IGC Issues: Progress and the Dublin Draft

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This paper looks at progress at the Intergovernmental Conference since it opened in March 1996, at the issues that it has tackled and how member state governments have informed their parliaments about the IGC process.

The outline draft treaty of the Irish presidency, *The European Union Today and Tomorrow: Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future*, 5 December 1996, is to be submitted to the IGC in Dublin on 13-14 December 1996. This paper considers the text of the Draft and its implications for Britain and the IGC process.

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I The IGC Timetable

The Intergovernmental Conference opened in Turin on 29 March 1996 under the Italian EU presidency and has continued under the Irish presidency. The Netherlands takes over the presidency in January 1997 and the Conference is expected to end in mid-1997. In a report on progress at the IGC, the Foreign Secretary Malcolm Rifkind said that "There is now total agreement that the Amsterdam summit of June next year will be the end of the intergovernmental conference. Britain agrees with that, and I believe it is the view of all the member states".[1]

If for some reason the IGC does not end by this time, it will continue under the Luxembourg presidency. However, there will be some pressure on the member state governments to conclude in June 1997 for a number of reasons. First, there is a general desire among the member and applicant states not to delay enlargement. Accession negotiations were due to begin for Cyprus and Malta six months after the end of the IGC, although the new Labour Government in Malta has now frozen Malta's application to join the EU and there is a reluctance to admit Cyprus until its constitutional and territorial problems have been solved. A protracted IGC might still affect the accession timetable, if not for Cyprus and Malta, then for future central and east European applicants.

Secondly, the present French government would not want the ratification process for an amended Treaty to coincide with National Assembly elections in spring 1998. Thirdly, the German government must hold general elections in autumn 1998 and, perhaps anticipating a constitutional challenge on economic and monetary union from the anti-EU lobby, would not want a delay in the ratification of a new Treaty that might complicate matters still further.

IGC negotiations have proceeded mainly at monthly meetings at foreign minister level, with weekly meetings to discuss progress involving representatives of the governments of the member states. The representatives have consisted of a mixture of ministers and diplomats. They have reported to the monthly ministerial meetings, which have reported in turn to the European Council. Since the IGC opened in March there has been a European Council in Florence on 21-22 June and two informal IGC meetings at the level of heads of state or government in Cork on 6-7 July and Dublin on 5 October.

A diagram entitled "Countdown to Europe's Future", showing the various strands of European development over the next decade, can be found in the Appendix 1 of this paper.[2]

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1 HC Deb, 24 October 1996, c134.

2 From *The Times*, 5 October 1996.

II Florence European Council

By the time of the Florence European Council, which marked the end of the Italian presidency, there had not been much significant progress at the IGC. This was not unexpected, since the IGC had opened half way through the presidency and in the midst of political upheaval in Italy. The Florence Council first had to agree on the framework for a phased lifting of the export ban on British beef in order to end the British Government's policy of non-co-operation which threatened to delay progress on the IGC as well as legislative decision-making procedures. The Presidency Conclusions recorded that the IGC proceedings to date had "served to bring into focus the main issues at stake", that analysis of these issues was "sufficiently advanced" and that the Conference could "now turn to seeking balanced solutions to the main political issues raised". It requested the incoming Irish presidency to prepare an outline for a draft revision of the Treaties for the Dublin European Council in December, addressing a number of aims which had already been identified by the Reflection Group in its final report.[3] These concerned the following issues:

- employment and social protection
- environmental protection and sustainable development
- transparency and openness in the Union's work
- European citizenship
- fundamental rights
- security and the fight against terrorism, organised crime and drug trafficking
- common foreign and security policy
- defence
- the role and functions of the institutions:
    - qualified majority voting
    - composition and appointment of the Commission
    - role of the European Parliament
    - role and functions of the Court of Justice
    - application of subsidiarity
    - role of national parliaments
- simplification of the Treaties and legislative instruments

III Cork and Dublin Meetings

The pace of negotiations quickened after Florence with an increase in the number of submissions from the presidency and member state governments. Representatives met

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[3] The Reflection Group was created in 1993 to examine submissions from the EU Institutions and member states in preparation for the IGC. It met for the first time in June 1995 and submitted its final report to the European Council on 15-16 December 1995.

informally in Cork on 6-7 July. There were substantive discussions on some of the more sensitive issues, including those where there remained considerable disagreement, such as defence and the CFSP. Progress was reported in discussion of the notion of "flexibility", whereby some member states would proceed towards integration faster than others in certain areas (see also below). The meeting also discussed human rights and ways in which the roles of the European Court of Human Rights and the European Court of Justice could be rationalised. The representatives tried to identify those proposals which would be the most difficult for national parliaments or their electorates to accept, in an attempt to avoid the ratification problems that arose at the time of the Maastricht Treaty.

The October Dublin summit was expected by some to "shift the whole process into another gear"[4] while others thought it would do no more than address general issues. At a foreign ministers' meeting on 8 September Mr Rifkind was sceptical: there could be a danger in "having too many summit meetings and arranging for meetings before you know if there will be issues to be addressed or resolved".[5] However, the German foreign minister Klaus Kinkel was enthusiastic about the meeting providing further impetus to IGC progress. In a speech to the EP on 18 September, the Commission President Jacques Santer hoped the October Dublin summit would "give the negotiations a decisive boost".[6] The Irish foreign minister Dick Spring thought the Dublin meeting would be a "useful stocktaking exercise" while the December summit would produce a draft Treaty text.[7]

The *European* commented on 10 October that:

> The Dublin summit ranked among the lamest gatherings the European Union has ever staged. Far from kick-starting the intergovernmental conference into life, it publicly demonstrated that the original Maastricht treaty (Maastricht I) has left Europe confused about what to do next.

The summit confirmed that the IGC was on course to meet the deadline for a "full draft Treaty" at the December European Council and to conclude by June 1997.

In his report to the House on progress at the IGC the Foreign Secretary said:

> The timing is now pretty clear: at the Dublin summit later this year, the presidency will produce draft conclusions, not with a serious expectation of immediate agreement

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4 *Irish Times*, 9 September 1996.
5 *Irish Times*, 9 September 1996.
6 *Irish Times*, 19 September 1996.
7 *European*, 26 September 1996.

but to focus the debate more specifically on the outstanding issues, because only when one addresses texts does one know where each country stands and what are likely to be the important areas of difference.

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Important progress is being made on issues such as the future of the Western European Union; there is not yet final agreement, but there is broad acceptance of the way in which we are heading on such matters. The important question of the relationship of WEU to the European Union remains, and I believe that our determination that the one should not be subordinated to the other will be reflected in the final conclusions.

On common foreign and security policy, on the role of national Parliaments and on the subsidiarity protocol, good progress has been made, and over the next few months satisfactory conclusions will be reached. Some issues will be more difficult to resolve than others, but I believe that it is right to draw attention to those on which progress is already being made.

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The single most important issue for the intergovernmental conference is only beginning to be addressed now - flexibility. We must consider the extent to which groups of European Union states will be able to act together, when not all member states wish to do so, and still have access to EU institutions. If they do not want access to EU institutions, there is no problem, as the Schengen agreement has shown. Any group of countries can join together on their own initiative and take certain actions jointly. However - this is a fundamental British position - access to European Union institutions for those in such agreements is acceptable only if all 15 states agree. We believe that not for theoretical or ideological reasons, but because access to European institutions means the involvement of the European Commission, the European Court of Justice and the budget. That is not acceptable unless all 15 agree.

Such agreement is possible, as with the Europol convention. The issue was whether countries under the Europol convention should have access to the European Court of Justice. The final agreement was that the other 14 states would have access to the European Court of Justice on Europol matters and the United Kingdom would not. That arrangement was acceptable because it was agreed by all 15 member states.

I do not suggest that we or any other country have thought out all the implications of flexibility. It is a fundamental issue and much more work needs to be done in this country and elsewhere if we are to move in that direction. No one doubts that the European Union of the future will be flexible - that is unavoidable and such flexibility already exists to some extent. The issues are how the system will work, what the institutional implications will be and how the interests of minorities as well as majorities can be properly safeguarded.[8]

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[8] HC Deb, 24 October 1996, cc134-136.

IV Main Areas of Disagreement

A. Introduction

During the course of the IGC preparatory stages and the current discussions differences have emerged in some key areas. Press reports in August suggested that Britain was in a minority of one on 35 issues under discussion at the IGC and had opposed 98 out of 148 proposals put to the Conference at that point.[9] "On nine issues", the report continued, "Britain has only one ally out of all the other European members. ... Altogether Britain has rejected 98 proposals. Germany has rejected 29, France 39, Denmark 35, Finland 40 and Sweden 42". Britain's potential isolation at the IGC was also noted by the Foreign Affairs Committee in its report on the Intergovernmental Conference:

> In our view, there is a real prospect that the United Kingdom may find itself isolated on a number of major issues;[10]

Sir Stephen Wall, the British Ambassador to the EU (UKREP), replied that many of our European partners "do worry about whether we remain committed to making a success of our membership of the European Union". The main sticking points for UK negotiators are likely to be on the amendment of Article 118A (with reference to the Working Time Directive), quota-hopping in the fisheries sector, retention of the national veto and the use of QMV in CFSP matters.

Below is a brief description of the main areas of disagreement among the member states. Many of these are discussed in more detail in the section on the Irish draft treaty revision.

B. Common Foreign and Security Policy; Defence

There has been continued disagreement about the future status, role and organisation of the Common Foreign and Security Policy (CFSP) which currently forms Title V or the "second pillar" of the Treaty on European Union[11] and over the eventual framing of a common defence policy. A German CDU foreign policy paper in September suggested that consensus on the CFSP was within reach:

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9 *Guardian*, 5 August 1996. Based on data from *Britain's Relationship with the EU*, Graham Mather and Wes Himes, *European Policy Forum* 20, 1996.

10 Foreign Affairs Committee Third Report, *The Intergovernmental Conference*, HC 306, 1995-95, para. 25.

11 For a brief explanation of the pillar structure, see Library Research Paper 96/73, *IGC Issues: Summary and Bibliography*, 17 June 1996.

> because Germany, the main proponent of a new leap forward towards political union, had lowered its expectations and would now be content with a minimal pump-priming exercise.[12]

However, it is clear that Germany still supports integration of the CFSP in the first pillar, with a leading role for the Commission. This was opposed originally by Britain and France, which have insisted that the CFSP remain intergovernmental. France supported a separate CFSP secretariat but is now closer to adopting the German position, which the British Government would not be prepared to accept as it would give the Commission a role and decisions would be taken by QMV rather than unanimity.

Bonn and Paris support a gradual transfer to the EU of responsibility for the military role of the WEU. Other submissions have proposed reducing or eliminating the national veto in security and defence decisions as part of a progressive move towards a common defence policy.

C. Employment chapter

A new employment chapter or employment provisions to be inserted in the Treaty was proposed by the Italian Presidency and has been supported by Austria, Sweden, Belgium and the EP. This would include measures to co-ordinate national employment policies with a view to developing a common employment strategy and create an Employment Advisory Committee to consult with unions and management and oversee development in this area. The proposal is opposed by Britain and Germany on the grounds that this is a matter for national governments.

D. Justice and Home Affairs

Co-operation in Justice and Home Affairs (JHA) currently comes under Title VI or the "third pillar" of the Union Treaty and decisions are made intergovernmentally. Proposals to include immigration and asylum policy in the main Community (first) pillar could mean more decision-making by QMV rather than unanimity and greater powers for the Commission and Court of Justice. The transfer of JHA aspects to the Community pillar is supported by Germany, particularly in immigration and asylum matters, but opposed by Britain which holds that they are largely the responsibility of national governments.

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[12] *Financial Times*, 18 September 1996.

E. Institutional reform; more QMV and less unanimity

The weighting of votes in the Council of Ministers, the extension of qualified majority voting and the abolition of the national veto are likely to be among the most contentious and difficult problems to solve. Germany has taken the lead in advocating more QMV in areas currently subject to unanimous voting. Other issues involve the membership and role of the Commission, the powers of the EP and the jurisdiction of the ECJ.

The British Government has consistently defended the national veto in areas of particular national interest. It has consistently opposed an extension of QMV on the grounds that this would constitute a threat to national sovereignty. In its White Paper on the IGC the Government pledged that it would:

> oppose further extension of qualified majority voting. We do not accept the argument that unanimity in those areas to which it currently applies would be incompatible with effective decision-making, even in an enlarged Union.[13]

On the weighting of votes in the Council, the Government would like to see a more equitable system which would take more account of the size of the member state and not allow a group of small states to out-vote a large state such as the UK on an issue of national importance. The smaller states, on the other hand, are keen to retain their proportional advantage in the allocation of Council votes in order not to be marginalised by the bigger states.

F. Flexibility

A Franco-German proposal in October on a flexibility clause for the Treaty stated *inter alia* that "no member state would have the right of veto" which might prevent enhanced co-operation among other member states.[14] This is vigorously opposed by the British Government and it has been opposed in the past by France.

There is general agreement that an enlarged Union will need to be more flexible but the application of this flexibility is a bone of contention. While Britain favours a loose arrangement whereby structures such as the WEU and Schengen can exist separately from the Treaty for those member states that want to join them, other members, notably Germany and

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13 *A Partnership of Nations: the British Approach to the European Union Intergovernmental Conference 1996*, Cm 3181, 1995/96.

14 CONF. 3955, 18 October 1996, *Letter on Closer Co-operation with a View to Increased European Integration.*

France, would like to keep flexibility within the Union with ground rules for its implementation.[15] This raises some important legal as well as political questions which have yet to be resolved and are unlikely to be resolved in Dublin. In the event of a dispute between parties to a "flexible" arrangement within the Treaty structure, how would the other member states be insulated against a judgment of the ECJ on the issue, and how would the undermining of the *acquis communautaire* be avoided?

G. National Parliaments

The role of national parliaments in the decision-making process has been discussed at COSAC[16], the forum for members of national parliamentary committees dealing with EU matters. It has also been the subject of a report by the French National Assembly Committee on the EU and the House of Commons Select Committee on European Legislation.[17] The importance of national parliaments was the subject of Declaration 13 of the TEU and while there has been general agreement on the need to involve national parliaments more in the scrutiny and decision-making process, there is disagreement as to the degree of involvement. The British proposal for a minimum period of four weeks to allow for scrutiny procedures in the member states is not a contentious issue, but whereas the French Government favours a formal role for COSAC, other member states, including the UK, support a more informal role for the body.

V The Dublin Draft

A. Introduction

The IGC process has so far been largely exploratory, with many Presidency, national and institutional submissions but little evidence of the real political bargaining that will eventually shape a new Treaty. However, the process has progressed from statements on broad principles and national positions towards actual proposals for redrafting the Treaty text and adding new Treaty Articles.

The Irish presidency was expected to concentrate on issues on which there was likely to be more consensus, leaving the contentious issues for consideration by the Netherlands presidency which takes over in January 1997. The most "general outline for a draft revision of the Treaties", prepared by the presidency for the Dublin summit, will not result directly in

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15 *Financial Times*, 24 October 1996.

16 The Conference of European Affairs Committees.

17 Select Committee on European Legislation, 28th Report, *The Role of National Parliaments in the European Union*, HC 51-xxviii, 1995/96.

Treaty revision but will provide the basis for further discussion. As a presidency paper, it is intended to contain ideas which will carry forward the negotiation, rather than ideas which are particularly favoured by the Irish government. Although the presidency carries some weight, it does not mean that Treaty revisions proposed in the text will stand a better chance of being accepted by the other 14 member states. The Irish Foreign Minister Dick Spring, speaking in London on 7 November, said that the Dublin summit would not be the occasion for any final trade-offs and that it was not the presidency's intention to close off options at this stage. The member states would be free to continue to hold their positions "on all aspects of the emerging settlement".[18]

At the last IGC in 1991 draft treaties were drawn up which pulled together a number of submissions into single texts called "non-papers" or draft papers. During that process the Netherlands presidency offered a draft paper which suggested a very different and more integrated model for the EU than many member states had envisaged. It was rejected by the majority and the Conference returned to the modified form presented by the preceding Luxembourg presidency.

As the outline revision text drawn up by the Irish presidency will be the first consolidated proposal to be submitted to the IGC it will be the springboard for further debate, the starting point for refinements to proposed amendments and ultimately for the draft text expected to be agreed at the Amsterdam summit next June. Any treaty amendments eventually agreed will have to be ratified "by all the member states in accordance with their respective constitutional requirements".[19] The ratification procedures in the member states may take several months and may involve a referendum in some cases. The last draft Treaty was agreed in Maastricht in December 1991 and signed on 7 February 1992. It was not ratified by all member states until November 1993.

B. General Aspects of the Draft

In contrast with the draft treaties relased during the 1991 IGC, the Dublin draft offers not only proposed Treaty amendments but also an introduction to the issues and a commentary which includes references to minority or other views.

The presidency introduction emphasises that the draft:

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[18] *Financial Times*, 8 November 1996.

[19] Article N of Treaty.

> is not binding in its detail on any delegation. Delegations remain free to advocate their own proposals and to press their concerns in further negotiations.[20]

The presidency also pays tribute to the contribution of the European Parliament for its input to the IGC. The EP's influence is perhaps more evident in the current IGC than in the last one because of its involvement in both the preparatory and current stages through the participation of MEPs Brok and Guigou which was agreed by all the Member States.

The draft is thematically divided into three parts. Part A proposes texts in the areas of freedom, security and justice; the Union and the citizen; an effective and coherent foreign policy; the union's institutions and enhanced co-operation or flexibility. Part B concerns other issues and Part C deals with simplification of the Treaties.

C. Fundamental Rights and Non-Discrimination

Treaty revisions would emphasise the Union's commitment to fundamental human rights, equality and non-discrimination for current and prospective member states. The draft strengthens Article F of the present Treaty which states that the Union shall respect fundamental rights as they are guaranteed by the European Convention on Human Rights. In a new Article Fa, the draft introduces a procedure for determining instances of a serious or persistent breach of the fundamental principles of democracy and human rights on which the Union is founded and for a partial suspension of the rights of a member state found to be in breach. The breach would be determined by the European Council by unanimity and the decision to suspend certain rights would be decided by QMV in the Council of Ministers on a recommendation by the Commission and after consulting the EP. Measures could be revoked by the European Council.

The Draft offers a compromise solution between proposals for the inclusion of a catalogue of human rights in the Treaty and the accession by the Community to the European Convention on Human Rights, on which the ECJ gave a negative Opinion in March 1996.[21] It is not clear how the present proposal might relate to the role of the Commission and Court of Human Rights (both Council of Europe institutions) in determining human rights violations by member states or whether a state could find itself arraigned before both the EU and Council of Europe institutions for the same alleged misdemeanour.

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[20] Presidency Draft p. 2.

[21] Opinion 2/94, 28 March 1996, on the accession of the European Community to the European Convention on Human Rights.

The Draft also includes in new Article 6a a reference to non-discrimination on the basis of sex, racial, ethnic or social origin, religious belief, disability, age or sexual orientation. The lack of any explicit reference to non-discrimination in the Treaty has been criticised by the EP and some member states, though not the UK. While Directives on equal opportunities in the workplace and various ECJ rulings have established the principle of equal opportunities for men and women, this and other forms of equality have not been enshrined in the Treaty text. In the Draft the Council may by a unanimous decision and after consulting the EP take "appropriate action" to prohibit discrimination in the proposed areas. The Draft commentary suggests that the IGC will have to give more consideration to the categories of discrimination. It will also have to define more precisely what is meant by "appropriate action".

D. Third Pillar Matters: Free Movement of Persons, Asylum and Immigration; JHA action

1. Future of the pillar structure

The three pillar structure emerged from the last IGC as a means of distinguishing between methods of co-operation agreed to be appropriate to three major areas of EU activity. Since the Member States could not all agree to the use of the existing Community mechanisms (the first pillar) for the Common Foreign and Security Policy or for co-operation in Justice and Home Affairs, it was decided instead to create the second and third pillars respectively. While the detailed arrangements are specific to these pillars, the common element is that they both emphasize intergovernmental co-operation based on consensus in the Council of Ministers, rather than majority voting, and they provide for little or no input from the Commission, the European Parliament or the European Court of Justice. The word "pillar" does not appear in the formal treaty language: the "third pillar" is formally known as Title VI of the Treaty on European Union.

The Dublin draft for a revision of the treaties would alter this structure in significant ways. It would create a new title, which could be seen as a "fourth pillar" (although it is not referred to as such in the draft and its eventual location in the treaty structure is left unresolved) which would take over a significant part of the existing inter-governmental third pillar in as far as it deals with free movement, asylum and immigration and, subject to further consideration of the details, introduce elements of Community (i.e. first pillar) practice. The remainder of the existing third pillar would be somewhat extended in its scope, but would remain essentially intergovernmental in nature, albeit with more "first pillar" procedures than it has at present.

2. A new "title": free movement of persons, asylum and immigration

The Dublin draft endorses the view that co-operation on these matters under the third pillar "has lacked sufficient coherence, consistency and impetus". It therefore seeks to strengthen the Treaty provisions.[22] The draft builds on a variety of detailed proposals put forward by Belgium, the Netherlands and other states. The new title would open with a commitment to adopt within one year of entry into force of the treaty amendments:

> measures, consistent with the best possible security conditions and in compliance with Article 7a, with a view to ensuring the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;[23]

There has been a long-running difference of opinion between the UK and the Commission as to whether or not the existing Article 7a of the Treaty requires the removal of all internal border controls, the UK maintaining that it does not. The Irish presidency proposal would appear to remove any ambiguity on this point.

The title would also provide for concerted measures on the security of the external borders of the Union, on visas, on the free movement of nationals of third countries for a limited period, on asylum, refugees and immigration.

The decision-making rules for these matters would be contained in Article G of the proposed new title and are at present only sketched in, subject to further consideration. However, the Irish presidency gives a distinct steer in favour of the Commission having an exclusive right of initiative (where, in the existing third pillar, the right of initiative is shared by the Commission and the Member States) and of the European Parliament having a "necessary role" (whereas at present it has only a very limited right to be consulted on broad aspects and to debate and ask questions under Article K.6). The draft also envisages that the Court of Justice would be associated with the interpretation of provisions under the new title, but recognises that this could substantially increase the workload of the Court and require new procedures. The draft does not lay down the voting rules for the proposed new title, but suggests that decisions might be taken initially by unanimity, with qualified majority voting coming into effect after an (unspecified) fixed period. A mechanism of this kind already exists in Article 100c of the Treaty and is designed to encourage decision-making by consensus.

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22 Dublin draft, p19.

23 p22.

Much of the detail of how the new title would operate remains to be filled in during the remainder of the IGC, but it is clear that the concept emerging from the Dublin draft is very different from the British Government's own proposals for the third pillar, which would firmly entrench intergovernmentalism and avoid as much as possible the involvement of the Community institutions, especially the European Parliament and Court of Justice.

3. Reform of the remainder of the Third Pillar

While the presidency draft would transfer some items from the existing third pillar (formally known as Title VI) to a new Title (see above), it would replace them with a series of new or redefined subjects on which there has been fairly general agreement.

If asylum, external border controls, immigration, customs co-operation and action on drugs were to move to the proposed new title, the following list from existing Article K.1 would remain:

> combating fraud on an international scale
> judicial co-operation in civil matters
> judicial co-operation in criminal matters
> police co-operation (including combating terrorism)

In the presidency draft, the following would be added to this list:

> combating trafficking in persons and offences against children
> combating illegal drug trafficking[24]
> preventing and combating racism and xenophobia
> judicial co-operation in commercial matters
> ensuring consistency in rules applicable to conflicts of jurisdiction in civil and commercial law
> preventing and combating corruption

Few of the topics listed in proposed new Article K.1 would be completely new, but they would represent a clearer elaboration of areas of co-operation previously referred to in the narrower context of police co-operation under existing Article K.1(9). The draft takes account

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[24] An area of overlap with the proposed new title. The combating of drug trafficking was previously mentioned in Article K.1(9) under the general heading of police co-operation.

of the fact that the Europol Convention has now been adopted and awaits ratification[25], whereas it still lay in the future when the third pillar was created at Maastricht.

The presidency draft goes on to suggest a much more detailed set of definitions of areas for judicial, police and customs co-operation in possible new articles K.1a and K.1b.

Draft Article K.3(2) suggests reforms to the decision-making procedures for the third pillar, all of which are directed at "strengthening" and some of which involve a greater role for Community institutions.

Unanimity would be retained as the voting rule for most decisions under the pillar. At present some implementing decisions may be taken by QMV, but only if all the Member States agree (ie by unanimity) that this should be so. Under the new proposals, measures implementing specific decisions (taken by unanimity) would automatically be taken by QMV. In other words once all of the Member States had agreed on a policy or action, further decisions to implement that policy or action could not be blocked by a national veto.

"Framework decisions", which would be similar to Directives under the first pillar in that they would be binding on Member States as to the result, but not as to the method of implementation, would also be agreed by unanimity, retaining a national veto.

At present the third pillar gives the European Court of Justice only a very small role, in that conventions adopted under K.3.2 (c) may, but need not, give the Court jurisdiction over interpretation and disputes arising from the convention. The presidency draft would expand the Court's role considerably by giving it automatic jurisdiction over "framework decisions" under the pillar. As far as conventions are concerned, ECJ jurisdiction would remain optional, except that it would be mandatory where the conventions make any references to concepts in Community law, or where disputes between Member States over the interpretation of the convention cannot be resolved in the Council of Ministers within 6 months. These extensions of the role of the Court are contrary to the view of the British Government that the Court should be excluded from the third pillar. The British Government has insisted on arrangements for the Europol Convention which avoid ECJ jurisdiction as far as the UK is concerned.[26]

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[25] Cm 3050. The Draft European Police Office (Legal Capacities) Order 1996, which is the only UK legislation required before ratification of the Europol Convention, was debated in the Second Standing Committee on Delegated Legislation on 3 December 1996.

[26] In a written answer on 19 November 1996 the Home Secretary told Sir Ivan Lawrence MP that "the Government's policy on the role of the European Court of Justice in respect of conventions negotiated under the third pillar... is to consider each case on its merits". He went on to explain that the Government had agreed to a flexible formula whereby the Member States could opt in to the jurisdiction of the Court to give preliminary rulings on

The right of initiative for the third pillar would continue to be shared between the Member States and the Commission, but the European Parliament would be given a new right of consultation on each proposal, where at present it has only a general right to be consulted and to ask questions about the "principal aspects" of third pillar activity.

Another measure to correct a perceived weakness in the current third pillar arrangements would attempt to speed up the process of national ratification of third pillar conventions. Since the basic requirement that such conventions should be adopted in accordance with the respective constitutional requirements of the Member States is retained, it is not possible to set a strict timetable for national ratification, but the presidency draft takes two steps in that direction by proposing that there should be a time limit for Member States to initiate the process of national ratification and, more speculatively, a declaration attached to the Treaty whereby Member States would undertake to ensure the completion of necessary national procedures within a reasonable time. There have been long delays in completing the process of national ratification of some of the existing third pillar conventions.

Another related proposal would allow conventions in some circumstances to enter into force before all the Member States have completed their national procedures, but only in respect of those who had notified their completion. This is a device which is quite commonly used in other international treaties and conventions, but has been avoided in EU practice because of the desirability of maintaining uniformity and a common legal area. The proposal in draft Article K.3(2) is therefore closely linked to the continuing debate about "flexibility" in the EU (see below). The presidency draft takes no position on the related question of how the Schengen Agreement which currently involves only 7 of the 15 Member States and is outside the EU structure[27], might be incorporated into the Treaty, except that this might be done in a phased way with provision for opt-outs.

E. Flexibility/enhanced co-operation

The presidency draft document describes the flexibility issue as being one of the most important before the IGC. Partly for this reason it accepts the view of many of the delegations that it is too soon to put forward draft treaty texts.

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the basis of references from national courts. He made it clear that the UK would not exercise this option. The Minister of State at the Home Office, David Maclean, explained in standing committee on 3 December that if there were to be a dispute over the Convention between the UK and another Member State, the UK could not be forced to go to the European Court of Justice; instead the dispute would fall to be settled in the Council of Ministers under Article 40. See HC Debates, 19 November 1996, c467w; also Second Standing Committee on Delegated Legislation, 3 December 1996, cc9-10; the Protocol and Declaration negotiated as adjuncts to the Europol Convention are in Cm 3465.

27 Several other Member States have indicated an intention to join the Schengen group.

The original Treaty of Rome made some allowance for enhanced co-operation between a subset of Member States in Article 233, recognising the Benelux agreement. The Treaty on European Union contains several provisions negotiated at Maastricht which reflect different approaches to the problem of flexibility. The EMU provisions recognise that not all of the Member States will move to the third stage at the same time, or at all; the Social Protocol facilitates a 14-state arrangement for social policy legislation which does not apply to the UK but makes use of the EU institutions; the third pillar (existing article K.7) refers to the possibility of closer co-operation in justice and home affairs between two or more of the Member States, providing that it does not conflict with or impede 15-state co-operation. The latter provision gives a shadowy EU legitimacy to the Schengen agreement, which is otherwise completely outside the Treaty.

The presidency document outlines issues where it sees a degree of consensus emerging on future arrangements. It notes, for example, that the existing models for flexibility could be built on, but that they should be used only subject to precisely defined conditions which preserve the overall coherence of the Union. It also notes that new flexible arrangements should be open equally to all Member States, an approach which would discourage the formation of regionally-based sub-groups.[28]

Two concrete proposals for flexibility are, in fact, contained in draft articles elsewhere in the presidency document: the idea of constructive abstention in the second pillar; and the idea of conventions under the third pillar entering into force for some Member States before they have been ratified by all. There is also a hint that the Schengen Agreement could be attached to the Treaty as an optional Protocol. Otherwise, the approach very tentatively endorsed by the presidency is similar to what has been proposed jointly by France and Germany, ie that rules for potential applications of flexibility might be written into the Treaty in detail, some general and some specific to certain pillars or policy areas.[29]

One of the key questions left unanswered is whether or not, when particular Member States decide to avail themselves of "flexibility", they should also be required to obtain the specific consent of all the Member States, or whether it will be enough to comply with any rules and principles to be laid down in the Treaty. The Franco-German proposal is that the Council should decide on issues of closer co-operation, but that no Member State should have a right of veto, a formula which points to decision in the Council by QMV rather than unanimity.[30] Some method for authorising enhanced co-operation might be found more necessary with the prospect of enlargement, which might increase the risk of different sub-sets of Member States setting up competing arrangements in the same areas of co-operation. The presidency has also

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28 For the British Government's view on "flexibility" see section III above

29 CONF 3955/96.

30 CONF 3955/96, p2. This would be for decisions as to whether closer co-operation could take place in certain areas. Under the Franco-German proposal subsequent implementing decisions would be taken in the Council of Ministers only by the States which had decided to take part.

refrained from making any suggestion about the minimum number of states required for the exercise of flexibility. As noted above, existing Article K.7 in the third pillar refers only to "two or more" states. Other institutional problems which could be created by "flexibility" are not elaborated in the draft. Unlike the Franco-German proposal, the presidency commentary does not underline that the Commission would have to retain its "collegiate" role (collegiality mean that the commissioners of states not participating in an area of enhanced co-operation would retain full rights in recognition of their functional rather than representational role). The problem of the European Parliament is not mentioned (would only the MEPs of participating states be able to comment and vote on implementing legislation? - a possibility which would create many organisational problems and could undermine the "collegiality" of the Parliament). A brief reference only is made to the problem of financing areas of flexibility.

F. Employment

In the section on the Union and the citizen there are proposals on employment, social provisions, the environment, consumer policy, transparency and subsidiarity.

Of these, the proposed new Title on employment is perhaps the most controversial. The Draft acknowledges that while "competence for employment must remain essentially at Member State level, the importance of addressing the employment issue at European level also, in support of action taken at national level, is widely accepted".[31]

The Draft proposes adding the objective of promoting "a high level of employment" to the list of objectives in Article B (common provisions) of the Treaty, with further references to competitiveness and the coordination of employment policies among the member states with a view to developing a common strategy. The new Title reiterates these aims and provides for guidelines on employment "which the member states shall take into account in their employment policies".[32] The member states would be required to report annually to the Council and Commission, and the Council would be able to make recommendations to member states in the light of its examination of the reports. Article 6 of the Draft establishes an Employment Committee with advisory status to monitor the situation, formulate opinions and work with the Council in preparing recommendations. The British and German governments, while acknowledging the importance of a high level of employment in the EU, are largely opposed to the inclusion of an employment Title or chapter on the grounds that employment matters are best dealt with at national level and in accordance with particular domestic circumstances.

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31 Dublin Draft, p. 40.

32 ibid. p.43.

G. Social Provisions

The Draft acknowledges that the desirability of integrating the Agreement on Social Policy, the so-called Social Chapter of the TEU, into the main body of the Treaty is accepted by a majority of member states, but that tackling the issue should be left to a later stage of the IGC process. The British Government remains opposed to integration of the Social Chapter and would strongly defend the opt-out it secured at Maastricht. In its White Paper in March, the Government stated that it would "not give up its opt-out and cannot be forced to do so".[33]

The Government's opposition to the Agreement is linked also to its challenge at the ECJ regarding the legal base for the Working Time Directive,[34] in which it argued that this Directive ought not to have been based on Article 118a of the Treaty (on the health and safety of workers) but should have been adopted under the Social Chapter, in which case it would not have applied to Britain. While the Draft refers to the British proposal to amend Article 118a, it defers this for further consideration.

H. Environment

The Draft aims to make protection of the environment and the sustainable development of economic activities explicit objectives of the Union by enshrining these principles in the Preamble to the TEU and in treaty Articles B, 2 and 3. These are general provisions and the IGC may yet consider the inclusion of environmental considerations in specific sectoral policies such as agriculture and transport with an extension of QMV into these areas.

I. Transparency

The question of transparency and openness in the EU institutions has been a subject of debate among the member states and the institutions, as well as an ECJ judgment which obliged the Council of Ministers to deliver to *The Guardian* newspaper a number of documents on Council proceedings which it had requested.[35] The Draft proposes enshrining in the Treaty "a right of access to European Parliament, Council and Commission documents, and providing that when the Council acts as legislator, the results of votes and explanations of votes shall be made public". Since October 1993 the Council has given details of votes in the Council and explanations of votes where the member state so requested. This would provide a legal

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33 Cm 3181, p.25.
34 Directive 93/104/EC.
35 Case T-194/94, 1994.

base for disclosure of information subject to certain conditions to be laid down in the Rules of Procedure of the institutions.

J. Subsidiarity

The British Government claimed the credit for the inclusion of a subsidiarity Article in the TEU which assumed national competence except where Community competence could be justified on grounds of scale or practicality. However, the definition of subsidiarity in Article 3b has given rise to criticism from the member states for not providing clear guidelines for the application and monitoring of the principle. The presidency Draft proposes incorporating into the Treaty a legally binding protocol containing such guidelines. Under these guidelines the Commission would be obliged to "consult widely before proposing legislation and, wherever appropriate, publish consultation documents".[36] The relevance of its proposals and any subsequent amendments would have to be justified with regard to subsidiarity and the Commission would be required to submit an annual report to the Council and EP on the application of Article 3b. One of the potential problems of strengthening the application of this principle is that the checking and justifying process might lengthen the legislative process.

K. Reforming the second pillar: developing the Common Foreign and Security Policy

1. Introduction

The Common Foreign and Security Policy (CFSP) was established as the second pillar of the European Union under the Treaty of Maastricht. Under the Treaty, the objective of the Union in external policy is to "assert its identity on the international scene, in particular, through the implementation of a common foreign and security policy, including the eventual framing of a common defence policy, which might in time lead to a common defence".[37] The CFSP therefore contained two separate elements, a diplomatic side, developed from the earlier system of European Political Co-operation and a new, ill-defined security and defence side which would in large part be implemented by the Western European Union.

In language similar to statements made during the last IGC, it is now held that the EU's external political weight is not commensurate with its economic power. The Union is not as "effective as it could be in using its diplomatic influence and economic capacity in

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[36] Draft p. 60.
[37] TEU, Article B

relations with third countries and in promoting peace, stability and prosperity in the world. One of the Conference's top priorities must be to make the external policies of the Union more coherent, effective and visible".[38] The high hopes expressed for the CFSP during and immediately after the last IGC were quickly dashed over Bosnia. The disintegration of the Former Yugoslavia revealed that the CFSP was neither particularly "common", as Member States were divided on approaches to the crisis, nor was it capable of generating or bringing security; nor, given the fragmented and blocked decision-making in the Union, might it even be said to constitute a coherent policy.

Following the Balkan experience, the implementation of the CFSP has become less grandiose in design but remains global in its scope, with a wide range of Joint Actions and Common Positions and a continuing plethora of declarations. From the first meetings of the Reflection Group, discussion centred on fairly limited functional improvements to external policy mechanisms and on the means of strengthening the Presidency in its external role. More controversially, the question of how decision-making could be improved via the extension of QMV was also raised. All these aspects appear in the Dublin Draft.

Debate about the reform of the defence and security aspects of the CFSP has also moved on. The Maastricht compromise on defence which saw the WEU becoming both the defence arm of the EU and the newly reinforced European pillar of NATO was forged in the twilight of the Cold War when the Warsaw Pact and the Soviet Union were still in existence. A longer-term US disengagement from Europe seemed possible to some Member States with the concomitant need to provide for a future European Common Defence organization capable of independent military action.

Five years on the strategic picture in Europe has changed in many key respects. The Clinton administration appears keen to maintain a leading security role in Europe. NATO has been acknowledged, even by France and Spain, which are now in the process of rejoining its military structures, as the predominant security organization. Germany has shed many of the restrictions on a greater operational role for the *Bundeswehr* outside its borders. A whole series of new military tasks in Europe under Chapters VII and VIII of the UN Charter, such as humanitarian intervention, crisis management and peacekeeping, have emerged. The EU has identified the need to pursue objectives in these spheres, known from a WEU declaration as "Petersberg tasks".[39] Without military means, the Union would still need the assistance of the WEU to fulfil these aims but in order to do so the relationship between the two bodies would have to be altered to improve effectiveness. This new direction of the putative European Common Defence Policy has taken place against the background of the decision by

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[38] Dublin Draft, p. 63

[39] Agreed at Petersberg, near Bonn in June 1992.

the USA to lend its military NATO-assigned assets to the WEU for limited military operations under the Combined Joint Task Forces concept.[40]

2. Changing the Common Foreign and Security Policy

The Dublin Draft proposes a number of reforms to the CFSP. These include: changes to the clauses on political solidarity and external objectives; the leadership of the CFSP; the institutions within the Second Pillar and their relative role; and to decision-making.

(i) Political Solidarity

There is a general sentiment in the Union that the CFSP has been weakened by a lack of collective political will. There is some sceticism as to whether a sense of purpose can be inculcated by Treaty article. Despite this, the Dublin Draft suggests amendments to Title V which are aimed at instilling collective solidarity. These include strengthening the existing solidarity clause (Art. J.1(4)), although the new wording is not as strong as some Members had advocated; nor are the references to solidarity amended in the Common Provisions, as some had wished.[41] There is also the inclusion of the word "integrity" as an additional objective of the CFSP in Article J.1(2). The latter is in part a reference to Greek proposals to include an explicit reference to safeguarding the territorial integrity of the Union, from the specific national perspective of continuing border disputes and intermittent hostility with Turkey.[42] The other Member States are unlikely to make themselves hostages to fortune in this respect. However, the addition of the wording "in conformity with the principles of the United Nations Charter" provides a reference to an implicit collective security understanding within the Union, as well as to the Petersberg tasks.[43]

(ii) Leadership of the CFSP

The Draft proposes amending Article J.1(1) of the Treaty to include the statement that the European Council "shall define the principles of and general strategic guidelines" for the CFSP.[44] This is not novel, but merely makes more explicit existing text in the Common Provisions. More significant are changes to the Troika (the present, past and future holders

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40 The CJTF concept was originally launched in 1994 but its development became bogged down in argument between France and the USA. The NATO Council held at Berlin in June broke this logjam and scheduled an agreement on this issue by the end of 1996.

41 Dublin Draft, p. 68

42 EC/IGC/CONF/3969/96 30 October 1996

43 Dublin Draft, p. 67

44 *ibid*

of the Presidency) and the allocation of new responsibilities to the Secretary-General of the Council Secretariat.

A weakness of the CFSP has been that it has been overly dependent on the diplomatic resources of the country holding the Presidency. When small states, such as Luxembourg, have been incumbents, they have often been greatly stretched. The Troika was intended to help remedy this deficiency but still lacks coherence. Under the proposed amendment of Article J.5 and a new Article J.8b, the Presidency will now be assisted by the Secretary-General of the Council Secretariat in a new capacity as external policy advisor and representative. The Secretary-General would replace the past holder of the Presidency in the Troika. In a rewording of the existing text the Commission will be more closely associated with the CFSP "in order to ensure consistency in the external activities of the Union".[45] This is also reinforced by a minor amendment to Article C of the Common Provisions.[46] The Commission is not being brought into the new Troika (current and future holders of the Presidency and the Secretary-General), so the CFSP retains its intergovernmental nature.

The Irish Presidency Draft rejects two other approaches for a new figure to "enhance the effectiveness, continuity and visibility of the CFSP", although both remain on the table.[47] One was for the appointment of a personality outside the existing structures who would act as a CFSP representative, the so-called "Mr or Ms CFSP", originally a French proposal. "Mr CFSP" would be a prominent political personablity from a Member State. However, some States were concerned that such a person might adopt his or her own agenda, potentially in conflict with the European Council. The Secretary-General of the Council is of course an official. The second was for the appointment of a person of Secretary-General rank within the Secretariat, who would work alongside the current Secretary-General, to assume the CFSP representative/advisory role.[48] The rationale for the latter position may be of concern over the administrative burden on the Secretary-General, whose work load will be multiplied by the addition of new CFSP responsibilities. It would seem probable that if the Presidency's preferred option is chosen, a new post of Deputy Secretary-General may need to be created to undertake some of the duties of the current Secretary-General. In a possible reference to the Mr/Ms CFSP idea, a further amendment of Article J.5 would allow the Council to appoint a special representative with a mandate to deal with particular policy issues, although in practice this power already exists.

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45 Dublin Draft, p. 69-70

46 Dublin Draft, p. 66

47 Dublin Draft, p. 70

48 This is the British position (see EC/IGC/CONF/3893/96, 30 July 1996)

(iii) The Planning Cell and Changes to the Political Committee

The CFSP has often been criticized for being too reactive. This may be partly one of the consequences of intergovernmentalism. Currently, in ministerial meetings, each national representative arrives in Brussels with his or her national assessment of, and perspective on, a given situation or crisis. Much time may then be expended in formulating a common approach to the issue at hand before addressing any possible solutions. There is a general feeling that Foreign Affairs Councils are under-supported. The CFSP unit established under Maastricht, which contains a Director and one diplomat from each Member State, may be little more than a centre for shuffling papers between the Council, Commission and European Parliament. A Declaration in the Draft would establish a new policy planning and early warning cell, placed within the Council Secretariat under the responsibility of the Secretary-General, which, as its name implies, would inter alia prepare policy options for Council meetings.[49] The Cell would include personnel drawn from the Member States, the WEU, the Commission and the Council Secretariat. In addition, the Cell would be able to draw on the information resources of both the Member States and the Commission.[50] Both the Member States and the Commission would have the right to suggest particular research or planning projects.[51]

In another move to improve the preparation for and speed of decision-making, the Draft proposes a minor amendment to the position of POCOM under Article J.8(5). POCOM is the Committee of Political Directors in the foreign ministries of each Member State which convenes before each Foreign Affairs Council and also co-ordinates much of the CFSP work between ministerials. Under the amendment and in a new Declaration, POCOM would meet more frequently, as a rule weekly. To facilitate this, Deputy Political Directors would also be able to represent their national governments at POCOM meetings.[52]

In order to improve the clarity of the CFSP, the Dublin Draft contains provisions to strengthen the distinction between Common Positions and Joint Actions by amending Articles J.1(3), J.2 and J.3.[53] A Common Position is currently a mutual agreement between Members on "any matter of foreign and security policy of general interest in order to ensure that their combined influence is exerted as effectively as possible by means of concerted and convergent action".[54] On the advice of the European Council, some of these matters can be chosen as one for a

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49 Dublin Draft, p. 71

50 The Commission has expanded its external policy organization from the original one Directorate General at the time of Maastricht, to two and now three DGs responsible for different aspects of commercial and political foreign relations.

51 In British proposals the Cell would be small containing only 5-6 secondees, a single Commission official and a WEU contact based externally (see EC/IGC/CONF/3894/96, 30 July 1996)

52 Dublin Draft, p. 72

53 Dublin Draft, pp. 73-74

54 Article J.2(1)

joint action.[55] In practice, the difference between these two mechanisms has been said to have broken down, possibly because taking forward action as part of a Common Position removes the requirement for any form of Majority Voting. Under the changes, a Common Position "shall now define the approach of the European Union to a particular matter of geographical or thematic nature", while Joint Actions "shall define the Union's objectives and the means to be put at the disposal of the Union to address specific situations where operational action is deemed to be required in areas in which Member States have important interests in common".[56] The question of whether Common Positions and Joint Actions should bind the institutions of the Union, as well as the Member States, is subject to further consideration.

(iv) Decision-making

The majority of Member States have suggested that the consensual nature of CFSP decision-making is one of the main reasons for the Second Pillar's failure to fulfil the EU's external aspirations. However, there is a wide range of opinions on the extent to which national vetoes should be relaxed, with the UK government remaining categorically opposed to any change from unanimity to QMV.

The current position is that, on the advice of the European Council, the Foreign Affairs Council can decide that some matters should be subjects for Joint Action. The Foreign Affairs Council is empowered to agree by unanimity that certain decisions within a Joint Action can be decided by QMV. In short, any single Member State can insist that there is no majority voting on a particular subject and that all decisions connected with a Joint Action are taken by consensus. However, once the Council has decided that a particular area should be subject to QMV, then all Member States are bound by the decision. This is subject to a number of provisos including a demonstrable change of circumstances which has an effect on the areas subject to Joint Action, major difficulties on behalf of a Member State in implementation and national action in an emergency.[57]

The Dublin Draft moves the text on decision-making in Joint Actions from Article J.3 to a new Article J.8a. On one level, the new Article maintains the status quo. The adoption of a matter for Joint Action, and also any Joint Action decisions relating to defence or security under Article J.4, can be adopted only by consensus. However, the constructive abstention of one or a small number of Member States from a Joint Action would be allowed. These States would not be required to approve of the Action, nor to take part in its implementation,

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55 Article J.3(1)
56 Dublin Draft, pp. 73-74
57 Article J. 3

but would be obliged not to oppose it. If the number of Members recording their abstention represented more than 25 votes, weighted in accordance with Article 148 (2), then the Joint Action could not be adopted.[58]

On another level, the new Article J.8a would change the current practice whereby the Member States can decide by unanimity that decisions implementing a Joint Action can be taken by QMV. Under the Draft proposals all decisions within a chosen Joint Action would be taken by QMV subject to Article 148 (2). Approval would require at least 62 votes in favour from at least 10 Member States. However, the new proposals in effect include a national veto, since a Member State can reject the adoption of any decision within a Joint Action for "stated reasons of national policy".[59] If a number of other Member States can achieve a qualified majority under this Article, they can then appeal to the next European Council, where decisions are taken by unanimity. Clearly, the use of a veto within a Joint Action would be seen as a major step and is discouraged by the Treaty text here and elsewhere.

3. Security and Defence

Since the start of the IGC there has been agreement that the EU should have access to military capabilities to pursue CFSP objectives but without the EU actively being involved in these tasks. This role will continue to be fulfilled by the WEU, focusing on the Petersberg tasks, the definition of which will need to be included in the revised Treaty. On the more profound question of the form of relations between the EU and WEU and of whether or not collective defence should be brought into the Treaty now or in the future, disagreement remains.

The key Article in this respect has been J.4(1) which currently states that the formulation of a Common Defence Policy will be "eventual" and "might in time lead to" a Common Defence. In short, the former concept, EU involvement in certain defence tasks, is placed in the future the latter, a collective security organization within the Union, might not happen at all. The Irish Presidency has sought to steer a mid-course between the British view, which sees no reason to alter this wording, and the views of other states, such as Germany and Italy, which favour a definite timetable for achieving both objectives. The Draft replaces the word "eventual" with "progressive" and "might in time lead to" with "in the perspective of". In effect, this brings a Common Defence Policy nearer and accepts the principle of Common Defence but with no timetable given for its introduction.[60]

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58 Dublin Draft, p. 75
59 Dublin Draft, p.75
60 Dublin Draft, p. 82

Article J.4 (1) is also amended to include Petersberg tasks. However, there is no consensus on exactly how these tasks should be defined, given that there are differing interpretations of what they consist of, and also of the term 'peacekeeping' in international law.[61] By using the words "tasks of combat forces in crisis management", the Irish Presidency has chosen the most flexible interpretation. A Declaration is added to the Treaty stating that the use of military means for humanitarian tasks is without prejudice to the civil humanitarian functions performed under the Treaty of Rome.[62]

All the Member States are in accord that the WEU should provide the vehicle for the Union's new quasi-military objectives, but there is disagreement as to how the two bodies should be related. Britain opposes any change in the current wording of Article J.4 (2), which states that the Union "requests" the WEU to undertake actions on its behalf. The British Government maintains that the institutional and legal separation between the WEU and EU should remain absolute, but that various practical measures could be taken outside the Treaty to improve Europe's ability to undertake limited miliary actions.[63] The UK has consistently pointed out that the disparity in membership between the Fifteen and the Ten of the WEU (the remaining five EU states Austria, Denmark, Finland, Ireland and Sweden are observers) acts as a barrier between the two bodies. Other Member States have sought to give the EU authority over the WEU in the implementation of Petersberg tasks by inserting the word "instruct" here, and also to specify a merger between the two organizations. They have also proposed circumventing the neutrality or specific defence stances of the WEU observers by placing mutual defence commitments in a separate optional protocol to the Treaty (not included in the Draft), should a merger take place.

Again the Irish Presidency has sought a compromise between these two positions. The key word "requests" is replaced by the barely stronger phrase "will avail itself of". However, the amended Article J.4 (2) would also charge the EU with fostering closer institutional relations with its defence partner.[64] The altered wording would also allow all EU states, including the WEU observers, to participate in the planning and conduct of a WEU Petersberg operation if they chose to be involved in it. As the Draft points out, this area is one for joint decision-

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61 Paragraph II.4 of the Petersberg Declaration defines the tasks as "humanitarian and rescue, peacekeeping and combat forces in crisis management, including peacekeeping". Para I.2 refers to "the effective implementation of conflict prevention and crisis management measures, including peacekeeping activities of the CSCE [now OSCE] or United Nations Security Council" (*WEU Petersberg Declaration* June 1992). Peacekeeping also has different meanings in the UN and NATO.

62 Dublin Draft, p. 82

63 See *Memorandum on the United Kingdom Government's Approach to the Treatment of European Defence Issues at the 1996 Inter-Governmental Conference,* March 1995 (Deposited Paper 3S/2695). Since Maastricht, extensive work has taken place in the WEU on improvements to its capacity to undertake limited military operations. This was most recently reflected in the *Birmingham Declaration*, May 1996 and the *Ostend Declaration*, November 1996.

64 Dublin Draft, p. 82

making with the WEU and would require adjustments to Declaration 30 of the TEU, the WEU's statement on its relationship with the Union.[65]

The peacekeeping tasks envisaged as Petersberg missions are similar to a number of UN operations in which all Member States, regardless of their neutrality, have participated. Both Finland and Sweden have made a significant shift in policy in supporting the inclusion of Petersberg missions in Article J. 4. They have even favoured a stronger form of wording for Article J.4 (2), namely "shall have recourse to the WEU", than is proposed by the Irish.[66] However, it should be remembered that the amended Article J.4(2) makes explicit reference to Article J.4(4) which recognizes "the specific character of the security and defence policy of certain Member States" which could refer to NATO, to multilateral defence arrangements, such as EuroCorps, or to neutrality.[67]

An amendment of Article J.4 (3) makes clear that in dealing with decisions which have defence or military implications, the Council will act by unanimity only.[68]

4. Finance of the CFSP and other aspects

The Dublin Draft also addresses the question of financing of the CFSP.[69] There has been some dispute on this issue due to the contradictory nature of Article J.11 of the TEU. This states that the EC budget would pay for the (small) administrative costs of the CFSP but that operational costs would either, by unanimous consent of the Council, be charged to the EC budget, in which case the EP would be involved, or be charged to the Member States themselves on a scale to be determined.[70] This procedure has created some dispute with the EP which has demanded budgetary control over all areas of CFSP expenditure.

The new wording seeks to remedy this problem by stating that, as well as administrative spending, operational expenditure for the implementation of CFSP decisions, other than those involving defence and security under Article J.4(2), will be charged to the European Communities budget unless there is a qualified majority under Article J.8a(2) against. This will be expenditure under Article 203 of the Treaty subject to EP procedures. If expenditure is not charged to the budget of the European Communities it will be charged to the Member

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65 Cm 3151, pp. 33-35

66 Finnish-Swedish Proposals EC/IGC/CONF/3946/96, 8 October 1996

67 On this point, it should be remembered that the *Decision of the Heads of Government, meeting within the European Union, concerning certain problems raised by Denmark on the Treaty on European Unions,* agreed at Edinburgh in December 1992, states unequivocally that Copenhagen will not "participate in the elaboration or implementation of decisions and actions of the Union which have defence implications" (Cm 3151, p. 243).

68 Dublin Draft, p. 86

69 Dublin Draft, p. 117

70 Article J.11 (2)

States on the basis of national shares of EU GNP, unless the Council on a proposal from the Commission decides unanimously otherwise.

The IGC has considered a number of other areas of reform in relation to the Second Pillar which have not appeared in the Dublin Draft. These include the repeal of Article 223 which excludes defence industries from EC competence (this idea now appears to have been abandoned); and a greater consultative role for the European Parliament in external policy.[71]

L. External Economic Relations

The presidency draft proposes an additional article to be inserted after the existing Article 113, which is concerned with the common commercial policy and the powers of the Commission to negotiate with other states and international organisations on behalf of the Member States. The existing article defines this power in terms of matters which "need to be negotiated" for the furtherance of the common commercial policy. The new article would confer specific competence on the Commission to represent the Member States in multilateral negotiations concerning trade in services, intellectual property and direct foreign investment and remove any ambiguity about whether these are already implied by the articles defining the common commercial policy. Some states have held that this refinement is unnecessary and that the Community has already shown that it can negotiate effectively on these matters on behalf of the Member States in the World Trade Organisation context.

The presidency notes that there is disagreement about this. It underlines that the new competence would be limited to the external field and that the Member States would retain their internal powers in these areas (proposed new Article 113a.6). The decision-making process for the extended powers would be similar to those for trade negotiations, ie the Council would authorise the Commission to negotiate and the Commission would be guided by a special committee as in Article 113. The Council would act by QMV as in Article 113. In a departure from Article 113 the Council would have to consult the European Parliament before concluding the agreement. In Article 113 there is no role for the European Parliament and there is no explicit provision for agreements to be formally endorsed by the Council.[72]

M. Legal personality for the European Union

The Irish presidency draft reflects the view of the majority of Member States that the time

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[71] See Paper on Security and Defence EC/IGC/CONF/3869/96, 16 July 1996, and Presidency Approach on the CFSP EC/IGC/CONF/3935/96, 30 September 1996.

[72] This point led to some disagreements during the final stages of the negotiation of the GATT Uruguay Round when it was unclear for a while whether or not France would seek to vote against the terms of the agreement if it returned to the Council for final endorsement.

has come to confer legal personality on the EU as a whole, at least for certain purposes. At present the three separate Communities which make up the first pillar and which have largely common institutions (the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community) have three distinct legal personalities, but there is no legal personality for the European Union acting on second or third pillar matters.

International legal personality is a matter of degree, rather than an absolute. It may include the capacity to conclude contracts, acquire property and institute legal proceedings, ie capacities which a private company would have, but it may also extend to enjoying diplomatic privileges and immunities and allow an international organisation to conclude legally binding agreements with other international organisations and with third countries.

It has long been established in principle that international organisations are capable of concluding treaties and, therefore, of being bound by their legal implications. The EC (but not, so far, the EU) has concluded many treaties. It is able to do so partly because of the explicit conferral of powers to conclude treaties (eg Article 228 TEU), but also because, under the treaties, the EC has large areas of competence for which it is fully and legally responsible. Without such competence there would be few areas on which the EC would have the authority to conclude agreements with third countries.

The IGC has been debating a wide range of options. The options vary as to whether the EU should have a legal personality separate from or merged with the three existing communities and as to whether it should be constricted in certain ways. For example, the power of the EU to conclude its own legally binding agreements with third countries and other international organisations could be limited to particular matters under the second and third pillars, or to matters already determined as being for joint action. Certain restrictions have already emerged from the IGC negotiations, eg all military agreements would be excluded and all EU agreements with external parties would be determined by unanimity at all stages.[73]

The presidency draft endorses the view that the European Union should have legal personality, while noting that some Member States dissent from this and regard it as unnecessary. The draft leaves open all of the technical options regarding the possible merger of the existing legal personalities of the three European communities. As regards the extent of the proposed EU legal personality the draft endorses the view that there should be a specific treaty exclusion of any power to conclude agreements for the use of military means, but otherwise suggests that the legal capacity should exist "to the extent necessary for the exercise of its [ie the Union's] functions and the fulfilment of its purposes".

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[73] CONF 3979/96, p2.

The debate about legal personality for the EU is largely technical, but there is a symbolic importance in as far as the Maastricht Treaty left the overarching European Union relatively weak compared to other international organisations. It was intended that the Union structures should be minimal and that the principal function of the Union was to supply a common framework for the three pillars, one of which, the European Communities, already had a strong and established identity as an international organisation in its own right. The exclusion from the draft of any capacity to conclude defence agreements on behalf of the Union should satisfy those who are opposed to the Union taking over the functions of the WEU or NATO, but there may still be some anxiety that the conferral of legal personality on the Union would be a further small step towards the creation of a single supranational organisation with multiple functions. On the other hand, it can be argued that although both international organisations and sovereign states may be regarded as subjects of international law, they exist in quite different categories. The legal personality of an international organisation is delimited by the purposes set out in its constitutive documents. An international organisation with legal personality, even if this is quite extensive, does not thereby become a super-state. A recent specialised study of the problem summarises the position:

> Although the supreme position of states in international law is decreasing and their powers are more and more limited by decisions of international organisations, an equation of the legal personality of organisations with that of states would be inappropriate.[74]

N. The Union's Institutions

1. Reform of co-decision

Reform of the structure and composition of the institutions has been seen generally by the member states as an essential part of the enlargement process. The Union has grown from a community of 6 to a union of 15 with the prospect of increasing to 20 or more in the next decade. This section of the Draft comments on the main issues surrounding the EP, Commission and Council but acknowledges the general view that "it would be preferable not to put forward specific Treaty texts at this stage, pending further negotiation at the Conference".[75] It emphasises the importance of a strong EP as "an essential part of a democratic Union"[76] and suggests that it would be desirable "to take a further step in the process of establishing the Parliament's role as 'co-legislator' with the Council". The presidency proposes reducing the number of legislative procedures to three (co-decision, consultation and assent), extending the scope of the co-decision procedure and improving the efficiency of this procedure.

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[74] R Frid, *The Relations between the EC and International Organisations: Legal theory and practice*, 1996, p15.
[75] Draft p. 92.
[76] Draft p. 93.

The co-decision procedure, which was introduced by the Treaty on European Union (TEU) to enhance the powers of the EP in the EC legislative process, has been used 68 times as at September 1996.[77] Of these, only two co-decision cases resulted in failure to adopt a proposal and one of these has since been remedied.

Co-decision currently applies in the following areas:

Article	**subject matter**
49	free movement of workers
54(2)	freedom of establishment: implementation of general programme
56(2)	freedom of establishment: special treatment of foreign nationals
57(1)(2)	self-employed persons
100a & b	internal market
126	education
128	culture
129	public health
129a	consumer protection
129d	trans-European networks (guidelines)
130i(1)	research: multi-annual framework programme
130s(3)	environment: general action programmes

The Draft does not specify which new areas might become the subject of co-decision, stating that this is "an issue for further negotiation".[78] However, since the draft seeks to eliminate the co-operation procedure (Article 189c) except for EMU, there is an implication that all legislative decisions currently subject to co-operation procedure might shift to co-decision. This would involve the following treaty articles:

Article	**subject matter**
6	non-discrimination
75(1)	transport
118a(2)	social policy
125	Social Fund
127	vocational training
129d third paragraph	trans-European networks (except for guidelines)
130e	economic and social cohesion: implementing decisions
130o second paragraph	research: implementation of programmes

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[77] European Parliament Committee on Institutional Affairs, *Initial Working Document on Legislative Procedures and on Council Voting Weights and Procedures*, Konrad Schwaiger (suiveur), 17 September 1996.

[78] Draft p. 96.

130s(1) and (3) second paragraph	environment: decision and implementation action programmes
130w	development co-operation
2(2)	Agreement on Social Policy

The co-decision procedure is set out in Article 189b of the Treaty. It is extremely complex, involving up to three readings, including the possibility of EP participation in a Conciliation Committee if the Council does not approve unanimously EP amendments on which the Commission has delivered a negative opinion, and finally offering the EP the right to prevent the adoption of an act by rejecting by an absolute majority a joint text approved by the Conciliation Committee. If the Conciliation Committee does not approve a text, it is not adopted unless the Council confirms by QMV the original common position on the proposal, possibly with EP amendments, or if the EP rejects the text by an absolute majority.

The presidency Draft proposes removing the last stage of the co-decision procedure whereby the Council can confirm its original common position if there is no agreement in the Conciliation Committee. The Conciliation Committee would address the common position and proposed EP amendments instead of trying to agree on a new joint text with recourse to the common position only if there is no agreement on a joint text. The Draft acknowledges that the procedure could be simplified still more and that this would have to be settled by the Conference.

While the British Government "agrees that the co-decision procedure is cumbersome", it would only consider simplification if this did not involve changing the institutional balance.[79] In its White Paper on the IGC the Government had stated that it did not feel that the EP needed new powers.[80]

2. The Council of Ministers and qualified majority voting; the Commission and Court of Justice

The IGC will have to address three issues concerning the Council: the scope of qualified majority voting (QMV), the weighting of votes and the threshold for QMV decision-making. The weighting of votes and the QMV threshold were raised by Britain at the time of the accession negotiations for Norway, Sweden, Finland and Austria in 1994.[81]

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79 Government Response to Select Committee on European Legislation Twenty-Eighth Report on the role of National Parliaments in the European Union, Cm 3440, 1995-96, p. 7.

80 Cm 3181, p. 16.

81 The arguments surrounding QMV and the weighting of votes in the Council are discussed in Library Research Paper 94/51, *Qualified Majority Voting: the Argument and the Agreement*, 31 March 1996.

The Draft suggests that these complex issues will not be resolved until a later stage in the IGC and has therefore not proposed a revision text. The presidency comments, however, on some of the issues involved and suggests that general agreement might be sought on the principle of excluding some areas *a priori* from QMV (eg. constitutional matters); examining the extension of QMV into other Treaty areas and the possibility of phasing in the QMV extension over a specified time.

On the threshold for a qualified majority the Dublin Draft makes no specific proposals for treaty amendments but concludes that there is a need for adjustment to the current arrangements in the context of enlargement. It identifies two avenues of approach which the IGC might consider: a re-weighting of votes in the Council or the introduction of some form of dual majority, of which one component would reflect the population of member states. The presidency Draft sets out some of the possibilities identified by the Conference so far but concludes that such sensitive issues should be settled towards the end of the IGC.

The Draft does not make revision proposals for the Commission either, but identifies the main issue to be the future size of the Commission. Proposals put to the IGC so far have included:

- a Commission with a membership smaller than the number of member states;
- a Commission with a number of members at least equal to the number of member states.

The issue is one of balancing national representation and legitimacy with efficiency in an expanding Union. It is envisaged that the smaller states will strongly resist any solutions which propose shared Commission representation or a rota system of representation. The presidency Draft concludes that it does not at this stage endorse any of the proposals but suggests that:

> a combination of ideas based in part on internal organisation and structuring of the Commission and in part on strengthening the powers of the President of the Commission could offer a useful avenue of approach to further discussion and perhaps eventually to a settlement of this question.

On the European Court of Justice the Draft makes proposals for the revision of Article 167 (on the election of the President of the Court) and Article 188 (on the amendment of the Court's Statute), but does not tackle other more sensitive issues such as the Court's role in the area of human rights, the number of judges or the British Government's proposals (see Appendix 2, UK submissions to the IGC)

O. National Parliaments

The Dublin Draft proposes a new Protocol on the role of national parliaments to be annexed to the TEU which would reinforce the current Declaration 13 introduced by the TEU. The Protocol is concerned mainly with the provision of information to national parliaments. It stipulates that, subject to exceptions on the grounds of urgency, a four-week period must elapse between a Commission legislative proposal being made available in all the EU languages and the date when it is placed on the Council agenda for a decision either to adopt the act or for the adoption of a common position.

The draft gives COSAC, the Conference of European Affairs Committees of National Parliaments and the EP, a more clearly defined role in contributing to the legislative process. COSAC may "make any contribution it deems appropriate for the attention of the EU institutions", particularly with reference to draft legal texts forwarded to it by member state representatives "in view of the nature of its subject matter". Under the Dublin Draft COSAC would also be able to examine at the EP's request any proposal or initiative under the Third Pillar which might have direct bearing on the rights and freedoms of individuals. It may also draw the institutions' attention to matters concerning the implementation of subsidiarity.[82]

The Draft comments that its proposals respond to concerns voiced at the IGC on the need for more involvement by national parliaments but without the creation of a new body, such as a second chamber (which had been rejected by the majority of member states), without upsetting the current institutional balance in the decision-making process and without complicating it still further.

Several member state governments, including the UK, but more notably France, have called for an enhanced role for national parliaments and for improving the functioning of COSAC. The minimum four-week period for scrutiny of EC legislative proposals by national parliaments was one of the British Government's recommendations to the IGC and was adopted by COSAC in its Conclusions on 16 October.[83]

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82 Draft p. 125.

83 See also Select Committee on European Legislation Twenty-Eighth Report, *The Role of National Parliaments in the European Union*, HC 51-xxviii, 1995-96, paras.77-85, and Government Response, Cm 3440, 1995-96.

VI Keeping Parliaments Informed[84]

A. The European Parliament and the IGC

The EP was actively involved in the initial stages of the IGC. MEPs Elmar Brok of Germany and Elisabeth Guigou of France were chosen as the EP representatives to take part in the Reflection Group where the EP was given equal standing with member states. The EP also lobbied for an observer role at the IGC, which was accepted by all member states except Britain and France. After consultation it was decided that Mr Brok and Ms Guigou could attend the monthly meetings of foreign ministers. They have been restricted to attending only one in four of the weekly meetings but also attend some working dinners. By visiting national parliaments and their committees the two MEPs have attempted to foster relationships between national parliaments and the EP. National parliamentary representatives have also been invited to attend the Brok/Guigou report-back meetings.

At the European Parliament responsibility for monitoring the IGC is shared by staff from the Political Groups and an inter-institutional delegation. The EP Institutional Affairs Committee holds informal weekly meetings with the Irish Presidency, writes reports, and receives all the IGC documentation.

Compared with its role in previous IGCs the EP has been more involved and perhaps more influential in the present IGC, but ultimately the role of the EP is limited because, unlike national parliaments, it does not have the power to refuse ratification of the Treaty.

B. Obligations and commitments of governments to inform their national parliaments

Most governments do consult and inform their parliaments about European Union matters, although the degree to which member state governments have consulted and informed their parliaments about EU matters in general and the IGC in particular differs widely. Belgium, Germany, the Netherlands and Portugal have specific articles or laws that govern the way their parliament is informed on European Union matters, including the IGC. Article 23 of Germany's constitution, the Basic Law, guarantees the participation of both chambers in EU policy-making. The Federal Government has a duty to inform parliament fully and as early

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[84] A conference organised by the House of Commons Library and the European Centre for Parliamentary Documentation and Research on 5-6 November 1996 provided a forum for representatives of the member states to explain how their national parliaments had dealt with the Intergovernmental Conference and how national parliaments were informed about developments. This section is a summary by Susan Kielty of the views expressed by delegates from the member states and the EP.

as possible. The Länder can appoint a representative, which the federal government must involve in any discussions, including cabinet meetings, which concern Germany's position at the IGC.

For most member states the informing process takes place in plenary sessions where the relevant ministers are made available to answer questions, through government statements, or through the use of specific committees. Most member states have a European Affairs Committee or a Foreign Affairs Committee dealing with the IGC. Germany, France, Spain and Portugal have also created specific bodies to deal with the IGC either in the form of a committee, sub-committee or a working group. Spain's IGC committee was only set up to deal with the initial stages of the IGC, while Germany's still actively monitors progress at the IGC. Spain has also set up a committee to deal with the follow-up to the IGC. Italy's Foreign Affairs Committee deals with European Union matters and the IGC.

The committees have varying functions, procedures and structures. Belgium's Federal Advisory Committee includes members from the Senate, Chamber of Representatives and the European Parliament. Socio-economic and cultural bodies were also asked to contribute to Belgium's memorandum on the IGC. Some committees act as the direct link between parliament and government, as is the case in Finland, where the government informs parliament through its Grand Committee. The Netherlands European Affairs Committee initiates and co-ordinates debate on the IGC, whereas Portugal's committee actually works with the government in formulating Portugal's position. In Denmark the committee is also expected to inform the public as well as parliament. In most cases ministers or senior officials regularly brief the committees and provide them with information on the IGC. However, Sweden's Advisory Committee produced a report which stated that the government did not utilise the committee enough in the early stages of the IGC. This committee also stressed that the government had failed to provide them with enough information on the position of other member states. Since August 1996 the Swedish government has briefed the committee weekly on the IGC, although it is under no obligation to do so.

Finland's committee has been frustrated at not being able to obtain the information it would like. The German parliament receives presidency documents, national government position papers, European Parliament documents, Commission opinions and reports, as well as reports from the Federal Government's permanent representative. Some national parliaments, in France and Portugal, for example, obtain a great deal of information, but lack the structure and resources to make full use of it.

C. Parliamentary initiatives on the IGC

Some member states have created their own bodies to inform MPs and in some cases the public on the IGC. The Netherlands Second Chamber has created its own information service which produces a weekly bulletin. The bulletin provides an overview of important new documents from the EU institutions and includes articles on EU issues as well as summaries of the main EU proposals. In Portugal better relations with the national press and more accurate reporting on EU affairs were seen as ways to inform MPs and generally increase awareness on the IGC. Sweden's parliament has set up an information service mainly for the public which has produced a fact sheet on the IGC. Similarly Denmark has an information service for the public in the form of a telephone hotline.

D. The degree of parliamentary interest

There is no precise way of measuring the level of interest a national parliament takes in the IGC, although the number of parliamentary questions and debates would make it possible to draw some conclusions. Most national parliaments have shown an interest in the IGC and most do not regard the IGC as a divisive issue, at least in principle. The Italian parliament has not yet had a debate dedicated to the IGC, partly because the crisis within the government has disrupted the availability of information on the IGC. In Sweden there has apparently been little parliamentary interest in the IGC.

The issues in which national parliaments are interested vary tremendously according to national interests. Similarly, national policy on referendums also varies, with the majority of member states at present unclear as to whether a referendum will be held on the outcome of the IGC and what this would mean for the ratification procedure.

VII Conclusion

It has not been clear since the initial consultation and preparatory stages of the IGC whether negotiations would lead to a radical reform of the Treaty or to only minor amendments. Some of the submissions made so far would entail significant constitutional changes affecting the competence of the Union, its structure, operation and legal status. Although some commentators have predicted that radical change is no longer likely, others, including the present Irish presidency, have emphasised that reform will mean ambitious objectives and that there will be no question of small Treaty changes.[85]

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[85] *Agence Europe*, 6827, 7/8 October 1996.

Unlike earlier reforms such as the Single European Act, the current process has perhaps so far lacked focus in attempting to concentrate on a great many different and difficult issues. The *Financial Times* argued on 9 September:

> The EU is most unlikely to agree on big constitutional changes now. It should therefore keep the agenda it attempts to a strict minimum. Unless it does so, it risks being bogged down for the foreseeable future in acrimonious and fruitless institutional debate.

Chancellor Kohl has suggested that another Intergovernmental Conference might "revisit the outcome of this IGC when enlargement talks are underway and EMU is in place from 1999".[86] In Jacques Santer's view, another IGC on further reforms might be a much longer- term option in perhaps ten or twenty years' time.

There has been some scepticism about prospects for any real progress at the IGC until after the British general election. Another view is that real progress will only be made when negotiations have reached the point when concessions simply have to be made or the whole attempt abandoned. This suggests that a considerable amount of horse-trading lies ahead in order for reforms to be agreed unanimously within the proposed timetable.

The French Foreign Minister has commented that the draft reflects the "mediocre state of negotiations" and criticised its lack of ambition[87] By contrast Mr Rifkind has commented that the document reflected the differing views "in a fair and comprehensive way" and that proposals for strengthening the CFSP were "encouraging". The German Foreign Minister thought that progress had been made but that parts of the draft were ambitious and needed more discussion.[88] The *Irish Times* commented on 6 December, that "Many of the changes proposed for a new EU Treaty will please Ireland, but there are still some to worry about".

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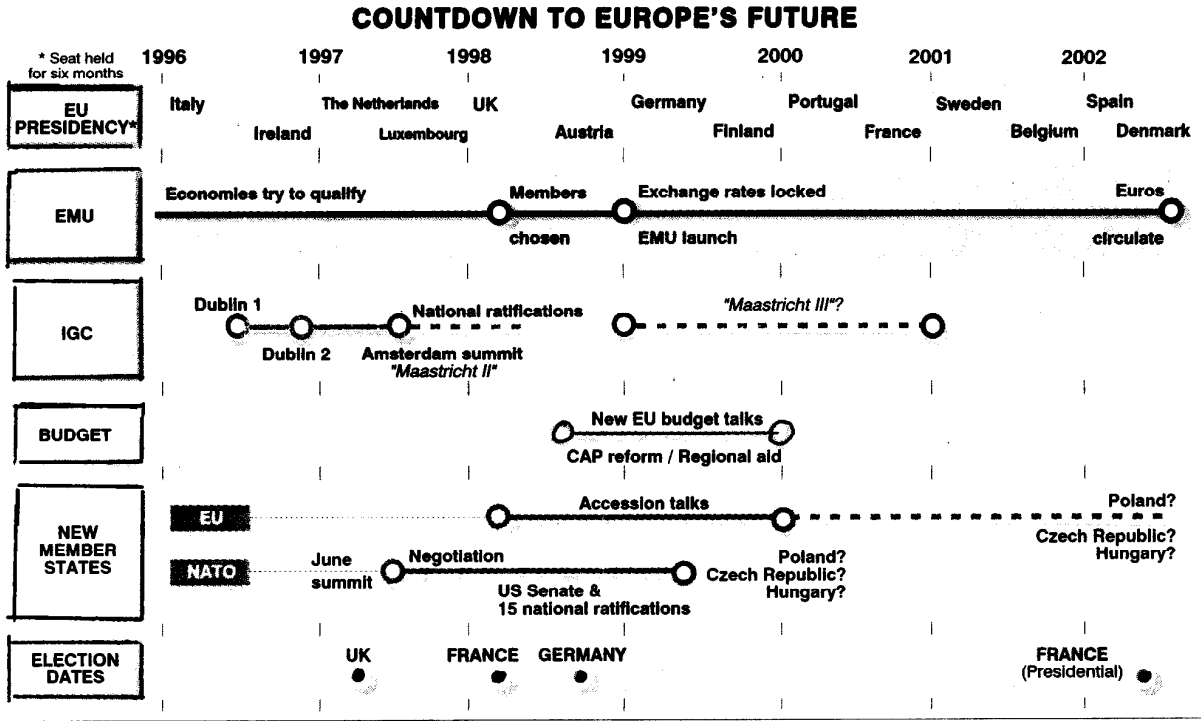
86 *Irish Times*, 7 October 1996.

87 *Financial Times*, 7 December 1996

88 *Ibid*

Appendix 1



(From: *The Times*, 5 October 1996)

Appendix 2

UK Submissions to the IGC[89]

In contrast with the relative lack of substantive input from the British Government at the last IGC, the Government has made a number of submissions to the present IGC. The Foreign Office Minister David Davis said of the proposals:

> These are not airy-fairy ideas for armchair philosophers about the shape of Europe. They are hard-headed practical steps to help Britain in Europe and improve the way the EU operates.[90]

Below are summaries of the UK submissions:

A. Memorandum on the European Court of Justice[91]

The British Government has been particularly concerned about the role and powers of the ECJ. This has been seen largely as the result of a few landmark cases in which the Court has ruled against the British Government.

The Memorandum proposes Treaty amendments to tackle the following areas of concern:

1. the liability for damages even when a member state has made every attempt to meet EC obligations

While the British Government supports the principle of the obligation to pay damages where a member state government has failed to implement an EC law,[92] it would like the criteria for its application to be laid down in the Treaty. In particular, the Government believes that a member state should not be liable for damages because it has misunderstood the scope of the obligations of an EC law. It should be liable for damages only where is has **manifestly and**

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89 All UK submissions have been deposited in the Library: Deposited Paper/3 3763

90 *Financial Times*, 23 July 1996.

91 EC/IGC/CONF/3883/96, 25 July 1996.

92 According to the Francovich principle, following the ECJ judgment in *Francovich v. Italy*, C-6 9/90 (1991).

gravely breached an EC obligation under which individual rights were granted and an individual has suffered as a result. Furthermore, a member state should not have to pay unlimited damages for past breaches where claimants have delayed bringing proceedings, and arrears of damages should not be payable for a period over three years before legal proceedings were started.

2. the retrospective effect of EC judgments even when this creates disproportionate financial and administrative burdens

Limits on the retrospective effects of judgments[93] should be confirmed and clarified in a Treaty amendment, taking into account the serious financial consequences for economic operators or national exchequers.

3. the non-applicability of national time-limits in some cases

Claims should be made promptly in accordance with jurisprudential principle. Directives alone are not subject to national time limits as are regulations and Treaty Articles. This follows the *Emmott* case in which ECJ held that if an EC law had not been implemented, individuals could not know the full extent of their rights. This uncertainty could only be remedied by implementation. In the Government's view this is an exception to the general legal principle that time limits are for member states to determine as long as there is no conflict between national and EC law.

4. lack of an appeals procedure at the ECJ

An appeals procedure is needed for cases heard by the ECJ and against preliminary rulings under Article 177. The Government proposes that cases heard by the ECJ other than on appeal from the Court of First Instance (CFI) should be heard by a chamber rather than the full Court with the decision of the chamber subject to an appeal to the full Court. The ECJ could then review ambiguous or disproportionate rulings; there would be opportunity for more clarity in complex issues and consistency would be achieved in cases heard by the CFI and ECJ at first instance. The Government has proposed a leave system to allow for appeal if the appellant shows that the appeal raises a serious question affecting the interpretation or application of the Treaty or EC law, or a serious issue of general importance. There would be no Advocate-General's Opinion at appeal stage but at first instance. The Court would dispense with the oral hearing, which would become the final appeal stage. Judgment would take effect once it was clear that there would be no appeal or when the appeal had finished.

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[93] see *Defrenne v Sabena*, 1976.

5. need for an expedited procedure for Article 177 references

The Government identified a need to reduce the average time to deliver judgments in Article 177 cases from 18 months and for a provision to be made in the Statute of the Court to empower the President of the Court "in special circumstances" to give one case priority over others where there were serious consequences for the parties to the litigation. Arguments would have to be presented quickly and with less time for preparation and there would be a time limit for the judgment to be given (eg. 9 months after entry in Registry). The Advocate-General's Opinion could be dispensed with.

6. need for amendment of legislation after ECJ judgment which interprets EC legislation contrary to policy of Council

In the Government's opinion the final Council text is not always easy to interpret and it might be difficult for the ECJ to give effect to Council policy. It is difficult and slow to amend legislation, however, and there is a need for the Commission to initiate amendments, which it does not always do if it favours the ECJ interpretation. Exceptionally, the ECJ could be given the right to decide by simple majority to discuss amendments in order to clarify texts and to ensure that the interpretation is what was intended. This would be subject to normal Treaty procedures. Alternatively, Article 152 could be expanded to allow the Council and Commission to make an urgent study of judgments which appear not to reflect legislative policy and to make a proposal to the Council to clarify the text so as to remedy this. If the Commission did not make a proposal within a specified time, the Council could decide by a simple majority to discuss adoption of the amendment, using normal legislative procedures.

7. need for clarification of subsidiarity principle in interpreting EC law

The Government believes that the ECJ should interpret EC law in accordance with subsidiarity and should adopt the least intrusive instrument where there are gaps or ambiguities. This would need a Protocol annexed to the Treaty confirming the assumption of conserving the freedom of the member states as far as possible.

B. Memorandum on Common Fisheries Policy - quota hopping[94]

This proposal is believed to have arisen from the *Factortame* case in which Spanish fishermen fishing in UK waters under the British flag were forced by UK law to tie up their boats

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[94] EC/IGC/CONF/3884/96, 25 July 1996.

because new legislation in this country, which was later found to be in breach of EC internal market laws, prohibited them from this practice. The final outcome may cost the Government a considerable amount in compensation to the Spanish fishermen whose livelihood was curtailed or interrupted. British fisheries have also suffered and many have closed as a result of the total allowable catch quotas including catches by non-UK nationals, and there has been pressure on the Government to act to prevent the loss of Britain's fishing industry.

The Government's memorandum regrets that the principles of the Common Fisheries Policy (CFP), namely fish conservation and real economic links between fishing vessels and the flag state, have not been upheld by the ECJ. This problem has been most acute in the UK but also occurs in Belgium, France, Germany and Ireland. In the Government's view, the Commission has so far failed to resolve the problem within the existing Treaty and Treaty amendments are therefore needed. The Government proposes a Protocol to give full meaning to the CFP commitments of 1982 by ensuring a real economic link with populations dependent on fisheries and related industries in the flag state. This would mean conditions relating to: legal and beneficial ownership, crewing, port of departure and place of landing. A text is proposed in the annex to the Memorandum.

C. Memorandum on transparency and quality of legislation[95]

The Government believes firstly that there is too much EC legislation and also that it is over-regulatory and unclear. It also often imposes significant costs where the revision of domestic law is needed. The principle of subsidiarity needs to be entrenched in the Treaty through a protocol incorporating key elements of the Edinburgh guidelines on subsidiarity. The amendment of Article 190 is needed to require the Commission to specify the objective of proposals. Better consultation of the affected parties is needed before a measure is finalised. A minimum period of time is needed for national parliaments to scrutinise texts (eg 4 weeks) before a Council decision is made (except for urgent decisions). Papers by experts on Commission proposals should be made available to the public, with fiches d'impact attached (showing costs and benefits).

Adequate democratic oversight is needed for the Council or Commission legislation. For this Article 145 should be amended to allow changes to legislation governing the current system of comitology.[96] The Council should be able to amend by QMV a Commission proposal for particular legislative item. A standard set of rules is needed for all comitology committees.

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95 EC/IGC/CONF/3885/96, 25 July 1996.

96 The system under which some, mainly technical, legislation is delegated by the Council to be settled by Commission Committees.

The Government identified the need for an opportunity to ask the ECJ for an opinion on the proposed legal base of a draft before the Council adopts the measure (not just after adoption, as under the present Article 173).

The Government also supported the idea that legislative proposals not adopted within a certain time limit should be dropped from the legislative programme.

Review clauses should be inserted into new legislation to allow for change or repeal if they become obsolete.

On the drafting of legislation, the Government thinks that more use of existing guidelines on the quality of drafting is needed; that the simplest form of legislative instrument should be used with more use made of framework directives.

Annex C of the Memorandum makes proposals for the monitoring of implementation and enforcement of EC legislation.

D. Memorandum on competition rules for agriculture (Article 42 of TEU)[97]

Article 42 provides that those Articles dealing with competition (85-94) apply to agricultural products only to the extent specified by the Council under Article 43. Provisions relating to state aid in Articles 92-94 have been applied to most agricultural products but where no common organisation of markets has been adopted, there is only a requirement to notify new aid to the Commission. There is thus currently an unintended anomaly that no attention is paid to potential distortions of competition in the single market. In the Government's proposal the first sentence of Article 42 should be amended to refer only to the rules on undertakings (Articles 85-90) and the second sentence amended to apply Articles 92-94 to the production of and trade in all agricultural products. The amendments would be subject to certain exceptions or derogations determined by the Council.

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[97] EC/IGC/CONF/3885/96, 25 July 1996.

E. Memorandum on animal welfare[98]

This is a proposal for a draft protocol to be added to the Treaty to pay full regard to animal welfare when drafting and implementing the Common Agricultural Policy (CAP), transport, internal market and research legislation.

F. Proposal for a Protocol on the Application of the Principle of Subsidiarity[99]

This protocol proposes Articles on the application of Article 3b, the Article on the subsidiarity principle added to the Treaty by the TEU.

The Government believes that proposals are still being made in some areas where Community action is unnecessary and where a disproportionate burden is imposed on business. It suggests entrenchment of subsidiarity and proportionality principles in a protocol to the Treaty in accordance with guidelines established at the Edinburgh European Council in December 1992. This would aim to improve EC legislation by ensuring that the Community legislated only when necessary and that all legislation is proportionate to its objectives. It would demonstrate the importance the Community attaches to subsidiarity (which the Government believes the current Article 3b does not) and it would strengthen judicial review. In setting out specific procedures and requiring the institutions to justify their action, the protocol would make subsidiarity justiciable before the ECJ. The draft protocol proposed by the Government draws attention to Article 3b and defines precisely how it should be applied.

G. Trans-European Networks (Amendment to Article 129c)

This concerns Article 129c which was introduced by the Treaty on European Union and sets out when and how the Community might contribute to funding for Trans-European Networks (TENs). The Government believes that the scope for such projects is hindered by the reference to projects financed by member states and proposes amending the Article to remove this reference. This would allow the Community to support projects on their merits, including those with private sector funding. It would also support the importance of private/public partnerships (PPPs) emphasised by the Essen European Council of December 1994.

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98 EC/IGC/CONF/3887/96, 25 July 1996.

99 28 August 1996.

H. Amendment to Articles 100A(2) and 130S(2)[100]

Article 100A(1) provides for approximating measures to be adopted by QMV for the achievement of the internal market while Article 100A(2) requires unanimity for fiscal provisions and those concerning the free movement of persons and the rights and interests of employees. Article 130S(1) also provides for QMV to achieve environmental objectives while Article 130S(2) requires unanimity for decisions of a fiscal nature and certain other specified measures. The Government questions the use of the words "provisions" and "measures" in the two Articles and suggests that the intention of the Treaty drafters was that QMV should not apply to measures containing provisions relating to taxation, the tights and interests of employed persons or the free movement of persons. The Government suggests amendments to substitute unanimity for QMV in both cases.

I. Memorandum on Third Pillar Objectives and Scope of Application[101]

The third pillar on Co-operation in Justice and Home Affairs is currently contained in Article K of Title VI of the Treaty. This pillar is outside the main Community pillar and decisions made under it do not, with certain exceptions, involve the Union institutions or decision-making procedures. Decisions are taken intergovernmentally on the basis of unanimous agreement among the member states.

The Government proposes replacing the present Article K by two new Articles (K and Ka) and to expand on K.1 by adding new areas of common interest. The British proposal amends a previous Presidency submission on the "maintenance and development of an area of freedom, security and justice". It introduces three new concepts:

- limiting EU co-operation in this area to serious threats or action which would bring substantial benefit to EU citizens. Such action would require cross-border co-operation and exclude purely national action.

- a subsidiarity consideration must be taken into account, to be linked to a proportionality test: can the action be justified on grounds of cost-effectiveness and practicability?

- close co-operation with third countries is required, giving special priority to those with association status with the EU and the Council of Europe.

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[100] EC/IGC/CONF/3913/96, 23 September 1996.
[101] EC/IGC/CONF/3918/96; DEP/3 3763, September 1996.

The matters of common interest in Article K.1 would if possible exclude the reference to "family reunion and access to employment" in the immigration and asylum clause, but it would retain other matters such as combating drug addiction, international fraud, judicial co-operation in civil and criminal matters and customs co-operation. It would make clear that Europol was only one aspect of police co-operation and would provide for co-operation not only between police and customs but "other competent authorities" (financial regulators for example). It also endorses the Italian presidency proposal of adding "combating corruption on an international scale" to the list of common interests and that there is scope for useful co-operation in combating racism and xenophobia under the third pillar, although it believes that the latter is best tackled at national level "in the light of domestic circumstances".

Civil protection is another area in which the Government believes there is scope for co-operation but at an intergovernmental rather than Community level and proposes deleting the reference to civil protection from the Article 3(t) of the Treaty.

J. Proposal for Amendment of Articles 54,57 and 118A, and for a Protocol concerning Directive 93/104/EC (Working Time)[102]

This proposal arises from the ECJ ruling on 12 November 1996 on the Working Time Directive in which the ECJ dismissed the British application for annulment on the grounds of defective Treaty base.

The Government recalls that under the original Treaty chapter on social provisions Directives on many employment related matters, including the protection of workers, were made under Articles 100 or 235, requiring unanimity in the Council. Article 118a was introduced by the Single European Act for Directives harmonising conditions in the area of health and safety of workers, to be adopted by QMV. The Maastricht Treaty provided for social provisions (in the so-called Social Chapter) to be adopted by 14 member states excluding Britain by QMV (in the Protocol on Social Policy) and the Government believes that the Working Time Directive should have been adopted under this Protocol.

The Government does not accept that 118a is a valid legal base for measures concerning health and safety and wants to amend this Article to make future measures adopted under it subject to unanimity. This would "ensure that Article 118a itself can no longer be used for purposes that the UK regards as inappropriate in the light of the Maastricht agreement".

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[102] EC CONF/3978/96 (Annex), November 1996.

The Government also proposes adopting a Protocol deeming the Working Time Directive to be adopted under the Agreement on Social Policy and therefore not applicable in the UK.

The Government also proposes that Article 54, which allows measures on freedom of establishment in the EU to be adopted by QMV, should not be used for Directives on employee information, consultation and participation, which it believes are social policy issues to be adopted under the Social Chapter. Again, the Government proposes that this Article be subject to unanimity where provisions relate to the rights and interests of employed persons.

The Government also considers that Article 57 on the rights of establishment for the self-employed is an inappropriate Treaty base for Directives concerning working conditions, in this case specifically the Directive on the posting of workers. This too should have been adopted under the Social Chapter.

The Government has pledged to make the amendment of Article 118a an issue at the IGC. Following the ECJ ruling in November the President of the Board of Trade, Ian Lang, said:

> We shall insist that the Intergovernmental Conference addresses issues which this ECJ verdict raises. That means arguing both for measures to prevent any other "social engineering" directives being forced on the UK by similar manoeuvres, and requiring that the Working Time Directive in particular should no longer affect the United Kingdom.[103]

The Prime Minister said:

> I shall not accept what has been determined by the Court today and, at the end of the intergovernmental conference, I shall demand that change or there will be no end to the intergovernmental conference.[104]

VM/RJW/TD/JML

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[103] DTI press release, 12 November 1996.
[104] HC Deb, 12 November 1996, c.152.

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