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The Treaty Establishing a Constitution for Europe: Part III

> "This is a treaty for an effective European Union of freely co-operating nations, with national Governments firmly in control"
> Jack Straw, debate on the European Constitution 9 September 2004

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

Part III contains the detailed arrangements for the policy articles in Part I of the Constitution.

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

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Summary of main points

- The final elements of the *Treaty Establishing a Constitution for Europe* were agreed on 18 June 2004 and the provisional consolidated text was published on 25 June 2004 as CIG 86/04.

- The final edited text was published on 6 August 2004 as CIG 87/04 with Addendums 1 and 2 containing Protocols and Declarations respectively.

- Part III contains the detailed arrangements for policies set out in Part I and consists of seven titles:

- Provisions of General Application
- Non-Discrimination and Citizenship
- Internal Policies and Action (in five chapters)
- Association of Overseas Countries and Territories
- The Union's External Action (in eight chapters)
- The Functioning of the Union (in three chapters)
- Common Provisions

- Part III starts at Article III-115 and ends at Article III-436. These provide the detailed arrangements for policies set out in Part I (see Research Paper 04/66, 6 September 2004).

- The contributors to this Paper are: Christopher Barclay (agriculture, fisheries, civil protection), Brenda Brevitt (energy), Lorraine Conway (consumer protection), Christine Gillie (education), Sally Broadbridge (judicial cooperation in criminal matters), Tim Edmonds (capital and payments), Steven Kennedy (social security), Vincent Keter (employment), Vaughne Miller (institutional provisions, legislative processes, enhanced cooperation, international relations, common provisions, human rights and citizenship), Bryn Morgan (aid and cooperation with third countries), Fiona Poole (transport), Ed Potton (EU budget, economic and financial policy), Jo Roll (public health), Antony Seely (fiscal provisions, competition), Pat Strickland (police cooperation), Claire Taylor (common foreign, security and defence policy), Arabella Thorp (free movement of people, immigration and asylum), Gemma Wallace (culture), Philip Ward (intellectual property, sport)

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I Introduction

The Convention on the Future of Europe (the Convention) drew up a draft constitutional text, the *Draft Treaty Establishing a Constitution for Europe*, 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 text was published as IGC document CIG 86/04 on 25 June 2004.[1] The British Government published this as Command Paper 6289 on 19 July 2004. The formal title of the text is the *Treaty Establishing a Constitution for Europe* but it is referred to here as "the European Constitution" or "the Constitution". 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 text was edited by the Council of Ministers' legal and linguistic experts in the 20 official languages of the EU, in order to make it authentic within the meaning of Article IV-448 of the Constitution itself. The edited text of the 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 Constitution.

The Constitution is to be signed in Rome on 29 October 2004 and will then have to be ratified by all 25 Member States in accordance with their constitutional requirements before it can come into force. In the UK the final text of the Constitution will be re-published as a Command Paper following signature, and again after ratification as part of the European Treaty Series.[4]

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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

4 See HC Deb 20 July 2004 c26WS at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040720/wmstext/40720m05.htm#40720m05.html_sbhd2

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 the policy and principle 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 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,[5] now concedes that a "poacher's pocket" will be needed.[6]

This paper looks at Part III of the European Constitution, "The Policies and Functioning of the Union", which contains the detailed policy and procedural provisions deriving from Part I articles. Part III begins at Article III-115.

The paper up-dates Research Paper 03/58, *The draft treaty establishing a European constitution: parts II and III* of 6 July 2003, and is one of a series of Library papers that will consider the four parts of the Constitution and certain Protocols and Declarations attached to it. Research Paper 04/66 looks at articles in Part I of the Constitution.

The following acronyms are used.

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

II Clauses of general application and Non discrimination and citizenship

Articles III-115 to III-116 lay down aspects to be taken into account in the formation and implementation of all EU policies and action. **Article III-115** (new) calls for consistency between policies and taking the Union's objectives into account, but with

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5 "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

6 *Economist*, 10 July 2004; also at British Embassy Berlin website http://www.britischebotschaft.de/en/news/items/040710.htm

special emphasis on the principle of the conferral of powers by the Member States on the Union in its efforts to ensure this consistency.

Article III-116 (Article 3(2) TEC) is on the elimination of discrimination generally and the promotion of equality between men and women in particular. **Article III-117** (new), requires that policies take into account the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health; **Article III-118** (new) is on combating discrimination on a wide range of grounds. The present Article 13 TEC allows the EU to take action to combat discrimination, whereas the Constitution makes an anti-discrimination element integral to the defining and implementing of all Union measures.

Under **III-119** (Article 6 TEC) and **III-120** (Article 153(2) TEC), environmental protection and consumer protection are similarly required to be integral to the law-making process. **III-121** (new) includes respect for animal welfare, while also respecting Member States' religious rites and cultural traditions.

III-122 (Article 16 TEC) requires that services of general economic interest (for example, transport, postal services, energy and communications) should "operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfil their missions". The Constitution adds a provision for European laws to establish principles and set conditions for their operation, without prejudice to the competence of Member States, "to provide, to commission and to fund such services".

Articles III-123 – III-124 (Articles 12 and 13 TEC) deal with the principle of non-discrimination. Under **III-123** (Article 12 TEC) the Constitution reverts to the present Treaty text, providing that the Council *may* (rather than 'shall' in the Convention text) lay down rules to prohibit discrimination on grounds of nationality. **III-125** (Article 18 TEC) allows the Union to enact the necessary legislation to ensure freedom of movement, except that, for measures concerning passports, identity cards, residence permits and measures concerning social security or social protection, the Council must act by unanimity. Under **III-126** (Article 19 TEC) the Council will also act by unanimity for the arrangements for Union citizens to vote in, or stand for, municipal elections. **III-127** (Article 20 TEC) provides for the diplomatic and consular protection of Union citizens abroad.

Article III-128 (Article 21 TEC) concerns the languages of the Union and **III-129** (Article 22 TEC) requires the Commission to report to the EP, Council and Economic and Social Committee on the application of **Article I-10** on Union citizenship. These provisions are similar to existing Treaty provisions under the *Principles* and *Citizenship of the Union* headings.

III Title 3: Internal Policies and Action

This is a lengthy title containing five chapters on internal policy areas.

A. Internal Market

Articles III-130 - III-132 (Articles 14-15 TEC) establish the basis for the internal market. The expiry date of 31 December 1992 has been removed, but otherwise the provisions are the same as those in the TEC.

1. Free movement of persons and services

Articles III-133 - III-149, on the free movement of persons and services, are on the whole almost identical to the provisions of Title III TEC. The few notable differences are highlighted below, and these mostly concern legislative procedures, rather than substance.

- **Social security for migrant workers**

Article III-136 is concerned with social security for migrant workers. The provisions are currently in Article 42 TEC. At present, Article 42 TEC is given effect by Council Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.[7] On 29 April 2004 the Council and the EP adopted a new Regulation[8] which updates and simplifies the rules. It is expected that the Regulation will come into force in 2006.[9]

Under Article 42 TEC, the Council has to act unanimously throughout the co-decision procedure when adopting the social security measures necessary to provide freedom of movement for workers and their dependants. The Convention Text provided for the adoption of European laws or framework laws in this field by QMV, but the British Government was opposed to the extension of QMV in this area.[10] **Article III-136(2)** of the Constitution includes a so-called "emergency brake". Where a Member State considers that a draft measure would "affect fundamental aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system", QMV is suspended and the matter referred to the European Council, which may then refer the draft back to the Council or ask the Commission to submit a new proposal.

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

8 883/2004, OJL 166 30 April 2004

9 For further background see 'EU revamps social security rules: simplified legislation should help promote mobility throughout Europe', *Social Agenda*, April 2004, pp 7-8

10 See the House of Lords Select Committee on the European Union, *The Future of Europe – The Convention's Draft Constitutional Treaty*, HL 169 2002-03, 21 October 2003, para 92

- **Freedom of establishment**

Article 44 TEC sets out the legislative duties of the Council and the Commission in the area of freedom of establishment (for business people, the self-employed, agencies, branches and subsidiaries etc). Under **Article III-138** the EP also has duties in this regard.

- **Professional qualifications**

Existing Article 47(2) provides that:

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

Article III-140, like Article 46 TEC, allows Member States to make provision for providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

Article III-141 removes the requirement of Article 47 TEC for the Council to act unanimously under the co-decision procedure, in situations where a directive would require a Member State to change its legal requirements on professional training and conditions of access.

Article III-142 on companies registered in the EU is identical to Article 48 TEC.

Articles III-144 – III-150 on the freedom to provide services are virtually identical to present Articles 49-55 TEC.

2. Free movement of goods

Articles III-151 – III-155 concern the free movement of goods and correspond with Articles 23-31 TEC. The Constitution articles on the customs union are the same as those in the present Treaty, with the additional provision in **Article III-152** that European laws or framework laws shall establish measures to strengthen customs cooperation between Member States and between them and the Commission. Provisions concerning the prohibition of quantitative restrictions between Member States are the same as existing provisions.

3. Capital and payments

Articles III-156 – III-160 deal with the movement of capital and payments. **Articles III-156, 157** and **III-159** (Articles 56-59 TEC) relating to the movement of capital, including

the provision of financial services, real estate establishment and the admission of securities to capital markets, remain substantially unchanged, although the EP is now given a role in adopting measures. As at present, where movements of capital threaten to cause serious difficulties for the operation of economic or monetary union, safeguard measures lasting up to six months may be implemented against third countries, after agreement with the European Central Bank (ECB).

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

Article III-158 is new and also relates to the Union's objective of creating an area of freedom, security and justice. **Article III-160** adds the grounds of "preventing and combating terrorism and related activities" to the current provisions in Article 60 TEC on sanctions against a third state, specifying "the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities".

4. Competition

Articles III-161 – III-166 concern rules on competition. They incorporate existing provisions in the Treaty, set out in Articles 81-86 TEC.

Article 81 TEC prohibits agreements, decisions and concerted practices ("anti-competitive agreements") which prevent, restrict or distort competition. As one of the EU's two main competition provisions, a substantial body of case law surrounds the interpretation of this article. It forms the basis in the *Competition Act 1998* for the Chapter I Prohibition of the UK's domestic competition regime (ss.2, 9). In the Constitution, only minor changes have been made to the wording as it now appears in **Article III-161**,[11] and these do not appear to require consequent changes to UK legislation. Article 82 TEC is the other main competition article, prohibiting abuse of a dominant position (i.e. monopolistic abuse), which forms the basis for section 18 of the *Competition Act 1998*. There are no significant changes to this provision as it now appears in the Constitution under **Article III-162**.

Article 83 TEC makes provisions for the legislative framework to implement the EU's competition regime. As at present, **Article III-163** provides for legislation to be adopted by QMV. Minor drafting changes are incorporated in **Article III-164** (replacing Article 84 TEC), which gives Member States jurisdiction for competition matters in the internal market in default of the introduction of the EU legislation provided for in Part III.

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

Article III-165 (Article 85 TEC) gives the Commission responsibility for investigating competition infringements within its competence, and requires Member States to assist the Commission in this work. There is one addition to the text. Under **Article III-163(b)** the Council may lay down detailed rules for those circumstances under which agreements may escape the general prohibition against anti-competitive agreements established under **Article III-161**, "taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other." Where the Council has adopted a regulation pursuant to this provision, the Commission is empowered to "adopt European regulations relating to the categories of agreement" (**Article III-165(3)**).

Article III-166 (Article 86 TEC) makes the state sector and nationalised industries subject to the EU competition regime, with a narrow exception for services of general economic interest and revenue-producing monopolies. Under **Article III-166(3)** the Commission may "where necessary, adopt appropriate European regulations or decisions."

Articles III-167 – III-169 (Articles 87-89 TEC) concern state aids. The provisions are the same, except that **III-167(2)(c)**, on aid granted to Germany after unification being compatible with the internal market, now provides for the possibility of a European decision to repeal that point five years after implementation of the Constitution. A Declaration annexed to the Constitution notes that the provisions will be interpreted in accordance with ECJ case law. (Similar wording is included in **Article III-243** on transport).

"Regions" are added to **III-167(3)(a**) as possible qualifiers for aid "in view of their structural, economic and social situation".

Article III-168(2) provides that the Commission "shall act" upon a compatibility application if the Council has not made its attitude known, whereas present Article 88(2) TEC states that the Commission "shall give its decision on the case".

In June 2004 the Commons European Scrutiny Committee took evidence from Patricia Hewitt, the Secretary of State for Trade and Industry, who spoke about the competition elements in the then draft constitution:

> As far as the subject we are looking at today is concerned, the draft Treaty says that the Union shall have exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market. We think that is right. It is a prime function of the European Union to deliver an effective internal market and that goal of a dynamic, open and competitive market across the European Union is of huge benefit to the United Kingdom and that is one of the main reasons why we have been at the forefront in developing a pro-active and effective competition policy in Europe drawing on our own significant efforts to remodel and modernise our competition regime which of course we did with

> the 1998 Competition Act, the 2002 Enterprise Act and the implementation of the modernisation regulations this year. Our view is that in a world where businesses and markets are increasingly global, most competition cases of concern to the authorities will have an impact beyond national borders. The European Commission and the national competition authorities including our own Office of Fair Trading already work very closely together on such cases. The framework for that of course is enshrined in significant recent reforms of the European competition regime through the modernisation of the application of Articles 81 and 82 and the amendments to the European merger regime. The changes that have been made clearly reflect the shared understanding between us and our European colleagues in the Commission that competition cases should be dealt with by the authority best placed to do so in accordance with the principle of subsidiarity. The new merger regime has introduced a simplified mechanism to reallocate cases between the Commission and the Member States. So, the Competition Directorate will consider cases with a significant European dimension, national authorities, those which are primarily orientated towards national markets. We do not believe that the Treaty will prevent us having additional domestic competition rules for other purposes that do not obstruct the effectiveness of the Community rules and are not aimed at the functioning of the internal market. Finally, the text of the Constitution as originally drafted by the Convention of the Future of Europe did raise some concerns in relation to competition. They were essentially of a technical nature; we sought to deal with them through the technical review in the IGC process overseen by Jean-Claude Piris, the Head of the Council Legal Service. We succeeded in our goal of getting that clause redrafted; we worked extremely hard with colleagues to get clarity into the text through that amendment and I think that the amendment we secured on competition does provide both the clarity we were seeking and the basis for the further effective operation of competition policy in the European Union.[12]

There were concerns among Committee members about the granting of Union exclusive competence for competition in Article I-13. Michael Connarty reminded Ms Hewitt that the Government had argued against this at the Convention and asked whether it was now concerned that it would "prevent the UK from adopting legislation to prevent or regulate anti-competitive practices". The Government did not think the British Government and Parliament would be restricted. Ms Hewitt continued:

> … the view we took instead once we got into the technical review was that the exclusive competence should operate where it was necessary for the functioning of the internal market and we believe that clarifies the interface between domestic and community law … .[13]

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12 ESC Minutes of Evidence 16 June 2004 at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/700/4061602.htm

13 ESC Minutes of Evidence 16 June 2004 at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/700/4061602.htm

5. Fiscal provisions

Articles III-170 – III-171 concern taxation. They incorporate the existing tax provisions set out in Articles 90 to 93 TEC. There are no fundamental changes to these provisions. In the draft constitution published in November 2003, it had been proposed that the Council would be given the opportunity of adopting legislation relating to indirect taxes and company taxation by QMV, *provided* that in each case the Council had agreed *unanimously* that the measure related to administrative cooperation or combating tax fraud.[14] Both provisions were removed from the final version of the text.

Article III-170(1) and **(2)** reproduces Articles 90 and 91 TEC. The first prohibits both fiscal discrimination and fiscal protectionism against foreign products. The second prevents tax subsidies on exports to the territory of other Member States by the repayment of any internal taxation. There is no change in wording.

Article III-170(3) reproduces Article 92 TEC, under which the Council may approve the limited use of charges – other than indirect taxes – by a Member State to discriminate in favour of exports or against imports.[15] Any such provision must be approved by a decision of the Council.

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

> The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.[16]

This provision is replaced by **Article III-171** with one substantive change. Legislation for harmonising indirect taxes may be adopted (*emphasis added*) "provided that such harmonisation is necessary for the establishment or the functioning of the internal market *and to avoid distortion of competition*." It remains the case that any such legislation must be agreed by the Council acting "unanimously".

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[14] These provisions were contained in Article III-62(2) and Article III-63 of the draft text (CIG 50/03, 25 November 2003).

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

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

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

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

Although directives introduced under Article 94 TEC may be approved under the co-decision procedure, this does *not* apply to fiscal provisions.[17] The Constitution maintains the requirement for unanimity on any fiscal measure introduced under this treaty base. The wording in both cases is fundamentally unchanged and Articles 94 and 95(2) TEC are replaced, largely unaltered, by **Articles III-173 and III-172** of the Constitution.

As noted above, the earlier version of the text had included a new provision to allow for measures on company taxation relating to "administrative cooperation or combating tax fraud and tax evasion" to be adopted by QMV *if* the Council had agreed unanimously that such measures were "necessary for the establishment or functioning of the internal market and to avoid distortion of competition."[18] This has been deleted.

The possibility that all taxation measures might not be subject to unanimity at some point in the future has been a controversial issue for some time.[19] The Government's position on the issue has been stated many times, as, for example, in answer to a Parliamentary Question in June 2003:

> **Mr. Mitchell:** To ask the Chancellor of the Exchequer what amendments to the draft EU constitution he will propose in order to protect the rights of the UK Government to determine its own tax regime.
>
> **Dawn Primarolo:** Any changes to the provisions of the existing EU Treaties require the unanimous agreement of all member states. The Government have made it clear that it will not accept any changes that move away from unanimity on tax matters.[20]

When the Prime Minister made a statement to the House following agreement of the Constitution in June 2004, he underlined the point that "this treaty … keeps unanimity for the most important decisions … in particular for tax, social security, foreign policy,

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

18 Article III-63 to CIG 50/03, 25 November 2003

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

20 HC Deb 9 June 2003 c 602W

defence and decisions on the financing of the Union affecting the British budget contribution."[21]

Articles III-172 – III-176 are "Common Provisions", the renamed "Approximation of Laws" for internal market laws contained in Articles 94-97 TEC. The general aims are unchanged and European framework laws will establish measures for the approximation of laws, regulations or administrative provisions of the Member States that directly affect the internal market. The out-dated term "common market" is removed and replaced with "internal market" throughout the Article.

A new **Article III-176** has been inserted. This deals with setting "uniform intellectual property rights protection" throughout the Union. A European law or framework law will establish this and central Union-wide authorisation, coordination and supervision arrangements. The Council will make the language arrangements for the instruments, through the adoption by unanimity of a European law.

Some of these aims have already been achieved by the "European Copyright Directive". Directive 2001/29/EC on the "harmonisation of certain aspects of copyright and related rights in the information society" was adopted on 22 June 2001 and was supposed to be implemented in Member States by 22 December 2002. The UK, in common with almost every other Member State, was late in implementing the Directive. It was brought into force by Statutory Instrument on 31 October 2003.[22] The Directive harmonises the basic rights relevant to uses of copyright material in the information society and e-commerce, namely the rights of reproduction (copying) and communication to the public (electronic transmission, including digital broadcasting and "on-demand" services). It also limits the type and scope of permitted exceptions to these rights and provides legal protection for technological measures used to safeguard rights and identify and manage copyright material. The *Copyright, Designs and Patents Act 1988* already provides protection similar to many of the obligations contained in the Directive. However, the 2003 Regulations amend the Act "insofar as its provisions do not conform or comply with the Directive and regarding matters that are related to or consequential upon these obligations".

IV Economic and Monetary Policy

Article III-177 corresponds with the principles set out in Article 4 TEC in the "Principles of the Community". **Articles III-185 – 191**, on the role and remit of the European System of Central Banks (ESCB) and the ECB, are broadly similar to Articles 105-110 TEC. Present Article 111 TEC, on the conclusion of exchange rate system agreements with third parties, is transferred to **Article III-326** of the Constitution in the chapter on International Agreements.

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[21] HC Deb 21 June 2004 c 1079

[22] *The Copyright and Related Rights Regulations 2003* SI 2003/2498

A. Economic and Monetary Policy

In **Article III-179** the Commission may now "address a warning" to Member States if they are not following the broad economic guidelines. This is in addition to the Council being able to make recommendations to the Member State in question, a right which currently exists. The vote of the Member State being considered will not be counted in the Council and a qualified majority will be defined, as from 1 November 2009, as the majority of the votes of the other Member States, defined as at least 55% of the other voting Council members, representing Member States comprising at least 65% of the population of voting Council members.

Article III-184 covers excessive deficits. **III-184(5)** has been changed to the effect that, if the Commission considers that an excessive deficit has occurred or may occur, it can address an opinion directly to the Member State concerned and inform the Council. Previously, the Commission would address this opinion to the Council.

III-184(6) now states that when an excessive deficit is established by the Council, recommendations to correct this will be brought forward without "undue delay".

Council decisions relating to Member States will be made without the vote of the Member State concerned, with a qualified majority, as from 1 November 2009, defined as at least 55% of the voting Council members, representing Member States comprising at least 65% of the population of the voting Council members.

B. Institutional Provisions

An additional task for the Economic and Financial Committee (formally the Monetary Committee) is to report on financial relations with third countries and international institutions (**Article III-192(2b)**).

C. Transitional Provisions

Article III-197 sets out the arrangements for Member States "with a derogation".[23] This has changed substantially in format but the content has been for the most part simply re-arranged. **Article III-197**, **Article III-179(2)** (Article 99(2) TEC), which covers the adoption of broad economic guidelines in the euro area, does not apply to Member States with a derogation. Under this Article, the "following provisions of the Constitution shall not apply to Member States with a derogation" (parts (i) and (j) were new in June 2004):

> (a) adoption of the parts of the broad economic policy guidelines which concern the euro area generally (Article III-179(2));

[23] i.e. those Member States which do not fulfil the criteria for adopting the euro

(b) coercive means of remedying excessive deficits (Article III-184(9) and (10));
(c) the objectives and tasks of the European System of Central Banks (Article III 185(1), (2), (3) and (5));
(d) issue of the euro (Article III-186);
(e) acts of the European Central Bank (Article III-190);
(f) measures governing the use of the euro (Article III-191);
(g) monetary agreements and other measures relating to exchange-rate policy (Article III-326);
(h) appointment of members of the Executive Board of the European Central Bank
(Article III-382(2));
(i) European decisions establishing common positions on issues of particular relevance for economic and monetary union within the competent international financial institutions and conferences (Article III-196(1));
(j) measures to ensure unified representation within the international financial institutions and conferences (Article III-196(2)).[24]

Article III-197(4) has been altered to include two further areas where Member States with a derogation cannot vote:

(a) recommendations made to those Member States whose currency is the euro in the framework of multilateral surveillance, including on stability programmes and warnings (Article III-179(4));
(b) measures relating to excessive deficits concerning those Member States whose currency is the euro (Article III-184(6), (7), (8) and (11)).[25]

While the IGC did not agree on a new Stability and Growth Pact, a Declaration regarding the Pact was annexed to the Constitution:

V Policies in Other Areas

A. Employment and Social Policies (III-203-219)

Articles III-203 - III-208 on employment policy remain essentially unchanged from Articles 125-130 TEC.

The EU's competences in the field of social policy are set out in **Articles III-209-219**. The key provision is **Article III-210**, which specifies the social policy areas in which the EU is committed to supporting and complementing the Member States, and the basis for decision-making. The policy areas are:

(a) improvement in particular of the working environment to protect workers' health and safety;

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[24] CIG 87/04 http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf
[25] ibid.

(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated;
(e) the information and consultation of workers;
(f) representation and collective defence of the interests of workers and employers, including co-determination (but not in the areas of pay, the right of association, the right to strike or the right to impose lock-outs);
(g) conditions of employment for third-country nationals legally residing in Union territory;
(h) the integration of persons excluded from the labour market;
(i) equality between men and women with regard to labour market opportunities and treatment at work;
(j) the combating of social exclusion; and
(k) the modernisation of social protection systems.

Measures in the areas listed above are subject to QMV, with the exception of (c), (d), (f) and (g), which require unanimity. However, the Council may decide unanimously, following a proposal from the Commission, to change the basis of decision-making in areas (d), (f) and (g) to co-decision with QMV.[26] This is a so-called *passerelle* or bridging clause, allowing a change in voting method without a formal treaty amendment process.[27] QMV cannot, however, be extended to social security and social protection of workers.

In the field of social policy the Constitution essentially maintains the existing position under Article 137 TEC. The case for extending QMV to areas of social policy, where unanimity is currently required, was considered by the Convention Working Group on Social Europe, but it did not reach a consensus.[28] Retaining unanimity for social security decisions was one of the Government's "red lines".[29] The Government set out its initial position in a memorandum to the House of Lords European Union Committee in February 2003:

> 12. The final report of the working group notes that the group could not agree whether to extend qualified majority voting (QMV) in the social policy field. The Government does not believe that any extension of QMV in this area is necessary. It is not convinced that more QMV will create more and better jobs, or help further alleviate social exclusion. The Government also considers that unanimity has not been a bar to the adoption of necessary legislation in the social

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26 Article III-104(3)

27 See Research Paper 04/54, *The Extension of Qualified Majority Voting from the Treaty of Rome to the European Constitution*, 7 July 2004, p 41

28 *Final report of Working Group XI on Social Europe*, CONV 516/1/03 REV 1, 4 February 2003: http://european-convention.eu.int/doc_register.asp?lang=EN&Content=WGXI

29 For information on the Government's 'red lines', see Standard Note SN/IA/2740, *The Intergovernmental Conference on the Draft Treaty Establishing a Constitution for Europe: issues, concerns and 'red lines'*, 7 November 2003 at http://hcl1.hclibrary.parliament.uk/notes/iads/snia-02740.pdf

> field. Unanimity allows proportionate legislation to be adopted which respects the diversity of national traditions in EU Member States.
>
> 13. New decision-making arrangements in the social field under the Nice Treaty only came into effect on 1 February 2003. The new rules allow the Council to decide unanimously to move to qualified majority voting in some areas of social policy. The Government considers that it would be premature to consider changing these arrangements at this stage. Given that they have not yet been properly tested, the Government believes that the arrangements should be preserved in the new Treaty.[30]

The Committee commented that, while the Government's concerns about the extension of QMV in the social policy field were understandable, it was doubtful whether unanimity would be a viable basis for making decisions in this area following EU enlargement. It also argued that any discussion about extending QMV in social policy should be accompanied by an attempt to clarify the EU's competence in this area.[31]

In its October 2003 report on the Convention text, the Lords Committee called on the Government to "stand firm" against attempts to amend the draft Treaty to extend QMV to matters of tax or social security.[32]

Article III-210(5)(a) states that laws adopted under this article "shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium of such systems".

B. Economic, social and territorial cohesion

Article III-220 – III-224 are similar to Articles 158-162 TEC.

III-220(sub-para.3) extends the list of areas to which particular attention should be paid from the "least favoured regions or islands, including rural areas" in the TEC and the Convention text, to:

> … rural areas, areas affected by industrial transition, and areas which suffer from severe and permanent natural or demographic handicaps such as the northernmost

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30 House of Lords Select Committee on the European Union 14th Report, Minutes of Evidence, 2002-3, 12 March 2003, p 2 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/79/3031202.htm

31 House of Lords Select Committee on the European Union 14th Report, *The Future of Europe: "Social Europe"* HL 79 2002-03 7 April 2003, para 19: http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/79/79.pdf

32 House of Lords Select Committee on the European Union 41st Report, *The Future of Europe – The Convention's Draft Constitutional Treaty*, HL 169 2002-03 21 October 2003, para 93: http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/169/169.pdf

> regions with very low population density, and island, cross-border and mountain areas.

The IGC also declared that these island areas could "include island states in their entirety, subject to the necessary criteria being met".

The Government was asked by the Scottish Liberal Democrat MP, Michael Carmichael, what assessment it had made

> of the impact of the territorial cohesion provisions in the draft EU Constitution Treaty on applications from peripheral and insular areas for regional European support and state aid; and what discussions his Department has held with local government representatives from Highland and Island councils on this subject.[33]

The Foreign Office Minister, Denis MacShane, replied that the Government did not expect the references to territorial cohesion to have any impact on existing arrangements for the structural funds and regional aid.

C. Agriculture and fisheries

The revision to the passage on agriculture and fisheries is mainly tidying up. There are almost no changes to articles in the Convention text concerning farming. **Articles III-225 - III-232** reproduce virtually the same wording as Articles 32 - 38 TEC and much of the wording goes right back to the *Treaty of Rome* in 1957.

The only substantial change relating to farming comes in **Article III-226**, which rewrites Article 37 TEC. The surprising thing about this Article is not that it has been rewritten, but that it has stayed the same for so long. Until the Treaty of Nice in 2000, it retained the paragraph from the Treaty of Rome calling for a conference of Member States "with a view to making a comparison of their agricultural policies". It then called for proposals for working out and implementing the Common Agricultural Policy (CAP) within two years of the entry into force of the Treaty. In other words, it was a passage whose relevance had long since passed.

Even the new **Article III-231** looks a little old-fashioned, with **III-231(1)** stating that the Commission shall submit proposals for working out and implementing the CAP, including the replacement of certain national organisations. However **Article 231(3)** takes realistic account of the Common Fisheries Policy (CFP) for the first time:

> The Council, on a proposal from the commission, shall adopt the European regulations or decisions on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.

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[33] HC Deb 16 December 2003 c797-8W

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

Probably the most important matter for fisheries is in **Article I-13** where the Union is given exclusive competence for "the conservation of marine biological resources under the common fisheries policy". This would allow the Union to introduce any new policy regulating catches or banning fishing altogether in certain areas. This is not really different from the current position, but opponents of the CFP might consider that it would make the EU's conservation policy more permanent. At least one amendment was tabled at the Convention to remove the Union's exclusive competence in this area.[34] The consequence of that amendment, however, would not have been to remove the legal basis for the CFP itself.

Article III-225 contains one new sentence: "References to the common agricultural policy or to agriculture, and the use of the term 'agricultural', shall be understood as also referring to fisheries". This was already implicit in the TEC, but the explicit statement does raise one particular issue. The definition of the objectives of the agricultural policy dates back to the Treaty of Rome, and was drafted with agriculture, not fisheries, in mind. Thus, the first objective of the CAP in **Article III-227** is "to increase agricultural productivity by promoting technical progress…" This might be used as the legal base for a policy involving, for example, subsidising new and more efficient fishing vessels. Yet such a (hypothetical) policy would make little sense in the current context of declining fish stocks and the closure of some fishing areas. Of course, the objective in **Article III-227(1)(d)**, "to assure the availability of supplies", would probably be interpreted as favouring conservation. However, it might have been more appropriate to provide the common fisheries policy with its own objectives.

The Constitution takes more account of animal welfare. **Article III-121** incorporates in the Constitution the contents of a Protocol (Protocol 10) to the Amsterdam Treaty in 1997. It requires Member States to "pay full regard to the welfare requirements of animals, as sentient beings, while respecting the legislative or administrative provisions and customs of Member States relating in particular to religious rites, cultural traditions

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

and regional heritage." The wording suggests that it could not be used either to ban the religious slaughter of animals without pre-stunning or Spanish bullfighting.

Mr Heathcoat-Amory suggested in an evidence session of the European Scrutiny Committee (ESC) that Article II-73 of the Constitution (containing the Charter of Rights), which states that "The arts and scientific research shall be free of constraint", might contradict or override the animal welfare article.[35] The Home Office Minister, Caroline Flint, replied in a letter to the Committee on 27 January 2004:

> The rights and principles set out in the Charter of Fundamental Rights are not absolute. Article II-52 [now Article II-112] provides that limitations may be imposed on the exercise of the rights and principles if they are necessary and meet objectives of general interest recognised by the Union. There is thus no conflict between Article II-13 and Article III-5a. In formulating the Union's research policies the Union is to have regard to the welfare requirements of animals. If those welfare requirements required restrictions being placed on animal research that would be compatible with Article II-13 read in conjunction with Article II-52.[36]

It is not clear how the ECJ will assess what weight to give to the limitations under Article II-112 against the substantive rights conferred by Articles II-61 - II-110. Article II-112 is a horizontal clause applicable to several articles in the Charter of Rights, unlike the European Convention on Human Rights, which qualifies individual rights with limitations in the interests, for example, of public safety or morality. Paying full regard to animal welfare, as set out in **Article III-121**, requires that it be taken into account in devising policies, but not that any particular result must be achieved.

D. The Environment, Consumer Protection and Transport

Articles III233 – III-234 concern the environment and are virtually identical to Articles 174 and 175 TEC.

Article III-235 on Consumer Protection is similar in its wording and purpose to existing provisions under Article 153 TEC. In both texts the stated aim is to contribute to safeguarding the health, safety and economic interests of consumers, in addition to ensuring a high level of protection through legislation, information and education initiatives.

However, whereas Article 153(2) TEC includes a statement that consumer interests *must* be taken into account in all EU policies and activities, Article III-235 does not stipulate

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35 European Scrutiny Committee Minutes of Evidence 4 December 2003 at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/91/3120403.htm

36 Ibid

the integration of consumer protection in other policies. This wider requirement is contained in **Articles II-98** and **III-120**.

Both the present Treaty and the Constitution provide that Member States may maintain or introduce more stringent protective measures.

The Constitution does not advocate a consumer protection policy that is drastically different from the domestic consumer protection policy adopted in the UK. Consumer interests are already at the forefront of UK policy. Whether implementation of future EU consumer protection legislation will present a particular issue for the UK in terms of amending existing UK legislation or practice can only be determined on a case by case basis.

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

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

1. to achieve a high common level of consumer protection;
2. to achieve effective enforcement of consumer protection rules; and
3. to promote the involvement of consumer organisations in EU policy.

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

Some would argue that the problem is not one of promoting consumer protection policies, but of enforcing them. It has been argued that, although there is increasing EU consumer protection legislation, the monitoring and enforcement of consumer legislation is inadequate. Currently, Member States are not required to provide systematic feedback on the impact of EU legislation, including the practical enforcement problems encountered.

The National Consumer Council (NCC) in the UK has suggested that one solution would be for all Member States to be required to specify enforcement arrangements when EU legislation is transposed into domestic law.[37] The NCC has also argued that Member

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

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

Another criticism of EU consumer protection policy is the preference for more legislation, instead of other forms of regulation. Various organisations (including the Advertising Association in the UK) have said that divergent national legislation is not, in itself, a sufficient reason for greater EU legislation.[38] Adding to existing legislation imposes burdens on industry that hinder market development and consumer choice.

The NCC has called for a clear legal framework for self-regulation at EU level. Schemes should meet basic standards of independence, stakeholder representation, monitoring, sanctions and transparency. However, the NCC also acknowledges that statutory regulation will always be necessary in a number of situations where the use of self-regulation would be unacceptable (for example, where competition alone cannot deliver essential services to consumers who are not of commercial interest to suppliers, or where regulation is needed to make fair competition work).[39]

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

The NCC welcomed the setting-up of a new permanent Inter-services Committee on consumer policy, but stressed that the Committee had to be an effective body which would ensure that consumer integration became an integral part of the development of all EU policies. Consumer impact assessments would be an important tool for the new Committee.[40]

The NCC thought that the needs of disadvantaged and vulnerable consumer groups should be highlighted in the new Action Plan. It argued that strategies based on providing consumers with better information may fail to help the most vulnerable groups.[41]

In **Articles III-236 – III-245** on transport, there are even fewer changes between the TEC and the final text than with the Convention draft.

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

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

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

41 Ibid.

In the Convention text, with the exception of then Article III-129 (see below), there were no significant changes to articles on transport and trans-European networks. Article III-129 **(**now **Articles III-236 and III-237)** contained the only significant change, namely the deletion of the second part of Article 71 TEC, which read:

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

Much of this has now been reinstated. Other, minor, changes are Article **III-240 (3)**, which adds the EP to those bodies to be consulted, and **Article III-243**, allowing the Article (concerning German unification) to be repealed after 5 years.

Articles III-246 – 247 on Trans-European Networks (TENS) contain only minor changes.

E. Research, technology and space

Articles III-248 - III-251 replace Articles 163 - 173 TEC. **Article III-248** establishes a European research area

> in which researchers, scientific knowledge and technology circulate freely, and encourage it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other Chapters of the Constitution.

This is a more ambitious rendering of Article 163 TEC, which simply provides that the EU shall "have the objective of strengthening the scientific and technological bases of Community industry". **Article III-250(2)** specifies that the Commission's initiatives in this area would aim to establish "guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation". It also provides that the EP should be kept "fully informed".

Article III-254 is new and provides for the Union to draw up a "European space policy", to be underpinned by a European law or framework law which "may take the form of a European space programme". The vague wording of the paragraphs describes only what is already happening under the aegis of the European Space Agency, the coordinating body through which the UK's contributions to space research and exploration are channelled.

In January 2003 the European Commission issued a *Green Paper on European Space Policy*,[42] with a public consultation period ending on 30 May 2003. The Green Paper asked how far Europe should aim to compete in the global space industry, given that Europe's current spending on space activities at that time was only €15 euros per head of population, while the US was spending €110 euros per head (p 17). At a meeting on 27 May 2003, ministers called for a framework agreement formalising institutional relations between the ESA and the EU to be completed by the end of 2003.[43] The UK's own draft "space strategy", published in January 2003, strongly focused on research likely to have an immediate economic and research benefit.[44]

F. Energy

The energy article, **III-256**, has proved highly controversial in the UK, particularly with regard to control over the UK's North Sea oil and gas reserves. The British Government's energy policy, as set out in the Energy White Paper of February 2003,[45] largely fitted in with the objectives set out in the draft constitution as it stood in June 2003, although the text was silent in some areas key to UK policy, such as measures to address fuel poverty.

The draft constitution appeared to give assurance that it would not impose an unworkable energy balance upon Member States, but no mention was made of sovereignty of energy resources, leaving the overall position unclear, and thus unsatisfactory, as far as the Government was concerned. After the opening of the IGC on 4 October 2003 the British Government maintained that it had raised its concerns about energy on numerous occasions at IGC meetings.

On 10 November 2003 the Foreign Secretary told the Standing Committee on the IGC that the Government was worried about the shared competence provision for energy and would pursue this.[46] It wanted to amend the draft constitution to reflect existing EU competences. However, Mr Straw also told the IGC Committee that "Nothing in the treaty will affect the ownership of oil and other energy resources in the North Sea or elsewhere, and nor should it".[47] On 11 November the Government responded to a PQ on the effects of the energy provisions on the North Sea oil licensing regime as follows:

> EU competence in energy matters, including natural resources, will fall under Article 111-157 [now Article III-256] of the draft Constitutional Treaty, with

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42 5707/2003

43 http://www.esa.int/export/esaCP/SEMEGDS1VED_index_0.html

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

45 Energy White Paper: *Our Energy Future – creating a low carbon economy*, Cm5761 DTI February 2003.

46 Standing Committee on the IGC, 10 November 2003 at http://pubs1.tso.parliament.uk/pa/cm200203/cmstand/other/st031110/31110s01.htm

47 http://pubs1.tso.parliament.uk/pa/cm200203/cmstand/other/st031110/31110s03.htm

> voting by qualified majority. There is considerable Community competence already in the field of energy, and a number of Directives and Regulations have been brought forward in the areas of energy and environment, often under qualified majority voting. There is a carve out to preserve "Member State's choice between different energy sources and the general structure of its energy supply", where our understanding is that the EU would have to act by unanimity. Discussions on the draft Treaty are continuing in the framework of the Intergovernmental Conference: the UK Government would not agree to any proposals that were inconsistent with UK energy interest.[48]

On 19 November 2003 the Prime Minister assured the House of the Government's determination to retain national competence over energy:

> **Mr. Bob Blizzard (Waveney):** Ever since oil and gas were first discovered in the North sea in the early 1960s, we have exercised national control over the exploitation of these assets through licensing arrangements and so on. Does my right hon. Friend share my concern that the inclusion of energy clauses in the draft treaty on the European Union constitution could lead to the ceding of competence over these matters to the European Union? Will he draw an end to uncertainty on this matter by making it a red line issue in the forthcoming negotiations?
> **The Prime Minister:** We have made it absolutely clear that there cannot be any question of the European Commission getting those powers, and I can assure my hon. Friend that that will be one of the issues that we raise in the course of the negotiation we are about to enter into—and I have no doubt that, as with other things, we will be successful.[49]

At the end of November 2003 the Italian Presidency proposed a Declaration on energy to the effect that Member States should be able to take their own measures to secure their energy supplies.[50]

On 1 December 2003, at the third meeting of the IGC Standing Committee, Mr MacShane was unwilling to disclose the details of the energy text the British Government had proposed to the IGC, but assured the Committee members that "their points are well made and extremely well taken".[51]

On 2 December Alistair Darling responded to several questions about the Scottish oil and gas industries and the draft constitution:

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48 HC Deb 13 November 2003 c401W
49 HC Deb, 19 November 2003 c 770
50 CIG 52/03, Add 1, Annex 26, 25 November 2003 at http://ue.eu.int/igcpdf/en/03/cg00/cg00052-ad01.en03.pdf
51 Standing Committee on the IGC, 1 December 2003, c 122

2. Sir Robert Smith (West Aberdeenshire and Kincardine) (LD): What discussions he has had with the Foreign Office about the impact of the draft European constitution on investment in oil and gas exploration jobs in Scotland.

4. Angus Robertson (Moray) (SNP): What discussions he has held with the Foreign Secretary on the energy provisions of the draft constitutional treaty of the EU.

The Secretary of State for Scotland (Mr. Alistair Darling): I have met representatives of the oil industry, and we have made it clear that we will not agree to any proposal that is inconsistent with the United Kingdom's energy interests.

Sir Robert Smith : I thank the Secretary of State for that answer, which is helpful in so far as it goes. I must declare an interest related to oil and gas exploration that is registered in the Register of Members' Interests. Last night, at the sitting of Standing Committee on the Intergovernmental Conference, the Foreign Secretary said that nothing is agreed until everything is agreed and, therefore, we will never know what the outcome will be until the final draft constitution comes out of the IGC process. Does the Secretary of State recognise that if the energy chapter remains unamended, it will put uncertainty into the minds of investors, damaging vital investment in the exploration and production of North sea oil and gas, which provides so many jobs in Scotland?

Mr. Darling : I do recognise that, and I was in Aberdeen last week and met representatives of the oil industry. I am in no doubt of the importance of North sea oil not just to Scotland, but to the whole of the United Kingdom, but the proposals as presently drafted are not acceptable to the Government. We have made it clear that we are extremely concerned about the proposals on taxation, which we regard as a matter for member states' national Governments. We are also concerned about the proposal in relation to the extraction of oil from the North sea, as well as powers in times of emergency. Those matters are of great importance, which is why we are pressing them—the Prime Minister made that very clear in the House a couple of weeks ago—and we shall continue to do so. As for the outcome, the Foreign Secretary was simply pointing out the obvious to the hon. Gentleman: the conclusions are reached at the end of the day, not now. We have not yet reached the conclusions. We are continuing to press the matter.

Angus Robertson : Yesterday, at a sitting of the Standing Committee on the IGC, Foreign Office Ministers refused to confirm the text of the amendment on the controversial energy chapter; less than half an hour ago, the Minister for Energy, E-Commerce and Postal Services did so at a sitting of the European Scrutiny Committee. The amendment shows that the UK Government are not seeking to retain the power over treaty negotiations and boundary issues, and it did not even include the text about important fiscal measures. Will the Secretary of State confirm what that text states and what the Government intend to do on boundary and treaty negotiation issues? When will they pull their finger out and pull their weight on this important subject?

Mr. Darling: As I told the House a few moments ago, the Government are very concerned about the text that the Commission has proposed. We are holding discussions with other member states. The matter was discussed with Foreign Ministers at the weekend, and we are currently discussing with other member states a redrafting of the text to meet the United Kingdom's concerns. The issue is of great importance, which is why we will continue to press it.

Mr. Frank Doran (Aberdeen, Central) (Lab): I welcome my right hon. Friend's statement and the commitments that other Ministers, including the Prime Minister, have given. The North sea oil and gas industry is extremely important not just to the north-east of Scotland and East Anglia, but to the whole country. I know from the Secretary of State's visit to Aberdeen last week, which was very welcome, that he will be seized of that fact, but ending the uncertainty is important to the oil industry. This is the time of year when investment in the North sea for next year—the period following April—is negotiated, and not always with the London or UK offices that are fully seized of the issue, but with the Houston and Dallas offices, so is it not important that the uncertainty should end as soon as possible?

Mr. Darling: My hon. Friend, who knows a great deal about the North sea and the taxation regime there, is quite right. The matter is of immense importance not just to the north-east of Scotland and East Anglia, but to the whole country. That is why we attach considerable importance to making sure that the United Kingdom's interests are safeguarded.
The point that my hon. Friend makes about certainty in the North sea oil regime is equally important, and I am well aware of the fact that companies prize knowing where they stand more than just about anything else. That is why the Government have gone to considerable lengths over the years to ensure that we consult and talk to the industry and try to take it with us. As I told the House a few moments ago, we are continuing to press the matter because it is of great importance to all of us.

Mr. Michael Connarty (Falkirk, East) (Lab): May I take a different view from the hon. Member for Moray (Angus Robertson) and congratulate the Government on the very hard work that they have been doing over the past month to insert amendments into the clauses of the new constitution? I suggest that the biggest advantage for Scotland is probably its nearness to the Norwegian fields, and the vital ability of our Government to sign a deal with another nation will be under threat if we do not have specifically in the constitution—it is not in the amendments that we saw today at the European Scrutiny Committee—provision for the right of a sovereign Government to sign a treaty with another nation without the EU keeping that competence to itself.

Mr. Darling: My understanding is that, notwithstanding what is being offered by way of a draft, it is within our competence to sign treaties with countries such as Norway. My hon. Friend is right to draw attention to the importance of that. Because of the negotiations that took place between this country and Norway, we were able to secure gas supplies that will ensure the continuation of work at St. Fergus and Mossmorran.

I return to the point that discussions are still continuing; they were not concluded at the weekend. The Government have made it absolutely clear that we attach considerable importance to getting this right and we intend to continue to do that right up until the constitution is eventually agreed, whenever that may be.

Mrs. Jacqui Lait (Beckenham) (Con): As the Secretary of State has indicated how important this issue is to the north-east, is it not right that oil and gas workers should have a referendum on the new draft constitution whenever it comes out of the mangle?

Mr. Darling: As I said to the House and as the hon. Lady suggests, the matter is of great importance to the north-east of Scotland, but it is also of great importance to people living in Beckenham. The whole of the United Kingdom benefits from the industry. As for a referendum, the Government have made their position clear time and time again, and I am in complete agreement with everything that has been said on that.

Mrs. Helen Liddell (Airdrie and Shotts) (Lab): May I thank my right hon. Friend for his recognition of the seriousness of these matters? Security of supply issues are very important in relation to oil and gas, and to energy in general. The European Union has long had ambitions to extend competence into energy matters, so can he reassure me that he will take the message from the House that there is grave concern about the energy chapter, and will he echo the remarks of the Prime Minister that he will resist it at every opportunity?

Mr. Darling: My right hon. Friend is absolutely right. This appears to be an example of the Commission trying to go further than we believe that it should. We believe that it is very important in matters of taxation and our ability to regulate, and extract, the supply of oil from the North sea that we retain the competence and right to do so as a member state. That is very important to us. As Members have said, this issue is not just about the United Kingdom's short and medium-term interests. If we want to ensure that we continue to extract the considerable supplies that are still in the North sea, we must have a stable regime—stable in taxation and stable in regulation so as to ensure that investment stays in place. As I have said, we believe strongly in that and will continue to press the point in the discussions that are continuing.

Malcolm Bruce (Gordon) (LD): Given that there is more oil and gas to be extracted from the North sea than has yet been produced, does the Secretary of State not recognise that it would be utterly unacceptable for the United Kingdom to give up its sovereign right to control the depletion policy and licensing? Although he has said that it is not over until it is over, the fact remains that any suggestion that that right would be given up means that the draft constitution would not be a tidying-up exercise, but would involve the total surrender of sovereignty in a crucial area.

Mr. Darling: With the possible exception of the SNP, which almost gives the impression that it has a vested interest in hoping that the discussions do not succeed, the rest of us completely agree about the importance of oil and of getting the provisions absolutely right. I do not think that I should detain the House

> further by repeating what I have said. The matter is important; that is why we are continuing to press it.[52]

On 3 December 2003, in reply to a question about the possible impact of the energy provisions on the oil and gas industries on the UK's continental shelf and any changes to the present regime, the Government replied:

> It is not yet clear what the precise effect of the energy chapter would be for the UK oil and gas industries. Although the draft Constitutional Treaty creates a legal base for energy, it does not, for example, bring forward a new regulatory regime. Article 111-157 of the draft Constitutional Treaty sets out EU competence in energy matters, including natural resources, with voting by qualified majority. The UK has proposed amendments which would make it clear that Member States retain control of their natural resources.[53]

A week later the Foreign Secretary told the Foreign Affairs Committee: "We have made considerable progress on energy. It looks as though the re-drafted energy proposals are acceptable to the industry and to Ministers concerned".[54]

In February 2004 the Leader of the House, Peter Hain, said:

> An Energy Chapter will bring European competence on energy together in a single legal base. We support the proposal on the basis that it is more transparent than existing legislation. We have, however, consistently set out our concern that any uncertainty about the impact of the Energy Chapter could undermine investment in North sea oil and gas. With that in mind, we proposed a series of amendments to this part of the Treaty with the aim of ensuring that European member states would retain the right to control the exploitation of their natural resources.[55]

The Irish Presidency's proposal for a meeting of focal points on 4 May 2004 contained in Annex 34 a revised draft article III-157 on energy.[56] This retained the earlier Italian Presidency text stating that European laws would not affect the right of a Member State "to determine the conditions for exploiting its energy resources and the structure of its supply". The Declaration supplementing the article would safeguard national energy measures. While the Commission argued that the text reduced existing Community competence in energy, the British Government reported that it was satisfied with this

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52 HC Deb 2 December 2003 cc 351-5
53 HC Deb 3 December 2003 c104W
54 Foreign Affairs Committee, Minutes of Evidence, 11 December 2003, 2003-04, at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/1233/3102813.htm
55 HC Deb 12 February 2004 c 1570W at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040212/text/40212w05.htm#40212w05.html_sbhd5
56 CIG 73/04 at http://ue.eu.int/igcpdf/en/04/cg00/cg00073.en04.pdf

wording, as it stated clearly the right for Member States to choose how to exploit their own natural resources and included a strengthened Declaration on Member States' right to ensure security of supply during fuel shortage emergencies. **Article III-256** of the Constitution retains the Irish Presidency formula and is as follows:

> 1. In establishing an internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim to:
> (a) ensure the functioning of the energy market,
> (b) ensure security of energy supply in the Union, and
> (c) promote energy efficiency and saving and the development of new and renewable forms of energy.
> 2. Without prejudice to the application of other provisions of the Constitution, the objectives in paragraph 1 shall be achieved by measures enacted in European laws or framework laws. Such laws or framework laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.
> Such laws or framework laws shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article III-130(2)(c).
> 3. By derogation from paragraph 2, a European law or framework law of the Council shall establish the measures referred to therein when they are primarily of a fiscal nature. The Council shall act unanimously after consulting the European Parliament.

The *Declaration on Article III-256* (No. 22) reads:

> The Conference believes that Article III-256 does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the conditions provided for in Article III-131.

In the September 2004 *White Paper on the Treaty Establishing a Constitution for Europe*, the Government stated that the final text was "a good outcome":

> It now strikes a good balance between protecting our abilities to control UK energy resources and allowing the EU to act where appropriate to liberalise energy markets. In particular, the Chapter preserves a Member State's right to control the exploitation of its natural resources (such as North Sea oil and gas). It is also consistent with the Government's commitment to ensure unanimity is retained for tax matters decided at EU level. […] It also recognises the need to preserve and improve the environment, with one of its three aims being the promotion of energy efficiency and the development of renewable energy.[57]

[57] Cm 6309 September 2004 p.27

- **The European Atomic Energy Community (Euratom)**

The use and supply of nuclear materials for the generation of nuclear power in the EU is regulated by the European Atomic Energy Community Treaty (Euratom), signed on 25 March 1957. Part IV of the Convention draft made provision for a Protocol to amend the Euratom Treaty in certain institutional and financial fields only, to bring it in line with changes to the structure of the EU proposed by the draft constitution. Whether Euratom should be amended, integrated into or appended to the proposed constitution was disputed. A number of MEPs thought Euratom should be overhauled, with "the integration into the future European Constitution of those parts which contain a European added value".[58] Green members of the Convention were opposed to Euratom losing its legal standing under the draft constitution.[59] Provisions on Euratom are appended to the Constitution as a legally binding protocol, the *Protocol amending the Treaty Establishing the European Atomic Energy Community*, and will continue to have full legal effect.

VI Area of freedom, security and justice

A. Border checks, asylum and immigration

Introduction

The Constitution sets out the EU's common policies on border checks, asylum and immigration in **Articles III-265 to III-268**. These articles encompass, with some significant changes and additions, the present Title IV TEC, ("Visas, asylum, immigration and other policies related to free movement of persons"). The new general provisions on the Area of Freedom, Security and Justice contained in **Articles III-257 to III-264** of the Constitution also apply to this area.[60]

Title IV TEC was created by the 1997 Treaty of Amsterdam, which came into force in 1999.[61] It gave the EU powers to adopt Community legislation on immigration and asylum for the first time, by moving these areas out of the inter-governmental "third pillar" into the EC "first pillar". Immigration and asylum were therefore no longer matters for inter-governmental coordination. The Constitution now takes this further by

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58 Jo Leinen Press Release 10 April 2003 http://www.joleinen.de/www/html/content/english/press_releases/html/PM030410BriefVGE-EN.html

59 Greens in the European Parliament News Release, "*Green success at the European Convention*" 10 March 2003 http://www.greens-efa.org/en/press/detail.php?id=1483&lg=en

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

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

applying co-decision (through the Ordinary Legislative Procedure, OLP) and QMV to measures in this area. It does not affect the "opt-out/opt-in" provisions, under which the UK does not take part in immigration and asylum measures unless it chooses to do so.

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

Constitution	**Subject**	**Title IV TEC**
Article III-265	Checks on persons at borders	Articles 61(a) and 62 TEC
Article III-266	Asylum	Articles 61(a) and (b), 63(1) and (2) and 64(2) TEC
Article III-267	Immigration	Articles 61(a) and (b) and 63(3) and (4) TEC
Article III-268	Principle of solidarity	*New article*

A more detailed comparison is given below in relation to each topic.

Border checks (Article III-265)

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

Constitution, Art III-265	**Title IV TEC, Art 62**
1. The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders.	The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: 1. measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;
2. For this purpose, European laws or framework laws shall establish measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders;	2. measures on the crossing of the external borders of the Member States which shall establish: (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders; (b) rules on visas for intended stays of no more than three months, including: (i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement; (ii) the procedures and conditions for issuing

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders. 3. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.	visas by Member States; (iii) a uniform format for visas; (iv) rules on a uniform visa; 3. measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.

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

> [Present Article III-265] largely reproduces the 'border control' provisions of Title IV (Article 62(1) and (2) TEC). There is, however, one important addition. There is now a specific legal base for the gradual introduction, at an EU level, of a 'common integrated management system for external borders'. This follows a number of EU initiatives in the field, most notably the Commission Communication on the 'integrated management of external borders and a subsequent Council Action Plan.[27] Further political impetus was given by the Seville European Council (June 2002), which called on the Council, the Commission and the Member States to implement a series of steps before June 2003.[28] It is, however, not yet fully clear what an 'integrated management for external borders' will entail and whether it will lead to the gradual establishment of a 'European Border Guard'. This is the subject of an inquiry currently being undertaken by Sub-Committee F and it is therefore something to which we will return in more detail.
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> Notes
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> [27] Doc COM (2002) 233 final and Council Doc 9834/02
> [28] Presidency Conclusions, Doc SN200/02, at paragraphs 31 and 32[62]

The Committee's report on a European Border Guard was published on 10 July 2003.[63] The human rights organisation, *Statewatch*, has suggested that any move to develop a European border guard should only be approved by a unanimous vote in the Council, the assent of the EP and ratification by national parliaments.[64]

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[62] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report 2002-03, 27 March 2003: http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm, para 36.

[63] House of Lords Select Committee on the European Union, *Proposals for a European Border Guard*, 29th report 2002-03, 10 July 2003: http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/133/13301.htm

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

The Lords Committee was also concerned about the shift in legislative procedures, from unanimity (and EP consultation) to the adoption of measures by co-decision and QMV. It felt that this would be controversial "in view of the close link between border control functions and national sovereignty".[65] However, as explained below, QMV is already applicable to Article 62(2)(b) TEC on short-term visas, and could be applied to the remainder of Title IV TEC, should the Council so decide under Article 67(2).

Asylum (Article III-266)

The Constitution's provisions on asylum, compared with TEC articles, are as follows:

Constitution, Art III-266	**Title IV TEC, Art 63(1) and (2) and 64(2)**
1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties. 2. For this purpose, European laws or framework laws shall lay down measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or	63. The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: 1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas: (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States, (b) minimum standards on the reception of asylum seekers in Member States, (c) minimum standards with respect to the qualification of nationals of third countries as refugees, (d) minimum standards on procedures in Member States for granting or withdrawing refugee status; 2. measures on refugees and displaced persons within the following areas: (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need

[65] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003: http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm, para 37

subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. 3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt European regulations or decisions comprising provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.	international protection, (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons; […] Measures to be adopted pursuant to points 2(b), […] shall not be subject to the five-year period referred to above. 64(2) In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.

There is a minor change here from the Convention draft in that paragraph 1 now includes a reference to "subsidiary protection". This article was based on the recommendations of the Convention Working Group X ("Freedom, Security and Justice"):

> That qualified majority voting and codecision be made applicable in the Treaty for legislation on asylum, refugees and displaced persons; - That Article 63(1) and (2) TEC be redrafted in order to create a general legal base enabling the adoption of the measures needed to put in place a common asylum system and a common policy on refugees and displaced persons as set out in Tampere. This legal base should, as in the present Treaty, ensure full respect of the Geneva Convention but enable the Union also to provide further complementary forms of protection not embraced by that Convention.[66]

Under the Constitution there is a provision which would allow the Commission to act without using the OLP, if there is an emergency situation in which a sudden influx of third-country nationals arrives in a Member State. In this situation, according to Article **III-266(3)**, the Commission may adopt regulations or decisions for the benefit of that Member State, after consulting the EP.

The Lords Committee highlighted the progress that had already been made towards establishing minimum standards for refugees and asylum seekers under Article 63 TEC:[67]

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

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

38. [Article III-266] goes a step further than the current Treaty by expressly aiming to establish a 'European asylum system' with uniform standards and common procedures. In so doing it reflects political decisions already taken. At the Tampere European Council, Member States decided that a common European asylum system was to be established by a two-stage process. Member States have agreed on a number of matters establishing minimum standards to be addressed in the short (first) term. In the long (second) term a truly common asylum procedure and a unified status for refugees, valid throughout the Union, would be established.

39. The first stage requires the adoption of a number of key measures, including a Directive on minimum standards in asylum procedures for granting and withdrawing refugee status (the Procedures Directive[29] - still under negotiation), a Directive on minimum standards for reception of asylum seekers[30] (now agreed[31]), a Regulation (replacing the Dublin Convention) on criteria and mechanisms for determining the State responsible for examining asylum requests[32] (now agreed[33]), a Directive on qualification and content of refugee status and on subsidiary forms of protection[34] (still under negotiation).

40. **The references in [Article III-266(2)] to "subsidiary protection" are especially welcome**. In our Reports on the Procedures Directive and the Reception Standards Directive[35] we drew attention to the absence of provision for those claiming such protection status. The draft Directive on qualification and content of refugee status and on subsidiary forms of protection is the only measure in the current asylum package to address the position of those seeking such protection. Union action in this area should take account of all bases for international protection and any common asylum policy should ensure high standards (particularly in relation to procedures and reception conditions) and consistency in application across the Union.[36]

41. The last paragraph of the Praesidium's Explanatory note on this Article states: ""Nationals of third countries" must be understood to include stateless persons". We agree. **The text of [Article III-266] should be amended accordingly**. [68]

Notes

29 The subject of our Report *Minimum Standards in Asylum Procedures* (11th Report, Session 2000-01, HL Paper 59). A revised text of the proposal is being prepared.

30 The subject of our Report *Minimum Standards of reception conditions for asylum seekers* (8th Report, Session 2001-02, HL Paper 49).

31 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. [2003] OJ L 46/18.

32 The subject of our Report *Asylum applications: who decides?* (19th Report, Session 2001-02, HL Paper 100).

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68 House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003: http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm, paras 38-41.

[33] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.
[34] The subject of our Report *Defining refugee status and those in need of international protection* (28th Report, Session 2001-02, HL Paper 136).
[35] *Op cit*
[36] *Defining refugee status and those in need of international protection* (28th Report, Session 2001-02, HL Paper 136, at paras 42 and 43).

Since that report, there has been some progress on asylum measures, in particular through the adoption of the Directive on qualification and content of refugee status in April 2004. Political agreement was reached on 29 April 2004 on the amended proposal for a Directive on minimum standards for granting and withdrawing refugee status. The Commission has recently published Communications inviting proposals for the second five years of an area of freedom, security and justice,[69] and launching further discussion on a single asylum procedure.[70] In July 2004 the Commons European Scrutiny Committee published a report the on the EU's Justice and Home Affairs work programme for the next five years which looks at the Commission's proposals relating to visas, asylum and immigration; civil and criminal justice; and police and customs cooperation.[71]

Immigration (Article III-267)

The following table shows how **Article III-267** on immigration control and the rights of migrants compares with the equivalent provisions of Title IV TEC:

Constitution, Art III-267	**Title IV TEC, Art 63(3) and (4)**
1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. 2. For the purposes of paragraph 1, European laws or framework laws shall establish measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion; (b) the definition of the rights of third-country	63. The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: […] 3. measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion, (b) illegal immigration and illegal residence, including repatriation of illegal residents; 4. measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may

[69] COM (2004) 401
[70] COM (2004) 503
[71] ESC 28th Report 2003–04, HC 42-xxviii, 14 July 2004 at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/42-xxviii/42-xxviii.pdf

nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation. (d) combating trafficking in persons, in particular women and children.	reside in other Member States. Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.
3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.	Measures to be adopted pursuant to points […], 3(a) and 4 shall not be subject to the five-year period referred to above.
4. European laws or framework laws may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.	
5. This Article shall not affect the rights of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.	

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

> 42. [Article III-267] is a considerably expanded version of Articles 63(3) and (4) TEC. Paragraph 1, which refers to the objectives of the EU immigration policy, mentions for the first time the 'efficient management of migration flows'—a concept which has been used by the Commission in its work on migration[37] and recently in the conclusions of the Seville European Council[38]. Managing migration flows is to be accompanied by fair treatment of legally resident third country nationals and action to prevent and combat, by 'enhanced measures', illegal immigration and trafficking in human beings.
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> 43. EU competence regarding legally resident third country nationals (TCNs) is considerably extended.[39] [Article III-168] is not limited to defining their right of residence. Paragraph 1 refers to the general objective of 'fair treatment of TCNs', while paragraph 2 envisages the adoption of EU legislation defining the rights of legally resident TCNs including (but not limited to) 'the conditions governing the

freedom of movement and of residence in other Member States'. A further and important innovation is the inclusion of [Article III-168(4)], which gives the EU a competence for 'supporting action' with the view of promoting the integration of legally resident TCNs.

44. Changes are also proposed to the Treaty language on illegal immigration. [Article III-168(1), now Article III-267] refers for the first time to its 'prevention', while there is also a reference to 'enhanced measures' to combat illegal immigration and trafficking in human beings. It is not clear what the meaning of 'enhanced measures' is, and whether it signifies a shift to stricter control measures in the field. [Article III-168(2)] also refers to illegal immigration and unauthorised residence, which is deemed to include 'removal and repatriation of persons residing without authorisation'. This appears to be inspired by the prioritisation of expulsion policies decided at the Seville European Council, coupled with pressure towards the conclusion of readmission agreements between the EU and third countries.[40] In this respect, [Article III-168(3)] provides a broad legal basis for the conclusion of such agreements enabling the readmission of TCNs residing without authorisation to their countries of origin or provenance.

45. In our Reports and day-to-day scrutiny **we have repeatedly emphasised the need for a 'common' EU approach to immigration**. It remains to be seen whether [Article III-168] will provide a basis for a balanced EU approach to immigration which this Committee has consistently advocated,[41] combining the opening up of avenues of legal migration with the effective control of illegal immigration. The reference to more 'inclusive' measures on legally resident TCNs is a welcome step in this direction. A further impetus towards the enhancement of EU action in the field, in particular as regards more 'inclusive' measures, will be provided by the shift from unanimity and consultation to qualified majority voting and co-decision ('the legislative procedure') provided for by [Article III-168(2)]. **This is a positive step to avoid legislative paralysis in an EU of 25, but will be controversial in view of Member States' reluctance to relinquish power in sensitive matters such as the treatment of TCNs**.

46. On the other hand, [Article III-168] contains no specific references to positive policies to encourage lawful routes for the admission of migrants currently outside the Union. Further, the broad wording relating to illegal immigration ('enhanced measures') and the specific reference in the Article to removal and repatriation may lead to a greater emphasis on stricter control measures.

Notes

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

38 Presidency conclusions (paragraph 27).

39 Article 63(4) TEC is a legal basis for the adoption of measures defining the rights and conditions under which legally resident TCNs may reside in other Member States. A proposed Directive under this Article has been the subject of a detailed inquiry by this Committee. See *The Legal Status of Long-Term Resident Third-Country Nationals* (5th Report, Session 2001-02, HL Paper 33).

40 Presidency Conclusions, paragraphs 30 and 33-36.

[41] See our Report *A Community Immigration Policy* (13th Report, Session 2000-01, HL Paper 64) and our latest Report *A Common Policy on Illegal Immigration* (37th Report, Session 2001-02, HL Paper 187). [72]

The Article has since been amended. **III-267(3)** has been reworded, replacing the phrase "residing without authorisation" with the more detailed phrase set out above; and **III-267(5)** is entirely new.

Article III-268: Solidarity

Article III-268 is new and has no equivalent in Title IV TEC:

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

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

> The need for solidarity and the fair sharing of responsibility between Member States has been raised in the context of the negotiations of the 'Dublin II' Regulation[42] as well as, and perhaps most prominently, in the context of the debate over the need to have an integrated EU management of external borders[43]. The explicit reference to the 'financial implications' of solidarity is noteworthy, though it is not clear what it will entail in practice.
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> Notes
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> [42] The Committee examined this proposal in detail: *Asylum Applications-Who Decides?* (19th Report, Session 2001-02, HL Paper 100).
> [43] Sub-Committee F is currently examining the issue in the context of its "European Border Guard" inquiry. [73]

Voting procedures

The voting procedure for Title IV TEC was amended by the Treaty of Nice and is contained in Article 67 TEC. It provided for a transitional period of five years (1999-2004), during which Member States shared the right to initiate proposals with the

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[72] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003: http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm, paras 42-46.

[73] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm, para 47

European Commission, and actions were then adopted by the Council acting unanimously after consulting the European Parliament.[74]

When this five-year period ended on 1 May 2004, Member States lost their right of initiative, which now rests solely with the Commission. In addition, the Council is now able to decide unanimously to change the voting procedure for Title IV measures to the co-decision procedure under Article 251 TEC (which implies QMV). On 1 May 2004 QMV was automatically applied to Article 62(2)(b) TEC on visas and to Article 66 TEC (these changes were under Article 67(3) and (4) and Protocol 35 TEC), but the Council has not yet made any changes to the voting procedure for other articles.

Under the Constitution there will be a change of legislative procedure. Most measures on border controls, asylum and immigration will take the form of European laws and framework laws made under the OLP. The British Government appears to have supported the extension of QMV to the area of asylum and immigration, whereas other countries, including Germany, were apparently less keen.[75]

Opt-outs and opt-ins

The House of Lords EU Committee has described as follows the background to the EU's provisions on border checks, asylum and immigration, and in particular the current system of opt-outs and opt-ins applying to the UK, Ireland and Denmark:

> 10. As a basis for the area of freedom, security and justice, and in particular to facilitate the removal of internal border controls, the Amsterdam Treaty incorporated into the framework of the EU the Schengen *acquis*.[6] Some of the acquis went into Title IV TEC, some into Title VI TEU. The Schengen arrangements incorporated into Title IV apply, as EC law, only to 12 Member States. Denmark is outside Title IV, but remains, as a party to Schengen, bound in international law. The UK and Ireland, by contrast, are not parties to Schengen but may, with the agreement of the 13 Schengen States, opt-in selectively.[7]
>
> 11. In addition to the Protocol on Schengen, a separate Protocol to the TEU safeguards the position of the UK and Ireland confirming that the UK is entitled to exercise frontier controls (TEU Protocol No 3).
>
> 12. Further Denmark, Ireland and the UK stand in a special position as regards Title IV TEC (Visas, asylum, immigration and other policies related to free movement of persons). The UK and Ireland can opt-in selectively to (non-Schengen) measures under Title IV (TEU Protocol No 4). Denmark cannot be selective but can opt-in to Title IV *in toto* (TEU Protocol No 5).

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

75 Jack Straw, HC Deb 9 July 2003 c 1208

> 13. What is to be the future of these Protocols when the new Constitutional Treaty replaces the TEU? Whether the new Treaty will signify the end of the UK's ability to opt out of, for example, immigration measures waits to be seen. When giving evidence to the Committee on 25 March Mr Peter Hain MP said that the Government did not want to see any change in the UK's position as contained in the current Protocols.
>
> Notes
>
> [6] Including the 1985 Schengen Agreement, the 1990 Schengen Convention and the decisions of the Executive Committee established by the Schengen agreements. See the Protocol No 2 TEU. The position is explained more fully in our Report *Incorporating the Schengen Acquis into the European Union* (31st Report, Session 1997-98, HL Paper 139). The UK's participation is set out in Council Decision 2000/365/EC of 29 May 2000.
>
> [7] The UK has sought to maintain its border controls and has so far elected to participate in Schengen only in respect of police and judicial co-operation, drugs and the Schengen Information System (SIS-a computerised database). Ireland has taken a similar approach.[76]

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

> On internal border controls, the Government secured, and have had for some time, an opt-out clause on all those matters, including Schengen. The opt-outs remain and are not affected by the Convention's discussions and proposals.[77]

Indeed, **Article IV-442** of the General and Final Provisions of the Constitution states that "The Protocols and Annexes to this Treaty shall form an integral part thereof". Protocols 17 to 19 relate to the Schengen *acquis* and to the special position of the UK and Ireland on border controls, asylum and immigration, judicial cooperation in civil matters and on police cooperation.[78] The Protocols make it clear that the UK will not be involved in measures under Articles III-265 to III-268 ("policies on border checks, asylum and immigration") and certain other measures, unless it notifies the Council in writing of its intention to do so.

B. Judicial cooperation in civil matters, criminal matters and criminal procedure

Article III-269 builds on Article 65 TEC and sets out the areas in which the EU will develop judicial cooperation in civil matters with cross-border implications, possibly via the approximation of national laws. The areas are:

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[76] House of Lords Select Committee on the European Union, *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)*, 16th report of 2002-03, 27 March 2003: http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm, paras 10-13.

[77] HC Deb 16 June 2003 c16

[78] CIG 87/04 ADD 1 at http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf

(a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;
(b) the cross-border service of judicial and extrajudicial documents;
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
(d) cooperation in the taking of evidence;
(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff.

Articles III - 270 to 274 on judicial cooperation in criminal matters depart in some ways from the drafts under consideration during 2003, especially in the addition of "emergency brakes" for proposals which may affect fundamental aspects of a Member State's criminal justice system. It is also to be noted that, although firm opposition had been expressed in the UK and elsewhere, there is still an Article under which a European Public Prosecutor's office may be established (see below).

Mutual recognition of judgments and minimum rules in criminal procedure

Article III-270 replaces current provisions in Articles 61(e) TEC and 31(1) and 34 TEU. The two paragraphs of **Article III-270** derive from two separate articles in earlier drafts, namely Article 15 (Judicial cooperation in criminal matters) and Article 16 (Criminal procedure). The Praesidium explained the merger, saying that approximation of criminal procedural law might prove necessary in order to facilitate the full mutual recognition of decisions. The first paragraph starts by restating the principle of mutual recognition of judicial decisions as one of the ways in which the Union is to ensure an area of freedom, security and justice (Article 31 TEU), and goes on to a new provision for European laws or framework laws on measures to:

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

The wording has not changed in any significant way from the earlier draft on which the House of Lords EU Committee commented:

> It is our experience that the difficulties and sometimes controversy (e.g. the European Arrest Warrant) lie not in the existence of such a power but fears about the way in which it may be exercised.[79]

Article III-270(2), on criminal procedure, is derived from previous draft article 15 and goes much further than the existing Article 31(1)(c) TEU, which merely includes in the list of common actions "ensuring compatibility in rules applicable in Member States as may be necessary to improve [judicial] cooperation". **Article III-270(2)** states:

> To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, European framework laws may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.
> They shall concern:
> (a) mutual admissibility of evidence between Member States;
> (b) the rights of individuals in criminal procedure;
> (c) the rights of victims of crime;
> (d) any other specific aspects of criminal procedure which the Council of Ministers has identified in advance by a European decision. The Council of Ministers shall act unanimously after receiving the approval of the European Parliament.
>
> Adoption of such minimum rules shall not prevent Member States from maintaining or introducing a higher level of protection for the rights of individuals in criminal procedure.[80]

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

> the creation of a legal basis permitting the adoption of common rules on specific elements of criminal procedure to the extent that such rules relate to procedures with transnational implications and are needed to ensure the full application of mutual recognition of judicial decisions or to guarantee the effectiveness of common tools for police and judicial cooperation created by the Union. The Treaty legal basis could specify as one domain of action common minimum rules on the admissibility of evidence throughout the Union. The Council could

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79 House of Lords Select Committee on European Union, Sixteenth Report 2002-03 HL 81 *The Future of Europe: Constitutional Treaty - Draft Article 31 and Draft Articles from Part 2 (Freedom, Security and Justice)*, March 2003

80 http://www.fco.gov.uk/Files/kfile/CIG_86_04_Provisional%20EU%20Constitutional%20Treaty,0.pdf

> subsequently by unanimity identify all elements of procedure on which minimum rules are required to facilitate mutual recognition.
>
> This legal base could also provide for the setting of common minimum standards for the protection of the rights of individuals in criminal procedure, building on the standards enshrined in the European Convention of Human Rights as reflected in the Charter of Fundamental Rights and respecting different European legal traditions.[81]

The Lords EU Committee considered that the then reference to "the [definition of the] rights of individuals in criminal procedure"[82] was unexceptionable, but noted evidence that weight was being placed on maintaining security, to the perceived exclusion, or neglect, of freedom. Moreover, they doubted the need for this provision, in the light of the Commission's then recently published Green Paper on *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*.[83]

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

> Rules on the admissibility of evidence may be closely related to the mode of trial (for example, in England and Wales, to trial by jury). That such rules could be changed without the consent of a Member State is, we believe, unacceptable.[84]

They recognised that, even with a restriction to cases having cross-border implications, any EU legislation under this draft article "would most likely have substantial effects on procedure in purely domestic criminal cases".[85] In practice, it could be difficult to apply different standards in purely domestic cases, on the one hand, and those with a cross-border dimension, on the other. The Praesidium emphasised that the article "in no way seeks to harmonise admissibility or indeed taking into account of such evidence, which are matters wholly and exclusively for national courts"[86] and the word "mutual" was inserted to clarify this.

The EU Committee's concern that the power then was not, but ought to be, restricted to cases with cross-border implications, was shared by a number of Convention members, and has been reflected in a modification to the Convention draft. However, it could still be argued that a framework law could legitimately establish minimum rules which would

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

82 http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/81/8108.htm

83 Com (2003) 75, published 19 February 2003, http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0075en01.pdf currently under scrutiny by the European Scrutiny Committee, see Twenty-Sixth Report 2003-04: http://pubs1.tso.parliament.uk/pa/cm200304/cmselect/cmeuleg/42-xxvi/4202.htm

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

85 Ibid

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

apply to purely domestic cases, if doing so would (or was intended to) facilitate cooperation etc in cases which had a cross-border dimension. Further modification in the final text has spelled out that the rules shall take into account the differences between the legal traditions and systems of the Member States, and in **III-270(2)** replaced "in order to facilitate" with "to the extent necessary to facilitate".

In responding to the Lords EU Committee's concerns, the Government said:

> 23. The Government shares the serious reservations of the Committee about the proposed article on criminal procedural law, including the Committee's concern that rules on evidence could be changed without the consent of a Member State.
>
> 24. The Government remains firmly opposed to giving the EU wide-ranging competence to harmonise criminal procedural law. Judicial co-operation in criminal matters should be based on the principle of mutual recognition and respect for the diversity of Member States' legal systems. Common procedures should therefore be pursued only where they are a necessary consequence of implementing that principle.
>
> 25. We recognise that it may be necessary to develop some light minimum standards in the areas where people facing criminal proceedings in a Member State of which they are not a national would be disadvantaged by virtue of that fact. The Government has therefore tabled an amendment to provide for this in the areas of legal advice, information, interpretation and access to diplomatic and consular authorities. The amendment would also make any approximation in this limited area subject to the use of framework laws and unanimity.[87]

The European Scrutiny Committee did not seek to duplicate its sister committee's commentary on the draft articles but focused on issues of particular concern, including the harmonisation of criminal procedure and of substantive criminal law, and the proposed European Public Prosecutor. They said:

> 49. We note that some of our witnesses supported the adoption of minimum procedural standards, but we do not consider there is sufficient justification for any generalised harmonisation of rules of criminal procedure in the EU. We therefore welcome the limitations which have now been included in Article III-166(2) [now III-270(2)], confining any action to matters with cross-border implications. In our view, any harmonisation of criminal procedure should be limited to achieving such minimum standards as are necessary to secure mutual recognition of judgments and decisions in particular cases, and should complement the existing procedural guarantees provided by the European Convention on Human Rights.

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[87] Government Response July 2003, at http://www.fco.gov.uk/Files/kfile/JHA_FinalGovernmentResponse,0.pdf

> 50. We share the view that the proper operation of a system of criminal justice depends on a degree of ownership by the people of the country concerned and on democratic accountability. Accordingly, we do not believe that the subject-matter of criminal procedure is appropriate for QMV or the co-decision procedure. In particular, we do not accept that rules on the admissibility of evidence can properly be adopted in this way, since such rules are so closely connected with the different modes of trial in the Member States. As they stand, the provisions of Article III-166(2) (formerly Article 16) create a risk that, should the UK be outvoted on the issue, a more flexible EU standard on the admissibility of evidence would have to be applied in a jury trial in this country, and we do not consider this an acceptable risk.[88]

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

The Government's view, set out in the September 2003 White Paper, was:

> 83. The new Treaty would also provide for minimum standards at EU level to protect British citizens facing criminal proceedings in another Member State. The scope of the provision in the draft Treaty, however, is wider than this and it is subject to QMV. The Government will seek to define where the EU should act to set light minimum standards in the area of criminal procedures. The Government also believes that qualified majority voting would not be the most appropriate way of proceeding where significant harmonisation of criminal procedural law was concerned.[89]

A new **paragraph 3** to **Article 270** was proposed during the final stages of the IGC. It is one of the so-called "emergency brakes".

> Such a brake system would comfort those member states who want to push forward with closer integration in these areas - like France and Germany - while giving more reluctant member states - such as the UK and the Nordic countries - a way out if they wanted.
>
> The solution already found public praise with some member states. Austria's foreign minister Benita Ferrero-Waldner said it was a good compromise.
>
> Officials indicated that this might be the way forward in the areas of justice and home affairs where there is still a veto in the Constitution.[90]

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88 European Scrutiny Committee 26th Report, 2003-03 at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxvi/6306.htm

89 "A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference 2003", September 2003, FCO, Cm5934

90 "'Emergency brake' may be solution for veto issues", 19 May 2004, *Euobserver.com*

The emergency brake provides that where a Member State considers that a draft framework law would affect fundamental aspects of its criminal justice system, it may request that the draft be referred to the European Council, which would decide by unanimity. In the case of judicial cooperation in criminal matters, if the European Council fails to agree within four months, a sub-group of at least a third of Member States can move ahead with the proposed policy on their own. Some critics have suggested the mechanism is too vague, while others see it as potentially tantamount to a veto.

In responding to the Prime Minister's statement on 16 June 2004, David Heathcoat-Amory, who was one of the UK's parliamentary representatives on the Convention on the Future of Europe, assessed the mechanism as follows:

> The Government might think that that will meet their red line, but they should realise that it would be a fudge and completely unacceptable. There is already a torrent of legislation on such issues, and if they are to pull the emergency brake whenever social security or criminal justice arises it will be full on all the time. Last year, the Committee on which three of us sit examined 1,000 new measures from the European Union. Many of them are incremental. Once qualified majority voting is allowed on criminal justice and social security, and once the EU starts to co-ordinate our employment policies, no emergency brake in the world will be an adequate substitute for the veto that we were promised in the White Paper, which is now one of the red lines. I hope that the Foreign Secretary's silence in the debate does not indicate any kind of retreat. The point is, however, that even if he does secure his red lines they will be inadequate, given all the hundreds of amendments with which the Government failed. [91]

Elmar Brok, Chairman of the EP Committee on Foreign Affairs, European Parliament, complained that the introduction of the emergency brake was the "veto re-invented". He anticipated that, on issues such as the fight against organised crime or terrorism, the Council would become a "legislative cemetery", as the proposals would remain there transfixed.[92]

Approximation of criminal law

The current substantive provisions on criminal law are contained in Articles 29, 31(1)(e) and 34 TEU and the existing power to adopt framework decisions for the approximation of criminal law requires unanimity. **Article III-271(1)** would allow for approximation by framework laws and QMV of minimum rules for the definition of, and penalties for, offences, initially in areas of crime which correspond with those now set out in Article 29 TEU. Racism and xenophobia, the prevention and combating of which are specified in Article 29 TEU, are not in the list in paragraph 1, but there is currently a proposal for a Council framework decision on combating racism and xenophobia, so they may in due

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91 HC Deb 16 June 2004 c 825

92 *Agence Europe* briefing, 25 May 2004

course be covered by **III-271(2)** (see below). The House of Lords EU Committee reported on that draft framework decision in July 2003 to update the House on the main developments in the text and the progress of scrutiny. They said "The Framework Decision remains a complex and politically sensitive matter on which we will keep a close eye".[93]

Other areas of "particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis" may be identified by a unanimous European decision, so that (implicitly) framework laws could also include them.

Article III-271(2) also allows for approximation by means of framework law if it proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. This is a narrower extension than would have been made by the previous draft. The procedure for adopting these framework laws will be the same as that for the adoption of the harmonisation measures. The European Scrutiny Committee's principal concern about proposals for the harmonisation of criminal law was with the proposed legislative procedure:

> 58. … We consider that the scope of criminal liability within a Member State is primarily a matter for the national parliament. Whilst we welcome the limitations which have been written into Article III-167 [now III-271], it remains the case that the scope of a range of serious offences can still be determined against the wishes of the national parliaments of Member States in the minority. We agree with Statewatch that effectively removing those parliaments from the debate raises a serious question of principle and undermines the legitimacy of the criminal law. In our view, harmonisation of criminal law within the European Union should proceed by agreement of all Member States, or it should not proceed at all.[94]

An "emergency brake" provision virtually identical to that added to Article III-270 has been added in **Article 271(3)**.

Crime prevention

Article III–272 on crime prevention provides:

> European laws or framework laws may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

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93 Lords EU Committee 32nd Report 2002-3 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/136/136.pdf

94 ESC 26th Report at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxvi/6306.htm

Although Article 61(e) TEC currently provides that the Council shall adopt measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security *by preventing* and combating *crime*, **Article III-272** would provide a legal base (not requiring unanimity) limited to incentive and supporting measures for the prevention of crime.

Eurojust

Article III-173 is on Eurojust (European Judicial Cooperation Unit), which is an agency of judicial cooperation for the investigation and prosecution of serious cross-border crime. Each Member State is represented either by a senior prosecutor, judge or police officer. This body was established by Council Decision in February 2002 but had been preceded by a provisional unit, Pro-Eurojust, operative from March 2001, and before that by the European Judicial Network, which replaced more informal arrangements for cooperation.

The 2002 Council Decision emphasised the need for Eurojust to act in a co-ordinated way with the other European agencies, and provided that Eurojust and Europol should maintain close co-operation.[95] The offences covered by Eurojust include the types of crime and offences within the scope of Europol, as set out in Article 2 of the Europol Convention of 26 July 1995, and other specified crimes, such as computer crime, money laundering and environmental crime.

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

Its remit and powers would be substantially increased by **Article III-273**. **III-273(1)** sets out its "mission", which is to support and strengthen coordination and cooperation between national prosecuting authorities "in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases". The Constitution extends Eurojust's mission to include investigating authorities. **III-273(2)** provides that a European law will determine its structure, workings, scope of action and tasks, which may include:

> a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions, conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
>
> (b) the coordination of investigations and prosecutions referred to in point (a);

[95] The Decision was amended in June 2003 by Council Decision 2003/659/JHA

> (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

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

> It is a matter of strengthening Eurojust's competences in this regard. As matters now stand, Eurojust can already ask the national authorities to undertake a criminal prosecution on the basis of specific evidence. the latter may, however, decide not to comply with the request … As the Article is now worded, they could be obliged to do so if the law so requires.[96]

A Declaration on this Article states: "The Conference considers that the European laws referred to in the second subparagraph of Article III-273(1) should take into account national rules and practices relating to the initiation of criminal investigations". However, the Article is silent about the national authorities' powers to discontinue prosecutions.

A previous draft had provided that Eurojust could be tasked to supervise Europol's operational activities, to take account of the fact that in most of the Member States' legal systems, the police authorities conduct criminal investigations under the instructions or supervision of judges, magistrates or public prosecutors. This was removed on the grounds that it was unnecessary and perhaps unclear. But Europol's tasks are to be, "where appropriate, in liaison with Eurojust". Relations between Eurojust and Europol (which has an intelligence-gathering but not an operational function) are now regulated by an agreement signed on 9 June 2004 which enables personal data to be exchanged.

> Based on the agreement's provisions as well as on the legal frameworks of both organisations, new horizons are opened in supporting and coordinating Member States' international criminal investigations and prosecutions. Both parties may participate in setting up of joint investigation teams and coordinate their further action in the field of their competences. A new dynamic intelligence approach is also initiated as Eurojust may also provide Europol with information for the purpose of its Analysis Work Files or even to present requests to Europol for opening an Analysis Work File. On the other hand, Europol may also supply to Eurojust analysis data and analysis results which may be required for the tasks of Eurojust. Last but not least, Eurojust and Europol are now able to support Member States' criminal investigations and prosecutions on a day-to-day basis by exchanging information and intelligence including personal data with respect to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.[97]

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

97 "EU strengthens police and judicial cooperation", Eurojust Press Notice, 9 June 2004

In July 2004, the House of Lords EU Committee published its report *Judicial Cooperation in the EU: the role of Eurojust*,[98] reviewing Eurojust's first year of full operation, and noting that, in a remarkably short time, it had established itself as a highly effective means of facilitating cooperation between investigating and prosecuting authorities in serious criminal cases. The Committee said that, by having senior prosecutors from each Member State available full-time to facilitate communication between prosecutors, to provide a high level of expertise in mutual legal assistance procedures, and to co-ordinate complex cases, Eurojust was meeting an undoubted and growing need. The UK was one of the main users. Not all Member States had implemented the Decision setting up Eurojust,[99] but in those which had, there were considerable differences in the powers given to their national members.

The Committee described Eurojust's relations with other bodies, including OLAF (*Office Européen de Lutte Anti-Fraude*) which is the body responsible for investigating allegations of fraud against the Community budget and related irregularities. There was already some overlap between the functions of the two bodies, and relations between them were far from perfect. Co-operation was apparently hampered by suspicion and antagonism, to the detriment of effective action to tackle fraud against the resources of the Union and consequently of the European taxpayer.

The Committee was also able to comment on the constitutional provisions relating to Eurojust and establishing a European Public Prosecutor "out of Eurojust". It was critical of the proposed increase in the powers of Eurojust, when few of the witnesses had advocated giving Eurojust additional powers at present:

> 86. The proposed Constitutional Treaty increases the powers of Eurojust. Article III-174(2)(a) [now III-273] provides that Eurojust's tasks (which will be determined by future EU legislation) may include "the initiation of criminal investigations". This goes further than Eurojust's current powers, which are limited to proposing to national authorities the initiation of investigations and does not accord with the view of most of our witnesses (including Eurojust itself) that no further powers are needed at this stage.
>
> 87. In its written evidence, Eurojust noted that the use of the word "initiate" prompted much discussion when the Eurojust Decision was being negotiated as it is interpreted as meaning the commencing of an investigation or proceedings. "Request" was preferred as it offered a capacity to influence rather than to take charge or responsibility for starting investigations or prosecutions, which many felt would bring Eurojust too close to being a European Public Prosecutor…
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> 89. The increase in powers of investigation may have significant implications for the relationship of Eurojust with OLAF. The Treaty gives Eurojust powers

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98 Lords EU Committee 23rd Report, 13 July 2004 at http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/138/13802.htm

99 Council Decision 28 February 2002, OJL 63, 6.March 2002

> regarding "criminal investigations", whereas the work of OLAF finishes before this stage, as OLAF conducts preparatory investigations which may lead to a criminal investigation and prosecution. In practice, however, it is difficult to see how the investigations of the two bodies in fraud cases differ. There is certainly an overlap, especially in view of the fact that the proposed Constitutional Treaty stresses the role of Eurojust in combating offences against the EU's financial interests. It remains to be seen how the two bodies will interact in practice after the increase of Eurojust's powers. One possibility is that OLAF would become the investigative branch of Eurojust, at least in cases affecting the Community's financial interests.[100]

European public prosecutor

Article III-274 would allow the Council to establish the European Public Prosecutor's Office. There has been an unenthusiastic response to similar proposals in recent years. The British Government was opposed to this proposal, which was reported to be one of the UK's "red lines".[101] In the 2003 White Paper the Government stated:

> we see no need for the creation of a European Public Prosecutor who would have powers to decide – at EU rather than national level – how to investigate and prosecute serious transnational crimes. The Convention has proposed that such a decision could be taken only by unanimity.[102]

The Government maintained its opposition to this post in the September 2004 White Paper on the Constitution, stating "The Government sees no need for such a Prosecutor".[103]

The creation of a new authority, the office of a European Public Prosecutor (EPP), was one of the proposals of a research report, *Corpus Juris*, which was published in April 1997. It also proposed a uniform code of criminal offences to deal with fraud against the Community's finances, and that for the purposes of the investigation, prosecution, trial and execution of sentences relating to an act which constitutes an offence under the code, "the territory of the Member States of the Union" would constitute "a single legal area". In May 1999, the *Corpus Juris* was the subject of a report by the House of Lords Select Committee on the European Communities.[104] They were not persuaded that the *Corpus Juris* offered, at the time, a practically feasible or politically acceptable way forward, having regard to the state of the Union and public opinion. In particular, the creation of a separate prosecution authority with no accountability to Parliament would raise very difficult issues.

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100 http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/138/13802.htm
101 "Hain in trouble over EU blunder", *The Guardian* 28 May 2003
102 Cm 5934 *A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference* September 2003
103 Cm 6309 *White Paper on the Treaty establishing a Constitutions for Europe* September 2004 p.31
104 Lords EU Committee 9th Report, HL Paper 62, 1998-99, 8 May 1999

The European Commission then presented an outline of its proposal to establish a European Public Prosecutor at the Nice IGC in 2000, but the proposal was not taken up. In 2001 the Commission published a Green Paper on "Criminal Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor".[105] The Commission believed that the IGC had not been given the necessary time to examine the proposal. Its press notice explained:

> In this Green Paper the Commission fleshes out its contribution to the Nice Intergovernmental Conference. It suggested there that the EC Treaty should provide for the establishment of a European Public Prosecutor […] who would be responsible for the criminal-law protection of the Community's financial interests. In the Commission's view, the EC Treaty should govern solely the appointment and removal from office of the European Public Prosecutor, his functions and the salient features of his office. All other rules such as those governing the European Public Prosecutor's status and his modus operandi, would be laid down in secondary legislation. These are the questions considered in the Green Paper.
> […]
> The tasks of the European Public Prosecutor would be the following:
>
> - He would gather all the evidence for and against the accused, so that proceedings can be commenced where appropriate against the perpetrators of common offences defined in order to protect the Community's financial interests. He should also be responsible for directing and coordinating prosecutions. He would have specialised jurisdiction, prevailing over the jurisdiction of the national enforcement authorities but meshing with them to avoid duplication.
>
> - He would have recourse to existing authorities (police) to actual conduct the investigations but would direct investigation activities in cases concerning him. He would further reinforce the judicial guarantee as regards investigations conducted within the European institutions.
>
> - Action taken under the authority of the European Public Prosecutor, whenever it could impinge on individual freedoms and basic rights, must be subject to review by the national judge performing the office of "judge of freedoms". This review, exercised in a Member State, would be recognised throughout the Community so as to allow the execution of authorised acts and the admissibility of evidence gathered in any Member State.
>
> - He would have authority, subject to judicial review, to send for trial in the national courts the perpetrators of the offences being prosecuted.

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

- When cases come to trial, he must prosecute cases in the national courts in order to defend the financial interests of the Communities. The Commission considers it essential that the trial stage remain in national hands. There is no question of creating a Community court to hear cases on the merits.[106]

When the Commission gave a presentation of its proposals to the Justice and Home Affairs Council early in 2002, the Council:

> considered that the time had not come to take such a radical step. It was generally felt that newly created institutions such as Eurojust and OLAF needed time to affirm themselves in the fight against offences committed against the financial interests of the Communities. Misgivings were also voiced about the idea that the European Public Prosecutor remit, if such an institution were to be set up, should be limited to the narrow area of the protection of the Community's financial interests. Finally, the discussion highlighted the extremely complex constitutional implications raised by the Green Paper.[107]

The ESC considered the Green Paper in June 2002 and

> did not think that any sufficient case had been made out for the Commission's proposals, and agreed with the Government that the establishment of Eurojust made these proposals unnecessary. We identified a number of concerns of principle, such as the ready assumption by the Commission that the function of prosecuting offences should be combined with that of investigation, the notion that the European Public Prosecutor would have the power to commit a person for trial, and to determine the Member States in which the trial is to be held and the creation of differing standards of criminal responsibility for fraud according to whether or not the offence concerns the Community's financial interests. We were particularly concerned that the proposals had the effect of putting the prosecution function completely beyond the reach of democratic accountability. [108]

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

> 14.12 We continue to believe that this proposal is impractical and that it raises serious issues of principle. We see no reason for creating an institution at EU level, which will have the effect, on the one hand, of diluting the

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

[107] Council press release 6533/02 28 Feb 2002

[108] ESC 34th Report 2001-02, June 2002

> responsibility of Member States to deal with fraud and, on the other, of putting the function of criminal prosecutions beyond the reach of democratic accountability.[109]

In a subsequent Report, the ESC challenged the Commission's analysis that a majority favoured the proposal and presented an alternative view.[110] The Government also disagreed with the Commission's analysis of support for an EPP:

> The Government also disagrees with the Commission's conclusions that the majority of Member States, who attended the Public Hearing, were in favour of the EPP. A number of these Member States voiced significant practical reservations against the proposal and some said that it could not be justified solely in the context of protecting the Community's budget. The Government therefore does not agree that the majority of Member States support this proposal. The Commission acknowledged that a minority of Member States; including Denmark, Ireland, Finland, UK and Austria were totally opposed to the EPP. The Commission also included France in this category, although France has subsequently emerged as a supporter of the EPP concept. Since the hearing, Sweden and the Netherlands have joined the group of countries opposed to the EPP. Member States opposed to the EPP expressed their views strongly at the JHA Council at Veria and in the Convention on the Future of Europe.[111]

Nevertheless, the proposal was brought forward again in the Praesidium's draft articles (published in March 2003) on judicial cooperation in criminal matters.[112] There were some amendments to the wording of the previous draft article 20, the main one being the addition of liaison with Europol "where appropriate". The Praesidium conceded that a large number of Convention members opposed the idea of creating an EPP Office, some saying that there was no need for it, others pointing out that Eurojust had only recently begun to operate and that it was necessary to wait before assessing the need to create the office. However, "many other members" were in favour of its creation and some wanted the constitution to provide for it.

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

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[109] ESC 34th Report 2001-2 June 2002
[110] ESC 21st Report 2002-3 May 2003
[111] Ibid
[112] http://european-convention.eu.int/docs/Treaty/cv00836.en03.pdf

Statewatch urged that the words "through the national prosecutor's office" should be inserted, because it was important that the prosecutor should know the legal system of the Member State concerned.[113] *Justice* thought:

> This model raises serious issues about the possibility of 'forum shopping' so that the Prosecutor could take advantage of different standards in burden of proof, mode of trial, sentencing and admissibility of evidence that apply across the European Union. The notion of prosecuting a case in a national court according to specific rules of procedure and judicial review applicable only to the European Public Prosecutor creates an unjustifiably complex system of European and national criminal laws and procedures. JUSTICE believes that such a model would be unworkable and could present a danger of watering down of procedural safeguards, in particular in relation to admissibility of evidence. The establishment of a European Public Prosecutor's Office must involve strict rules governing the selection of jurisdiction and a provision on double jeopardy that would prevent national prosecutors re-prosecuting an offence that had already been dealt with by the European Public Prosecutor.
>
> 9. The need to establish a European Public Prosecutor's Office has not yet been demonstrated. It is difficult to see how, in the model set out, the European Public Prosecutor would add any practical value to the role of Eurojust. JUSTICE believes that if a European Public Prosecutor's Office were to be established to meet a genuine need, it would need to be accompanied by the establishment of a European Court of Criminal Justice and a coherent set of procedural rules with adequate safeguards for the rights of the defence. [114]

The Times reported on the British Government's rejection of the EPP proposal:

> It argued that the Euro-prosecutor would be unable to tackle the root causes of fraud and would mean a loss of accountability for prosecution decisions that affect individuals' rights. Peter Hain, Britain's representative on the Convention on the Future of Europe, said: "Criminal prosecution should be essentially a national responsibility. Our national prosecutors must be accountable to national courts and ultimately to our national parliaments. The European prosecutor would be accountable to neither."
> […]
> With the support of Sweden, Finland, Denmark, Ireland, Austria and Estonia, Mr Hain presented an alternative five-point plan, saying that this would be more effective in tackling cross-border crime, while ensuring that prosecution of individuals remains a national responsibility.[115]

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

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

[115] *The Times* "Britain rejects EU prosecutor" 23 May 2003

The Independent reported:

> Supporters of the plan, led by France and Germany, argue that national police forces do not have sufficient resources, or links with other forces, to pursue the largest international fraudsters. But the proposal looks doomed to failure as it is opposed by eight of the 15 EU members, when the opposition of just one could defeat it.
>
> A spokesman for the Government confirmed last night that Britain was prepared to use its veto on the issue. He said: "This idea would mean setting up a whole new institution, which is the reverse of what the Convention is supposed to be doing.
>
> "We already have cross-border judicial arrangements to tackle matters of joint EU interests, such as abuse of EU finances, and we are concerned about what areas of crime this prosecutor, if appointed, would investigate."
>
> He said the proposed powers were not compatible with the variety of legal systems within the EU. Britain also believes that any body that has the power to initiate a prosecution in a member state must be accountable in that country.
>
> "We believe it could be the thin end of the wedge towards what it is covered in national criminal justice systems."
> (…)
> The Tories fear the plan could be the first step towards a single European judicial system. A spokesman said: "These proposals will not make any difference. Fraud is not tackled by setting up some grandiose office. Brussels needs to get its own house in order. Criminal prosecutions are a matter for national governments."[116]

The ESC included in its 26th Report in June 2003 some of the strong comments witnesses had made about how this proposal had come to be included, including those of Mr Jakobi of Fair Trials Abroad on an OLAF meeting on the EPP:

> What was quite extraordinary was the way that the Commission rapporteurs were determined to take their view as a consensus view over and above the view of all the national representatives and experts around. There were very few voices in a very large assembly in favour of a European Public Prosecutor… .[117]

None of the evidence given to the Committee supported the proposal for an EPP. The Government was still opposed to it and tabled an amendment to remove the article from the draft. The Committee emphasised:

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[116] *The Independent* "European Convention: Britain to veto plan for powerful EU prosecutor" 28 May 2003

[117] ESC 26th Report para.75 at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxvi/6307.htm

> 81. We have repeatedly opposed the proposal to create a European Public Prosecutor, considering it impractical and likely to remove the prosecution function from democratic accountability. In the light of the evidence given to us about the risk of "forum-shopping", with the Prosecutor selecting the forum where he is most likely to secure a conviction, we note that the proposal also has the potential for creating an engine of oppression.
>
> 82. We entirely support the Government's opposition to this proposal and we look forward to the deletion of this provision from the draft Treaty.

Article III-274 has been modified so that the initial authorisation to set up a EPP Office would apply only to combating crimes affecting the financial interests of the Union, not cross-border crime as well. But the text does provide for its remit to be extended:

> 4. The European Council may, at the same time or subsequently, adopt a European decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

In their report on the role of Eurojust, the House of Lords EU Committee appeared to endorse witnesses' suggestions that the extension of Eurojust's powers alone would be a step towards having a EPP, even without Article 274. They set out the Attorney-General's views and the reasons given by the Prime Minister for agreeing to the inclusion of the Article, but were not convinced that it was desirable:

> 94. We have received a number of comments regarding the relationship between Eurojust and the European Public Prosecutor. According to NCIS, "from a United Kingdom perspective, effective use of Eurojust could help to deflect calls for the establishment of a European Public Prosecutor". This view was to some extent reflected in the evidence of the Attorney-General, Lord Goldsmith, who told us:
>
> > "I personally am against the idea of a European Public Prosecutor. I do not think it is desirable and I do not think it is necessary. One of the reasons I do not think it is necessary is precisely because I believe that, with the sort of cross-border crime that we are talking about, the most effective way of dealing with that is going to be through properly directed national law enforcement agencies, operating in co-operation with their international counterparts and their European counterparts, and that Eurojust, amongst other things, is a very good way of enabling that co-operation and co-ordination to take place".
>
> In his statement on the outcome of the Intergovernmental Conference on 21 June the Prime Minister was more positive in explaining why the Government had accepted the inclusion of a reference in the Treaty to a European Public Prosecutor. He said:

> "Let me explain to the right hon. Gentleman why we agreed with the notion that there could be a European public prosecutor, provided that is done with unanimity, so we have to give our consent. It is precisely for the reasons that the right hon. Gentleman suggested. There is a need to deal with issues to do with fraud and accountancy problems in the European Union, so how on earth does it help for us to disappear off into the sidelines of Europe?"

95. We asked most of our witnesses what they thought that establishing a European Public Prosecutor "from Eurojust" meant. No one was sure. Three different models were suggested: that the EPP should oversee Eurojust; that Eurojust itself would take on the role of the European Public Prosecutor, or that the European Public Prosecutor, while a separate body, would join the Eurojust College, as the "26th member" as a number of witnesses put it.

96. We remain doubtful of the need or desirability for a European Public Prosecutor. As we have pointed out, there is already overlap between Eurojust and OLAF and to introduce another player would be likely to cause further overlap and confusion. But if, despite the reservations we have expressed, an EPP is eventually created, we agree that, as the proposed Constitutional Treaty implies, it should build on Eurojust. Eurojust is an institution which in our view is already showing its effectiveness: it works with the grain of different national legal systems and different criminal codes (as opposed to an approach which would seek to harmonise them) and it is highly desirable that an EPP should follow a similar approach.[118]

C. Police Cooperation

Articles III-275 – III-277 contain provisions on police cooperation and police operations on the territory of another Member State. The wording of these articles is based on existing TEU provisions, although it is generally more concise. The Constitution sets out a brief framework, while the detailed provisions would be contained in secondary legislation. Currently, the detail is set out in the *Europol (European Police Office) Convention*, which is more difficult to amend than secondary legislation because amendment entails unanimous agreement and national ratification. Concern has been expressed that the wording of the provisions would extend Europol's remit beyond dealing with serious *organised* crime to serious crime affecting two or more Member States. This is discussed in more detail below.

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

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[118] Lords EU Committee 23rd Report, *Judicial Co-operation in the EU: the role of Eurojust*, 13 July 2004

> If the European Union is to win the maximum support of its citizens, it must show that it can deliver concrete results on issues that really matter. The Convention will be deemed to be a success if it is seen to have put in place means to ensure that freedom can be enjoyed in conditions of security and justice is accessible to all. People have a right to expect the Union to address the threat to their freedom and legal rights posed by terrorism and serious crime.[119]

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

Constitution	**Subject**	**Title VI TEU**
Article III-275	Police cooperation in the prevention, detection and investigation of crime	Article 30(1)TEU
Article III-276	Europol	Article 30(2) TEU
Article III-277	Operations on the territory of another Member State	Article 32 TEU

Currently, under Article 34 TEU, voting in the Council on police cooperation, except on implementing measures, must be unanimous. The Constitution changes this to QMV, with some exceptions for more sensitive areas, such as legislation concerning:

- "operational cooperation" between national law enforcement authorities under Article III-275(3)

- the rules under which police authorities may operate in the territory of another Member State under Article III-277

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

The table below shows the new police cooperation provisions alongside the equivalent articles in Title VI TEU:

Draft Constitution, Art III-275	**Title VI TEU, Art 30 (1)**
1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences. 2. For the purposes of paragraph 1, European laws or framework laws may establish	1. Common action in the field of police cooperation shall include: (a) operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;

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

measures concerning: (a) the collection, storage, processing, analysis and exchange of relevant information; (b) support for the training and exchange of staff, equipment and on research into crime-detection; (c) common investigative techniques in relation to the detection of serious forms of organised crime. 3. A European law or framework law of the Council may establish measures concerning operational cooperation between the authorities referred to in this Article. The Council shall act unanimously after consulting the European Parliament.	(b) the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data; (c) cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research; (d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.

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

> 64. A striking feature of Article 21—and of the whole chapter on police cooperation—is the absence of any data protection safeguards in the text. This is acknowledged in the Explanatory notes, where it is stated that general data protection provisions, covering the whole Treaty, will be included in the Title on 'the democratic life of the Union'. In view of the vast amounts of data that may be collected, analysed and exchanged under the police cooperation chapter, **we believe that adequate data protection safeguards are essential and should be clearly reflected in the Constitutional Treaty. This is something to which we will return when the Praesidium publishes its proposals on data protection**.[120]

Article III-276 concerns Europol, the agency responsible for supporting EU Member States in combating serious organised crime.[121] The Constitution aims to define Europol's structure, operating rules and tasks in a new European law, which would replace the Europol Convention. In its December 2002 report, Working Group X explained its approach as follows:

> The group has considered that rather than trying to "update" the detailed statement of Europol's tasks in Article 30 TEU - which is already outdated today in certain respects - it would be better to replace it by a shorter and more general

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[120] Lords EU Committee 16th Report 2002-3 *The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice)* 27 March 2003 para 64 at http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm

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

> provision on Europol in the new Treaty. This provision would contain a legal base giving the legislator a greater margin to develop Europol's tasks and powers.
>
> However, this legal base should not be open-ended. It would rather indicate the direction of possible developments and pose basic limits to such developments, which have not been contested within the Group. Thus, the provision could state Europol's central role within the framework of European police co-operation, define its general scope of action (i.e. serious crime affecting two or more Member States), indicate that Europol's tasks and powers shall be defined by the legislator and that they *may* (to the extent defined in the legislation) include powers relating to intelligence, coordination and carrying out of investigations, as well as to participation in operational actions to be carried out jointly with Member States services or in joint teams. Finally, the provision should make clear that any operation action involving Europol would need in any event to be carried out in liaison and agreement with the Member State(s) concerned (analogous formula to current Article 32 TEU) and that coercive measures would always have to be carried out by competent Member State officials.[122]

The wording in Article III-276 is compared with Article 30(2) TEU in the table below:

Constitution, Art III-276	**Title VI TEU, Art 30(2)**
1. Europol's mission is to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy. 2. European laws shall determine Europol's structure, operation, field of action and tasks. These tasks may include: (a) the collection, storage, processing, analysis and exchange of information forwarded particularly by the authorities of the Member States or third countries or bodies; (b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust. European laws shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with	2. The Council shall promote cooperation through Europol and shall in particular, within a period of five years after the date of entry into force of the Treaty of Amsterdam: (a) enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity; (b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime; (c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol; (d) establish a research, documentation and statistical network on cross-border crime.

[122] Final report of Working Group X 2 December 2002 p18

national parliaments. 3. Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities.	

The new wording would provide a legal base for the adoption of measures to enable the scrutiny of Europol's activities by the EP and national parliaments, which the Lords Select Committee welcomed.[123]

Europol summarises its own mandate as follows:

> Europol supports the law enforcement activities of the Member States mainly against:
>
> - illicit drug trafficking;
> - illicit immigration networks;
> - terrorism;
> - illicit vehicle trafficking;
> - trafficking in human beings including child pornography;
> - forgery of money (counterfeiting of the Euro) and other means of payment;
> - Money-laundering.
>
> In addition, other main priorities for Europol include crimes against persons, financial crime and cyber crime.
>
> This applies where an *organised* criminal structure is involved and two or more Member States are affected.[124]

Of concern to the Lords Committee was the extension of Europol's mandate to cover "serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy".[125] A previous attempt to extend the mandate of Europol beyond organised crime was made by the Danish Presidency in 2002, but this was abandoned.[126] The Lords Committee was concerned at the re-emergence of this policy:

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[123] Lords EU Committee 16th Report para 69

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

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

[126] See Lords EU Committee 5th Report *Europol's Role in Fighting Crime* HL 43 2002-03 28 January 2003 at http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/43/4301.htm

> 66. Article 22 [now III-276(1)] introduces a number of changes to the existing legislative framework. A potentially far-reaching development concerns the extension of Europol's mandate, in Article 22(1), to cover 'serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy' (wording similar to Eurojust's proposed mandate—see Article 19 above). The proposal to extend Europol's remit to 'serious crime' is not new, but was put forward in 2002 by the Danish Presidency in its proposals to amend the Europol Convention. The Committee strongly criticised such extension as being detrimental to legal certainty, potentially leading to significant differences of interpretation of what constitutes 'serious crime' among national authorities, and leaving the interpretation of the term—and hence the delimitation of Europol's remit—to Europol itself, and ultimately the Court of Justice. We welcomed the abandonment, in the course of negotiations, of the reference to 'serious international crime' in favour of a definition which is similar to Article 2 of the Europol Convention and is based on specifically enumerated offences. The re-introduction of 'serious crime' in Article 22 is a matter of concern and somewhat surprising in view of the "general approach" reached in the Council not to extend Europol's remit in these terms. [127]

Article III-277, on operations on the territory of another Member State, largely reproduces the wording of Article 32 TEU. As set out below, this is subject to unanimity and consultation with the EP:

Constitution, Art III-178	**Title VI TEU, Art 32**
A European law or framework law of the Council shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles III-270 and III-275 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council shall act unanimously after consulting the European Parliament.	The Council shall lay down the conditions and limitations under which the competent authorities referred to in Articles 30 and 31 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State.

VII Union supporting, coordinating or complementary action

A. Public health

Article 152 TEC is the only current Treaty Article that explicitly mentions health issues, although the Treaty has also impinged on health policy through its provisions on the free movement of persons, services and capital. For example, there are provisions on social security, which, in this context, has been interpreted to include health care for employed

[127] Lords EU Committee 16th Report para 65

persons and their families moving within the Community.[128] Judgments of the European Court of Justice have raised questions about the extent to which Treaty provisions on the freedom to provide services might also affect the provision of health care.[129]

Changes to the Article on public health were proposed by the Convention Working Group on Social Europe set up at the end of 2002. The Working Group concluded that, broadly speaking, the existing EU competences in the field of social policy were adequate. However, it did recommend a specific extension to existing EU competences in one area, that of public health.[130] According to the House of Lords report on "Social Europe" of March 2003, this recommendation was cautiously welcomed by the British Government, which acknowledged that there might be a case for enhancing Community action in areas such as bio-terrorism and communicable disease control, and that it would be beneficial to rationalise existing Community powers to deliver health objectives, such as on tobacco control, more effectively.[131]

The House of Lords EU Committee commented:

> It may, however, be difficult to determine what is included under EU action in "public health" – whether, for example, it should cover areas such as tobacco advertising and the mobility of patients across the EU- and clarity will be needed when drafting the relevant Title of the Treaty. This is particularly important in view of the legitimate concern of member States – expressed in the government's evidence to use – to retain control over the way that their national health systems are run. The Commission was, however, confident that a provision on public health could be drafted "to make clear that Union action would in no way impinge on the competence of the member State to manage and finance their own health systems".[132]

The Committee concluded that there was a case for extending EU competence in the area of public health, provided that such an extension was confined to issues that were genuinely cross-border and did not impinge on Member States' control over how their health services were run.[133]

The EU's current powers relating to public health are a mix of shared and supporting competences. Article 152(1) TEC, for example, envisages the Community taking action to complement national policies. Article 152(4) TEC enables the adoption of measures,

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128 Provisions on social security are referred to elsewhere in this Paper.

129 See, for example, Lords EU Committee 14th Report *The Future of Europe: "Social Europe"* HL Paper 79, 2002-3 para 13 and note 18. See also Library Standard Note SN/SP/2906: http://hcl1.hclibrary.parliament.uk/notes/sps/snsp-02906.pdf

130 Ibid paragraph 13.

131 Ibid

132 Lords EU Committee 14th Report *The Future of Europe: "Social Europe"*

133 Ibid para. 37

by co-decision and QMV, setting standards of quality and safety for blood and blood derivatives (among other things).

The new **Article III-278** includes a number of changes, although, as before, there is a mixture of shared and supporting competences. The changes include an extension of EU competence to draw up European laws and framework laws to

a) deal with cross-border threats to health, and
b) protect public health with regard to tobacco and the abuse of alcohol.

However, there is also a new and stronger statement of the responsibilities of Member States for their own health services that may be a response to some of the ECJ judgments on this issue.

The new Article is set out below. The main additions to earlier drafts are in italics. The main omission is at sub-paragraph 7 (previously 5) where it is no longer just action *in the field of public health* that must respect Member States' responsibilities for their own healthcare systems, but EU action in general. The text no longer says "fully respect", but has been changed to add the responsibility for the definition of health policy, and the responsibilities of Member States are now defined to include the management of health services and medical care and the allocation of the resources assigned to them.

> 1. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.
>
> Action by the Union which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to *physical and mental* health. Such action shall cover:
>
> (a) the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education;
>
> *(b) monitoring, early warning of and combating serious cross-border threats to health.*
>
> The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.
>
> 2. The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. *It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas.*
>
> Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful

initiative to promote such coordination, *in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed*.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

4. By way of derogation from Article I-11(5) and Article I-16(a) and in accordance with Article I-13(2)(k), European laws or framework laws shall contribute to the achievement of the objectives referred to in this Article by establishing the following measures[134] *in order to meet common safety concerns:*

(a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;

(b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;

(c) measures setting high standards of quality and safety for medical products and devices for medical use;

(d) measures concerning monitoring, early warning of and combating serious cross-border threats to health.

European laws or framework laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

5. European laws or framework laws may also establish incentive measures designed to protect and improve human health *and in particular to combat the major cross-border health scourges, as well as measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol*, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.

6. For the purposes set out in this Article, the Council, on a proposal from the Commission, may also adopt recommendations.

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[134] Article 152(4) TEC states that "The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objective referred to in this article …". There was a different 4 (c), which is now included in 5.

> 7. Union action shall[135] respect the responsibilities of the Member States for *the definition of their health policy and* for the organisation and delivery of health services and medical care. *The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them.* Measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

The British Medical Association (BMA) had questioned the wording of this Article just before the final text was agreed, as it appeared to give the EU powers to draw up laws to combat serious threats to health. The final text has added the words "cross-border" to "serious threats". Dr Edwin Borman, Chairman of the BMA's International Committee, referred to this in a speech on 29 June 2004:

> I hesitate to mention the new EU constitution, but the Government can be happy that they secured their red lines at the recent European summit – and so can the BMA. When a questionable clause was introduced at the last minute spotted by our man in Brussels, Kevin Doran, I wrote to the Irish Presidency – in charge of the Intergovernmental conference – to point out that the Constitution could dramatically increase EU competence in public health matters. I am please to say that the constitution now gives a clearer idea of what the EU's role is in health policy.[136]

The Government's view of the final text, set out in the September 2004 White Paper on the Treaty Establishing a Constitution for Europe, was that although the public health provisions were slightly different from the present Treaty, "They do nothing to change the fact that the UK runs its own health policy" and were clearer than current Treaty provisions regarding organisation and delivery of health services, and the prohibition of harmonisation.[137]

B. Industry, Culture, Tourism, Education, Youth, Sport and Vocational Training

Article III-279 on industry adds to Article 157 TEC clarification of the Commission's initiatives in this area, "in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation". The EP will also be kept "fully informed". **III-279(3)** specifically rules out harmonisation measures.

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[135] The TEC included the word "fully" here.

[136] See also BMA Eurobrief 1-15 June 2004 at http://www.bma.org.uk/ap.nsf/Content/EuroBrief112004?OpenDocument&Highlight=2,european,constitution

[137] Cm 6309 September 2004 p.28

Article III-280 on culture differs only minimally from Article 151 TEC. There was no specific cultural policy until the TEU in 1993, although some aspects of culture were taken into account before this. The present Article 151 TEC authorises the EU to make use of instruments supporting cultural activities, such as the "Culture 2000" programme and the European City of Culture and European Cultural Month actions. An example of topical interest is the European Capital of Culture,[138] because of Liverpool's recent successful bid for the year 2008. The objective is twofold: to contribute to the "flowering of the cultures" of the Member States, while respecting their national and regional diversity, and at the same time to bring their *common* cultural heritage to the fore.

Under **III-280(5)** there is to be European law or framework law rather than the present "incentive measures". While Article 151 TEC requires unanimity for the adoption of Commission recommendations and incentive measures, **Article III-280** requires QMV for the adoption of European laws establishing incentive measures.

Tourism was added to **Article I-17**, areas where the Union has competence to carry out supporting, coordinating or complementary action, and a new **Article III-281** states that Union complementary action shall help to create a favourable environment for tourism undertakings and promote good practice, but will exclude harmonisation.

Article III-282 - 283 cover education, youth, sport and vocational training. Article 149TEC and Article III–282 of the Constitution make clear that it is for individual Member States to organise their education systems and determine the content of teaching at the national level. The Articles set out actions aimed at developing the quality of education by encouraging co-operation between Member States.

The education provisions of the present Treaty and the new Constitution are almost identical. The main difference is that **Article III-282(1)(e)** extends the provision on youth exchanges and related activities to encourage young people to participate in "democratic life in Europe".

On 14 July 2004, the European Commission adopted proposals for the next generation of EU programmes in education, training, culture, youth and the audiovisual sector. The aim is to have the new programmes approved by the Council and the EP before the end of 2005, and for the programmes to run from 2007 to 2013. One of the programmes is "Youth in Action", which aims to develop a sense of personal responsibility, initiative, concern for others, and citizenship and active involvement at local, national and European level among young people.[139]

The Constitution provisions relating to sport have been inserted into the section on education, youth and vocational training. There are few changes to the present Treaty

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[138] European Capitals of Culture take over from Cities of Culture in 2005.
[139] http://europa.eu.int/comm/dgs/education_culture/newprog/index_en.html

provisions, although sport is given a distinct profile for the first time. The difference between the present Article 149 TEC and **Article III-282** is that the Union will contribute to the promotion of European sporting issues and develop the European dimension in sport, "while taking account of its specific nature, its structures based on voluntary activity and its social and educational function". Union action will be aimed at:

> developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.

EU measures already impinge on sport, notably football, in a variety of ways: for example in the transfer of players between clubs,[140] the sale of broadcasting rights[141] and in the listing of sporting events (providing the opportunity for wide TV coverage).[142] The Nice European Council in December 2000 adopted a declaration on the specific characteristics of sport, acknowledging its wider social function,[143] and the Constitution reflects this.

C. Civil protection

Article III-284 is new, although civil protection is listed in Article 3(u) TEC as an area of Community activity. The Article encourages and supports Member States in their attempts to prepare for a range of natural and man-made disasters at local, regional and national levels. Although the definition of man-made disasters is open to interpretation, it is assumed that this would include the aftermath of terrorist incidents. It is not clear whether the definition would apply equally to the dislocation of vital supplies arising from industrial disputes or protest action.

Since 11 September 2001 the threat of terrorist attack has heightened the level of preparedness in the Member States, and systems that had largely been left in abeyance since the end of the Cold War are being revived, reviewed and strengthened. In the UK new civil defence legislation is expected soon[144] that will implement such measures. Local authorities will take the lead in dealing with most contingencies, with tiers of support designed to operate at the regional and national levels. Events that threaten the security of the country at a national level will be dealt with centrally.

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

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[140] See Library Research Paper 03/02, *Current Issues in Football*, 7 January 2003
[141] See Library Standard Note SN/HA/2192, *Financing Football*
[142] See Library standard note SN/HA/802, *Listed Sporting Events*
[143] Nice European Council Conclusions December 2000 at: http://ue.eu.int/en/Info/eurocouncil/index.htm
[144] The *Civil Contingencies Bill* had its Second Reading in the Lords on 5 July 2004

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

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

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

D. Administrative cooperation

Article III-285 is a new article. It states that the "Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest".

The Union will help Member States to improve their implementation of Union law through information exchange and training schemes. This is possibly a response to disparities in Member States' implementation methods making some less efficient than others. While stating on the one hand that "No Member State shall be obliged to avail itself of such support", **Article III-285(2)** also states that "European laws shall establish the necessary measures to this end", excluding harmonisation.

E. Association of overseas countries and territories

Articles III-286 – III-291 reproduce Articles 182-187 TEC, except that **Article III-291** specifies the adoption of European laws, framework laws, regulations and decisions on

the detailed rules and procedure, rather than just "provisions", and also requires EP consultation.

VIII The Union's external action, foreign, security and defence policy

A. General provisions

Articles III-292 - III-293 (Article 3(2) TEC and 11 TEU) define the provisions which have a general application across all matters of external action. **Article III-292** establishes the guidelines and strategic objectives behind the external actions of the EU, based on the "principles which have inspired its own creation", namely "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for the principles of the United Nations Charter and international law". The Article refines and elaborates on Article 11 TEU. In particular, several additions on social, economic and environmental development are made in **III-292(d-h)**.

Article III-292(2) states:

> 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
> (a) safeguard its values, fundamental interests, security, independence and integrity;
> (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
> (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
> (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
> (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
> (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
> (g) assist populations, countries and regions confronting natural or man-made disasters;
> (h) promote an international system based on stronger multilateral cooperation and good global governance.

Furthermore, EU policies and actions should be "joined up": there should be consistency between the different areas of the Union's external action and between these and its other policies. The Council, the Commission and the Foreign Affairs Minister will be responsible for ensuring this consistency.

The decision-making process in matters relating to external action is set out in **Article III-293**, which reflects the current provisions for the CFSP in Article 13 TEU. However, it has been refined to present a clearer framework for the whole area of external action. The Article states that "the European Council shall act unanimously on a recommendation from the Council, adopted by the latter under arrangements laid down for each area".

B. EU Minister for Foreign Affairs

Under **Article III-294** the new Union Minister for Foreign Affairs will conduct the EU's common foreign and security policy through the implementation of decisions adopted by the European Council and the Council of Ministers (as opposed to the holder of the EU Presidency and the High Representative for CFSP under present Articles 18 and 26 TEU). The Foreign Minister also has the right of initiative in CFSP matters, as outlined above.

Article III-296 provides that the Foreign Minister will also preside over the Foreign Affairs Council,[145] will represent the EU on CFSP matters, co-ordinate all matters relating to the EU's external action, conduct a dialogue with third parties on the EU's behalf and put forward the Union's position in international organisations and at international conferences. The Minister will also be responsible for consulting the EP on the development of CFSP (**Article III-304**) and under **Article III-302** the Minister has the right of initiative in proposing to the Council the appointment of a special representative, over whose work he would have overall authority.

In a Written Answer on 5 July 2004 Mr MacShane outlined the role of the new Minister for Foreign Affairs:

> Once the Constitutional Treaty is ratified and in force, the Union Minister for Foreign Affairs would be responsible for the implementation of the policy decisions in the Common Foreign and Security Policy (CFSP) adopted unanimously by the European Council and the Council of Ministers, and together with the Council he or she would also be responsible for ensuring the principles laid down in the Treaty on CFSP are complied with.
>
> The Union Minister for Foreign Affairs would also be able to make proposals to the European Council and Foreign Affairs Council for development of EU foreign policy. Once these are decided by Member States, on the basis of unanimity, he or she would act as the Council's servant to implement them. He or she may also propose that a Special Representative is appointed by the Council. The Union Minister for Foreign Affairs would also take on the role currently carried out by the Presidency in conducting political dialogue with third parties and representing the Union at international organisations and conferences including representing an agreed EU position in the United Nations at the request

[145] This is currently the General Affairs and External Relations Council.

> of Member States who are members of the Security Council. He or she, along with the Commission, would also be charged with establishing relations with other international organisations.
>
> The Union Minister for Foreign Affairs would have the following duties: he/she would conduct the Union's common foreign and security policy (Article 1–27(2)); be a Vice-President of the Commission (Article 1–27(4)); chair the Foreign Affairs Council; head the External Action Service and be responsible for Union delegations overseas. He or she would also be responsible for: the external relations aspects of Commission business: ensuring the consistency of the Union's external action and consulting the European Parliament on the development of common foreign and security policy in line with the consultation procedure allowed for in the Treaty.[146]

Niall Ferguson, writing in *The Guardian*, commented:

> The most attention-grabbing institutional change is the creation of a new EU minister of foreign affairs, but this merely ends the anomaly whereby two people did the same job. Since the constitution does nothing to harmonise the foreign policies of member states, the European foreign minister will have little more clout than the double-act he replaces. Neither he nor the council president will really be in charge of the EU, any more than the president of the commission. Ultimate legislative power will continue to lie, as before, with the council of ministers.[147]

Article III-306(2) (Article 19 TEU) introduces a new provision that obliges those Member States who sit on the UN Security Council (UNSC) to request that the Minister for Foreign Affairs present the Union's position on any subject on its agenda. Although the introduction of this provision by the Praesidium to the Convention was motivated by the desire to raise the profile of the EU within the UNSC, some have viewed the clause as an obligation on Member States on the UNSC to give up their seat in favour of the EU when there was a common Union position on an issue.

In its May 2003 report on *the Future of Europe: Constitutional Treaty – Draft Articles on External Action* the Lords EU Committee commented:

> We can see that the aim is to provide a single voice for the European Union in the United Nations, but there are serious questions about this Article. First, surely who appears before the UN Security Council is a matter for them and not for the European Union. Secondly, the requirement on Member States who are members of the Security Council to defend positions in the interests of the Union, albeit derived from an existing Treaty provision, seems to ignore the fact that discussion in the Security Council is organic. Members' positions develop during the course

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[146] HC Deb 5 July 2004 c593-4W

[147] "Europe gets my vote" *The Guardian*, 29 June 2004

> of discussion and debate and it is inconceivable that one player would be expected to do no more than defend the pre-agreed position which they had no mechanism to adapt.
>
> The Committee was under the impression that Member States who have dissented from decisions taken (perhaps by QMV) in the Council cannot be under an obligation to support and defend the council's position in the United Nations Security Council. The Committee considers that the proposal to give a special status to the proposed Foreign Minister within the UN Security Council would be impracticable in present circumstances. We are also concerned that there is insufficient regard to the need for positions to develop during debate in the Security Council. Member States, and in particular those who are permanent members of the Security Council, must be free to act independently within the Security Council.[148]

In December 2003 the Foreign Secretary assured the Standing Committee on the IGC that "Nothing in the provisions will lead to our seat or autonomy in the Security Council being usurped".[149] In a letter to *The Independent* on 24 June 2004 Mr MacShane also refuted the argument that the UK's position on the UNSC would be undermined. He stated:

> The UK will retain its permanent seat on the UN Security Council. There will be no EU seat; the EU is not and cannot be a member of the UN or take our seat on the Security Council. The EU constitution cannot override the UN charter, which allows only states to be members of the Security Council, and nor would we wish it to.[150]

C. EU External Action Service

Article III-296(3) provides for the creation of a European External Action Service to assist the Minister for Foreign Affairs in fulfilling the CFSP mandate. This service will work in cooperation with the diplomatic services of the Member States and will comprise officials from the relevant departments of the General Secretariat of the Council and the Commission and seconded diplomatic staff from Member States.

The organisation and functionality of the Service, which many observers are referring to as a European Foreign Ministry, will be established by a Council decision on a proposal from the Minister for Foreign Affairs, after consulting the EP and obtaining the consent of the Commission.

An article by the Centre for European Reform (CER) was optimistic about the Service:

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148 Lords EU Committee *The Future of Europe: Constitutional Treaty – Draft Articles on External Action*, HL Paper 107, 13 May 2003, p.11

149 Standing Committee on the IGC 1 December 2003 c 107

150 "EU cannot take our Security Council seat", *The Independent*, 24 June 2004

> One potentially significant innovation in the treaty is the creation of a so-called EU external action service to support the work of the new foreign minister […] It should give the EU a more coherent external presence. It will seek to provide common analysis of foreign policy problems and thus encourage the development of common policies. And it should reduce the wasteful institutional infighting in Brussels between the Commission and Council bureaucracies. But the new external action service will not give the EU institutions any new powers over foreign policy […] decision-making remains largely a matter of unanimity, which means that the member-states will continue to call the shots.[151]

D. Common Foreign and Security Policy (CFSP)

Present Articles 11-28 TEU outline the framework for the development of a Common Foreign and Security Policy (CFSP). The majority of CFSP provisions in the Constitution remain unchanged, although a few articles have been amended to improve clarity. The creation of the Union Minister for Foreign Affairs, the inclusion of a "solidarity clause" and the extension of QMV in CFSP matters, with the agreement of the European Council, are, however, significant additions.

The provisions relating to CFSP are set out in Part I and detailed in Part III in **Articles III-292 – III-308.** The main provisions of these Articles are as follows:

Decision Making

Under the provisions of **Article III-295** the European Council will define the strategic interests of the Union and the objectives of CFSP, including matters with defence implications. The Council of Ministers will frame the specific 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 under **Article I-40(5)**, prior to 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 within the European Council or the Council of Ministers. The Article calls for Member States to show "mutual solidarity". Although these provisions are already laid down in Article 11(2) TEU, they have raised some concerns following the recent divisions within Europe over the campaign in Iraq.

Article III-295 also lays down a new provision allowing for the President of the European Council to convene a meeting of the European Council when an international

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[151] "The CER's guide to the EU's constitutional treaty", *Centre for European Reform,* 7 July 2004

situation dictates, in order to define the Union's policy on this matter. A similar provision exists for the Council of Ministers in **Article III-299**.

Unanimity, QMV and the Right of Initiative

CFSP matters in the European Council will continue to be decided on the basis of unanimity (**Article III-293**). Decisions adopted in the Council of Ministers will also be by unanimity, except in the following situations, where QMV will apply (**Article III-300(2)**):

- When adopting European decisions defining an action or position on the basis of a European decision taken by the European Council (by unanimity) relating to the Union's strategic interests and objectives.
- When adopting a European decision defining an action or position on a proposal presented by the Union Minister for Foreign Affairs, following a specific request to them from the European Council, made on its own initiative or that of the Foreign Minister.
- When adopting a European decision implementing a European decision defining a Union action or position.
- When adopting a European decision concerning the appointment of a special representative with a mandate in relation to a specific policy issue.[152]

This Article expands the areas in which QMV would be applied to CFSP matters from those set out in Article 23(2) TEU, to include decisions on proposals presented by the Minister for Foreign Affairs, either acting alone or with the support of the Commission. This Article also allows the European Council to adopt unanimously a decision providing for the Council of Ministers to act by QMV in cases other than those already outlined above.[153]

However, any Member State can oppose the adoption of a decision by QMV for reasons of national policy. In these cases the Council, acting by QMV, may request that the matter be referred to the European Council for a decision by unanimity.

There appeared to be some discrepancy between the Government's statements that unanimity must be retained for CFSP, and those of the Foreign Secretary, when he told the Foreign Affairs Committee in December 2003:

> I have said what I have said. Unanimity must remain the general rule for CFSP as proposed in the final Convention text. […] in Maastricht there is an element of QMV written into the Articles, which allows for QMV to operate in an area

[152] A European decision is a binding, non-legislative decision taken by either the European Council or the Council of Ministers.

[153] This provision is also set out in Article I-40(8)

> which I think there has been no objection to by Conservatives, in terms of how to operate a particular policy agreed by unanimity. For example, I proposed that there should be QMV operating in respect of the method by which the EU sanctions on Zimbabwe were enforced in order that no one country could operate a reverse veto about being tough on those sanctions, and that makes every sense. That is written into the Convention text, but in terms of setting the policy for foreign policy as for defence, that should be by unanimity.[154]

The Prime Minister insisted in his statement on the Brussels European Council that the UK would ensure that it kept its control over defence and foreign policy, "as it said it would".[155] However, the Government did not say that it would try to amend the QMV element in the present CFSP arrangements; nor did it rule out the *passerelle* option for CFSP. In March 2003 Peter Hain said in evidence to the European Scrutiny Committee:

> QMV is a no go area in Common Foreign Security Policy. It has got to be decided by unanimity, unless the Member States decide by unanimity that for some practical reasons they want to proceed— [156]

In the FCO Memorandum in May 2003 the Government clearly favoured the *passerelle* option over other QMV proposals in this area:

> The Government has made it clear that it cannot accept the proposed extension of qualified majority voting in CFSP set out in the draft articles and that we strongly prefer the formula in Article 9.3 [Article III-196 (3)] **[now Article III-300(3)]** that any decision to move to more qualified majority voting in CFSP should be taken by unanimity on a case by case basis at the European Council. This was inserted in the External Action Working Group report at the UK's suggestion.[157]

What the Government appears to have meant in saying it had fulfilled its promise regarding maintaining unanimity for CFSP is that it helped to prevent the introduction of QMV as the standard decision-making procedure in CFSP.

Following agreement on the Constitution in June 2004, Mr MacShane said:

> The outcome of the Intergovernmental Conference met our objectives with respect to the Common Foreign and Security Policy in the Constitutional Treaty. These objectives were to ensure that CFSP remains in the hands of Member

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154 http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/uc129-i/uc12902.htm

155 See HC Deb 29 March 2004 c 1260 at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/cm040329/debtext/40329-06.htm#40329-06_head0

156 ESC Minutes of Evidence Questions 40-59 25 March 2003 at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxvi/3032503.htm

157 FCO Explanatory Memorandum on CONV 685/03 29 May 2003

> States and is decided by unanimity, whilst supporting proposals to increase the coherence and effectiveness of EU external action.[158]

Article III-300(1) allows any Member State to abstain from a vote in the Council of Ministers, but it is obliged to accept the decision that has been taken. If at least one third of the Member States, comprising at least one third of the population of the Union, constructively abstain then the decision would not be adopted. This provision already exists in Article 23 TEU. Constructive abstention could also be applied in the case of military operations.

Under **Article III-300(4)** QMV is not applicable to decisions "having military or defence implications".

Article I-40(7) and **Article III-299** define the right of initiative in CFSP, whereby any Member State, the EU Minister for Foreign Affairs or the Foreign Minister with the support of the Commission can refer questions or submit proposals on CFSP to the Council of Ministers and the European Council. **Article III-299** reflects the current provisions of Article 22 TEU, albeit amended to include reference to the Minister for Foreign Affairs.

Operational Action

If an international situation requires operational action by Member States, the Council of Ministers will, under **Article III-297**, adopt the necessary decisions, including those defining the objectives and scope of such action, the resources to be made available and, if necessary, the duration and conditions for implementation. Any Member State planning to adopt a national position or take national action prior to such a decision is obliged to inform and, where necessary, consult the Council. These procedures are already established under Article 14 TEU.

Under **Article III-303** (Article 24 TEU) the Union "may conclude agreements with one or more States or international organisations in areas covered by this Chapter". Hitherto, the EU alone has not been able to conclude international agreements in second and third pillar areas, as it does not have "legal personality".[159] Agreements in these areas have generally been "mixed agreements", involving conclusion and ratification by both the EU and the Member States. The Convention Working Group on legal personality thought the present Treaty provisions needed to be clarified and tightened up with an amendment to Article 24 TEU.[160]

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158 HC Deb 15 July 2004 cc1334-5W

159 "Legal personality" is the legal capacity to enter into contracts, sign treaties etc. At present, the CFSP is intergovernmental and not part of the EC's institutional structure. Agreements in this area cannot therefore be made by the EU, only by individual Member States

160 CONV 305/02 1 October 2002 at http://register.consilium.eu.int/pdf/en/02/cv00/00305en2.pdf

Article III-305 provides for Member State coordination of action in international organisations and at international conferences, where they will be obliged to uphold the Union's position coordinated by the Foreign Minister. This requirement for solidarity is currently provided in Article 19 TEU.

Article III-307 defines the role of the Political and Security Committee (PSC) in CFSP decision making. As in Article 25 TEU, the PSC will be responsible for monitoring the international situation, delivering opinions to the Council of Ministers at their request, at the request of the Union Foreign Minister or on their own initiative; and for monitoring the implementation of agreed policies. Under the authority of the Council and the Foreign Minister, the PSC will exercise political control and strategic direction over crisis management operations.

E. Common Security and Defence Policy (CSDP)

The current Treaty provisions on a Common Security and Defence Policy (CSDP) are contained within the terms defining the CFSP. Article 17(1) TEU, in particular, makes provision for "the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide".

Part I of the Constitution sets out the basic principles for the development of a CSDP and builds largely upon Article 17 TEU. These principles are laid out in greater detail in **Articles III-309 – III-312**. The significant additions to the Constitution within the area of CSDP are the provision for "permanent structured cooperation" in defence matters, the creation of a European Defence Agency and a limited reference to mutual defence, in contrast to previous draft constitutional texts, which contained a mutual defence clause comparable to the defence obligations of NATO's Article V.

Remit

Article III-309 defines the operational remit of the Union in CSDP. Tasks in which the Union may use civilian and military means include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping, and tasks of combat forces undertaken for crisis management, including peace making and post conflict stabilisation. All of these tasks may contribute to the fight against terrorism, including support for third countries in combating terrorism.

Decision Making

The European Council will define the general guidelines for CFSP matters that have defence implications (**Article III-295**). European decisions on the implementation of the CSDP, including the launch of operations, will be adopted by the Council by unanimity. The Minister for Foreign Affairs will have the right of initiative alongside Member States and will also, where appropriate, be able to make proposals to the Council of Ministers in

conjunction with the Commission. QMV in the Council of Ministers is not applicable to any decisions having military or defence implications (**Article III-300(4)**).

Under **Article III-310** the Council of Ministers may entrust 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. The Council will, in these instances, be kept regularly informed. Should any amendments to the scope, duration or objective of the tasks be necessary, the Council will adopt the necessary European decisions. This emphasis on closer cooperation could foster the predilection towards "coalitions of the willing" when planning and implementing EU operations. The need for unanimity in the Council, however, would ensure the political support of all Member States for any operation.

The role of the Political and Security Committee in CSDP decision making is outlined above.

European Defence Agency

Article I-40(3) and **Article III-311** provide the legal framework for the creation of a European Defence Agency (or EDA, referred to in the June 2004 text as the European Armaments, Research and Military Capabilities Agency). Under the authority of the Council of Ministers, the Agency would:

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

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.[161]

ESDP Permanent Structured Cooperation

Article I-41(6) and **Article III-312** set out the arrangements whereby Member States can engage in permanent structured cooperation in defence matters. The criteria and

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[161] See Library Standard Note SN/IA/2949 9 March 2004 *Developments in European Security and Defence Policy* for an outline of the structures and main provisions of the agency and an examination of some of the issues which have prompted debate.

capability commitments for doing so are set out in the *Protocol on Permanent Structured Cooperation*.[162] **Article 1(b)** of that Protocol states that participating Member States should have the capacity to supply by 2007 at the latest, either at national level or as a component of multinational force groups, combat units and supporting elements, including transport and logistics. These would be capable of deployment within 5-30 days, in particular in response to requests from the UN. They would be sustained for an initial period of 30 days and extended up to a period of 120 days.

This provision is a conclusion of the Franco-British initiative on rapid reaction capabilities that was announced in November 2003.[163] The Protocol also sets out provisions in the area of capability harmonisation, the pooling of assets, cooperation in training and logistics, regular assessments of national defence expenditure and the development of flexibility, interoperability and deployability among forces. The possible review of national decision making procedures with regard to the deployment of forces is also emphasised.

The Council will decide by QMV, after consulting the Union Minister for Foreign Affairs, to establish permanent structured cooperation and determine the list of participants. Once established, only participating Member States will be able to take part in adopting decisions relating to the development of structured cooperation, including the future participation of other Member States. Decisions and recommendations will be taken by unanimity by those participating Member States, except with regard to the list of participating Member States, which will be decided by QMV (**Article III-312(3)**).

If a participating Member State no longer fulfils the criteria set out in the Protocol or is no longer able to meet its commitments, the Council of Ministers, acting by QMV, may suspend the Member State concerned. Only those members of the Council representing the participating Member States are eligible to vote.

The CER commented on permanent structured cooperation:

> This clause makes a lot of sense. Military capabilities and ambitions vary widely among the member-states. So the EU should rely on a smaller group of the most willing and best-prepared countries to run its more demanding military missions. The defence group will in some respects resemble the eurozone: some countries will stay outside because they choose to and some because they do not fulfil the entry criteria.[164]

Jean-Yves Haine, of the Institute for Security Studies, suggested:

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[162] CIG 87/04 ADD1 Protocol 23 at http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf
[163] This initiative is examined in Library Standard Note SN/IA/2949 9 March 2004
[164] "The CER's guide to the EU's constitutional treaty" *Centre for European Reform* 7 July 2004

> The principle of permanent structured cooperation for defence is now recognized by the EU Constitution. The criteria governing this cooperation are stringent, at least on paper: among other things, member states must have an adequate level of defence expenditure, take concrete measures to enhance the availability, interoperability, flexibility and deployability of their armed forces and commit resources to address shortfalls identified by the ECAP mechanism. The real novelty lies in the encouragement to coordinate the identification of military needs, to specialise national defence and to pool capabilities. Given the weakness of defence budgets and the chronic under-investment in R&T, collective procurement and multinational forces are obvious solutions. If implemented, permanent structured cooperation could offer a precious framework in which to change the dynamics of European defence.[165]

Mutual Defence Clause

In contrast to previous versions of the constitution, the final text does not make specific provisions for a mutual defence clause along the lines of the security commitment of NATO's Article V. Former draft article III-214 has been deleted and in the final text the provision for mutual defence is limited to an obligation of aid and assistance under Article I-41(7).

The CER commented:

> The treaty contains a new mutual defence clause that commits all EU governments to come to the aid of any member-state that is "the victim of armed aggression on its territory". The clause sparked much controversy during the negotiations and has subsequently been watered down and riddled with provisos. The treaty says that governments are requested to provide the EU with military and civilian capabilities enabling the Union to deal with international crises – but purely on a voluntary basis. The treaty does not establish a standing EU force, never mind a European army.[166]

Under **Article III-329** ("Implementation of the Solidarity Clause") regular assessments of the threats facing the EU will be taken by the European Council. However, decisions on the arrangements for implementing the provisions of the solidarity clause will be taken by the Council of Ministers. Joint proposals for action may be submitted by the Union Minister for Foreign Affairs and the Commission, while assistance to a Member State in the event of a terrorist attack or natural or man-made disaster will be provided at the request of its political authorities.

Financial provisions for CFSP and CSDP activities are contained in **Article III-313.** The terms of funding are largely unchanged from the current EC Treaty, whereby the common

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165 "A new impetus for ESDP" *ISS Bulletin* 11 July 2004

166 "The CER's guide to the EU's constitutional treaty" *Centre for European Reform* 7 July 2004

costs arising from CFSP and CSDP activities are met from the general EU budget and divided among Member States on a GNP-related basis.[167] Expenditure arising from military operations would be met by the individual Member States as determined by the Council.[168]

Any Member State that has constructively abstained from a decision taken with regard to a military operation is not obliged to contribute to its financing. However, **Article III-313(3)** allows for the rapid financing of activities in this area, and in particular for the preparatory phases of a crisis management operation, through a start-up fund based on Member States' contributions. Decisions on the financing of the fund, and in particular the scale of contributions by Member States, will be taken by QMV in the Council after consulting the EP.

The Foreign Secretary told the Commons on 9 September 2004:

> On common security and defence policy, the constitution fulfils our objectives by ensuring that cooperation is flexible, inclusive and complementary to NATO, and is focused on the development of military capabilities. It keeps unanimity as the rule for launching operations and determining policy, and – again, as a direct result of changes led by us – states that NATO is "the foundation for collective defence" of its members.[169]

IX Common Commercial Policy, Cooperation with Third Countries and Humanitarian Aid

The Common Commercial Policy (CCP) sets out in **Articles III-314 – III-315** the general aims of establishing the customs union, which include the harmonious development of world trade and the lowering of customs and other barriers. To this is added the progressive abolition of restrictions on foreign direct investment, which is currently not contained in Article 131 TEC.

The CCP is based on uniform principles, particularly with regard to changes in tariff rates and the conclusion of tariff and trade arrangements. **III-315(1)** expands upon Article 133 TEC to specify "relating to trade in goods and services and the commercial aspects of intellectual property and foreign direct investment…", making them subject to the exclusive competence of the Union.

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[167] In 2004 the UK's share of common costs is approximately 15%

[168] In March 2004 a permanent financing mechanism was established (ATHENA) for EU military operations, eradicating the need for a Council Decision adopting a separate financing mechanism for every military operation undertaken.

[169] HC Deb 9 September 2004 c 885

Under **Article III-315(3)**, where the Commission enters into negotiations on agreements with one or more states or international organisations, it will need to report regularly to the EP, as well as to a special committee established by the Council.

The Council will generally act by QMV, as at present, but by unanimity where unanimity is required for the adoption of internal rules. This will apply to the commercial aspects of intellectual property rights and trade in cultural and audiovisual services.

Specific derogations for certain services have been removed from the existing Article 133(6)(2) TEC. Agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services currently fall within the shared competence of the Community and the Member States, so the conclusion of such agreements require the unanimous agreement of the Member States, as well as the Community. The French Government had insisted on this remaining subject to the agreement of all Member States during the Nice Treaty negotiations in 2000. However, the Nice compromise in Article 133(6)(2) has been removed and replaced by the provision that "the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules".

Unanimity is also specified in **III-315(4)** for the negotiation and conclusion of agreements:

> (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
> (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

The Constitution removes Article 133(5) sub-paragraph 4 TEC, which allows Member States to maintain and conclude agreements with third countries or international organisations as long as they comply with EC law and other relevant international agreements. This deletion has been criticised by the environmental lobby in particular, which believes it will limit the ability of individual Member States to ensure that sustainable development is an element of their trade policy with third parties.[170]

Another new element is the provision in **III-314** that the CCP "shall be conducted in the context of the principles and objectives of the Union's external action".

In **Article III-316** (177 TEC) on development cooperation, a new emphasis is placed on the focus of Union development policy. The reduction and, in the long term, the eradication of poverty, are now its primary objectives. This is a welcome addition for the

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[170] See, for example, *Ecologic Briefs, The Common Commercial Policy in the Constitution for Europe: A Step Forward for the Environment?* Anneke Klasing September 2003 at http://www.ecofuturum.de/de/downloads/diskussionspapiere/EcoBriefs_Trade_EN.pdf

British Government, which has generally been critical of the focus of much EU development policy.

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

A European law or framework law will establish the measures necessary to implement development co-operation policy, whereas the TEC provides only for Council "measures" and multiannual programmes.

Under **Article III-319** (Article 181a TEC), "without prejudice to the development co-operation provisions", the Union will carry out economic, financial and technical co-operation measures, including aid in particular, and adding "in particular financial assistance, with third countries other than developing countries". The measures will be adopted by a European law or framework law. References to the general objective of promoting democracy, the rule of law and human rights and freedoms have been removed from this part of the Constitution, as they are included elsewhere.

There is a new **Article III-321** on humanitarian aid, which allows for ad hoc assistance, relief and protection for people in third countries and victims of man-made and natural disasters, to meet the resultant humanitarian needs. Operations will be conducted in accordance with international humanitarian law and the necessary measures implemented through a European law or framework law. Agreements may be made with third countries and competent international organisations. Humanitarian tasks are currently mentioned in Article 17 TEU as possibly arising under the CFSP.

Under **III-321(5)** a European Voluntary Humanitarian Aid Corps will be set up to provide a framework for joint contributions from "young Europeans". The EP and Council will adopt a European law determining the rules for this. Efforts will be made to co-ordinate the Union's and Member States' humanitarian aid measures and to co-ordinate any operations with those of international organisations, UN bodies in particular.

Article III-322 provides for restrictive measures to be taken against third countries, natural or legal persons and groups or non-State entities. The Council would decide by QMV on a joint proposal from the Union Minister for Foreign Affairs and the Commission on the "necessary European regulations or decisions". The EP would be informed. At present there is no Treaty provision for sanctions against non-State entities, and measures would therefore be subject to the "catch-all" Article 308 TEC and to unanimity. All applications of restrictive measures would be subject to the jurisdiction of the ECJ.

Conclusion of treaties

Articles III-323 – III-326 concern the conclusion of international agreements. These are currently set out in Article 133 TEC (on the CCP), 300 TEC and 310 TEC. There are also

separate provisions in the second and third pillar areas for the conclusion of intergovernmental agreements and conventions (Article 24 TEU on the CFSP and Article 34(d) TEU on police and judicial cooperation).

Under **III-323** the Union may conclude an international agreement:

- where the Constitution so provides
- where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, an objective of the Constitution
- where it is provided for in a legally binding Union act
- where it is likely to affect common rules or alter their scope.

Such agreements are binding on the Union and the Member States, as under Article 300(7) TEC.

Article III-325 sets out the procedures for concluding agreements, which are currently contained in the various TEC articles mentioned above. The Constitution Article covers all international agreements concluded by the Union, except those in the monetary field. The Council of Ministers authorises the opening of negotiations, the adoption of negotiating directives, the authorisation of signature and the conclusion of agreements. The Article sets out the responsibilities of the Commission and the Minister for Foreign Affairs with regard to the opening of negotiations, specifying in **III-325(3)** that the Minister for Foreign Affairs is responsible for negotiating agreements that relate exclusively or principally to the CFSP.

However, Article III-325 does not designate a negotiator, leaving it to the Council to nominate the negotiator or leader of the Union's negotiating team, depending on the subject matter of the agreement in question. At present the TEC gives the Commission the power to negotiate on behalf of the EU under Article 300 TEC.

The position of the EP is enhanced under **III-325(6)** by a right to be consulted on the following agreements:

(i) association agreements;
(ii) Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
(iii) agreements establishing a specific institutional framework by organising cooperation procedures;
(iv) agreements with important budgetary implications for the Union;
(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

In other cases the EP will be consulted within a deadline set by the Council. At present the EP's power of assent is limited to association agreements or agreements with significant budgetary implications (Article 300(3) TEC).

The Council voting method remains QMV under **Article III-325(8)**, except in cases where the agreement relates to an area in which unanimity is required for the adoption of a Union act ("parallelism"), and for association agreements and agreements with states which are candidates for Union accession (under **Article III-319**).

Under **Article III-324**, as in Article 310 TEC, the Union may conclude association agreements with third countries or international organisations which would involve reciprocal rights and obligations, common actions and special procedures.

Article III-326 provides for agreements on an exchange rate system with currencies of third states, as under current Article 111 TEC. The Council will decide by unanimity, as at present, on a recommendation from the European Central Bank or from the Commission and after consulting the ECB. Whereas the TEC currently requires that the Council should act by QMV to adopt, adjust or abandon the central rates of the euro within the exchange rate system, the Constitution simply states that the Council "may decide" to act.

Articles III-327 – III-328 concern Union delegations and the Union's relations with international organisations and third countries. These are presently referred to in several Treaty Articles (e.g. 177 TEC, 302 - 4 TEC, 19(2) TEU, 20 TEU). The Minister for Foreign Affairs and the Commission will be responsible for maintaining the Union's relations with organisations such as the United Nations (UN), the Council of Europe (CoE), the Organisation for Security and Cooperation in Europe (OSCE) and the Organisation for Economic Cooperation and Development (OECD). Union delegations in third countries and at international organisations will represent the Union, under the authority of the Minister for Foreign Affairs and in cooperation with Member States' diplomatic missions.

Article I-43 establishes, for the first time, a solidarity clause whereby the Union and its Member States will act jointly in the spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster. **Article III-329** outlines the specific provisions of the solidarity clause.

Regular assessments of the threats facing the EU will be made by the European Council. However, decisions on the arrangements for implementing the provisions of the solidarity clause will be taken by the Council of Ministers, following a joint proposal for action from the Minister for Foreign Affairs and the Commission. Where any decision has defence implications the Council of Ministers will act by unanimity.

Assistance to a Member State in the event of a terrorist attack or natural or man-made disaster will be provided only at the request of its political authorities. The Political and Security Committee (PSC) will also provide support to the Council of Ministers.

The establishment of a solidarity clause in the event of a terrorist attack was discussed in the immediate aftermath of 11 September 2001. It was also discussed at the Anglo-French

summit at Le Touquet in February 2003. The inclusion of a solidarity clause in the European constitution has, therefore, been largely welcomed.

X The Functioning of the Union: the Institutions

A. European Parliament

Throughout the Constitution the EP is given a greater role in decision-making by means of an increase in the number of legislative acts that would be decided by QMV (using the Ordinary Legislative Procedure – co-decision) and other measures requiring its consent.

Most articles on the functioning of the EP and the appointment and role of the European Ombudsman contain only minor changes from Articles 189 – 201 TEC. **Article III-338** provides that the EP shall generally act by a majority of votes cast, rather than an absolute majority under 198 TEC. Although this would make it possible for the EP to act with less than half the support of votes cast, in a Union of 25 members, it will facilitate the passage of legislation.

The *Protocol on the transitional provisions relating to the Institutions and bodies of the Union* attached to the Constitution[171] sets out the composition of the EP during the 2004-2009 parliamentary term as follows:

Belgium	24	Luxembourg	6
Czech Republic	24	Hungary	24
Denmark	14	Malta	5
Germany	99	Netherlands	27
Estonia	6	Austria	18
Greece	24	Poland	54
Spain	54	Portugal	24
France	78	Slovenia	7
Ireland	13	Slovakia	14
Italy	78	Finland	14
Cyprus	6	Sweden	19
Latvia	9	United Kingdom	78
Lithuania	13	----------	----------
		Total	732

This represents the formula agreed at the Nice IGC, adjusted to take account of the accessions in May 2004 and to achieve a maximum of 732 MEPs under Article 2(2) of the Nice Treaty "Protocol on the Enlargement of the European Union".

[171] CIG 87/04 Add 1 Protocol 34 at http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf

B. European Council

European Council voting procedures have not been laid down in the EC Treaty before. It usually decides by consensus. However, the Constitution introduces new articles on the European Council in **Article III-341**. Under **III-341(1)** a member (i.e. a head of state or government) "may also act on behalf of not more than one other member", and abstentions would not prevent the adoption of a decision for which unanimity is required. France and Germany have already cooperated in the spirit of **III-341(1)** and such cooperation is already provided for in Article 206 TEC on voting in the Council of Ministers.

The European Council has not so far adopted Rules of Procedure, but under **III-341(3)** it will adopt such Rules by a simple majority. The European Council will be assisted by the General Secretariat of the Council, whereas the Treaty provides at present under Article 4 TEU that it shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission.

C. Council of Ministers

The Convention text provided for the establishment of a rotating Council presidency by a unanimous decision of the European Council in Part III articles. The Constitution includes this in Part I-24 and provides for a European decision of the European Council acting by QMV to establish the list of Council configurations other than the General Affairs Council.

The *Protocol on transitional provisions for the Institutions* gives a breakdown of the allocation of votes in the Council of Ministers. The QMV definition provided for in Part I will take effect on 1 November 2009[172] after the EP elections that year, and the following weighted votes will apply until 31 October 2009:

[172] See Research Paper 04/66, *The Treaty Establishing a Constitution for Europe: Part I*, 6 September 2004

Belgium	12	Luxembourg	4
Czech Republic	12	Hungary	12
Denmark	7	Malta	3
Germany	29	Netherlands	13
Estonia	4	Austria	10
Greece	12	Poland	27
Spain	27	Portugal	12
France	29	Slovenia	4
Ireland	7	Slovakia	7
Italy	29	Finland	7
Cyprus	4	Sweden	10
Latvia	4	United Kingdom	29
Lithuania	7		

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

The formula is set out in Part I of the Constitution. From 1 November 2009, for the adoption of a proposal from the Commission, it will need to have the support of 55% of Member States (i.e. at least 15 out of a predicted 27 Members), representing 65% of the EU's population (i.e. it could not be formed by a grouping of the States with the smallest populations). 45% of Member States, or Member States representing 35% of the EU's population, will be able to block a proposal.

If a number of Member States representing at least three-quarters of either of these figures indicate that they oppose a proposal, the Council will delay adoption of the proposal and continue discussion in an effort to reach a satisfactory solution. This mechanism, currently contained in a Declaration on Article I-25, is to be set out in a Council Decision that will be adopted as and when the Constitution comes into force. It will be valid until 2014 and will then be removable by QMV.

The British Government was content with the Nice formula but open to suggestions for amendment. In the White Paper published in September 2004 the Government stated that it was "happy with the new mechanism", which "provides a reasonable balance between passing and blocking legislation, and ensures that the rights of small groups of Member States can be asserted when they need to be".[173]

[173] Cm 6309 September 2004 p.23

Article 3 of the Protocol stipulates that, for subsequent Union accessions, the threshold will be calculated to ensure that the QMV threshold does not exceed that in the table in the Nice Declaration on the Enlargement of the European Union.

An article by David Reid in *Physics World* looked at Polish conclusions that the allegedly fairer formula devised by the IGC was flawed:

> As Britain prepares to make its mind up over the proposed European Constitution, *Physics World* reveals new research by physicists in Poland that claims the most controversial aspect of the new constitution, the voting rules at the EU Council of Ministers, are fatally flawed and will give some countries unfair clout in the decision-making process.
> Karol Życzkowski and Wojciech Slomczynski, physicists from the Jagielonian University in Krakow, have used existing techniques in game theory to calculate how much power each country will have if the new constitution is adopted i.e. what their ability to influence the decisions of the Council of Ministers will be.
> They found that citizens in different EU countries will not have the same degree of influence on decisions taken by the Council. They disagree with the notion that the new constitution uses the simplest voting system possible, and claim that there is a much fairer solution, which they have named the *Jagiellonian Compromise.*
> The key problem is that voting power does not relate to the number of votes a member state has, but rather depends on their ability to get decisions passed by forming coalitions with other states to push decisions through the Council.
> A simple analogy would be a hung parliament where the most voting power actually rests with the minority parties, because they can swing any particular vote. This situation can be analyzed using a branch of mathematical physics known as game theory and the authors use two existing methods devised by Lionel Penrose (father of Roger) and John Banzhaf, a physicist turned law professor at George Washington University.
> These are accurate methods for looking at the actual voting *power* of countries or political parties. The authors have analysed every member state in the EU, and looked at how their voting power will change first when the Treaty of Nice is introduced in November and then what it will be if the proposed new EU Constitution is introduced.
> Under the proposed new constitution, new legislation will only have to satisfy two criteria to pass into law: the member states voting for it must account for at least 65% of the total population of the EU; and at least 15 member states must vote for it.
> Zyczkowski and Slomczynski have shown that this system is effectively the same as one in which "voting weight" is directly proportional to population, and that such a system gives an unfair advantage to larger countries
> If the proposed new constitution is adopted, Germany will gain the most voting power by far, followed by France, the UK and Italy. Spain and Poland will be the biggest losers.
> They go on to suggest a solution they claim is "representative, transparent, effective and objective" being based on a purely statistical approach that wont handicap any particular country. They calculate that all citizens in the EU would have the same voting power if each member state were given a weight that was

proportional to the square root of its population, and if new legislation required 62% of the votes at the council.[174]

D. Commission

Articles III-347 - 352 on the term and duties of Commissioners are similar to Articles 212-219 TEC. Commissioners are required to be independent, competent, impartial and not engaged in any other occupation. Provisions on the size of the Commission and appointment procedures are contained in Part I Articles 26 - 27.[175]

E. Court of Justice

The European Court of Justice (ECJ) was founded in the 1950s as the joint court for the three Communities (European Coal and Steel, Euratom and the EEC) that were consolidated into the European Community in 1967.[176] The Court interprets the EC Treaties and legislation. It has jurisdiction in disputes involving Member States, EU institutions, businesses and individuals. Although it may attempt to reconcile differences between national and EU laws, ultimately its decisions overrule those of national courts and this has tended to expand the EU's domain. In 1989 a lower court, the Court of First Instance (CFI), was set up to take on some of the Court's workload.

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

Articles III-353 – 356 on the composition, term and number of judges and advocates-general are similar to Articles 220 – 224 TEC, but the Constitution changes the name of the European Court of First Instance to the "General Court" ("High Court" in the Convention text) and under **Article III-359** the present "judicial panels" become "specialised courts". The appointment procedure now includes in **Article III-357** the establishment of a panel of seven members, chosen from among former ECJ, General Court and national court members or national lawyers, to give an opinion on candidates' suitability to be judges and advocates-general before Member State governments make the appointments referred to in Articles III-355 and III-356.

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[174] Institute of Physics News Release PR39(04) "Physicists reveal flaw in EU Constitution" 30 June 2004 at http://www.physicsweb.org

[175] See Research Paper 04/66

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

Article III-369 provides:

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

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

The Constitution extends the general system of jurisdiction of the ECJ to the current third pillar areas. Jurisdiction of the ECJ to give preliminary rulings on the validity and interpretation of decisions, framework decisions and conventions is currently governed by Article 35 TEU, which restricts the jurisdiction in a number of ways. These are not reproduced in the Constitution. Article 35(2) TEU allows Member States to accept the jurisdiction, by making a declaration which specifies whether requests may be made by any court or tribunal, or only those against whose decisions there is no remedy in national law. The UK is not among the Member States which have done so. Article 35(5) TEU provides:

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

The Convention draft article III-283 reflected that restriction in part, providing:

> In exercising its competences regarding the provisions of Sections 4 and 5 of Chapter IV of Title III concerning the area of freedom, security and justice, the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, *where such action is a matter of national law*.(emphasis added)

However, Constitution **Article III-377** omits the last clause, referring to action being a matter of national law.

Article III-376 states that the ECJ will not have jurisdiction in the CFSP, but it will have jurisdiction to monitor compliance with Article III-308 (concerning the exercise of Union competences) and to rule on proceedings reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council (**Article III-322(2)**).

In the debate on the European Constitution on 9 September 2004 the Shadow Foreign Secretary, Michael Ancram, insisted that the ECJ would have jurisdiction over the CFSP because Article III-376 does not cover Article I-16 (previously Article I-15) on the obligation of Member States to support the CFSP "in a spirit of loyalty and mutual solidarity". He cited the opinion of Professor Anthony Arnull, who told the House of Lords EU Committee in October 2003 that the Court would probably have some role in reviewing compliance with Article I-16.[177] The Foreign Secretary pointed out that, although Article III-376 did not specifically refer to Article I-16, it spelt out that the ECJ would not have jurisdiction over *any* CFSP matters.[178]

F. European Central Bank

Articles III-382 – 3 contain provisions on the European Central Bank which are broadly similar to Articles 112 – 3 TEC, but with one significant amendment. The President, the Vice-President and the other members of the Executive Board will be appointed by the European Council by QMV, rather than the present "common accord" in Article 112(2)(b) TEC.

G. The Advisory bodies : Court of Auditors, Committee of the Regions, Economic and Social Committee, European Investment Bank

Articles on the Court of Auditors, the Committee of the Regions and the Economic and Social Committee are similar to existing provisions under Articles 248 TEC (Court of Auditors), 263 – 5 TEC (Committee of the Regions) and 257 – 262 TEC (Economic and Social Committee). There are a few differences: in **Article III-384(4)**, the Court of Auditor's Rules of Procedure will require the consent of the Council, whereas Article 248(4) TEC requires the Council's approval, acting by QMV. Under **Articles III-386** and **III-390** the term of office for members of the Committee of the Regions and the Economic and Social Committee will be five years, instead of the present four. The

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[177] Lords EU Committee *The Future Role of the European Court of Justice* HL Paper 47 15 March 2004 2003-04 at http://pubs1.tso.parliament.uk/pa/ld200304/ldselect/ldeucom/47/47we03.htm

[178] HC Deb 9 September 2004 c 898

opinion of the two Committees will also now be forwarded to the EP, as well as to the Commission and Council and under **Articles III-387** and **III-391** the chairman and officers of the Committee of the Regions and the ECOSOC will be elected for a term of two and a half years, rather than the present two years. **Articles 393 – 4** on the European Investment Bank are similar to Articles 266-267 TEC. Under the Subsidiarity Protocol[179] the Committee of the Regions' role is strengthened by the introduction of an ability to take subsidiarity questions directly to the ECJ.

H. Common Institutional Provisions

The articles in this section set out the provisions on decision-making common to all the Union institutions, bodies and agencies.

Article III-395 alters current Article 250 TEC in making additional exceptions to the unanimity rule for a Council amendment to a proposal from the Commission in the cases referred to in Articles I-55 and I-56 (on the multi-annual financial framework and the budget respectively), Article III-396(10) and (13) (the conciliation procedure), and Articles III-404 and III-405(2) on the budgetary procedure.

Article III-396, which describes the Ordinary Legislative Procedure (co-decision), clarifies the stages of this complex procedure with the terms "first reading", "second reading" and "third reading". The following table shows how the two articles compare:

Article 251 TEC	**Article III-396**
1. Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply. 2. The Commission shall submit a proposal to the European Parliament and the Council. The Council, acting by a qualified majority after obtaining the opinion of the European Parliament: — if it approves all the amendments contained in the European Parliament's opinion, may adopt the proposed act thus amended, — if the European Parliament does not propose any amendments, may adopt the proposed act, — shall otherwise adopt a common position and communicate it to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European Parliament fully of its position. If, within three months of such communication, the European Parliament:	1. Where, pursuant to the Constitution, laws or framework laws are adopted under the ordinary legislative procedure the following provisions shall apply. 2. The Commission shall submit a proposal to the European Parliament and the Council. <u>First reading</u> 3. The European Parliament shall adopt its position at first reading and communicate it to the Council. 4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament. 5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament. 6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall

[179] This will be considered in a separate Research Paper.

(a) approves the common position or has not taken a decision, the act in question shall be deemed to have been adopted in accordance with that common position;	inform the European Parliament fully of its position. Second reading 7. If, within three months of such communication, the European Parliament (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
(b) rejects, by an absolute majority of its component members, the common position, the proposed act shall be deemed not to have been adopted; (c) proposes amendments to the common position by an absolute majority of its component members, the amended text shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.	(b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted; (c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.
3. If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, the act in question shall be deemed to have been adopted in the form of the common position thus amended; however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. If the Council does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.	8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority, (a) approves all those amendments, the act in question shall be deemed to have been adopted; (b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee. 9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.
4. The Conciliation Committee, which shall be composed of the Members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the Members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. In fulfilling this task, the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament.	Conciliation 10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament within six weeks of its being convened, on the basis of the positions of the Parliament and the Council at second reading. 11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.
5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the	12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted. Third reading 13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast,

proposed act within that period, it shall be deemed not to have been adopted. 6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted.	and the Council, acting by a qualified majority, shall each have a period of six weeks from that date in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.
7. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.	14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council. Special Provisions 15. Where, in the cases provided for in the Constitution, a law or framework law is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice or the European Investment Bank, paragraph 2, the second sentence of paragraph 6 and paragraph 9 shall not apply. In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee on the terms laid down in paragraph 11.

The "Special Provisions" apply to legislative acts taken under I-34(3), which states

> In the specific cases provided for in the Constitution, European laws and European framework laws may be adopted at the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice of the European Union or the European Investment Bank.

Such acts would not be based on a Commission proposal, thereby reducing the role of the Commission. Under the present Treaty the Commission has the sole right of initiative in legislative proposals in the Community pillar.

Whereas present Article 218 TEC states that "The Council and the Commission shall consult each other and shall settle by common accord their methods of cooperation", there is an emphasis on interinstitutional solidarity in Constitution **Article III-397**. This Article states that the EP, the Council and the Commission "shall consult each other and by common agreement make arrangements for their cooperation" and may conclude binding interinstitutional agreements. Another new element in **Article III-398** requires that the Union should have the support of an "open, efficient and independent European administration". The need for more transparency in the workings of the EU's institutions

was one of the elements mentioned in the Laeken Declaration in December 2001[180] and perceived to be one of the main reasons behind the growing public disenchantment with the EU. Transparency is further emphasised in **Article III-399**, which amends Article 255 TEC on the requirement for the institutions' Rules of Procedure to determine access to documents. The institutions must "ensure transparency in their work."

Article III-400 brings together Articles 210, 247 and 258 TEC on the salaries, allowances and pensions of staff of the EU institutions and payments instead of remuneration.

XI The Union's Annual Budget

Procedure for adoption

The Budget procedure has been revised in **Article III-404**. The procedure specified in the Constitution is as follows:

- The Budget will be set up through a European law.
- The Commission will submit the budget to both the Council and EP at the same time (it previously went to only the Council).
- The Council will forward its position on the draft budget to the EP by 1 October (was 5 October).
- If, within 42 days of this communication, the EP approves the Council decision, or has not taken a decision, the budget law will be adopted (this used to be 45 days).
- If, within the 42 days the EP makes amendments to the budget, the budget is sent to the Council and Commission, and the Conciliation Committee is convened. This is a new committee, established in part 5.
- If, within 10 days, the Council approves the EP's amendments, the Committee does not meet. The Committee would be composed of Council members and an equal number of representatives from the EP.
- The Committee would try to resolve differences, with any resolved budget being returned to both the Council and EP.
- If this does not resolve the differences, a new draft budget will be submitted by the Commission.
- If the EP accepts the Committee's joint text, but the Council rejects it, the EP can go on to confirm the original amendments proposed before the joint text.

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

Implementation of the Budget and Discharge

[180] The text of the Laeken Declaration is at http://www.euconvention.be/static/LaekenDeclaration.asp

Article III-407 provides for a European law to establish the control and audit responsibilities of Member States in the implementation of the budget and the resulting responsibilities. Under **Article III-408** the Commission will submit an additional report on results achieved, with particular reference to **Article III-409** on arrangements for the EP's discharge of the budget.

Common Provisions

Two new articles, **III-413** and **III-414**, ensure that third party financial obligations are met and that the Presidents of the EP, Council and Commission all work to ensure the provisions of this chapter are met.

XII Enhanced Cooperation

Enhanced cooperation is an arrangement whereby a sub-group of Member States may, under certain circumstances, integrate or cooperate more closely than is provided for by the rules which apply to all Member States, but leaving open the possibility for other States to join at a later date. This kind of arrangement existed informally for some time with Schengen and Economic and Monetary Union, but it was formally set up under the Treaty of Amsterdam. The Constitution expands the principles of flexible integration introduced into the Treaties of Amsterdam and Nice, but with application to the Constitution as a whole.

The present Treaty provisions on enhanced cooperation are contained in both the TEU and the TEC (11 and 11(a) TEC, 27(a)-(e) and 40-45 TEU) to take account of different decision-making mechanisms in the Community and intergovernmental areas. In the Constitution all the enhanced cooperation provisions are contained in one Chapter (Chapter III), with a different mechanism for foreign and security policy decisions.

The principles of enhanced cooperation are contained in **Article I-43** and the detailed procedures are set out in **Articles III-416 to III-423**. **Article III-416** opens with the statement that "Any enhanced cooperation shall comply with the Constitution and the law of the Union". This is the legal framework for the arrangement, as set out in Article 43(a), (b) and (c) TEU, but there are no references in the Constitution to furthering the objectives of the Union and reinforcing the process of integration, as contained in the TEU. Article III-416 requires that enhanced cooperation "shall not undermine the internal market or economic, social and territorial cohesion" (Article 43(e) TEU), and that it "shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them" (Article 43(f) TEU).

Article III-417 requires that competences, rights and obligations of non-participating States should be respected and that those States should "not impede its implementation by the participating Member States" (Articles 43(h) and 44(2) TEU).

Article III-418 on the need to make enhanced cooperation open to other Member States at any time is similar to existing Article 43(b) TEU, except that the Commission and participating Member States would "promote" participation by as many Member States as possible, rather than "facilitate" it, as under the Convention text, or "encourage" it, as under Article 43(b) TEU. Under **Article III-418(2)** the EP and the Council will be kept regularly informed about developments in enhanced cooperation.

The procedure for establishing enhanced cooperation is set out in **Article III-419** and is similar to Articles 11 TEC and 40(a) TEU. The Article refers to two exceptions: areas of Union exclusive competence (Article 43(d) TEU) and the CFSP (Article 27(a)-(e) TEU).

A request is made to the Commission, which may submit a proposal to the Council. Authorisation to proceed will be by a Council European decision, on a proposal from the Commission and after obtaining the EP's consent. At present the EP is only consulted, except in a Treaty area where the co-decision procedure is used, in which case, its assent is required.

Article III-419(2) concerns enhanced cooperation in the CFSP. The authorisation to proceed with enhanced cooperation in the CFSP will be by a decision of the Council, acting unanimously. The Convention text did not specify unanimity and the TEU established QMV, unless a Member State declared that, for important and stated reasons of national policy, it intended to oppose the adoption of a QMV decision, in which case a vote would not be taken and the matter possibly referred to the European Council for decision by unanimity. Before the Council decision, the Union Minister for Foreign Affairs will give an opinion on whether the enhanced cooperation proposal is consistent with the CFSP and the Commission will give its opinion, in particular on whether the proposal is consistent with other Union policies. The proposal will also be forwarded to the EP for information.

Article III-420 concerns participation in an enhanced cooperation arrangement already in progress. Under **III-420(1)** for areas other than the CFSP, it specifies unanimity in the Council for a decision on participation, whereas the Convention text set out both unanimity and QMV procedures. The Constitution provides for a four-month period for the Commission to confirm participation, whereas the TEC currently allows only three. In addition the Commission will "note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation".

However, if the Commission considers that the conditions of participation have not been fulfilled, it will suggest arrangements to be adopted in order to fulfil those conditions and set a deadline for re-examining the request. When the deadline has expired the Commission will re-examine the request, but if, after this, it considers that the conditions of participation have still not been met, the Member State concerned "may refer the matter to the Council, which shall decide on the request". The Council may also adopt the transitional measures on a proposal from the Commission.

Article III-420(2) sets out a slightly different procedure for participation in a CFSP enhanced cooperation already in progress. The Member State concerned must notify the Council, the Union Minister for Foreign Affairs and the Commission. The Council will confirm participation, after consulting the Foreign Affairs Minister and "after noting, where necessary, that the conditions of participation have been fulfilled". The Council, on a proposal from the Foreign Affairs Minister, may adopt transitional measures with regard to the application of the acts already adopted within the framework of enhanced cooperation. If the Council considers that the conditions of participation have not been fulfilled, it will suggest what the State might do to fulfil those conditions and will set a deadline for re-examining the request for participation. The Council will act unanimously, by which is meant the votes of the representatives of the participating Member States only (**Article I-44(3)**).

The principle that the costs for enhanced cooperation should be borne by participating Member States, contained in Article 44a TEU, is also set out in **Article III-421**.

An innovation is the flexibility introduced by the possible extension of QMV among States participating in an enhanced cooperation arrangement. **Article III-422(1)** is a *passerelle* clause, under which those States which have undertaken to participate in enhanced cooperation may, by a unanimous decision, introduce QMV among themselves in areas where unanimity is otherwise prescribed by the Constitution. Similarly, in **III-422(2)**, the Council may decide by unanimity to adopt the Ordinary Legislative Procedure where special procedures would normally apply. The Council must consult the EP in this case.

However, **Article III-422(3)** rules out any kind of extension to QMV for decisions having military or defence implications. There is also a Declaration for incorporation in the Final Act to the effect that Member States may indicate, when they make a request for enhanced cooperation, if they intend at that stage to make use of the QMV extension mechanism. The present Treaty text rules out enhanced cooperation in matters having military or defence implications in Article 27b.[181]

Article III-423 (Article 45 TEU) requires the Council and Commission to cooperate in order to ensure the consistency of enhanced cooperation activities, and their consistency with other Union policies.

While the British Government is against a multi-speed Europe, in which small groups of States would push ahead with closer integration, it supports the flexibility provided by enhanced cooperation. The Government also supports the use of QMV within the core group of participating States. Mr Straw told the FAC in May 2004:

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[181] In ESDP the Constitution introduces in III-312 the possibility of "structured cooperation" among several Member States within the Union's framework, and also provides for the possibility of "closer cooperation" in defence through the mutual solidarity provision in Article I-41.

> Have QMV within the small group and it becomes less exclusive in terms of who else can join, and that has been quite an important part of this. If you have unanimity that means that any member of the core group can veto the joining of others. This is an area where QMV works to the advantage of the greater number. So you have QMV in it so that one individual country could not veto another nation seeking to join, and that has been one of the things we have been arguing for. Sometimes QMV works in a counter intuitive way, just as one example; the Zimbabwe sanctions is another. Can I also say […] there never has been anything to stop Member States of the EU from cooperating bilaterally, trilaterally, quadrilaterally outside the Treaties, and plenty of that goes on at the moment, and long may it continue.

The Government opposed the use of QMV for enhanced cooperation in foreign policy (III-419.2). At the IGC its opposition to the use of QMV to trigger enhanced cooperation in CFSP (III-419.2) was successful and the proposal was amended to unanimity. It was unsuccessful, however, in changing the use of QMV through its wider use as a *passerelle* inside the core group (III-422). The Liberal Democrat MEP, Andrew Duff, commented:

> Whereas UK ministers may crow that they have won historic battles in order to prevent QMV, the fact is that they have propelled the Union forward to core group integration from which the UK is excluded.[182]

The Prime Minister told the Commons in his statement on 21 June 2004:

> [The Constitution] provides, through the route of enhanced cooperation, for a flexible Europe in which groups of countries can take action together within the framework of the European Union provided they do not damage the interests of others. This is a flexibility within the framework of law, not the free for all which some have advocated.[183]

In December 2003 Heather Grabbe of the Centre for European Reform thought enhanced cooperation was preferable to a "two-speed Europe" in which a hard core of countries, led by France and Germany, would press ahead of the rest of the Union in moves towards deeper European integration. She commented:

> The EU can keep going through shifting coalitions that team up to pursue particular initiatives. There is nothing wrong with bilateral alliances and cooperation between small groups of countries that want to pursue one project or another. Such "enhanced cooperation" will be increasingly common in the EU of 25 but these coalitions have to be based on policies, not particular countries

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[182] Memorandum to the ESC at http://www.andrewduffmep.org.uk/resources/sites/217.160.173.25-406d96d1812cb6.84417533/Constitution+Submission.pdf

[183] HC Deb 21 June 2004 c 1079 at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040621/debtext/40621-06.htm#40621-06_head0

> It will be even more dangerous if the largest member states use the threat of such a core to bring awkward partners into line. That tactic failed miserably at Brussels, when Poland stuck to its position. If they continue to pursue it, Paris and Berlin will become known as bullies, not pioneers.[184]

However, John Pinder (Federal Trust) thought the new arrangements, driven by the British Government, might lead to a federal hard core:

> The British insistence on veto in foreign policy, together with the opt-out from the Euro, strengthened the resolve of others to ensure that the Constitution provides for groups of States to go farther with enhanced co-operation, including the use of qualified majority voting among themselves; and this suggests the potential for a federal core within the Union, such as Joschka Fischer envisaged in his speech at the Humboldt University in May 2000.[185]

XIII Common Provisions

Articles III-424-436 set out Common Provisions, some of which are currently provided in the General and Final Provisions of the TEC.

Article III-424 concerns the application of the Constitution to French and Spanish territories on the periphery of the Union or elsewhere in the world, which will be decided by the Council, taking account of a number of factors, such as their remoteness, insularity, small size, difficult topography and climate, and economic dependence on a few products". This is covered by Article 299(1) and (2) TEC, but lists the names of the French Overseas Departments rather than just referring to them. The rest of Article 299 TEC is covered by Part IV articles.

Article III-425 provides that nothing in the Constitution will affect Member States' rules on property ownership. This is stated in Article 295 TEC.

Articles III-426, III-431 and **III-434** concern the legal capacity, contractual liability and privileges and immunities of the Union, expanding on **Article I-7**, which confers legal personality on the Union.[186] The Union may engage in the activities of legal persons under national and international laws, such as acquiring property, being party to legal proceedings or concluding treaties. At present legal capacity is in Article 282 TEC, contractual liability is in Article 288 TEC, and privileges and immunities are in Article 291 TEC. The Commission will generally represent the Union in legal proceedings, but

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[184] *Financial Times*, 16 December 2003

[185] *EU Constitution Project Newsletter* July 2004 at http://www.fedtrust.co.uk/uploads/constitution/News07_04.pdf

[186] See Research Paper 04/66 p.23

III-426 specifies that "the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation".

Article III-427 is on the adoption of the Staff Regulations defining the terms and conditions of Union officials and other staff. This is presently covered by Article 283 TEC.

Article III-428 upholds one of the Commission's constitutional powers set out in Article 284 TEC, in this case to call for information.

Article III-429 is on the production of statistics and is contained in Article 285 TEC.

Article III-430 requires that Union officials and other staff do not disclose confidential or damaging information about undertakings, their business relations or their cost components. This is contained in Article 287 TEC.

Articles III-432 and **III-433** reproduce Articles 289 and 290 TEC on the seat and the languages of the Union institutions. Both will continue to be decided unanimously.

Article III-435 concerns the rights and obligations arising from States' agreements with third parties prior to accession and the need to eliminate any incompatibilities. This provision is largely the same as Article 307 TEC.

Article III-436 on the protection of Member States' essential security interests is contained in Article 296 TEC.