of Justice* 2003-4 at http://pubs1.tso.parliament.uk/pa/ld200304/ldselect/ldeucom/47/4706.htm#note7

41 FN 99, "Lord Sankey in Edwards v Attorney-General for Canada [1930] AC 124 quoted in H. Calvert, Constitutional Law in Northern Ireland , Belfast, 1968, NILQ,p.121"

42 FN 100, "See in the Northern Ireland context under the Government of Ireland Act 1920, Belfast Corporation v OD. Cars [1960] N.I. 60"

43 Professor John McEldowney, University of Warwick, at http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldconst/168/16809.htm

D. The Union as a Legal Entity

Article I-7 stipulates that the Union shall have legal personality. At present only the European Community has legal personality under Article 281 TEC.[44] Article 282 TEC further stipulates:

> In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission.

That is to say, only the Community, represented by the Commission, currently has rights and obligations under international law. The Commission negotiates international agreements, such as trade and commercial agreements, on behalf of the Community with the authorisation of the Council.

The Constitution would merge the three 'pillars' of the Union (the first, or 'Community' pillar, the second, CFSP, pillar and the third, Justice and Home Affairs, pillar) into the one Union pillar, thereby removing the need for a different legal status for any part of the Union. This could have implications for the agreements and treaties that the Community has already concluded and for those that the Union will conclude with non-EU states. The rights and obligations of the European Communities which arose before the entry into force of the Constitution would be transferred to the Union.

The Convention Working Group on legal personality, supported by the EP, Council and Commission, was in favour of a single legal personality, mainly "for reasons of effectiveness and legal certainty, as well as for reasons of transparency and a higher profile for the Union" both in relation to third States and to European citizens, who, the Group thought, "would thus be encouraged to identify more with the Union."[45]

The British Government supported the granting of legal personality, but with some reservations. Denis MacShane said in May 2003:

> The explicit grant of legal personality to the European Union would have the advantage of clarity and simplicity. But the Government would only accept it on the basis that the distinct arrangements for the Common Foreign and Security

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[44] And corresponding articles in the Euratom Treaty and the former Coal and Steel Community Treaty

[45] CONV 305/02, Final Report of Working Group III on Legal Personality, 1 October 2002, at http://register.consilium.eu.int/pdf/en/02/cv00/00305en2.pdf

> Policy and aspects of Justice and Home Affairs were fully safeguarded, along with the existing arrangements for representation in international bodies.[46]

The Government would not accept, for instance, "any proposal that meant giving up its permanent membership of the UN Security Council and the rights which go with that".[47]

In a parliamentary reply in March 2003 Baroness Symons said that legal personality "would not necessarily mean a huge extension of powers" if the Government's safeguards were introduced. Lord Howell of Guildford thought the Government should 'reveal' to Parliament and the general public "that the rather innocent-sounding proposal […] to grant legal personality is in fact of far greater significance than people have been told."[48] He continued:

> Is it not a fact that the legal personality provision gives the Union the right to conclude treaties and to do so without any need for ratification by the nation states? That is a considerable advance in centralisation on past arrangements. It also gives the Union itself, as an entity, the right to become a member of international organisations including the United Nations. Ought we not to be told a little more about these ideas before Ministers say that they have agreed them?[49]

Baroness Symons replied:

> […] Conferring a single personality on the Union would give it the capacity to act within the legal system distinctly from the states that are its members. The noble Lord is quite right. In practice that would mean that the EU would have the capacity to make treaties, to sue and be sued, and to become a member of international organisations to the extent that the rules of those international organisations allow. I hope that I have made clear the position which we would take on our own membership of some of the international organisations where we would want to preserve our position. We are currently making agreements through the European Union, certainly where there are competencies on issues such as trade, with a number of countries.[50]

Lord Maclennan of Rogart, the UK's Liberal Democrat member of the Convention, said that legal opinion was almost unanimous in holding "that the European Union already had legal personality". This, he thought, was not the issue; rather,

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46 HC Deb 6 May 2003, cc 566-7W

47 Government White Paper, *A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference* Cm 5934, September 2003, at http://www.fco.gov.uk/Files/KFile/FoE_IGC_Paper_cm5934_sm.pdf

48 HC Deb 20 March 2003, cc 375-8 at http://pubs1.tso.parliament.uk/pa/ld200203/ldhansrd/vo030320/text/30320-10.htm#30320-10_head0

49 Ibid

50 Ibid

> that if the Union were to operate in future under one treaty, bringing together with different forms and procedures the operation of the foreign policy aspect with the community aspects, it made sense openly to attribute what was already commonly accepted to be the case.[51]

Lord Lester of Herne Hill welcomed the change, as it would make it easier for the Union to accede to the European Convention on Human Rights

> which would mean that Eurocrats would be directly bound if they abused their powers and that there would be effective remedies for the citizens of this country before the Strasbourg court against the Eurocrats of the European Union?

Baroness Symons agreed.

Article I-8, which was transferred from Part IV of the draft constitution, establishes the Union flag, anthem, motto, currency and a Europe Day. There is no such article in the present Treaty. Although these traditional symbols of nationhood have been acknowledged for some time,[52] their inclusion in the Constitution indicates to some Eurosceptics that the EU will become the "United States of Europe".

E. The Charter of Fundamental Rights

Article I-9, on fundamental rights, states that the Union shall respect the Charter of Fundamental Rights, which is incorporated into Part II of the Constitution. Incorporation of the Charter was a contentious issue for the UK, although most Convention members were in favour of giving it an enhanced status through incorporation, to be complemented by Union accession to the Council of Europe's *European Convention on Human Rights* (ECHR). Article 6(2) TEU states that the Union "shall respect fundamental rights, as guaranteed by the European Convention" and "as they result from the constitutional traditions common to the Member States, as general principles of Community law".[53] This triple guarantee of human rights observance has given rise to criticism on the grounds that it could mean duplication and a risk of conflicting jurisdictions if the Union has its own human rights guarantees as well as being bound to the ECHR.[54]

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51 HC Deb 20 March 2003, cc 375-8

52 The circle of twelve yellow stars on a blue background was adopted as the European flag by the Council of Europe in 1955 and by the European Community on 9 May 1986, the anniversary of Robert Schuman's declaration in 1950 on the founding of the European Union. The anthem, the 'Ode to Joy' from Beethoven's Ninth Symphony, was adopted at the same time.

53 http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_325/c_32520021224en00010184.pdf

54 The EU's existing human rights role and the position of the Charter are discussed in Library Research Paper 00/32, *Human rights in the EU: the charter of fundamental rights*, 20 March 2000.

The Convention text stated in (then) article I-7 that the Union "shall seek accession" to the ECHR, whereas the revised text states categorically that the Union "shall accede". This is clarified in a Protocol and Declaration:

> Article 1
> The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "European Convention") provided for in Article I-9(2) of the Constitution shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:
> (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
> (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.
> Article 2
> The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.[55]

The Declaration annexed to the Final Act states that Union accession should preserve the "specific features of Union law". It notes the regular dialogue between the ECJ and the Court of Human Rights, which should be reinforced with Union accession to the ECHR.[56]

The Charter contains human rights guarantees which bind Member States and the Union. In most cases, the Member States are already bound by these, or similarly worded articles, by virtue of having ratified international human rights instruments, such as the ECHR, International Labour Organisation conventions and the United Nations social, cultural, economic and political rights covenants. The Charter reinforces these rights and also makes them applicable to the acts of the EU institutions themselves. It is not intended that the Charter should supersede the ECHR or make it redundant, but rather that the Charter should complement the Council of Europe instrument and make human rights guarantees directly relevant to EU citizens.

When the European Scrutiny Committee looked at the incorporation of the Charter into the EC Treaties in May 2000, one of its points concerned the relationship between the Charter and the ECHR:

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55 CIG 87/04 ADD1, 6 August 2004, at http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf
56 CIG 87/04 ADD2, 6 August 2004, at http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf

> 132.[…] Various commentators[57] have expressed fears that the Charter and the ECHR could become competing catalogues of rights with different definitions of the rights, leading to confusion amongst the intended beneficiaries, and, quite possibly, to conflicting judgments from the ECJ (on the basis of the Charter) and the European Court of Human Rights (on the basis of the ECHR). Thus, it is felt, far from providing clarification and protection, the Charter might unintentionally create lack of certainty and undermine confidence in human rights protection in Europe. The EP's resolution on the Charter therefore calls upon the IGC:
>
> "to enable the Union to become a party to the ECHR so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights".
>
> 133. Currently, it is not possible for either the European Community or the European Union to become a party to the ECHR. In Opinion 2/94[58] the ECJ distinguished between the Community's duty to comply with fundamental rights as general principles of Community law and a competence to act internally in the field of fundamental rights which, according to the Court, the Community lacked. It followed that it also lacked the competence to become a party to the ECHR. In the case of the Union there is a more fundamental objection; its founding Treaty did not confer on it a legal personality, and hence the capacity to enter into international relations. Although it could acquire that capacity by practice, it has not yet been recognised to have done so. In either case, then, Treaty amendment is necessary to enable accession to the ECHR. Advocates for EU accession to the ECHR point out that, without it, protection of fundamental rights within the EU remains deficient by comparison with the protection available in respect of acts of Member States, where decisions of domestic courts are subject to an external check by a Court specialised in human rights. Even if the Union were to adopt a legally binding Charter, decisions of the ECJ would escape that supervision unless the *Union* at the same time became party to the ECHR. If only the European *Community* became party to it, Union action under the Third Pillar would not be subject to external supervision: in other words, the sensitive issue of EU actions in the field of police and judicial co-operation in criminal matters would be excluded.[59]

Although they duplicate each other in some respects, the Charter and the ECHR have different enforcement mechanisms and different jurisdictions. The rights set out in the Charter could not be applied universally, but only in relation to Union law or action taken under the Constitution. The ECHR, on the other hand, has no direct relation to Union

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[57] Including institutions with such fundamentally different attitudes to the Charter as the European Affairs Committee of the Italian Senate (op.cit.) and the Finnish Government and Parliament (see their position paper). See also the views of Judge Kapteyn of the ECJ: Q 147.

[58] 1996 ECR 1-1759

[59] ESC 17th Report, The 2000 Inter-Governmental Conference, Part IV, Charter of Rights, 15 May 2000, http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmeuleg/23-xvii/2307.htm#n168

law, although there may be an overlap in the subject matter of complaints.[60] Article II-112(3) of the Charter of Rights provides that, insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention. This would help to avoid conflicting interpretations of the two texts. The ECJ would rule in cases of alleged breach of the Charter, including, presumably, in cases where the complaint would also be admissible under the ECHR. However, as some commentators have observed, there is scope for duplication and confusion as to which would be the relevant Court.

The Charter of Rights will be discussed in more detail in a separate Paper on Part II of the Constitution.

Article I-10 is on citizenship of the Union, which is not a new concept. Elements of EU citizenship, such as free movement within the EU, were established in the original *Treaty of Rome*. The concept was formally introduced in 1992 by the Maastricht Treaty in Article 2 TEU, which states that the Union aims to "strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union" and detailed provisions are set out in Articles 17-22 TEC. In addition to the earlier right to move and reside freely in any Member State, Maastricht introduced additional voting and election rights (in EP and local elections) and extra consular protection. The Treaty of Amsterdam extended citizens' rights with a new anti-discrimination clause on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

The Constitution spells out that EU citizenship is additional to, and does not replace, national citizenship, which is also contained in present Article 17 TEC ("Citizenship of the Union shall complement and not replace national citizenship"). The present Treaty also specifies the rights and duties contained in the Constitution.

The provisions in Article 22 TEC on Commission monitoring of the application of the citizenship provisions and for strengthening or adding to these rights are not included in the Constitution Article. There is a reminder in **Article I-10(2)** that such rights are subject to the conditions and limits defined by the Constitution.

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[60] There have been contradictions, as in the case of *Matthews v UK*, in which the European Court of Human Rights found the UK in breach of the ECHR, but in remedying this situation the UK found itself in breach of an EC obligation, which it then had to rectify.

III Union Competences

A. Introduction

Title III on 'Union Competences' is new. It explicitly defines the limits of Union competences, which are conferred by the Member States, and it stipulates that competences not conferred upon the Union remain with the Member States. In other words, there is a statement, rather than just a presumption, in favour of Member State competence, which the present subsidiarity Article (Article 5 TEC, previously Article 3b) does not make clear.

Defining the broad areas of competence should help to clarify the subsidiarity principle, which is understood to be enshrined in Article 5 TEC (previously Article 3b) but which has sometimes been difficult to argue. It will also influence ECJ rulings on questions of competence. Many Convention participants, including the UK, were against a comprehensive list of competences, such as might be found in a national constitution to denote the responsibilities of various levels of government. The Constitution contains a compromise: there are lists, but they are short and do not cover every aspect of Union activity, thereby leaving some scope for interpretation.

The British Government generally welcomed the division of competences in the White Paper on the draft constitution, but was cautious about further conferral of powers on the Union:

> The draft for the most part clarifies rather than alters the current division of powers. But it also includes proposals to introduce some specific new competences, including for energy, intellectual property, sport and administrative cooperation. There is already some Union activity in these areas and creating specific provisions should lead to greater transparency and legal certainty. But we will need to consider, on a case by case basis, whether the conferral of specific powers on the EU is the best way to allow us to pursue Union objectives; and, if so, what the relevant new title should say.[61]

B. Subsidiarity and Proportionality

In **Article I-11(1)** the Constitution gives an explicit Treaty base to the method of applying the principles of subsidiarity[62] and proportionality[63] via the two protocols mentioned in this article. The Article states that "The limits of Union competences are governed by the

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61 http://www.fco.gov.uk/Files/kfile/FoE_IGC_Paper_cm5934,0.pdf

62 The principle that the Union will act only if the objectives of the intended action cannot be sufficiently achieved by the Member States

63 The principle that the content and form of Union action should not exceed what is necessary to achieve the objectives of the Constitution

principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality".

Article I-11(3) is almost identical to existing Article 5 TEC (defining subsidiarity), with one significant exception: it includes regional and local government within the sphere of application of subsidiarity. It does not prescribe how subsidiarity should be applied at sub-state level, but does not ignore this level, as the present Treaty does.

C. Categories of Competence

Articles I-12 – I-14 set out categories of competence.[64] The present Treaty text refers to "spheres of competence", "shared competence", "Community competence" and "exclusive competence", but does not list areas of exclusive or shared competence.

In a Memorandum to the House of Lords Select Committee on the Constitution Report, *The Draft Constitutional Treaty for the European Union*,[65] Professor Anthony Arnull of the University of Birmingham gives an overview of the then draft articles on the division of competences:

> 9. Article I-12 lists the areas in which the Union is to have exclusive competence, in other words, where the Member States would have no power to act unless empowered to do so by the Union. The list is remarkably short, comprising only five areas, all of which were understood by the Convention to fall within the exclusive competence of the Union at present.[66] The wording of one - "…to establish the competition rules necessary for the functioning of the internal market…" - is, however, problematic. The Court of Justice accepted, in a famous case decided in 1969, that "one and the same agreement may, in principle, be the object of two sets of parallel proceedings, one before the Community authorities under…the EEC Treaty, the other before the national authorities under national law."[67] That interpretation, the Court said, was confirmed by what is now Article 83(2)(e) EC, which authorises the Council to determine the relationship between national laws and the Community rules on competition. Article 83(2)(e) is in substance reproduced in Article III-52(2)(e) of the draft Constitution. The continued existence of domestic competition rules also underlies the new Council Regulation[68] on the implementation of the Treaty competition rules. The reference to such rules in Article I-12 should therefore be deleted.[69] Indeed, it is doubtful whether the subject needs to be mentioned expressly in Title III of Part I

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64 The debate in the Convention on the issue of competences is discussed in Library Paper 03/23, *The Convention on the Future of Europe: proposals for a European constitution*, 18 March 2003

65 9th Report, HL Paper 168, 2002-03, 15 October 2003 at

66 See CONV 724/03, p.70

67 Case 14/68 Wilhelm v Bundeskartellamt [1969] ECR 1, para 3

68 Reg 1/2003 [2003] OJ L1/1

69 See Dougan, "The Convention's draft Constitutional Treaty: bringing Europe closer to its lawyers?" (2003) 28 ELRev (forthcoming)

since it is an aspect of the internal market, which Article I-13(2) refers to as an area of shared competence. However, the drafting of that provision is not entirely satisfactory, as we shall see.

10. Article I-16 lists five areas in which the Union may take "supporting, coordinating or complementary action." Such action would not supersede the competence of the Member States to act in the areas concerned and must not entail harmonisation of national laws.

11. Where the draft Constitution gives the Union a competence which is not covered by Articles I-12 or I-16, it is to share that competence with the Member States. This means that both the Union and the Member States will be able to act. The Member States will normally be able to do so only where the Union "has not exercised, or has decided to cease exercising, its competence."[70] The main areas in which shared competence applies are listed in Article I-13(2), though the list is not intended to be exhaustive. Not surprisingly, the Convention had some difficulty in deciding which areas of competence should be included.[71] In some areas (specified in Article I-13(3) and (4)), the exercise by the Union of its competences will not prevent the Member States from exercising their own competences.

12. The idea that the competence of the Member States should be restricted once the Union has acted is well established in the case law of the Court. However, it might be sensible to make it clear that, as in areas of exclusive Union competence, the Member States would not be precluded by Union action from acting themselves if permitted to do so by Union law. It may be noted that the Cambridge draft submitted to the Convention[72] used a different formula to describe the duties of the Member States when the Union has acted in an area of shared competence, speaking of the Member States respecting "the obligations imposed on them by the relevant Union measures". However, the precise impact on national competence of Union action will in any event be affected by its legal basis in Part III of the draft Constitution.[73]

13. Articles I-14 and I-15 deal respectively with the Union's competence to coordinate the economic policies of the Member States and in matters of common foreign and security policy. The Convention considered this to be justified by the "specific nature" of those areas.[74] Both are already the subject of provisions in the EC Treaty or the TEU which are developed in Part III of the draft Constitution.[75]

While Professor Arnull does not appear to be unduly concerned by the competence articles, in another Memorandum, Sionaidh Douglas Scott of King's College, London, commented on certain constitutional problems that would be posed by the division of competences:

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70 Art I-11(2)
71 See CONV 724/03, pp.74-75
72 See (2003) 28 ELRev 3,17
73 See Art I-13; Dougan, above
74 See CONV 724/03, p.68
75 October 2003, at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldconst/168/16807.htm

> a) For the first time, a list of EU competences has been set out. However, there may still be problems likely to affect UK constitutional law. I see the problem lying in the dividing line between Article I-13 (shared competences) and Article I-16 (co-coordinating/supporting competences). For example, health is likely to be contentious. Article I-13 refers to 'common safety concerns in public health matters' as a shared competence and Article I-16 'protection and improvement of human health' as a supporting competence. There is likely to be some overlap. The difference between the two types of competences lies in the capacity of a shared competence to have a pre-emptive effect on member state action. Once the EU has exercised competence in a shared area the Member states may not act. This is likely to be contentious in areas such as health, which even if not directly constitutional, are still thought of as preserves of national sovereignty, as well as large spending areas in which different national economic, social and tax polices will make a difference.[76]

D. Coordination of Economic and Employment Policies

Article I-12(3) concerns the coordination of Member States' economic policy. Present Article 99 TEC states: "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council". The Foreign Secretary told the Standing Committee on the IGC in November 2003:

> So far as economic co-operation is concerned, it is in every member state's interest to be able to co-operate as far as it judges best with the economic policies of every other member state. However, […], as we spelled out in the White Paper, we have objections to article 11, paragraph 3, and we are seeking to change it.[77]

Two articles on the coordination of economic policy have been amended from the earlier draft constitutional text (CIG 50/03, 25 November 2003). **Article I-12 (3)** has been amended from:

> 3. The Union shall have competence to promote and coordinate the economic and employment policies of the Member States.[78]

to:

> 3. The Member States shall coordinate their economic and employment policies within arrangements as determined by Part III, which the Union shall have competence to provide.[79]

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[76] http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldconst/168/16808.htm

[77] Standing Committee on the IGC 10 November 2003 c 50 at http://www.publications.parliament.uk/pa/cm200203/cmstand/other/st031110/31110s02.htm

[78] CIG 50/03, 25 November 2003, available at: http://ue.eu.int/igcpdf/en/03/cg00/cg00050.en03.pdf

[79] CIG 85/04, 19 June 2004, available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81109.pdf

The amendment provides greater clarity on the parts of economic and employment policy the article covers. The Government insisted it would not agree to any changes that would "harm the UK's economic interest" and would "preserve the ability of member states to conduct their own economic policy, within rules agreed by member states in the Council".[80]

Similarly, **Article I-15(1)** on the coordination of economic and employment policies has been amended from the earlier:

> 1. The Union shall take measures to ensure coordination of the economic policies of the Member States, in particular by defining broad guidelines for these policies. The Member States shall coordinate their economic policies within the Union.[81]

to:

> 1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.[82]

As in Article I-12(3), the emphasis is on the Member States, rather than the Union, taking the initiative in the coordination.

Sionaidh Douglas Scott's comments to the Lords Committee on this article were:

> 'The coordination of economic and employment policies' also bears further scrutiny. What is the status of this article? It would seem to be a shared competence, although it doesn't fall under the list in Article I-13. It is a new clause, although to some extent reflects previous practice and case law. However, its implied status as a shared competence would imply pre-emption of state action, once the EU has acted - controversial particularly with regard to economic policy in Article 14(1), and again, with possible constitutional implications. [83]

E. The Union's Exclusive Competence

Article I-13 states that areas of Union exclusive competence shall be:

- Customs union
- Competition rules for the functioning of the internal market
- monetary policy, for the Member States which have adopted the euro
- the conservation of marine biological resources under the common fisheries policy

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80 HC Deb 9 July 2003 c871-2W
81 CIG 50/03
82 http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf
83 http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldconst/168/16808.htm

- common commercial policy

The principle of Community exclusive competence is contained in various Treaty articles and it has been acknowledged in a number of ECJ rulings that a certain EC power is exclusive, in which case Member States are not allowed to adopt separate laws. The concept appeared in the Maastricht Treaty in 1993, which specified in Article 3b (now Article 5) that the principle of subsidiarity applied in areas "which do not fall within the exclusive competence" of the Community. However, Article 3b did not specify which areas *were* areas of exclusive competence and this has given rise to considerable legal argument ever since.

In reply to Parliamentary Questions asking for a list of areas of exclusive EU competence, British governments have said that it was "not possible to draw up an exhaustive theoretical list".[84] They have given examples, such as the Common Agricultural Policy, the Common Commercial Policy and the external tariff.[85] Joyce Quin, as Minister for Europe, was somewhat more expansive:

> There are two topics which are solely within the competence of the European Community by virtue of the Community Treaties, and to which subsidiarity is therefore not applicable. These are: (a) the Common Commercial Policy; and (b) the Common Fisheries Policy insofar as it relates to conservation of marine resources.
>
> The Community may also acquire implied exclusive competence by enacting legislation which restricts the ability of Member States to act in a particular area as long as that legislation is in force. Examples of such areas are parts of the Single Market and the Common Agricultural Policy. However, before enacting this legislation, the Community would, since entry into force of the Maastricht Treaty, have had to take subsidiarity concerns into account.[86]

There has been a lively but inconclusive debate on the meaning of exclusive Community competence and a number of challenges to Community competence have been made at the ECJ.[87] In the "Tobacco Advertising" case the Commission claimed that the establishment and functioning of the internal market was an exclusive EC power. The Opinion of Advocate General Fennelly concluded:

> … that the exercise of Community competence under Articles 57(2) and 100A of the Treaty is exclusive in character and that the principle of subsidiarity is not applicable. There can be no test of comparative efficiency between potential

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84 Tristan Garel-Jones, Foreign Office Minister, HC Deb 23 October 1992, c 409W

85 The Attorney-General, HC Deb 19 May 1992, c 67W

86 HC Deb 27 April 1999 c 93W at http://pubs1.tso.parliament.uk/pa/cm199899/cmhansrd/vo990427/text/90427w03.htm#90427w03.htm_spnew5

87 For example, *Spain v Council*, the UK challenge to the Working Time Directive, Tobacco Advertising

> Member State and Community action. If there were, even more difficult questions of principle would arise. How, in particular, does one weigh the comparative benefits of Community harmonising action in pursuit of the internal market with individual Member State rules in respect of entirely different national preoccupations of a substantive character?[88]

The EC's legislative powers are largely "non-exclusive" (although again, this is not explicit in the Treaties). The term "shared competence" is often used to describe areas of law-making where the exercise of EC competence does not exclude the exercise of legislative powers by Member States, as long as they respect the primacy of EC law and do not enact laws which conflict with existing EC law and principles.

The inclusion of marine biological resources in the list of exclusive competence areas in the Constitution has been of concern in the UK, especially in Scotland, as legislation in this area will further reduce fishing quotas in order to conserve stocks. David Heathcoat-Amory called this inclusion an "illegitimate extension" that had not been discussed in the Convention Working Group on competences (of which he was a member).

> We certainly did not assent to the proposition that that policy area should become an exclusive competence, which of course means that member states are forbidden to legislate in that area. That is not just of concern to Scotland. Each member state ought to take fright when there is a power grab in a constitution to take over areas of policy that ought to be more properly shared or devolved downwards to those who can make decisions closer to the people concerned and to the resources in question.[89]

The Conservative Leader of the Opposition, Michael Howard, speaking in a keynote EP election speech in Southampton in June 2004, was critical of making fisheries conservation an EU competence:

> The Common Fisheries Policy has been a failure: it has led simultaneously to the dwindling of fish stocks and the near-destruction of the British fishing industry. Its quota system encourages the dumping of dead catches over the side of boats. Its rules have turned good men into liars.
>
> There is no reason why fishing grounds could not be administered at national level. Not only does this happen in the rest of the world, where many countries have pursued successful conservation policies; it has also happened within the EU itself, where large portions of European waters were never incorporated into the Common Fisheries Policy.

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88 Cases C-376/98 and C-74/99, judgment para. 142

89 Standing Committee on the Convention, 7 May 2003 cc17-8 at http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030507/30507s05.htm

> That which no one owns, no one will care for. The first step towards regenerating fisheries as a renewable resource is to establish the concept of ownership. That is why an incoming Conservative Government will negotiate to restore national control over British fishing grounds.
>
> For if we wait much longer, there will not be a fishing industry left to sustain.[90]

F. Concluding International Agreements

Article I-13(2), on the conclusion by the Union of international agreements, sets out the norm established by the ECJ in the *ERTA* case in 1971[91] that the Community has an exclusive power after it has adopted a common rule.[92] The ECJ ruled in *ERTA* that the prior use of internal competence adopting "common rules" was a necessary condition for the origin of the respective external power. Subsequent cases extended the powers of the Community in the conclusion of international agreements. In the *Kramer* judgement[93] it was implied that even if no common rule had been adopted at Community level, the EC may have a treaty-making power flowing implicitly from other provisions of the EC Treaty. Opinion 1/76 confirmed that the implied treaty-making power may flow from the provisions creating internal powers. The ECJ's Opinion was that:

> Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion. This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable,[...].[t]he power to bind the Community vis-à-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community.[94]

ECJ rulings, particularly on trade agreements, have been helpful in clarifying the competence issue. Trade in services is an area of so-called "mixed competence", which means that Member States take part in individual bilateral negotiations with other World Trade Organisation (WTO) Members, but the Commission acts as lead negotiator and

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90 1 June 2004 at http://www.conservatives.com/news/article.cfm?obj_id=104636&speeches=1

91 Case 22/70, [1971] ECR 263

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

93 Joined Cases 3, 4 & 6/76, *Cornelis Kramer and others*, [1976] ECR 1279

94 Opinion 1/76 ([1977] ECR 741)

speaks on behalf of Member States in the WTO. Common positions are agreed unanimously with all EU Member States with respect to trade in services. In contrast, for negotiations concerning the trade in goods, the Commission has had 'exclusive competence'. This means that it has the power to negotiate agreements with international organisations on behalf of the Member States under Articles 133 and 300 TEC.

There has been some pressure to extend the Community's competence to include other areas, notably the trade in services. The role of the Community, represented by the Commission, in negotiating the Uruguay Round GATT Agreement was the subject of an Opinion of the ECJ in 1994. The Court rejected the Commission's contention that the Community had exclusive external competence in all matters covered by the GATT Agreement, including services, transport and intellectual property. It concluded that the exclusive competence of the Community, in which ratification by the Member States is not required, was limited to the area of trade in goods. The Court ruled that:

> whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect".[95]

This was a landmark ruling by the ECJ. It settled various long-standing disputes between the Commission and the Council of Ministers and became a main point of reference for subsequent questions about Community competence. It was, however, disappointing for the Commission, which had for many years asserted exclusive external competence on the basis of its broad interpretation of Article 113 TEC and the scope of the Common Commercial Policy.[96]

The 1994 Opinion confirmed that, where external competence is not expressly provided for in the Treaty (as in Article 113 TEC), the existence and extent of "implied external competence" would be determined in accordance with the well-established principles of earlier ECJ case law. There are specific Treaty provisions which authorise the Community to engage in international co-operation in areas where the policy is already an area of internal EC competence. These provisions were introduced by the Single European Act in environmental policy and by the Maastricht Treaty for monetary policy, education and vocational training, culture and health.

Once the Community has adopted common internal rules, Member States may no longer undertake international obligations which affect or contradict these rules. To this extent, the Community then acquires exclusive competence. In the areas in which the ECJ has

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95 Opinion 1/76, Paragraph 26

96 There is an interesting commentary on the 1994 Opinion in the *European Journal of International Law* Vol 16, No. 2, 1995, "The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?" by Meinhard Hilf of the University of Hamburg at http://www.ejil.org/journal/Vol6/No2/art3.pdf

said the Community did not have exclusive competence, exclusive external competence has been acquired incrementally with the adoption of common internal Community rules.

Proposals to the Nice IGC on the Common Commercial Policy (CCP) included specific discussion of the EU's position at WTO negotiations. Article 133 was amended to include the negotiation by the Commission and the conclusion by the Council, acting by QMV, of external agreements relating to the trade in services and the commercial aspects of intellectual property. Unanimity would apply where internal Community rules were decided by unanimity or for areas in which the Community had not yet adopted internal rules. At French insistence at Nice, agreements relating to trade in cultural and audiovisual services, educational services and social and human health services would require unanimous agreement and would continue to be matters of mixed competence, in which agreements would be concluded jointly by the Community and the Member States. Under the Constitution, agreements in these areas would be decided by QMV, but by unanimity "in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity".[97]

G. Shared Competence

Article I-14(2) sets out areas of "shared competence", as follows:

- internal market
- social policy
- economic, social and territorial cohesion
- agriculture and fisheries, excluding marine conservation
- environment
- consumer protection
- transport and trans-European networks
- energy
- area of freedom, security and justice
- common safety concerns in public health matters.

In these areas Member States will have competence to adopt legislation to the extent that the Union has not exercised its competence (see Article I-12(2)). This has been interpreted by critics to mean, in effect, a back door to EU exclusive competence, giving the Union a right of first refusal with regard to competence, while Member States would only be able to do what the Union decided not to do. While the word "shared" is perhaps confusing in the context (is it not, rather, a "privileged competence"?), this view tends to ignore the fact that it is still the Member State governments that decide whether to legislate or not. One legal commentator observed:

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[97] Article III-315(4)(a) of Constitution

> It is typical for "shared competences" that the degree of harmonization depends on the will and ability of the political actors [i.e. the Member State governments, Commission, EP etc] to agree on specific legislative projects.[98]

Mr Heathcoat-Amory expressed concerns about the shared competence category:

> because it represents a substantial additional shift of power and decision making from member states to the Union. For instance, a number of supporting measures, which are explicitly described as such in the existing treaties—for instance, on public health in existing article 152, where measures are explicitly described as "complementing national policies"—are in the draft constitution described as "shared competencies". […] I believe that the concept of shared competencies does not tell us much about who does what. I am worried that, instead of closing the gap between the Union and the people, as we are required to do under our mandate to reduce the democratic deficit, we are in danger of widening it by allowing more decisions to be taken further away from the ordinary voter.[99]

In the pre-summit debate on European Affairs on 16 June 2004 John Redwood called on the Government to "expose the whole idea of shared competence", which, he maintained, was not 'shared' at all.[100] Mr Straw, however, was more optimistic in his interpretation of Article I-12(2). For him, the words "The Member States shall exercise their competence to the extent that the Union has not exercised, **or has ceased exercising**, its competence" is an "explicit provision … for competences shared between the European Union and the nation states … to be transferred back to full national control when European Union members decide that they no longer wish to exercise them in common".[101]

H. Common Foreign and Security Policy

Article I-16 sets out the Union's competence in matters relating to the common foreign and security policy, including the "progressive framing of a common defence policy, which might lead to a common defence". This corresponds with Articles 2 and 11 (2) TEC. The Article does not list the objectives of the Union in CFSP matters, however, as these are defined in Part III within the context of overall external action of the Union.

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98 Dr Daniel Thyn, L.L. M *The Area of Freedom, Security and Justice in the Draft Treaty Establishing a Constitution for Europe*, Walter Hallstein-Institut für Europäisches Verfassungsrecht, Humbold-Universität, Berlin, WHI Paper 4/04, February 2004, at http://www.europeum.org/summer_school/reading_materials/The_Area_of_Freedom_Security_and_Justice.pdf

99 7 May 2003, c7 at http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030507/30507s02.htm

100 HC Deb 16 June 2004, cc 842-3 at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/cm040616/debtext/40616-22.htm

101 Ibid c 786

The provisions for implementing CFSP are set out in **Article I-40** and detailed in Part III of the Constitution (Articles III-294 – III-308). The majority of the CFSP provisions remain unchanged from the current EC Treaty, although a number of clauses have been amended to provide clarity and to allow for the role of a Minister for Foreign Affairs (see Section IV.F below).

I. Supporting, Coordinating or Complementary Action

Article I-17 sets out a category of areas of supporting, coordinating or complementary action:

- industry
- protection and improvement of human health
- education, vocational training, youth and sport
- culture and tourism
- civil protection

The Treaty already provides for EU supporting, coordination or complementary action in individual articles, but does not categorise the areas. Examples include: Article 127 on supporting cooperation between Member States for attaining a high level of employment; Article 149 TEC on supporting cooperation to achieve a high level of education; Article 151 on supporting cultural cooperation; Article 44 TEC on Council and Commission coordination of measures on the freedom of establishment; Article 177 TEC on complementary action on development cooperation; and Article 181a on complementary action in economic, financial and technical cooperation with third countries.

J. The "Flexibility Clause"

The so-called "flexibility clause", **Article I-18**, is a reworked Article 308 TEC, the catch-all article that allows the EU to decide by unanimity to act in an area not provided for specifically by the Treaty, in order to achieve a Treaty aim. Article 308 has been the subject of much debate and some criticism from those who see it as a way for the EU to extend its competence. Article 308 applies to the operation of the single market, whereas the Constitution article is open-ended, which has led to fears about "creeping" Union competence. The Convention Praesidium emphasised that

> this provision could not be used to extend the competences of the Union by establishing a new policy, but only to carry out a measure relating to a policy already provided for by the Constitution.[102]

[102] CONV 724/03, 26 May 2003

David Heathcoat-Amory commented:

> […] the [working] group recommended that any flexibility clause should contain strict conditions, including a ban on amending the Constitution by this route. This too was ignored. The flexibility clause of the new Constitution (Article 17) supplies a means to extend the powers of the Constitution without going through the proper ratification process in each member state. The Union wants the powers that derive from a constitution but is unwilling to accept its discipline.[103]

In her Memorandum to the Lords Select Committee on the Constitution, Sionaidh Douglas Scott seemed to think worries about "creeping competence" were largely unfounded, as "there are probably enough safeguards written into it - the Council must act unanimously under it, and the national monitoring procedure for subsidiarity under Article 9(3) applies.[104]

The House of Lords European Union Committee commented on the then draft Article I-16, as follows:

> 82. First, the inclusion of a catch-all/fall back clause such as is being proposed casts doubt on the value of drawing up a list of competences. Even if it is accepted that that list cannot be definitive (the list in Article 11 above cannot by definition be exhaustive and that in Article 12 is merely illustrative) the desirability of including a provision which will inevitably affect the respective competences of the Union and the Member States needs the most careful consideration. There is also a danger that any "flexibility" clause could be used as a way of bypassing the need to amend the Constitution and the parliamentary democratic control and national constitutional requirements that would imply. On the other hand the absence of a power for the Union to take action might lead the Court of Justice to construe existing powers more widely and possibly even develop a theory of implied powers.
> 83. The experience of Article 308 TEC (formerly Article 235 EC and once known as "*la petite révision*"), sometimes linked with other Treaty Articles, has been that the power has been used extensively over a range of matters (including social policy, the environment, consumer protection, external affairs and institutional and financial matters).[105] In addition to filling in gaps[106] in the Treaty, some quite substantial policy and regulatory measures have been developed and adopted where the "Treaty has not provided the necessary powers". For example, the creation of a Community trademark[107] and the European company,[108]

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[103] Centre for Policy Studies, *The European Constitution and What it Means for Britain*, June 2003 at http://www.cps.org.uk/dhaconv.pdf

[104] http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldconst/168/16808.htm

[105] See *The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC*. A working document prepared by the Swedish Institute for European Policy Studies and submitted to the Convention Working Group V. Working Document 19

[106] For example, Council Regulation No 1103/97 [1997] OJ L162/1, relating to the introduction of the euro

[107] Council Regulation No 40/94 [1994] OJ L349/83

[108] Council Regulation No 2157/2001 [2001] OJ L294/1

> establishing a Community action programme in the field of civil protection,[109] and creating a rapid-reaction mechanism (humanitarian aid).[110] The new Article 16 would be wider in scope. It would apply to the Union (not just the Community/First Pillar) and therefore confer power to act in relation to the Common Foreign and Security Policy (CFSP—Second Pillar) and Police and Judicial Cooperation (Third Pillar). The power would be exercisable at the initiative of the Commission, a factor which is politically significant in the context of the CFSP.[111]

The Committee also acknowledged some safeguards, however:

> 84. There are some safeguards in Article 16. First, any measure must be adopted by unanimity in the Council. Second, parliamentary control is strengthened. Article 16(1) requires the assent of the European Parliament and Article 16(2) makes explicit reference to national parliaments. As regards the role of the Parliament, it might be questioned why co-decision should not apply. The reason given in the Explanatory note (that it might slow down the procedure) seems unconvincing. Why should action under this provision be any more urgent than action under any other provision? Further, Article 16(2) is a weak provision, requiring only that the Commission draw Member States' national parliaments' attention to proposals. It seems clear to us that if national parliaments are to have a meaningful role in this context then their views on the *vires* and merits should also be respected.
> 85. Finally, Article 16(3) prohibits the use of Article 16 to harmonise national laws where that is excluded by the Constitution. Article 16 cannot be used to get round Article 15(4).[112]

The Commons European Scrutiny Committee (ESC) also commented that this Article went further than Article 308 by extending flexibility to the former second and third pillar areas. They thought "The requirement for unanimity in the Council on the exercise of powers under this article is the minimum safeguard required".[113]

The British Government's assessment of the use of present Article 308 TEC included the assurance to the ESC that

> where the Commission puts forward a legislative proposal citing Article 308 as its legal base, we will provide the Scrutiny Committees with the Commission's justification of this choice of legal base. Any such proposal would need to respect the principle of subsidiarity set out in Article 5 TEC.[114]

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[109] Council Decision of 9 December 1999 [1999] OJ L327/53
[110] Council Regulation No 381/2001 [2001] OJ L57/5
[111] Ninth Report, *The Future of Europe: Constitutional Treaty – Draft Articles 1-16*, 25 February 2003, at http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/61/6107.htm
[112] Ibid
[113] ESC 24th Report at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxiv/6307.htm
[114] HC Deb 22 January 2004 c1417W

Presumably, the Government would extend this assurance in respect of Article I-18.

IV The Institutions

A. Introduction

Articles I–19 to I-32 (Article 7 TEU and 189-248 TEC) concern the structure and composition of the Union's main institutions.

Institutional issues have consistently proved to be the most difficult to resolve when it comes to EU Treaty reform and they have become even more contentious in the enlarged EU. This is because such issues, for example, the number of Commissioners or EP seats and the weighting of Council votes, are central to the EU's policy-making and decision-making processes. A Member State which believes it has not been fairly represented in the Institutions fears it will lose influence and power in these processes. This has been most keenly felt by the smaller and medium-sized States, which have traditionally been over-represented in the institutions, proportional to their populations. A strict allocation of power according to size of population would drastically reduce their representation and voting power, and the EU has never gone down this path. However, the various formulas devised by the Convention and the IGC in an attempt to achieve more representative allocations to the Union Institutions met with disagreement from some States and resulted in the collapse of the IGC in December 2003. Spain and Poland, two medium-sized Member States, were the aggrieved parties.

The final agreement reached by the IGC on 18 June was the result of a process of bilateral negotiations between the Irish Presidency and the Member States in the run-up to the summit and compromises at the summit itself.

Article I-19 makes the aims of the EU institutions explicit, which the present Treaty does not. It has been suggested that this is perhaps to counter any accusation that they are self-serving. The aims are to:

- promote the Union's values
- advance its objectives
- serve its interests (i.e. those of citizens and Member States)
- ensure the consistency, effectiveness and continuity of Union policies and actions.

Article I-19(3) limits the actions of the institutions to powers conferred upon them in (not 'by') the Constitution and states that they "shall practise mutual sincere cooperation" (changed from "full mutual cooperation" in the final provisional text). An American commentator thought that "competent constitutional systems (such as that in the United States) protect the rights of citizens not with cooperation but with conflict among

institutions".[115] This Article upholds the need for institutional balance and mutual respect that was identified by the ECJ in the so-called *Chernobyl* case:

> 21.The treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.
> 22. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.[116]

B. European Parliament

Article I-20 states that the EP "shall, jointly with the Council, exercise legislative and budgetary functions", two important functions that it currently has under Articles 251 and 272 TEC, but which are not established as general principles. **Article I-20(2)** (Article 190 TEC and Nice Protocol on the Enlargement of the European Union) retains the Praesidium's original proposal for the composition of the EP on the basis of 'degressive proportionality'.[117] The total number of EP seats shall not exceed 750 (it was 736 in the Convention text and is currently 732 under Article 189 TEC). The maximum number of seats for a Member State is capped at 96 and the minimum threshold is six (up from four in the Convention text). The final composition will be fixed by a European Council decision on a proposal from the EP. Interim provisions on the composition of the EP are set out in the *Protocol on Transitional Provisions*.[118]

C. European Council

By including **Article I-21** in Chapter 1 on "The Institutional Framework" the European Council is established as a Union Institution. It does not have this status under the present Treaty, although many would argue that it has virtually acquired it as European Council meetings have become regular (since 1974) and "institutionalised". Joseph Weiler and Martina Kocjan comment:

> The European Council has remained formally outside the structures of the European Community (i.e. the supranational pillar), not subject to the control of

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[115] Jonathan Kallmer, "Europe's Constitutional Confusion", *The American Enterprise*, March 2004 at http://www.taemag.com/docLib/20040128_p4043.pdf

[116] Case 70/88 *European Parliament v Council* (Chernobyl) [1990] ECR I-2041 at http://www.curia.eu.int/en/content/juris/index.htm

[117] The principle of allocating to the smaller states a greater per-head representation than the large ones with a proportionate distribution of votes for countries in between

[118] CIG 87/04, ADD 1

> the Court of Justice. Conversely it has no legal power to act in pursuance of the Community's objectives or power of decision (Case T-584/93 Roujansky v. European Council [1994] ECR II-585). Of course, there would be nothing to prevent the Heads of State or Government meeting as the Council of the European Union, and in limited circumstances the Council must meet in that composition (4.8); however, one of the strengths of the European Council, which has increasingly come to fulfil a troubleshooting role in pushing forward the process of European integration and resolving the conflicts between the Member States at the highest level, lies precisely in its informality. Indeed, it was originally intended as a relatively low key meeting, and is somewhat undermined in its effectiveness by the high levels of expectation and media interest which now generally accompany its meetings. It has also been gradually co-opted in parts of the legislative process in the EC Treaty, notably in relation to the determination of the broad guidelines of economy policies under Article 99 EC and, since the Treaty of Amsterdam, the formalised consideration of the employment situation in every Member State under Article 128 EC. Many of its 'decisions', embodied in the Presidency Conclusions have longstanding consequences for the shape and direction of the EU. Perhaps the best example are the so called 'Copenhagen Criteria' of 1993, establishing the basis for accession to the EU and now enshrined in Article 6(1) TEU as the very liberal constitutional cornerstone of the Union itself as well as appearing in Article 49, which governs accession.[119]

The *Stuttgart Solemn Declaration* of 1983 explicitly put the European Council within the Community framework by stating that when the European Council acted in matters within the scope of the EC, "it does so in its capacity as the Council within the meaning of the Treaties".[120] Successive Treaty revisions have incorporated into the Treaty the European Council's composition, mission and specific tasks. It was partially formalised in Article 2 of the 1986 *Single European Act* and its existence and role are defined more broadly in present Article 4 TEU.

Under Article I-21 the main functions of the European Council are broadly similar to existing provisions. Its voting procedure will generally be by unanimity and it will not exercise legislative functions (it will not adopt legislative acts, such as European laws or framework laws). The European Council does not currently adopt directives or regulations, although it does adopt intergovernmental Decisions.

The custom that has developed of holding European Council meetings in March and October, in addition to those at the end of each Presidency in June and December, is formalised in the Constitution, which states in I-21(3) that it will meet quarterly.

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[119] *The Law of the European Union* J.H.H.Weiler and Martina Kocjan, NYU School of Law 2004/4 at http://www.jeanmonnetprogram.org/eu/PDF-files/UNIT1-2-2003.pdf

[120] EC Bulletin 1983, n° 6

Under **Article I-22** there will be a President of the European Council with a 2½ year term of office, renewable once. There is a bar on him/her having a national mandate. This is a new position and replaces the six-monthly EU Presidency. One of the main criticisms of the full-time Presidency came from the smaller States, which believed it suited the aspirations of the large Member States and would marginalise their influence.

The President will "ensure the external representation of the Union" on CFSP issues, but without interfering with the mandate or powers of the Union Minister for Foreign Affairs. The Constitution is vague as to how the posts of Union President and Minister for Foreign Affairs will complement each other and avoid potentially damaging rivalry.

The British Government supports the creation of a full-time President of the European Council, which, it believes, will mean "greater accountability to national parliaments, as well as greater efficiency".[121] They do not think that either the European Council President or the new Foreign Minister represent any great change from existing procedures. Baroness Symons said in reply to a Written Question in November 2003:

> A full-time chair of both the European Council and a "Union Minister for Foreign Affairs" would be new appointments, but their functions will correspond to existing functions of (a) the rotating President of the European Council, and (b) the Commissioner for External Relations and the High Representative for the Common Foreign and Security Policy.[122]

Lord Stoddart expressed concern at the Standing Committee on the IGC about the powers of the new Union President in international relations:

> It has been said that this new sort of President will simply be a chairman but it does not sound as if that will be the case. He or she will be able to receive ambassadors, and presumably will be able to sign instruments of the European Union. The Prime Minister said—I think it was in a speech in Cardiff—that the President would be someone who could speak for the European Union. The Secretary of State for Wales intimated that he believes that the new President will be able to speak to the President of the United States on equal terms. Can the Foreign Secretary comment on those various attitudes towards the new presidency?[123]

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[121] HL Deb 18 March 2004 c 329 at http://pubs1.tso.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds04/text/40318-01.htm#40318-01_star0

[122] HL Deb 6 November 2003 c WA 137 at http://pubs1.tso.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds03/text/31106w04.htm#31106w04_sbhd0

[123] Standing Committee on the IGC 10 November 2003 c 60 at http://www.publications.parliament.uk/pa/cm200203/cmstand/other/st031110/31110s05.htm

Mr Straw thought the European Foreign Minister would have his own dossier to deal with, but that there were for the Union President, "plenty of issues in the domestic area that require external representation and responsibility for the external action service.[124]

Michael Howard, in a keynote EP election speech in Southampton, was sceptical about the new posts because the EU, instead of Britain, would "have new powers to make treaties with other countries" and this could, in turn, give the ECJ "new powers to review the actions of the British army". [125]

D. Council of Ministers

Article I-23 states, with similar wording to Article I-20, that "The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions". The repetition of this formula, which puts the Council and the EP on an equal footing, emphasises the importance of the EP in the legislative process.

This Article states that the general voting rule for Council of Ministers decisions will be by QMV. Article 205 TEC states that, unless the Treaty provides otherwise, the Council will act by a majority of its Members.

Under **Article I-24** the rotation of the Presidency is retained for Council of Ministers configurations, other than the Foreign Affairs Council. The Council will meet in public when carrying out legislative functions and each Council meeting will be divided into two parts, dealing either with deliberations on legislative acts or with non-legislative activities (the Convention proposal for a separate Legislative Council was abandoned early in the IGC process). The Council will meet in two formations: either as the General Affairs Council, which will "ensure consistency in the work of the different Council configurations, … prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission", or as the Foreign Affairs Council, which will "elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent".[126] The European Council will decide by QMV on the other Council formations.

Under the Draft Decision set out in Addendum 2 to the Constitution, Council formations other than the Foreign Affairs Council will be led by groups of three Member States for 18 months. The groups will be made on the basis of equal rotation among Member States, taking into account their diversity and geographical balance within the Union. Each

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[124] Standing Committee on the IGC 10 November 2003

[125] *The Case for a "live and let live" Europe*, 1 June 2004 at http://www.conservatives.com/news/article.cfm?obj_id=104636&speeches=1

[126] CIG 87/04

Member will chair all Council configurations, except the Foreign Affairs Council, for six months, assisted by the other group Members. Members of the team may decide alternative arrangements among themselves. Articles 2 and 3 of the Draft Decision set out the arrangements for the configurations.

Article I-25 (Article 205 TEC and Nice Protocol on EU Enlargement) will make QMV subject to a formula that will take more account than at present of the size of Member States' populations in calculating the number of votes required for a qualified majority.

A draft Council Decision, which will be adopted once the Constitution comes into force, is set out in Addendum 2 of the Constitution. It provides for a smooth transition from the Treaty of Nice QMV provisions (as set out in the *Protocol on the transitional provisions* annexed to the Constitution), which will apply until 31 October 2009, and the QMV system under Article I-25 of the Constitution. The Decision provides a "Ioannina Compromise" system,[127] whereby, if Council members representing at least three-quarters of the level of population, or at least three-quarters of the number of Member States needed to constitute a blocking minority, indicate their opposition to a QMV proposal, the Council shall discuss the issue and "do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns" raised by those Council members.[128]

From 1 November 2009 the final definition for a Qualified Majority will be at least 55% of the members of the Council, comprising at least fifteen of them, and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members. If not, the qualified majority will be deemed attained. When the Council is not acting on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority will be 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union.[129]

E. Commission

Under **Article I-26** (Articles 213-4 TEC and Nice Treaty Protocol on enlargement) the first Commission after the Constitution enters into force will contain one member from each Member State (25 in total, including the President and the new EU Minister for Foreign Affairs). As from the end of this term, which would be at the end of 2014, the

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[127] The Ioannina Compromise was secured by the UK at the enlargement negotiations in 1994 to allow further discussion of an issue of significant national concern to a Member State with a view to securing agreement in a QMV issue.

[128] http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf

[129] Examples of cases where the Council acts without proposal from the Commission: − in JHA, when the Council acts on initiative from the Member States, − in CFSP, when the Council acts on its own initiative, − in Economic and Monetary policy, when it acts on a recommendation from the Commission or from the ECB, − in the case of suspension of a Member State or withdrawal of a Member State, − in various nominations.

whole Commission will be reduced to two thirds of the number of Member States,[130] unless the European Council decides by unanimity to alter this figure.

The wording in I-26(6)(a) and (b) on the principle of equal rotation and ensuring geographical and demographic balance, is transferred from Article 3 of the Nice Protocol on enlargement.

The Commission will continue to represent the Union in external fora, except in the CFSP, and retains its exclusive right of initiative.

The Constitution includes a Declaration in the Final Act emphasising the need for transparency and for account to be taken of the national "political, social and economic realities" of those States that do not have a Commissioner.

Article I-27 contains the requirement that the Commission President be elected or rejected by the EP. Under Article 214 TEC the Commission President nomination requires the approval of the EP, but the Constitution stipulates that the candidate "shall be elected" by the EP by a majority of its members (I-27(1)).

As at present, the Council and the Commission President-elect will adopt the list of the other Commissioners proposed by the Member States, and the whole Commission, together with the Union Minister for Foreign Affairs, will be appointed by the European Council acting by QMV, following EP approval.

The *Protocol on Transitional Provisions* states that the Commission in office when the Treaty comes into force will remain in office until the end of that Commission's term, but that on the day the Foreign Affairs Minister is appointed, the term of the Commission member of his/her nationality will end.

A Declaration attached to the Final Act provides for consultation between the EP and the European Council to take place before the European Council decides on the appointment of Commission President. These will focus on the backgrounds of the candidates for President of the Commission, taking account of the EP elections.

F. Union Minister for Foreign Affairs

Article I-28 concerns the mandate of the new Union Minister for Foreign Affairs, who will conduct the Union's common foreign and security policy, sitting in the Commission as a Vice President and using its resources, but answerable to Member States in the

[130] By this time the EU could number 27, with Romania and Bulgaria, or 28 with Turkey, or 31, with Croatia, Macedonia and Serbia and Montenegro. If Switzerland and/or Norway re-applied, the number could rise to 33, although this is unlikely. Assuming a total of around 30 EU Members, the Commission would be reduced to around 20.

Foreign Affairs Council, over which he/she will preside. The Minister will be appointed by the European Council by QMV, with the agreement of the Commission President. The Constitution modifies the Convention text to clarify the roles of the Foreign Minister in the Foreign Affairs Council and the Commission. He or she will be bound by Commission procedures only if they are compatible with his/her Council mandate.

> 3. The Union Minister for Foreign Affairs shall preside over the Foreign Affairs Council.
> 4. The Union Minister for Foreign Affairs shall be one of the Vice-Presidents of the Commission. He or she shall ensure the consistency of the Union's external action. He or she shall be responsible within the Commission for responsibilities falling to it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the Union Minister for Foreign Affairs shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

In its report on the draft articles on external action, the Lords EU Committee drew attention to "the significant and powerful role of the proposed Foreign Minister" and questioned the Government's support for the merger of the present roles of the EU High Representative and the External Affairs Commissioner (Javier Solana and Chris Patten, respectively). The Committee thought

> […] significant questions remain unanswered about the Foreign Minister and in particular where the right of initiative will lie; who will actually determine policy; the relationship between the Foreign Minister and the Commission; and, in particular, the impact on the Foreign Minister's role of proposals to extend qualified majority voting […]. We cannot give our full support to the proposed post of Foreign Minister of the European Union unless these questions are answered and unless the uncertainties that they indicate are satisfactorily resolved.[131]

The FCO Explanatory Memorandum of 29 May 2003 stated:

> 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.[132]

It continued:

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[131] 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.6-7 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/107/10702.htm#a2

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

> 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.[133]

The House of Lords Committee was also concerned about the 'double-hatted' role of the Foreign Minster in his/her relations with the Commission:

> 295. Chief among our concerns remains the relationship the Union Minister would have with the Commission. There is a danger that as vice-president of the Commission, the Minister would be subject to Commission collegiality. Given that the Minister will have the right of initiative over the whole area of CFSP this is a serious problem. There are risks in the opposite direction. The Minister's role in ensuring coherence across the Union's external policy could lead to micromanagement by the Council of such Commission policy areas as transport and environment, as well as trade and development.
> 296. **We urge the Government to negotiate the role of the Union Minister for Foreign Affairs with extreme care. The person appointed to this post must remain firmly based in the Council, accountable to Member States. In order to make the status of the post less susceptible to unnecessary suspicion, we propose that a better job title be found, perhaps "Foreign Affairs Representative".**[134]

Mr Straw told the Standing Committee on the IGC in November 2003:

> We would have preferred to have explicit separation of those two posts. I do not believe that, in practice, they will merge. The institutional balance between the Council and the Commission is absolutely fundamental to the proper operation of the EU, and, for a variety of reasons, member states would not accept that they should merge into one position.[135]

G. European Court of Justice

Article I-29 sets out provisions on the European Court of Justice. The Court will include the Court of Justice (ECJ), the General Court (Court of First Instance) and specialised courts (as in Article 225a TEC). There will continue to be one judge from each Member State. The judges are currently nominated by Member State governments (Articles 223 and 225 TEC), and, although national nomination procedures are not always transparent, Article I-29(2) of the Constitution retains the current provisions, stating that the judges "shall be appointed by common accord of the governments of the Member States".

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

134 House of Lords Select Committee on the European Union, 41st Report, *The Future of Europe p the Convention's Draft Constitutional Treaty*, HL Paper 169, 21 October 2003, at http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/169/169.pdf

135 Standing Committee on the IGC 10 November 2003 c 56 at http://www.publications.parliament.uk/pa/cm200203/cmstand/other/st031110/31110s04.htm

This Article differs from the present Treaty by requiring Member States to "provide rights of appeal sufficient to ensure effective legal protection in the fields covered by Union law". This gave rise to comment in the Lords Report on *The Future Role of the European Court of Justice*:

> […] requiring the individual to use the national courts, rather than the Community Courts, to challenge the legality of Union measures may be inefficient and time-consuming. In some cases he or she may even have to subject themselves to the risks of criminal prosecution in order to test the legality of the underlying Union measure. **Article I-28 [now I-29] appears to be a poor substitute for amending the standing rule in Article III–270(4) in the way suggested in paragraphs 150–151 above. We invite the Government to identify what extra benefits Article I-28 would give the citizen and to say how it would propose to implement the Article in the United Kingdom**.[136]

H. European Central Bank, Court of Auditors and Advisory Bodies

Article I-30 is on the European Central Bank. The solidarity requirement in this Article requiring the European System of Central Banks (ESCB) to "support general economic policies in the Union in order to contribute to the achievement of the Union's objectives", is contained in Article 105 TEC.

Most significantly for the UK, sub-paragraph 4 states that "those Member States whose currency is not the euro, and their central banks, shall retain their powers in monetary matters". This may not quite be the "explicit reference to maintaining our opt-out on the euro until such time as Parliament and the people of Britain have taken a different decision",[137] proclaimed by Mr MacShane in December 2003, but it is a clear indication that the opt-out will remain.

Article I-31, on the Court of Auditors, contains the main general provisions of Articles 246-8 TEC. It is an official EU Institution, it will carry out the Union's audit and "ensure good financial management". Its members will be completely independent "in the general interest" of the Union.

Article I-32 establishes the Union's Advisory Bodies, which are the Economic and Social Committee (ESC) and the Committee of the Regions (CoR). Their functions will continue

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[136] HL Paper 47, 2003-4, 15 March 2004 at http://pubs1.tso.parliament.uk/pa/ld200304/ldselect/ldeucom/47/4702.htm

[137] Standing Committee on the IGC, 1 December 2003 c 122

to be advisory, as under Articles 7, 257 and 263 TEC, despite the many submissions from regional groups and organisations to the Convention that their role should be enhanced.[138]

The provisions that they may not be bound by any mandatory instructions and that they shall be completely independent in the performance of their duties, in the general interest of the Union, are identical to present Treaty requirements.

V Exercise of Union Competence

A. Legislative and Non-Legislative Acts

Article I-33 sets out six categories of acts. They are **European laws**, **European framework laws**, **European regulations**, **European decisions**, **recommendations and opinions**. The Constitution states:

> A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A European framework law shall be a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
>
> Recommendations and opinions shall have no binding force.[139]

'European laws', 'European framework laws', and 'European decisions' replace the present 'regulations', 'directives' and 'decisions' respectively. 'Recommendations' and

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[138] For example, Belgian contribution to the Convention 13 May 2002, at http://www.euconvention.be/contributions/detail.asp?ID=82 ; Committee of the Regions submission, CONV 26/02, 10 April 2002 at http://register.consilium.eu.int/pdf/en/02/cv00/00026en2.pdf ; see also CoR contributions at http://europa.eu.int/futurum/docinstjust_en.htm#cr

[139] CIG 87/04

'opinions' remain unchanged. The following table summarises the new categories of Union acts:

New category	Former category	Legislative act?
European laws	Regulations	Yes
European framework laws	Directives	Yes
European decisions	Decisions	No
European regulations		No
Recommendations	Recommendations	No
Opinions	Opinions	No

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 as being "legislative acts". European laws will be, like the present regulations, directly applicable.[140] 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 Article I-36 (see below) and 'implementing acts' under Article I-37. European regulations will have the same legal effects as European laws (general application, binding in their entirety and directly applicable in all Member States), except that they will be 'non-legislative acts' under **Article I-35**.

The House of Lords EU Committee commented on an earlier version of these articles, questioning, in particular, the distinction between 'legislative' and 'non-legislative' acts:

> 10. The authors of the new Constitution contend that this new categorisation of measures and terminology will add to transparency. But what added value, if any, there might be in trying to distinguish some generally applicable and legally binding rules as "legislative acts" and some as "non-legislative acts" is at first sight obscure. The reality is that at present there is no single Union legislature and Union legislation is made by the Council, the Parliament and the Commission. Further, there is no neat separation of powers. It may be that the scheme of Articles 24-26 [now Articles I-33-35] is seeking to distinguish the Legislature from the Executive in the new Constitution of the Union. But what seems clear is that if that is the objective any separation will remain blurred, at least so long as the Treaty provides for the Council to take executive action (which we imagine will continue to be the case at least as regards the CFSP for some time) and for the Commission to have a virtual monopoly of the right of initiative as regards Union legislation and the extensive power to make directly applicable secondary legislation. **In the meantime creating a new category of "regulation" and**

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

> **categorising some Union legislation "legislative acts" and some "non-legislative acts" does not seem helpful**.[141]

The Lords Committee was also sceptical about the new "European decision":

> 13. The term "European decision" is also not trouble-free. It is said to have been derived from Article 14 ECSC and the definition of "decision" in Article 24(1) is significantly different from that currently in Article 249 TEC. First, European decisions are expressed to be "non-legislative" acts. As already mentioned that does not mean that they are devoid of (general) legal effect but, it would appear, merely that they emanate from the Council or the Commission (as the executive?). As we have indicated above (para 10) it is very confusing to say that something is a "non-legislative act" when it results in a binding legal rule to which sanctions are or may be attached. Second, the words "upon those to whom it is addressed", currently in the Article 249 TEC definition of "decision", are not necessary for the definition of "European decision". This is the influence of Article 14 ECSC. Under the ECSC Treaty, "decision" covered acts providing general rules of law (*ie* "regulations" in EC terms) as well as those which were individually addressed to specific persons. And later Articles of the ECSC Treaty distinguished between "general decisions" and "individual decisions". The intention in adopting the ECSC definition in preference to Article 249 TEC appears to be to enable *inter alia* European decisions to replace the "joint actions" and "common positions" currently used in the Common Foreign and Security Policy (CFSP). A European decision will, however, be "binding in its entirety", except where it specifies those to whom it is addressed when it will only be binding on them. What "binding in its entirety" will mean in this context is uncertain. In the ECSC context it meant that a general decision could establish a legal principle, impose abstract conditions for its implementation and set out the legal consequences entailed thereby.[142] Whether and when "European decisions" might have a general normative effect is unclear. Such an effect might not always be appropriate for "European decisions" in CFSP, where if no addressee is specified the decision is presumably intended only to be binding on those party to it (*ie* the Member States under the CFSP).[143]

In its Response to the Lords Committee, the Government expressed its support for the new categories of legal acts:

> 3. The Government welcomes the proposals to simplify and reduce the number of instruments, and rename them. We believe the new terms "Law" and "Framework Law" reflect better the underlying concept and purpose of those instruments. We note the Committee's concerns about making a distinction between legislative and non-legislative acts. However, the Government believes that such a distinction

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[141] Lords EU Committee, 12th Report, *The Future of Europe: Constitutional Treaty-Draft Articles 24-33* at http://www.parliament.the-stationery office.co.uk/pa/ld200203/ldselect/ldeucom/71/7102.htm

[142] Case 13/57 *Eisen- und Stahlindustrie v High Authority* [1957-8] ECR 265, at p 275

[143] Lords EU Committee, 12th Report

> will contribute to greater clarity, in particular of the legislative role of the Council.[144]

Under **Article I-34** the Ordinary Legislative Procedure (OLP, like the present co-decision procedure, involving both the Council and the EP) is established as the procedure for adopting European laws and framework laws. The detailed procedures are set out in Article III-396 (the co-decision procedure under Article 251 TEC). There is an assumption that voting will be by QMV, if unanimity is not given as the basis for agreement in areas where the EU can legislate.

Special provisions apply to legislative acts taken under **Article I-34(2)** and **(3)**. These are not based on a Commission proposal and the role of the Commission is therefore reduced. Under the present Treaty the Commission has the sole right of initiative in legislative proposals, the only exceptions being in intergovernmental areas, such as enhanced cooperation, police and judicial cooperation and elements of Title IV (visas, asylum, immigration and other matters relating to the free movement of persons).

The Government is in favour of making the OLP and QMV the norm for most decision-making in the Community pillar:

> 9. The Government considers that qualified majority voting and co-decision should be the general voting arrangement for Union decision-making in what is now the first pillar, except in areas of vital national interest, where unanimity should apply. The Government believes that this exception should operate in remaining areas of the social and employment fields where unanimity currently applies, in order to respect the diversity of national traditions in Member States.[145]

The use of QMV for certain areas of "vital national interest" was one of the Government's "red lines" in the IGC negotiations. It stated that it would not agree to QMV in foreign affairs, taxation, social security, key areas of criminal procedural law, the system of own resources and defence matters.[146]

Article I-36 allows the Commission to enact "Delegated European regulations", which are not provided by the current Treaty, in order to supplement or amend certain non-essential elements of legislative acts. Convention Working Group IX had proposed creating a new category of "delegated acts", which would supplement or amend such non-essential elements. Their aim, according to the Praesidium, would be

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144 Government Response to Lords 12th Report, Lords 41st Report, *The Future of Europe- the Convention's Draft Constitutional Treaty* 14 July 2003 at http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/169/16917.htm#note140

145 Government Response to Lords 12th Report at http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/169/16918.htm

146 For a wider discussion of the Government's "red lines", see Standard Note SN/IA/2740, 7 November 2003, *The Intergovernmental Conference on the Draft Treaty Establishing a Constitution for Europe: issues, concerns and 'red lines'*

> to encourage the legislator to concentrate on the fundamental aspects, preventing European laws and European framework laws from being over-detailed. The legislator may decide to delegate the more technical aspects, while subjecting this delegation to stringent conditions enabling it, if necessary, to retrieve its power to legislate.[147]

The Lords EU Committee commented:

> Article 27(1) [now Article I-36), however, raises the question as to what is "essential" and what "non-essential". We are sympathetic to the view that Community legislation can become overloaded with technical detail (matters which would not be dealt with as primary legislation in any national parliament) and may not be able to respond quickly and flexibly to technical and market development. There is a need to distinguish between core policy decisions and technical issues. In practice the legislator (the Council and the Parliament or, exceptionally, the Council acting alone) will decide in the particular case whether there should be any delegation under Article 27 and/or 28. What is "essential" (or "fundamental" or "important") is a subjective and imprecise concept. Similarly there will be differing views on what is "technical" in relation to any subject area. Under Article 27 the legislator is given a discretion, but is not under any obligation, to delegate. This is entirely sensible, both politically and in practical terms, but it shows the nonsense of the "legislative"/"non-legislative" split. If a technical/detailed rule is formulated by the Council and the Parliament and contained in the basic act it is part of a "legislative act", but if it is devised by the Commission and included in a delegated act it will be characterised "non–legislative".
>
> 32. The basic instrument, a European law or European framework law, must specify the terms of the delegation and the "conditions of application", ie one or more of the means of exercising control over the Commission listed in Article 27(2). The decision of the legislator (the Council and the European Parliament) whether to "delegate" to (under Article 27) and/or to "confer implementing powers" on (Article 28) the Commission will have to be taken case by case. Whether the use of "delegated regulations" will improve the efficiency of Union law-making will have to be seen. Further, how the creation of the new category of measures, "delegated acts", will affect the balance of power as between the Commission and the Member States and, in co-decision cases, the European Parliament is unclear. Any assessment may need to await any reform of "comitology" procedures (see Article 28 below). In the meantime we welcome the overall objective of Article 27.[148]

The conditions attached to the delegation, such as the objectives, content, scope and duration of the delegation, will be explicitly determined by a European law, thus

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147 CONV 571/03, 26 February 2003 at http://european-convention.eu.int/docs/Treaty/CV00571.EN03.pdf

148 Lords 12th Report, 2002-3, 12 March 2003 at http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/71/71.pdf

involving both the EP and the Council. Either of these bodies may revoke the delegation or subject its entry into force to their approval.

A Declaration attached to the Final Act takes note of the Commission's intention to continue, as it does at present, to consult experts appointed by the Member States in the preparation of draft delegated European regulations in the financial services area.

Article I-37 provides for Commission implementing acts, in accordance with current Article 202 TEC, the so-called "Comitology Article". The implementing powers of the Commission are subject to control by Member State representatives under the comitology procedures. The House of Lords commented on comitology in a Report in 1999 as follows:

> "Comitology" is the established Community shorthand for the system of procedures involving committees, made up of representatives from Member States and chaired by the Commission, whereby the Member States can exercise some control over implementing powers delegated to the Commission by the Council. The fact that these committees exist is fairly well-known. But who sits on them, when they meet, how they work and what they decide is something of a mystery, except to insiders, assiduous Brussels watchers and a few academics and students.[149]

The Commission outlines below the history and application of comitology, drawing attention to recent reforms in the comitology process:

> Under the Treaty establishing the European Community, it is for the Commission to implement legislation at Community level (Article 202 of the EC Treaty, ex-Article 145). In practice, each legislative instrument specifies the scope of the implementing powers granted to the Commission and how the Commission is to use them. Frequently, the instrument will also make provision for the Commission to be assisted by a committee in accordance with a procedure known as "comitology".
> The committees which are forums for discussion, consist of representatives from Member States and are chaired by the Commission. They enable the Commission to establish a dialogue with national administrations before adopting implementing measures. The Commission ensures that they reflect as far as possible the situation in each country in question.
> Procedures which govern relations between the Commission and the committees are based on models set out in a Council Decision ("comitology" Decision). The first "comitology" Decision dates back to 13 July 1987. In order to take into account the changes in the Treaty - and, in particular, Parliament's new position under the codecision procedure - but also to reply to criticisms that the

[149] Lords European Communities Committee Third Report, *Delegation of Powers to the Commission: Reforming Comitology*, HL 23, 1998-9, 2 February 1999 at http://pubs1.tso.parliament.uk/pa/ld199899/ldselect/ldeucom/23/2301.htm

Community system is too complex and too opaque, the 1987 Decision has been replaced by the Council Decision of 28 June 1999.
The new Decision ensures that Parliament can keep a eye on the implementation of legislative instruments adopted under the codesision procedure. In cases where legislation comes under this procedure, Parliament can express its disapproval of measures proposed by the Commission or, where appropriate, by the Council, which, in Parliament's opinion, go beyond the implementing powers provided for in the legislation.
The Decision clarifies the criteria to be applied to the choice of committee and simplifies the operational procedures. Committees base their opinions on the draft implementing measures prepared by the Commission. The committees can be divided into the following categories:

- advisory committees: they give their opinions to the Commission which must take the utmost account of them. This straightforward procedure is generally used when the matters under discussion are not very sensitive politically.

- management committees: where the measures adopted by the Commission are not consistent with the committee's opinion (delivered by qualified majority), the Commission must communicate them to the Council which, acting by a qualified majority, can take a different decision. This procedure is used in particular for measures relating to the management of the common agricultural policy, fisheries, and the main Community programmes.

- regulatory committees: the Commission can only adopt implementing measures if it obtains the approval by qualified majority of the Member States meeting within the committee. In the absence of such support, the proposed measure is referred back to the Council which takes a decision by qualified majority. However, if the Council does not take a decision, the Commission finally adopts the implementing measure provided that the Council does not object by a qualified majority. This procedure is used for measures relating to protection of the health or safety of persons, animals and plants and measures amending non-essential provisions of the basic legislative instruments.

It also provides the criteria which, depending on the matter under discussion, will guide the legislative authority in its choice of committee procedure for the item of legislation; this is meant to facilitate the adoption of the legislation under the codecision procedure.
Lastly, several innovations in the new "comitology" Decision enhance the transparency of the committee system to the benefit of Parliament and the general public: committee documents will be more readily accessible to the citizen (the arrangements are the same as those applying to Commission documents). Committee documents will also be registered in a public register which will be available from 2001 onwards. The ultimate aim is, with the computerisation of decision-making procedures, to publish the full texts of non-confidential documents transmitted to Parliament on the Internet. From 2000 onwards, the

> Commission will publish an annual report giving a summary of committee activities during the previous year.[150]

Under **Article I-37(1)** the implementation of the Union's legally binding acts is generally within the competence of the Member States, as at present. The rules governing the exercise of Commission powers are presently decided by the Council acting unanimously, whereas under **Article I-37(3)** they will be taken by QMV.

Article I-38 provides for the Institutions to 'select' the type of act to be adopted "on a case by case basis", taking into account the proportionality principle and stating the reasons for the selection. Under Article 253 TEC, the EU's Institutions "state the reasons on which they are based", with reference to "any proposals or opinions which had to be obtained under the Treaty". In the Constitution there is added emphasis on the need to respect the principle of proportionality in deciding on the type of act to be adopted.

Article I-39 concerns the publication of an act in the Official Journal and its entry into force. Under current provisions in Article 254 TEC, Regulations, Directives and Decisions are signed by the Presidents of the EP and Council and published in the 'L' (legislation) series of the Official Journal of the European Union (OJL). They come into force on the date specified in the act or on the 20th day after publication. The Constitution provisions are broadly similar.

B. Common Foreign, Security and Defence Provisions (*by Claire Taylor*)

1. Common Foreign and Security Policy (CFSP)

Article I-40 sets out Specific Provisions for implementing the Common Foreign and Security Policy, which are different from those for other policies in this Title because there is a large inter-governmental element, as under the present Treaties.

Under **I-40(1-4)** the European Council will define the strategic interests of the Union and the objectives of CFSP. The Council of Ministers will frame the policies of the CFSP with reference to the strategic guidelines laid down, while the Minister for Foreign Affairs will have joint responsibility, with the Member States, for putting those CFSP policies into effect.

Member States are obliged to consult on any CFSP matter which is of general interest in order to determine a common approach. However, as defined in **I-40(5)**, before taking any action on the international scene, or fulfilling any commitment that could be perceived as affecting the Union's interests, each Member State will be obliged to consult

[150] http://europa.eu.int/comm/internal_market/en/indprop/design/comitology.htm

within the Council of Ministers or the European Council. Although this provision is already laid down in Article 14(5) TEC, it has raised some concerns following the campaign in Iraq.

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

> 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.

Article I-40(7) sets out the rights of initiative in CFSP and the continued need for unanimity in decision-making, with the exception of those proposals defined in Article III-196 which allow for a decision by QMV. These would include proposals submitted jointly to the Council of Ministers by the Minister for Foreign Affairs and the Commission. **Article I-40(8)** is a *passerelle*, or bridging clause, allowing for the extension of QMV in CFSP matters following unanimous agreement within the European Council.

Although related to CFSP matters, Article I-40 does not lay down the provision for establishing a Minister for Foreign Affairs, which is set out in **Article I-28**.

2. Common Security and Defence Policy (CSDP)

Article I-41 sets out the basic principles for the development of the Common Security and Defence Policy (CSDP),[151] building largely upon Article 17 TEU. These principles are elaborated in Part III of the Constitution (Articles III-310-313). Under **Article I-41(1)** CSDP will be an integral part of the Union's CFSP agenda. It will provide the Union with an operational capability for use in peacekeeping missions outside the Union's sphere of influence, for use in conflict prevention and in strengthening international security. The military and civilian capabilities required for performing these tasks will be agreed upon and provided by the Member States, while decisions on the implementation of the CSDP, including the launch of operations, will be adopted by unanimity within the Council of Ministers. The Minister for Foreign Affairs will have the right of initiative alongside Member States and will also be able to make proposals to the Council of Ministers in conjunction with the Commission.

The current Treaty provisions establishing CSDP are contained within the terms defining the CFSP. Article 17 TEU, in particular, makes provision for "the progressive framing of

[151] Generally, the term CSDP is used interchangeably with ESDP (European Security and Defence Policy).

a common defence policy, which might lead to a common defence, should the European Council so decide". While Article I-16(1) of the Constitution also refers to the "progressive framing of a common defence policy, which might lead to a common defence", **Article I-41(2)** states more decisively that the CSDP "will lead to a common defence, when the European Council, acting unanimously, so decides".

Within the CSDP framework the Council of Ministers will also be able to assign the implementation of a task to a smaller group of Member States which have both the necessary capabilities and political will to undertake that task. This emphasis on closer cooperation could foster the predilection for "coalitions of the willing" when planning and implementing EU operations. The need for unanimity in the Council, however, will ensure the political support of all Member States for any operation.

In order to improve European military capabilities **Article I-41(3)** makes provision for the establishment of a European Armaments, Research and Military Capabilities Agency. Under the authority of the Council, the agency would:

- Identify operational requirements;
- Promote the harmonisation of operational requirements and put forward measures to satisfy those requirements, including compatible procurement methods and multilateral 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;
- Define a European capabilities and armaments policy;
- Evaluate the progress made by each Member State in fulfilling its capability commitments.

The proposal for a European Armaments Agency has been discussed for a number of years, with the establishment of the Organization for Joint Armament Cooperation (OCCAR) by the UK, France, Germany and Italy, which is regarded by many as a possible precursor to a fully fledged armaments agency. The Convention Praesidium recommendation to establish a European Armaments and Strategic Research Agency was largely welcomed, including by the defence industry. An article in *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.[152]

However, 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 in the Six Nation Framework Agreement signed in July 1998. Attempts to harmonise equipment capabilities are considered to have achieved some success through NATO's Defence Capabilities Initiative (DCI) and the European Capabilities Action Plan (ECAP). However, many analysts argue that there has been limited progress in harmonising defence research and development. Many also argue that the success of multinational procurement, which will form a major part of the EAA, has been limited, mainly because of lack of funding, the divergence of national interests and requirements, and disputes over industrial participation.

The Lords EU Committee suggested in its report on *The Future of Europe: Constitutional Treaty – Draft Articles on External Action* 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.[153]

A decision establishing the Agency and setting out its principles, objectives and organisational structure was taken by the General Affairs and External Relations Council in November 2003.[154]

The provision for "structured cooperation" between a smaller group of Member States is laid down in **Article I-41(6)**, which allows greater cooperation in the area of capabilities.[155] **Article I-41(7)** establishes a clause for mutual defence but, in contrast to previous drafts which placed an obligation on participating Member States to come to the assistance of any state that is the victim of armed aggression, the Constitution's current provisions for a mutual defence clause no longer contain a security commitment along the lines of NATO's Article V.[156] Article III-214 of the earlier version in CIG 50/03 has been deleted and the provision for mutual defence is now limited under Article I-41 (7) to "the obligation of aid and assistance, by all means in their [Member States'] power, in

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

[153] 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.13

[154] Library Standard Note SN/IA/2949 *Developments in European Security and Defence Policy*, 9 March 2004 examines the structure and role of the European Defence Agency in more detail.

[155] Greater cooperation in military planning as a capability is inherent in this clause.

[156] Article V of the North Atlantic Treaty establishes the right of collective self defence where an armed attack against one NATO Member State is considered an attack against them all.

accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States".

The establishment of a mutual defence clause requiring the security commitment of NATO's Article V had given rise to some concern. Mr Heathcoat-Amory told the Standing Committee on the Convention on 7 May 2003:

> 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.[157]

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

> 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.[158]

In the FCO's May 2003 Explanatory Memorandum the 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. [159]

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[157] Standing Committee on the Convention on the Future of Europe, 7 May 2003

[158] Comments by the UK Government Representative on the Convention, Peter Hain, at the European Convention Plenary Debate, 16 May 2003.

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

C. An Area of Freedom, Security and Justice

Article I-42 concerns Specific Provisions for implementing the Area of Freedom, Security and Justice[160] introduced by the Amsterdam Treaty and relates to the approximation of national laws and police and judicial cooperation between national authorities. It provides that European laws and framework laws will be implemented "where necessary" to approximate national laws in the areas listed in Part III.[161] It also calls for the promotion of "mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions" and for "operational cooperation between the competent authorities of the Member States, including the police, customs and other services specialising in the prevention and detection of criminal offences".

Article I-42(2) provides for an "evaluation mechanism" for national parliaments to participate in the political monitoring of Europol[162] and the evaluation of Eurojust's[163] activities in accordance with provisions in Articles III-276 and III-273. The Government welcomed this innovation in its Response to the European Scrutiny Committee's Report on the Convention proposals on criminal justice,[164] but agreed with the Committee that the consultation with national parliaments in the evaluation process ought to include legislation as well as policy: "… we would fully expect legislation to be included as an integral part of the evaluation alongside implementation of the policies on the ground".[165] However, the Part III Articles relating to this Article make explicit reference only to policies.

Article 42(3) states that "In the field of police and judicial cooperation in criminal matters, Member States shall have a right of initiative".

The Government supports mutual recognition in this context, stating in its Response to the Lords 12th Report on the Convention's criminal justice proposals:

> 3. The Government welcomes the inclusion in Article 31(1) [now Article I-41(b)] of mutual recognition as a fundamental constitutional feature of the area of

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[160] This would be an area in which the free movement of persons is assured, but in conjunction with measures on external border controls, asylum, immigration and the prevention and combating of crime.

[161] E.g. measures to prevent and combat crime, racism and xenophobia, measures for coordination and cooperation between police and judicial authorities, the mutual recognition of judgments in criminal matters and, if necessary, the approximation of criminal laws; better access to justice through mutual recognition of judicial and extrajudicial decisions in civil matters.

[162] Europol is the European Police Office established under the Europol Convention of 1995. Europol facilitates the information exchange between Member States; obtains, collates and analyses information and intelligence, notifies the competent authorities via national units and aids investigations by sending them relevant information. It also maintains a computerised system of collected information with data.

[163] Eurojust is the European Judicial Cooperation Unit established by a Council Decision in February 2002.

[164] ESC 26th Report, *The Convention's proposals on criminal justice*, HC 63-xxxvi-I and II, 2002-3.

[165] ESC 1st Special Report, 2002-3, HC 1118, 25 September 2003

> Freedom, Security and Justice. Indeed, we believe that this reference could be strengthened further. It should also be made clear that approximation of national laws should take place only where necessary in accordance with the provisions of Part II of the draft Treaty.[166]

The Government agreed with the Committee's conclusions on the Member States' right of initiative in the field of police and judicial cooperation:

> Article 31(3) maintains Member States' right of initiative in the field of police and judicial cooperation in criminal matters. But following the Working Group's suggestion, Member States' initiatives would have to have the support of a quarter of Member States. This is a welcome limitation.
> 7. […] We share the Committee's view that there is a need to provide some limitation on Member States' right of initiative. A requirement to have the support of a significant proportion of other Member States prior to launching a legislative initiative will result in much greater coherence to future work in the justice and home affairs area.[167]

Article I-43 establishes a solidarity clause in the event of a terrorist attack, natural or man-made disaster. Article III-329 outlines the specific provisions of the solidarity clause. There is no equivalent TEC or TEU Article. The establishment of a solidarity clause in the event of a terrorist attack was discussed in the immediate aftermath of 11 September 2001 and at the Anglo-French summit at Le Touquet in February 2003. Its inclusion in the text was largely welcomed. However, moves to extend it beyond the campaign against terrorism, in line with the mutual defence provisions in Articles I-41(7) and III-309, met with opposition. Many analysts considered that a solidarity clause along the lines of Article V of the Brussels Treaty could undermine the collective defence commitment of NATO.

A Declaration attached to the IGC Final Act specifies that no provisions in Articles I-43 and III-329 of the Constitution should "affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State".[168]

D. Enhanced Cooperation

Article I-44 sets out provisions on enhanced cooperation, the procedure whereby groups of Member States may cooperate on specific issues when all Member States do not wish to, subject to certain rules and safeguards to protect the interests of the Union and the

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[166] Government Response to Lords 12th Report, July 2003, at http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/169/16919.htm

[167] Ibid

Member States. The Constitution procedures are generally the same as the present Articles 43-45 TEU. They also cross refer to the detailed procedures described in Part III (Articles III-416-423). Conditions such as respect for the Constitution, the aims of the Union and the rights of non-participating States remain. The use of such arrangements only as a last resort and only in areas of non-exclusive competence, the need for authorisation by the Council (i.e. intergovernmental) and for openness, and the requirement that the costs be borne by the participating States, remain guiding principles.

Under **Article I-44(2)** the decision to set up such an arrangement would require at least a third of Member States, rather than the (pre-enlargement) specified minimum of eight (representing just over half of the former 15 Member States). This might make more sense in a Union where the number of members is not fixed. The qualified majority for the adoption of decisions to implement enhanced cooperation would be by a majority of the votes of participating States, representing at least 55% of the Council members of participating States and at least 65% of the population of those States. For decisions not based on a Commission or a Foreign Minister proposal, the QMV will be at least 72% of Council members and 65% of the population of participating States. Non-participants would not have a vote in enhanced cooperation decisions but could take part in the deliberations, as currently provided in Article 44 TEU.

The Convention Praesidium wanted to simplify the wording and structure of the current enhanced cooperation provisions and to base the new structure on thematic criteria, rather than on the present grouping by pillar. The collapsing of the 'pillars' into the one Union pillar has brought about a thematic approach, but the extent to which the wording and structure have been simplified is debateable.

Both structured cooperation (in CFSP) and enhanced cooperation (in other areas) were areas of concern for the Labour Member of the Convention, Gisela Stuart, who thought that structured cooperation in Article I-41(6) was "especially divisive as it allows a core to develop, which can keep others out", while Article 44 on enhanced cooperation was "more open".[169] Mr Straw shared some of her concerns.

> […] We have considerable concerns about paragraphs 6 and 7 of article 40. [now Article I-44] we have a problem with structured co-operation, the detailed provisions of which are outlined in article 213 [now Articles 416-23]. They provide for an inner core of member states that would determine the rules of the club. We agreed with the principle of structured co-operation, as did most of my fellow Foreign Ministers. However, we want the process to be made more transparent and for the rules of the club to be set at 25, not formed by those countries that happen to join it at any one moment. We certainly do not want those countries that have joined to have a veto over which other countries may join. We are pursuing this major issue, and we have many allies. When such matters were discussed over a meal, there was not unanimity among Foreign

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[168] CIG 87/04 ADD 2 at http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf

[169] Standing Committee on the IGC 10 November 2003 at http://www.publications.parliament.uk/pa/cm200203/cmstand/other/st031110/31110s01.htm

> Ministers about it, but there was widespread support for the position that I and representatives of many other countries expressed.
> My hon. Friend was right to say that enhanced co-operation, which is specified under article 43 [44] and article III–22 [416] to III–29 [423], is a more open process. The difference is that structured co-operation is a continuing state—groups of member states would set up established arrangements for structured co-operation—whereas enhanced co-operation is broader and operations are regarded as one-off. An interesting question is how exactly the two matters relate to each other—like several questions about the European Union, there is no definitive answer. There cannot be an answer. It is possible that co-operation will develop either under enhanced co-operation on a rolling basis or under structured co-operation.[170]

VI The Democratic Life of the Union

This new title, comprising **Articles I-45 - I-52**, contains provisions on the principles of democratic equality, representative democracy, participatory democracy, autonomous social dialogue, institutional transparency, the Ombudsman, the protection of personal data, and the status of churches and non-confessional organisations.

Article I-45 on the principle of democratic equality (the "equality of citizens", who "shall receive equal attention from [the Union's] institutions, bodies, offices and agencies") is a response to the aim expressed in the *Laeken Declaration* of bringing the EU and its mechanisms closer to its citizens. This is expressed to some extent in Article 1 TEU, under which decisions should be taken "as openly as possible and as closely as possible to the citizens", which is repeated in **Article I-46(3)**.

Article I-46(4) conveys the aspirations of present Article 191 TEC on political parties at European level contributing to "forming a European awareness and to expressing the political will of the citizens of the Union" and conforms with the wording of Declaration No. 11 on Article 191 TEC, annexed to the Final Act of the Treaty of Nice. The British Government helped to secure the Conference Declaration to ensure that the provisions of the proposed Statute on European Political Parties under Article 191 would not conflict with the UK's *Political Parties, Elections and Referendums Act*, which bans foreign parties, or discriminate against European political parties on account of their attitudes to European integration.

Article I-47 provides for openness and transparency, particularly in the workings of the Union Institutions. The Government thought the draft text on participatory democracy provided "an appropriate means of recognising the dialogue between the Union's

[170] Standing Committee on the IGC 10 November 2003

institutions and civil society".[171] **Article I-47(4)** contains the first opportunity for indirect popular participation in the European process. Not less than one million Union citizens will be able to invite the Commission, under procedures to be set out in legislation at a later date and within the framework of the Commission's powers, "to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required to the purpose of implementing the Constitution".[172] This 'citizens' initiative' is probably a response to the poor public perception of the EU evidenced in the low turnout in EP elections, increasing numbers of calls for referendums on the Constitution and an increase in the number of citizens' complaints to the European Ombudsman.[173]

The Treaty already provides for a citizen's petition in Articles 21 and 194 TEC, but this is to the EP, not the Commission. The Constitution Article gives citizens the same right as the EP currently has to petition the Commission and the wording is almost identical to that granting the EP this right under the second sub-paragraph of Article 192 TEC.

Article I-48 recognises the role of the social partners (trade unions and employers) at Union level, while taking account of national systems. The social and employment policy provisions in Part III of the Constitution are largely similar to existing Treaty provisions in Articles 136-145 TEC. The Constitution emphasises respect for national systems and the autonomy of the social partners. Article I-48 also gives treaty status to the Tripartite Social Summit for Growth and Employment.[174]

In a paper for the Centre for Policy Studies (CPS) Ruth Lea thought "The potential strengthening of the unions could add to management's problems".[175] However, the British Government generally supports such involvement:

> 15. The Government recognises the key role played by the social partners in the social and employment policy fields. However the Government does not consider that further procedures or powers are needed to facilitate or enhance the social dialogue.[176]

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[171] Government Response to Lords 12th Report, July 2003, at http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/169/16918.htm

[172] The Citizens' Initiative is discussed in a publication by the Swiss Federal Department of Foreign Affairs and Initiative and the Referendum Institute Europe, *The European Constitution Bringing in the People, Contributions on "The options and limits of direct democracy in the European integration process* at http://www.europa.admin.ch/eu/info_mat/dossiers/e/european_constitution.pdf

[173] Ombudsman's press releases record an increase in the number of complaints of 8-10% over the last three years.

[174] The Tripartite Social Summit for Growth and Employment was proposed in a Commission Communication on 26 June 2002 (COM(2002)341 final) entitled *The European social dialogue, a force for innovation and change*. The summit met for the first time in March 2003, then in December 2003 and March 2004.

[175] *The Essential Guide to the European Union* CPS 2004 at http://www.cps.org.uk/ruth.pdf

[176] Government Response to Lords 12th Report, July 2003

Mr MacShane confirmed the Government's support for Article I-48 in a Parliamentary Answer:

> **Jim Sheridan:** To ask the Secretary of State for Foreign and Commonwealth Affairs what his assessment is of the effect of the Constitutional Treaty on trade unions.
> **Mr. MacShane:** The EU Constitutional Treaty's social and employment policy provisions are largely unaltered when compared to previous treaties. Article I-47 [now I-48] specifically recognises the role of social partners, that is to say the representatives of employers and trade unions, at European Union level, and institutionalises the Tripartite Social Summit. The Government welcome the reaffirmation of the social dimension to the European Union which is why they signed the Social Chapter in 1997.[177]

Article I-49 establishes the office of the Ombudsman, as under Article 195 TEC, "to receive, examine and report on complaints about maladministration in the activities of the Union institutions, bodies, offices or agencies".

Article I-50 concerns institutional transparency. Under **Article I-50(2)** the EP is required to meet in public (as at present), as is the Council "when considering and voting on a draft legislative act". Council secrecy has long been a contentious subject. National parliaments and the public have pressed for more transparency, including access to meetings and documents, in order to hold their governments to account over the adoption of legislation. Some progress was made at the Seville European Council in June 2002, which decided to open up Council legislative meetings to the public, but this was only for parts of the co-decision process. The Government supports Council openness, telling the ESC in October 2003 that it continued "to press for Council meetings to be held in public for all legislative proceedings" (i.e. not just in the co-decision procedure).[178] The Constitution Article would appear to satisfy this demand.

Under **Article I-50(3)** all EU citizens will have a right of access to the documents of all Union institutions, whereas Article 255 TEC currently specifies EP, Council and Commission documents. Article 255(3) TEC states that "Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents". Under Article 207(3) TEC the Council is authorised to elaborate in its Rules of Procedure the conditions for public access to Council documents, defining when it is acting in its legislative capacity and providing for the publication of votes, explanations of votes and statements in the minutes. The Constitution also provides for conditions to be set on public access, which might be limited on grounds of public or private interest.

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[177] HC Deb 13 Jul y 2004 c 1057W at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/cm040713/text/40713w12.htm

[178] Government Observations on ESC Report, *The Convention on the Future of Europe and the Role of National Parliaments*, HC 1176, 2nd Special Report 2002-3, 21 October 2003

Article I-51 on the protection of personal data is supplemented by a Declaration attached to the IGC Final Act, that when rules on the protection of personal data under Article I-51 could have direct implications for national security, due account would be taken of the specific characteristics of the matter.

Article I-52 is the compromise solution to the "Christianity issue". It states that the Union will "respect" and "not prejudice" the status of churches and religious associations or communities, but that it equally respects the status of "philosophical and non-confessional organisations". It recognises their "identity and specific contribution" and will maintain "an open, transparent and regular dialogue" with them.

This article was not in the original draft of Part I, but appeared in a revised draft of Part I of the constitution at the end of May 2003. It was adapted from Declaration 11 annexed to the 1997 Treaty of Amsterdam, which states:

> The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
>
> The European Union equally respects the status of philosophical and non-confessional organisations.[179]

Its inclusion in the draft constitution, and particularly the addition of paragraph 3 on the EU maintaining a dialogue with the Church, was largely a response to intensive lobbying by religious groups contributing to the European Convention. The Vatican "noted with satisfaction" Article I-51, although it regretted the absence of reference to Christianity in the Preamble.[180] The Commission of the Bishops' Conferences of the European Community (COMECE), which had also contributed to the Convention's drafting work, welcomed the article. In a press release issued on 19 June 2003, COMECE noted that "The provision for open, transparent and regular dialogue reflects the specific contribution of churches and religious communities, distinct from secular authority, at the service of European society as a whole".[181] Pierre de Charentenay, Director of the Catholic European Study and Information Centre (OCIPE), thought the Article was "an extraordinary recognition of the contribution of churches and religion to the collective life in a political entity, the European Union. Religion is not limited to private life, but is recognised here as an element of public life".[182]

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179 Treaty of Amsterdam, Cm 4434, October 1997 Declaration 11

180 Press Office Declaration on the European Constitution, Vatican City, 30 May 2003 at http://www.eurocristians.org/uploads/1054657430.pdf

181 http://www.maltachurch.org.mt/COMECE%20press/COMECE%20reaction%20to%20draft%20EU%20Constitution.pdf

182 23 June 2003 at http://www.jesuits-europe.org/ocipe/constitution.htm

However, others expressed fears about the possible threat to the neutrality of the EU's institutions that a dialogue with religious bodies might pose, and that Article 51 might institutionalise a right allowing them to interfere in the decision making processes of the European Institutions in matters relating to individual rights. Particular concerns were expressed about the implications of religious influence over any EU decisions relating to abortion, voluntary euthanasia, divorce, biomedical research (embryonic, human stem cell), equality between men and women, same-sex partnerships and contraception. Opponents wanted a clear separation between the Church and the EU's law-making bodies. The European Humanist Federation expressed strong views on this, lobbying governments and the EU for the removal of the article.[183] Humanists complained that the special status accorded to the Church in the draft constitution was "unnecessary and undemocratic" and not "in the best interests" of Union citizens.[184] An NGO campaign lobbied the Belgian Government, which in November 2003 proposed an amendment deleting article I-51 from the draft constitution. In December 2003 101 MEPs signed a resolution calling for the removal of the article.[185]

The Lords EU Committee commented on Article I-51 (then draft article 37 and before the addition of "open and transparent" dialogue) in its 22nd Report in May 2003:

> 25.[…] While we recognise that there has been pressure to include express reference to religious values in any new Union Constitution the Committee is concerned that Article 37, which may have been included as some form of compromise, may give rise to greater problems than it is intended to solve. **Whether Article 37 is necessary[186] or helpful requires careful consideration.**
> 26. In this Article as in others (see in particular our comments on Article 34 above) there are serious problems of uncertainty and lack of definition. The Praesidium's Explanatory note suggests that churches and the organisations referred to in Article 37(1) and (2) do not fall within the definition of "civil society", but as we explain in paragraphs 10 and 11 above the meaning of that term is far from clear and there is a good argument that the churches and such organisations form a part of civil society.
> 27. Article 37(3) places an obligation on the Union (and thus in turn on its Member States and the Union's institutions) "to maintain a regular dialogue with these churches and organisations". The scope and extent of application of this

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183 The humanist arguments are set out in literature which can be accessed at: http://www.humanism.be/english/03latestnews.htm

184 Alan Henness, Convenor of the Humanist Society of Scotland, at http://www.humanism-scotland.org.uk/PressReleases/europeanconstitution2.pdf. The Constitution articles relevant to Henness's argument are: Article 44: The principle of democratic equality, Article 45: The principle of representative democracy, Article 46: The principle of participatory democracy and Article 49: Transparency of the proceedings of Union Institutions

185 http://servizi.radicalparty.org/documents/index.php?func=detail&par=3151

186 Footnote 20: "Article 37 fudges the key issue of separation of church and state. Articles 9, 10, 11 and 14 ECHR (and their equivalents in the EU Chapter of Fundamental Rights) already provide a balanced approach to freedom of thought, conscience and religion, free speech, freedom of association, and freedom from discrimination on any ground."

> obligation is unclear. We query whether anything more than or different to Article 34 is required. According special positions *inter alia* to "churches and religious associations or communities" and to "philosophical and non-confessional organisations" without defining those terms might open the door to a wide range of bodies (including sects and cults), some of which might generally be considered to be harmful, and some actually dangerous, to society.
> 28. There are also problems with the drafting of this Article. It contains apparent internal inconsistencies. For example, Article 37(1) "respects and does not prejudice the status" of churches, while Article 37(2) only "respects the status" of philosophical organisations. There is also possible inconsistency with related Articles. Again Article 37(3) refers only to "those churches and organisations" and omits any mention of the "religious associations or communities" in Article 37(1). What is intended? It is noteworthy that maintaining "a regular dialogue" suffices for Article 37(3), while Article 34(3) requires "an open, transparent and regular dialogue with representative associations and civil society". It is doubtful, however, whether anything different is intended. It may be suggested, not least by lawyers, that the omission of the adjectives "open" and "transparent" can hardly be an accident, given the close proximity of Article 34(3). The greater clarity required for Article 34(3) (see paragraph 12 above) is required also here.[187]

The extent to which these fears are well-founded will depend on how the EU interprets 'dialogue', to what degree religious leaders are consulted about draft proposals, and how open and transparent this process is. The Church would join the many organisations that currently lobby the EU and others that are consulted (sometimes routinely) by the Commission in the course of its pre-legislative discussions. The difference in this case is that the specific dialogue with the Church would be a treaty based requirement.

VII The Union's Finances (*by Ed Potton*)

Article I-53 is on the Union's budgetary and financial principles.

Drawn from a number of articles in the TEC, this article sets out the rules concerning the setting and adoption of the annual EU budget along with the need for sound financial management. This article was not changed by the June 2004 IGC.

III-53(6) adds to the TEC a new statement:

> 6. The Union's budget shall be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that appropriations entered into the budget are used in accordance with this principle.

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[187] *The Future of Europe: Constitutional Treaty - Articles 33-37 (The Democratic Life of the Union)* 15 May 2003, HL 106 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/106/10604.htm#a7

Article I-54 sets out the decision-making process for Own Resources. The Own Resources Decision (ORD) is the EU's funding mechanism which determines the Budget revenue. The ORD also covers the UK abatement.[188] **Article I-54(3)** and **(4)** were altered between the draft constitution and the final version of the Constitution, which is as follows:

> 1. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.
>
> 2. Without prejudice to other revenue, the Union's budget shall be financed wholly from its own resources.
>
> 3. A European law of the Council shall lay down the provisions relating to the system of own resources of the Union; in this context it may establish new categories of own resources or abolish an existing category. The Council shall act unanimously after consulting the European Parliament. That law shall not enter into force until it has been approved by the Member States in accordance with their respective constitutional requirements.
>
> 4. A European law of the Council shall lay down implementing measures of the Union's own resources system in so far as this is provided for in the law adopted on the basis of paragraph 3. The Council shall act after obtaining the consent of the European Parliament.[189]

Article I-54(3) covers the approval process for the ORD. The law concerning resources is to be decided by unanimity and then approved within Member States. In the UK, this means it will be approved by Parliament. The UK abatement is covered by this.

The draft constitution had allowed the detail of the ORD to be determined by QMV. This has been changed in the final version. Now **Article I-54(4)** states that the implementing measures of the ORD will be decided by a European law (i.e. by QMV, with EP consent). However, the measures to be covered by this part are determined by the law agreed by **I-54(3)**. Therefore, powers under this part of the article will have been passed by unanimity and 'ratified' by national parliaments.

The Government insisted that the ORD should remain subject to unanimity. Mr MacShane said in December 2003 that "the Government believes that unanimity must be retained for the system of own resources, including the terms and conditions for the UK

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[188] The UK abatement, or rebate, was secured by Margaret Thatcher at the Fontainebleau European Council in 1984, which helped to make up the shortfall between what the UK paid into the EU and what it received. The UK tended to benefit less than other Member States from Common Agricultural Policy subsidies because of its relatively small farming sector.

[189] http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf

abatement".[190] Mr Straw told the Standing Committee on the IGC in December 2003 that the Government would "not sign up to it without such a change being made".[191]

Article I-55 on the multi-annual financial framework has been amended so that the approval of the framework is made unanimously, with no qualification stating that unanimity covers just the first framework agreed after the Constitution enters into force. **I-55(4)** now provides a *passerelle* mechanism, stating that the Council can decide, by unanimity, that the framework decisions can be made by QMV. **Article I-56** states that a "European law shall establish the Union's annual budget in accordance with Article III-404", which sets out the procedure for drawing up, approving and adopting the budget.

VIII The Union and its Neighbours

This title (Title VIII) was changed by the Council's legal/linguistic experts from "The Union and its Immediate Environment" to the more friendly "The Union and its Neighbours". **Article I-57** develops the "wider Europe" dimension in the EU's relations with neighbouring countries.[192] The aim is to establish an area of prosperity and good neighbourliness, based on the Union's own values and peaceful cooperation. It provides for the Union to conclude agreements with its neighbours containing reciprocal rights and obligations and for the possibility of joint activities.

There is no current Treaty provision in this area, but the EC has established over the years a number of cooperative partnerships with non-EU states and regional groups. Examples include the Euro-Mediterranean Partnership based on the Barcelona Declaration adopted in November 1995, the Stabilisation and Association Process of 2000, which aimed to help bring peace, prosperity and democracy in the Western Balkans, and a number of Partnership and Cooperation Agreements (CPAs) with Eastern European countries, such as Russia, Ukraine and Moldova in 1994-1995 and with the recently acceded EU Member States. Some of these agreements have helped to integrate neighbouring states into the EU, while others have aimed to bring about more stability in the region. A Declaration attached to the IGC Final Act makes special reference to the particular situation of small countries "which maintain specific relations of proximity with it".[193]

IX Union Membership

Articles I-58 – I-60 cover membership issues. **Article I-58** concerns the accession to the Union of new members, which is currently dealt with in Article 49 TEU. There are

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[190] HC Deb 1 December 2003 c 10W
[191] Standing Committee, 1 December 2003 c 107
[192] See the Commission's *Wider Europe-Neighbourhood:A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003), 104 final, March 2003 at
[193] http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf

changes to the details of the procedure, but accession remains subject to ratification by all the existing and prospective member states. Under current procedures a state wishing to accede makes an application to the Council. The Council decides the matter by unanimity after consulting with the Commission and having received the assent of the EP, by an absolute majority of its component members. Under **Article I-58** the application would still be made to the Council, but it would then notify the EP and the national parliaments of the application. The Council would act by unanimity, again after consulting the Commission and obtaining the consent of the EP, this time by a majority of its component members.

The accession arrangements would be embodied in a treaty, as at present, and would be subject to ratification by all Member States and by the acceding state(s). This is necessary because the accession treaties would effect amendments to the Constitution, for instance in the composition of the institutions.

Article I-59 is on the suspension of certain rights of Union membership as a result of deviation from the values of the Union, and corresponds with current Articles 7 TEU and 309 TEC. A reasoned proposal that a Member State risks breaching the Union's values may be put forward by one third of the Member States, by the EP or by the Commission, for consideration by the Council. The latter may adopt a decision by a four-fifths majority, and having obtained the consent of the EP, to determine that "there is a clear risk of a serious breach by a Member State of the values mentioned in Article I-2."

Further, the European Council may adopt a decision by unanimity, having obtained the 'consent' (rather than the present, slightly weaker, 'assent') of the EP and on a proposal by one third of the Member States or by the Commission, determining the existence of a serious and persistent breach of the values mentioned in Article I-2. The State in question may "submit its observations."

Following this, the Council may adopt a decision by QMV (at least 72% of Council members, comprising at least 65% of the population of the participating States). suspending "certain of the rights" of the State in question, including its voting rights. The State in question will not be released from its obligations under the Constitution during this period. The Council may vary or revoke these measures "in response to changes in the situation which led to their being imposed," and again it does so by QMV.

In either of these situations, a finding that there is a risk of a serious breach, accompanied by recommendations, or a finding that there is a serious and persistent breach, accompanied by suspension of rights, the vote of the State in question will not be taken into account. The consent of the EP will be on the basis of a two thirds majority of votes cast, representing a majority of MEPs.

The question arises, as it did at the time of the Amsterdam IGC which agreed the suspension clause, over the definition of a "serious and persistent" breach.

Article I-60 sets out a procedure for a voluntary withdrawal from the Union according to a State's "own constitutional requirements". A State wishing to withdraw must notify the European Council, which will consider the matter and set out negotiating guidelines. The Union will conduct negotiations with the State on this basis, and will conclude an agreement setting out the arrangements for withdrawal and taking into account "the framework for its future relationship with the Union." The Council of Ministers, having obtained the consent of the EP, will conclude the agreement, acting by QMV. The withdrawing state will not participate in discussions or decisions about it in the European Council or in the Council of Ministers.

The withdrawing state will be released from its obligations under the Constitution upon entry into force of the withdrawal agreement, or two years after its notification to the European Council. This period may be extended by unanimous agreement.

There is no mention of ratification of the withdrawal agreement by Member States, but it is likely that this would be necessary, for the same reason that accession agreements have to be ratified by all the states concerned before they can enter into force. Just as accession of new members has implications for the institutions, so withdrawal of an existing member would have a similar impact. This would not supersede the provision on the two-year time period.

Article I-57 on the Union and its neighbours may be relevant to the nature of the withdrawal agreement, since the withdrawing state would remain a part of the Union's immediate environment. The explanatory notes from the Convention Praesidium argued that this removed the need to create a special associate status for withdrawing states.

There is no provision for withdrawal in the existing EC Treaty. Under general treaty law a state may withdraw from a treaty lacking a withdrawal clause if all the states parties consent.[194] It must give at least three months notice, except in cases of emergency, and if another state party objects during that time, arbitration must be sought.[195] A state may withdraw without consent if it is established that the parties intended to admit the possibility of denouncing the Treaty or withdrawing from it, or if "a right of denunciation or withdrawal may be implied by the nature of the treaty."[196] The final point is a matter of interpretation. A state withdrawing in this way must give at least 12 months' notice,[197] and this notification must be given to all the other states parties.[198] Article I-60 therefore has more political than legal significance.

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[194] *Vienna Convention on the Law of International Treaties* 1969, Article 54
[195] *Vienna Convention* Article 65, citing Article 33 of the UN Charter on arbitration
[196] *Vienna Convention* Article 56
[197] Ibid
[198] *Vienna Convention* Article 65.

The explanatory notes on the draft constitution gave the rationale for the two approaches to withdrawal in this Article (by agreement or after at least two years):

> The Praesidium considers that, since many hold that the right of withdrawal exists even in the absence of an explicit provision to that effect, withdrawal of a Member State from the Union cannot be made conditional upon the conclusion of a withdrawal agreement. Hence the provision that withdrawal will take effect in any event two years after notification. However, in order to encourage a withdrawal agreement between the Union and the State which is withdrawing, Article I-57 [now I-60] provides for the possibility of extending this period by common accord between the European Council and the Member State concerned.

Under **Article I-60(5)**, if a State which has withdrawn from the Union asks to rejoin, it must re-apply under the procedure referred to in Article I-58. In other words, it will be dealt with as if it were a new applicant, with no special advantages. Jo Shaw, considering this Article as it appeared in the draft text (then Article I-59), wrote:

> The framework [for withdrawal] thus assumes an immediate reinstitution of the arm's length relationship between members and non-members, a point buttressed by the insistence in Article I-59(4) that a state having once withdrawn must apply to rejoin via the normal route laid down in Article I-57. There is to be no halfway house associate membership or automatic right to rejoin. This aspect of the provision is tougher in the final version than in the original draft.[199]

The British Government's position had been that there was no need for a withdrawal clause from the present EC Treaties. Former Foreign Office Minister, Baroness Scotland, was asked why there was no provision in the EC Treaties for the free and unilateral withdrawal of Member States, as there is for the treaties governing NATO and the WTO. She replied:

> We see no need for the Treaties governing membership of the Union to include a specific provision on unilateral withdrawal. It remains open to Parliament to repeal the European Communities Act 1972, the logical consequences of which would be to withdraw from the EU. The terms of such a withdrawal would be for the Government to negotiate with the other member states.[200]

When the Convention first included the withdrawal article in its early draft text, Peter Hain told the European Scrutiny Committee in November 2002: "It may be a good idea that Members States which are so fed up with the European Union are able to remove

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[199] Legal and political sources of the draft European Constitutional Treaty, Jo Shaw, Professor and Jean Monnet Chair of European Law, University of Manchester, Senior Research Fellow at the Federal Trust for Education and Research, London, 2003, at http://les.man.ac.uk/law/staff/documents/legalandpoliticalsourcesofthedrafteuropeanconstitution.pdf

[200] HL Deb, 11 January 2000, WA 96-7.

themselves from it. We need to look at the detail, we need to know exactly what it means.[201]

The Government supports the inclusion of the article in the Constitution and has argued that it should be welcomed by 'Eurosceptics' and Europhiles alike. The Foreign Secretary reminded Bill Cash about the 'benefits' of the withdrawal clause for Eurosceptics in the (then) draft constitution because "you could effect [withdrawal from the Union] without having to do it outside of the Treaty".[202] Mr Straw put a different slant on the clause in a debate on international affairs in November 2003:

> Happily, one of the many benefits of the draft constitution before the IGC was written with the hon. Gentleman [Mr Cash] in mind. For the first time, we have ensured—something that the Conservative Government never provided—that there is proper provision for a member state to withdraw from the EU.[203]

He added, however, that "The issue is not whether it can be done, but whether it is right and proper and in this country's interests". In an article in *Die Welt* in July 2004, Mr Straw wrote that the streamlined procedure for withdrawal was "proof, if more were needed, that this is an organisation of freely co-operating nations.[204]

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[201] 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

[202] ESC Minutes of Evidence, 10 September 2003, at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/1078/3091002.htm

[203] HC Deb 27 November 2003 c 151 at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/vo031127/debtext/31127-08.htm

[204] *Die Welt*, 10 July 2004, British Embassy in Berlin website at http://www.britischebotschaft.de/en/news/items/040710.htm