RESEARCH PAPER 07/86
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The *Treaty of Lisbon*: amendments to the *Treaty establishing the European Community*

The *Lisbon Treaty* amending the present EC and EU Treaties was concluded under the Portuguese European Union Presidency on 19 October 2007 by EU Member State governments meeting as an informal European Council. This reform came about as a result of the perceived need for institutional amendments to cope with successive EU enlargements. It aimed to resolve the constitutional reform process that had been stalled since France and the Netherlands voted against the *Treaty Establishing a Constitution for Europe* in 2005.

The Treaty of Lisbon, initially known as the Reform Treaty, amends the *Treaty on European Union* (TEU) and the *Treaty Establishing the European Community* (TEC). The former retains its title, while the latter becomes the *Treaty on the Functioning of the European Union* (TFEU). The TFEU contains Articles on institutional procedures and the policies in which the Union will have a role, including present Third Pillar areas in which the EC currently has little involvement.

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Summary of main points

An Intergovernmental Conference (IGC) opened under the Portuguese EU Presidency in July 2007 to negotiate amendments to the *Treaty on European Union* (TEU) and the *Treaty Establishing the European Community* (TEC, or *Treaty of Rome*). The IGC based its discussions on a mandate drawn up by the preceding German Presidency and agreed by the European Council in Berlin in June 2007.

A set of texts was published on the *Europa* website on 23 July and 5 October 2007. The IGC concluded the text at the informal European Council in Lisbon on 18 October 2007, which was then corrected by EU jurist-linguists. The final *Treaty of Lisbon* text will be signed at the European Council on 13 December 2007.

A few days before the Lisbon summit outstanding issues included the British Justice and Home Affairs (JHA) opt-out, Polish demands for a voting compromise, Italian views on the number of seats in the European Parliament, Austrian concerns about an influx of foreign students and Bulgarian complaints about the spelling of the word 'euro'.

Under the Lisbon Treaty most of the text of the *Treaty Establishing a Constitution for Europe* concluded in 2004 (referred to here as the Constitution) will be incorporated as amendments to the existing Treaties, the *Treaty on European Union* (TEU) and the *Treaty Establishing the European Community* (TEC), with certain modifications, protocols, annexes and declarations to take account of the specific concerns of individual Member States. These concerns centred in particular on the competences of the EU and the Member States and their delimitation, the specific nature of the Common Foreign and Security Policy (CFSP), the enhanced role of national parliaments in EU decision-making processes, the treatment of the EU Charter of Rights and the mechanism in police and judicial cooperation in criminal matters to allow a group of Member States to proceed in some areas, while others do not participate.

The final text of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* is contained in CIG 14/07, 3 December 2007 which is available at http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf. The Final Act, with Declarations, is in CIG 15/07, at http://www.consilium.europa.eu/uedocs/cmsUpload/cg00015.en07.pdf.

The main features of the Lisbon Treaty are outlined below. This paper considers only those which are amendments to the TEC. Amendments to the TEU are considered in Research paper 07/80, *The EU Reform Treaty: amendments to the Treaty on European Union*, 22 November 2007,[1] although the numbering of Articles in the TEU has been amended since this paper was published.

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1 Available at http://hcl1.hclibrary.parliament.uk/rp2007/rp07-080.pdf

- **Name and status**: In the renamed TEC, the *Treaty on the Functioning of the European Union* (TFEU), all references to the European Community are removed, reflecting the collapse of the 'pillar structure' established in 1992.
- **Functions of the EU**: the Treaty will be amended to include the provisions of the 2004 Constitution on:
  - areas of competence
  - the scope of qualified majority voting, mainly through the Ordinary Legislative Procedure (OLP – codecision): the Constitution moved 15 Articles from unanimous voting to QMV and introduced 24 new Articles with QMV.
  - the scope of co-decision with the European Parliament
  - distinctions between legislative and non-legislative acts
  - a 'solidarity clause'
  - improvements to the governance of the eurozone
  - specific provisions on individual policies
  - provisions on own resources, the multi-annual financial framework of the EU and the EU's budgetary procedure
  - provisions on JHA matters: changes to the voting system and a right of veto.

- **Amendments to the 2004 Constitution**: a number of modifications of the text of the Constitution are made by insertions into the 'Functions Treaty', including:
  - specific language on the definition of Member State and EU competences
  - amendment of the Treaty base on diplomatic and consular protection to provide for coordination and cooperation measures
  - provision to halt measures on the portability of social security benefits if the European Council fails to act within four months
  - a Protocol with interpretative provisions "on services of general economic interest" (i.e. state-provided social services)
  - specific language to enable some Member States to proceed with measures on police and judicial cooperation while others do not participate
  - an extension of the UK's 1997 opt-out on Justice and Home Affairs (JHA) issues to judicial cooperation in criminal matters and police cooperation
  - a role for national parliaments in applying a *passerelle* clause on judicial cooperation in civil matters relating to family law
  - a specific reference to energy supply solidarity between Member States
  - a restriction on European space policy
  - specific authorisation to the EU to take action to combat climate change at international level
  - retention of Article 308 TEC (the 'catch-all' clause), but with a provision stipulating that it may not apply to the CFSP.

- **Charter of Fundamental Rights**: this will have "legally binding value", though it will not be reproduced in the Treaties.
- **National Parliaments**: a new article will set out the role of national parliaments in the EU, including a 'yellow card' subsidiarity check for national parliaments.
- **Institutional changes**
  - From 2014, there will no longer be a Commissioner to represent every Member State, but two-thirds the number of States

- The European Council will be established as an EU Institution, with a permanent Presidency not connected to the rotation of Member State presidencies of the Council of Ministers
- The Council will move towards 18-month "team Presidencies"
- The voting system in the Council as agreed by the Treaty of Nice continues to apply until 1 November 2014, whereupon the double majority voting system in the Constitution will apply (a qualified majority will require 55% of votes in the Council representing 65% or more of the EU's population). In addition, between 1 November 2014 and 31 March 2017, any Member State can request a return to the Nice voting rules; between 1 November 2014 and 31 March 2017, if Member States, representing 75% of the Council votes or 75% of the population needed to constitute a blocking minority in the Council, signify their opposition to a proposal, a final vote on the proposal may be deferred in an attempt to seek agreement; from 1 April 2017 this final vote can be deferred if 55% of a blocking minority (either in votes or in population) signifies its opposition.

- **EU Foreign Policy**: the title of 'Union Minister for Foreign Affairs' (i.e. the person discharging the functions of the present External Relations Commissioner and CFSP High Representative) will be changed to 'High Representative of the Union for Foreign Affairs and Security Policy'.
- **External actions and CFSP**: Constitution provisions on the European External Action Service and structured cooperation in defence policy are retained, but a Declaration will underline the existing responsibilities of Member States for the formulation and conduct of foreign policy and representation in international organisations. CFSP will remain intergovernmental in nature with decisions taken by unanimity.
- **Enhanced co-operation**: enhanced co-operation actions can be launched with a minimum of nine Member States.
- **Legal personality**: the EU will have legal personality, though a Declaration will confirm that it cannot act beyond the competences conferred by Member States.
- **Voluntary withdrawal from the Union**: the Constitution article on voluntary withdrawal from the EU remains.
- **Treaty revision**: Constitution provisions for revising the Treaties without recourse to an IGC will be recast in one article, which will now also clarify that Treaty revision can reduce the competences conferred on the EU as well as increase them.
- **EU Accession:** Conditions for accession to the EU will be amended by the addition of text recalling the "conditions of eligibility agreed upon by the European Council" (i.e. the so-called Copenhagen Criteria).

The amendments agreed at Lisbon will be signed on 13 December 2007 and submitted to Member States for ratification in accordance with each State's constitutional requirements, with the aim of coming into force before the European Parliament elections in June 2009.

The following acronyms are used:

EU	European Union
EC	European Community
TEU	Treaty on European Union

TEC	Treaty Establishing the European Community
IGC	Intergovernmental Conference
RT	Reform Treaty
OLP	Ordinary Legislative Procedure (co-decision)
EP	European Parliament
ECJ	European Court of Justice
JHA	Justice and Home Affairs
CFSP	Common Foreign and Security Policy
ESDP	European Security and Defence Policy
ECB	European Central Bank
ESC	European Scrutiny Committee
FAC	Foreign Affairs Committee

New and amended Treaty Articles are shown in **bold**, while corresponding Articles from the 2004 *Treaty Establishing a Constitution for Europe* are given in brackets.

CONTENTS

I Treaty on the Functioning of the European Union

The "Lisbon Treaty", referred to in earlier drafts as the "Reform Treaty", comprises amendments to the *Treaty on European Union* and the *Treaty Establishing the European Community* (TEC), which is renamed the *Treaty on the Functioning of the European Union* (TFEU). This paper considers the TFEU, while Research Paper 07/80 looks at the amended TEU.[2]

The TFEU generally follows the structure of the present TEC, but changes the order of certain Articles and titles, and adds the 'Third Pillar' Articles (present Title VI, "Provisions on Police and Judicial Cooperation in Criminal Matters") to the main body of the Treaty.

A. Union Competence

1. Defining competences

'Competence' is the term used to define whether the Union or the Member States has the responsibility under the EC Treaties to make decisions on a particular policy. Competence at regional or local level is not specified in the Lisbon Treaty. In defining whether the EC or the Member States have competence in any particular area or for a specific task, the terms "spheres of competence", "shared competence", "Community competence" and "exclusive competence" are terms used in the present Treaties, but these do not list areas of exclusive or shared competence. The following EU explanation of competences, or powers, reflects the current situation:

> There are three types of powers, which depend on how they are conferred:
>
> **Explicit powers**: these are clearly defined in the relevant articles of the Treaties.
>
> **Implicit powers**: according to the implicit powers theory, competence in external matters derives from explicit internal competence. Where the Treaties assign explicit powers to the Community in a particular area (e.g. transport), it must also have similar powers to conclude agreements with non-Community countries in the same field (the principle of parallelism between internal and external powers).
>
> **Subsidiary powers**: where the Community has no explicit or implicit powers to achieve a Treaty objective concerning the common market, Article 308 of the Treaty establishing the European Community allows the Council, acting unanimously, to take the measures it considers necessary.[3]

In the 2003-04 constitutional discussions, which initially included the EU institutions, Member State governments and parliaments, NGOs and a range of representatives from civil society, some participants wanted comprehensive lists setting out divisions of competence, while others preferred a more flexible approach without lists. The Lisbon Treaty, like the Constitution in 2004, contains a compromise: there are lists, but they are

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2 Research Paper 07/80 uses the Article numbering in the Treaty texts available on 5 October 2007, which was subsequently amended.

3 http://europa.eu/scadplus/glossary/community_powers_en.htm

short and do not cover every aspect of Union activity, thereby leaving scope for interpretation. They define 'exclusive' and 'shared' competences, and areas in which the Union can provide supporting or complementary action.

In its 2004 White Paper on the draft Constitution the British Government had generally welcomed the division of competences, but had been cautious about further conferral of powers on the Union.[4] The present White Paper of July 2007 also supported the reforms in this respect, and particularly welcomed the Declaration stating that competences can be reduced, as well as increased:

> The Reform Treaty will set out a more transparent and accountable structure for the EU. It includes a definition of the Union's competences, which sets out where the EU can and cannot act. It also makes clear that Treaties can be revised to increase or reduce the competences conferred upon the EU. Therefore, the Member States would have the ability to transfer competences from the EU if they agree to do so.[5]

The amended TFEU opens with a statement on its purpose, which is, according to amended **Article 1 (Lisbon Article 1a)**, to organise the functioning of the Union and determine the areas, the scope of, and arrangements for exercising its competences. This Article makes clear the difference between the TFEU and the TEU, which contains intergovernmental procedures for the CFSP, treaty revision, ratification and other matters largely not subject to Union decision-making processes. There was no such Article in the Constitution. Amended **Article 2** spells out that the TFEU and the TEU are the founding Treaties of the Union and have the same legal value. The present TEU and TEC are also both legally valid, although subject to different decision-making processes.

The *Categories and Areas of Union Competence* are set out in Title 1, **Lisbon Articles 2A–E** (Constitution Articles I-12 to I-15 and I-17). Constitution Article I-16, on the Union's competence in the Common Foreign and Security Policy (CFSP), the progressive framing of a common defence policy and the requirement for loyalty and mutual solidarity, remains intergovernmental and is transferred to Article 11(3) of the TEU.[6]

Article 2A defines "Union exclusive competence" as allowing only the Union to legislate and adopt legally binding acts, "the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts". This Article reiterates in subparagraph 2 that in areas of shared competence,

> The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

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

5 Cm 7174, July 2007, White Paper "The Reform Treaty: The British Approach to the European Union Intergovernmental Conference", at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

6 See Research Paper 07/80, *The EU Reform Treaty amendments to the Treaty on European Union* 22 November 2007

In other words, the Member States may claim back competences, but only when the EU has relinquished them. It is not clear how the Union will relinquish competences.

A Declaration annexed to the TFEU reinforces the principle that "competences not conferred upon the Union in the Treaties remain with the Member States" and clarifies the notion that competences can be repatriated to Member States:

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence. The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality. The Council may, at the initiative of one or several of its members (representatives of Member States) and in accordance with Article 208 of the Treaty on the Functioning of the European Union, request the Commission to submit proposals for repealing a legislative act. The Conference welcomes the Commission's declaration that it will devote particular attention to these requests.
> Equally, the representatives of the governments of the Member States, meeting in an Intergovernmental Conference, in accordance with the ordinary revision procedure provided for in Article 33(2) to (5) of the Treaty on European Union, may decide to amend the Treaties, including either to increase or to reduce the competences conferred on the Union in the said Treaties.[7]

Article 2A(4) confirms that any Union competence in defining and implementing the CFSP and the progressive framing of a common defence policy will be "in accordance with the provisions of the Treaty on European Union", i.e. they will be subject to the intergovernmental procedures in that Treaty.

2. Exclusive competence

Article 2B (Article I-13 of the Constitution) states that areas of Union exclusive competence will be:

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

The principle of Community exclusive competence is contained in various Treaty articles and a number of ECJ rulings have acknowledged that a certain EC power is exclusive. The concept appeared in the TEU in 1993, which specified in Article 3b (now Article 5) that the principle of subsidiarity[8] applied in areas "which do not fall within the exclusive

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7 CIG 15/07 3 December 2007

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

competence" of the Community. However, Article 3b does not specify which areas are areas of exclusive competence and this has given rise to legal argument.

In reply to Parliamentary Questions asking for a list of areas of exclusive EU competence, the Government has said that it is "not possible to draw up an exhaustive theoretical list",[9] but has given examples, such as the Common Agricultural Policy, the Common Commercial Policy and the external tariff.[10] In 1999 Joyce Quin, as Minister for Europe, was somewhat more expansive:

> There are two topics which are solely within the competence of the European Community by virtue of the Community Treaties, and to which subsidiarity is therefore not applicable. These are: (a) the Common Commercial Policy; and (b) the Common Fisheries Policy insofar as it relates to conservation of marine resources.
>
> The Community may also acquire implied exclusive competence by enacting legislation which restricts the ability of Member States to act in a particular area as long as that legislation is in force. Examples of such areas are parts of the Single Market and the Common Agricultural Policy. However, before enacting this legislation, the Community would, since entry into force of the Maastricht Treaty, have had to take subsidiarity concerns into account.[11]

The debate on the meaning of exclusive Community competence has been lively but inconclusive, and a number of challenges to Community competence have been made at the ECJ.[12] In the 'Tobacco Advertising' case the Commission claimed that the establishment and functioning of the internal market was an exclusive EC power. Advocate General Fennelly concluded:

> … that the exercise of Community competence under Articles 57(2) and 100A of the Treaty is exclusive in character and that the principle of subsidiarity is not applicable. There can be no test of comparative efficiency between potential Member State and Community action. If there were, even more difficult questions of principle would arise. How, in particular, does one weigh the comparative benefits of Community harmonising action in pursuit of the internal market with individual Member State rules in respect of entirely different national preoccupations of a substantive character?[13]

In a Memorandum to the Lords EU Committee,[14] Sionaidh Douglas Scott of King's College, London, commented on certain constitutional problems that could be posed by the division of competences, in particular the dividing line between shared competences and coordinating or supporting competences. She thought health could be contentious.

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

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

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

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

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

14 *The Draft Constitutional Treaty for the European Union*, 9th Report, HL Paper 168, 2002-03, 15 October 2003 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldconst/168/16808.htm

While Article I-14 of the Constitution (**Article 2C(2)(k) TFEU**) referred to "common safety concerns in public health matters" as a shared competence, Article I-17 (**Article 2E(a) TFEU**) referred to "protection and improvement of human health" as a supporting competence. The two were likely to overlap, she thought, and continued:

> The difference between the two types of competences lies in the capacity of a shared competence to have a pre-emptive effect on member state action. Once the EU has exercised competence in a shared area the Member states may not act. This is likely to be contentious in areas such as health, which even if not directly constitutional, are still thought of as preserves of national sovereignty, as well as large spending areas in which different national economic, social and tax polices will make a difference. [15]

Under **Article 2B2** the Union will also have exclusive competence to conclude international agreements where such conclusion is provided for in a Union legislative act, or is necessary to enable the Union to exercise its internal competence. It was established by the ECJ in the *ERTA* case in 1971[16] that the Community has an exclusive power after it has adopted a common rule.[17] The ECJ ruled in *ERTA* that the prior use of internal competence adopting common rules was a necessary condition for the origin of the respective external power. Subsequent cases extended the powers of the Community in the conclusion of international agreements. In the *Kramer* judgment[18] it was implied that even if no common rule had been adopted at Community level, the EC may have a treaty-making power flowing implicitly from other provisions of the EC Treaty. Opinion 1/76 on the distribution of powers between the Communities and the Member States in the field of external relations confirmed that the implied treaty-making power may flow from the provisions creating internal powers. The ECJ's Opinion was that:

> Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion. This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable,[...].[t]he power to bind the Community vis-à-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community.[19]

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15 HL Paper 168, 2002-03, 15 October 2003

16 Case 22/70, [1971] ECR 263

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

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

19 Opinion 1/76 ([1977] ECR 741) 26 April 1977 at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61976V0001

ECJ rulings, particularly on trade agreements, have been helpful in clarifying the competence issue. Trade in services is an area of so-called 'mixed competence', which means that Member States take part in individual bilateral negotiations with other World Trade Organisation (WTO) Members, but the Commission acts as lead negotiator and speaks on behalf of Member States in the WTO. Common positions are agreed unanimously with all EU Member States with respect to trade in services. In contrast, for negotiations concerning the trade in goods, the Commission has had 'exclusive competence'. This means that it has the power to negotiate agreements with international organisations on behalf of the Member States under Articles 133 and 300 TEC.

There has been some pressure to extend the Community's competence to include other areas, notably the trade in services. The role of the Community in negotiating the Uruguay Round GATT Agreement was the subject of an Opinion of the ECJ in 1994. The Court rejected the Commission's contention that the Community had exclusive external competence in all matters covered by the GATT Agreement, including services, transport and intellectual property. It concluded that the exclusive competence of the Community, in which ratification by the Member States is not required, was limited to the area of trade in goods. This was a landmark ruling by the ECJ. It settled various long-standing disputes between the Commission and the Council of Ministers and became a main point of reference for subsequent questions about Community competence. It was, however, disappointing for the Commission, which had for many years asserted exclusive external competence on the basis of its broad interpretation of Article 113 TEC and the scope of the Common Commercial Policy.[20]

The 1994 Opinion confirmed that, where external competence is not expressly provided for in the Treaty (as in Article 113 TEC), the existence and extent of "implied external competence" would be determined in accordance with the well-established principles of earlier ECJ case law. The Opinion stated that:

> whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect".[21]

To summarise, once the Community has adopted common internal rules, Member States may no longer undertake international obligations which affect or contradict these rules. To this extent, the Community then acquires exclusive competence. In the areas in which the ECJ has said the Community does not have exclusive competence, exclusive external competence has been acquired incrementally with the adoption of common internal Community rules.

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

[21] Opinion 1/76, Paragraph 26

There are specific Treaty provisions which authorise the Community to engage in international co-operation in areas where the policy is already an area of internal EC competence. These provisions were introduced by the Single European Act (1987) in environmental policy and by the Maastricht Treaty (1993) for monetary policy, education and vocational training, culture and health. Proposals to the Nice Intergovernmental Conference (IGC) in 2000 on the Common Commercial Policy (CCP) included specific discussion of the EU's position at WTO negotiations. Article 133 was amended to include the negotiation by the Commission and the conclusion by the Council, acting by QMV, of external agreements relating to the trade in services and the commercial aspects of intellectual property. Unanimity would apply where internal Community rules were decided by unanimity or for areas in which the Community had not yet adopted internal rules. At French insistence, agreements relating to trade in cultural and audiovisual services, educational services and social and human health services would require unanimous agreement and would continue to be matters of mixed competence, in which agreements would be concluded jointly by the Community and the Member States. Under **Article 188C** (Constitution Article III-315(4)(a)), agreements in these areas will be decided by QMV, but by unanimity "in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity".

3. Shared competence

Article 2C is on 'shared competence', where the Union and the Member States are both able to act. The EC's present legislative powers are largely 'non-exclusive', although again, this is not explicit in the present Treaties. The EC and the Member States currently share competence in a large number of areas, including the CCP, and the list of shared competences in the Lisbon Treaty confirms this. The term 'shared competence' is often used to describe areas of law-making where the exercise of EC competence does not exclude the exercise of legislative powers by Member States, as long as they respect the primacy of EC law and do not enact laws which conflict with existing EC law and principles. The idea that Member States' competence should be restricted once the Union has acted is well established in ECJ case law (see above). In Lisbon, as in the Constitution, where the Union is given a competence which is not exclusive, it is shared. The main areas of shared competence are listed in **Article 2C(2)** as follows:

> (a) internal market;
> (b) social policy, for the aspects defined in this Treaty;
> (c) economic, social and territorial cohesion;
> (d) agriculture and fisheries, excluding the conservation of marine biological resources;
> (e) environment;
> (f) consumer protection;
> (g) transport;
> (h) trans-European networks;
> (i) energy;
> (j) area of freedom, security and justice;
> (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

In these areas Member States will have competence to adopt legislation to the extent that the Union has not exercised its competence. This has been interpreted by critics to mean, in effect, a back door to EU exclusive competence, giving the Union a right of first

refusal with regard to competence, while Member States would only be able to do what the Union decided not to do.

In 2004 the Foreign Secretary was optimistic in his interpretation of the shared competence Article. For Jack Straw the words "The Member States shall exercise their competence to the extent that the Union has not exercised, or has ceased exercising, its competence" was an "explicit provision … for competences shared between the European Union and the nation states … to be transferred back to full national control when European Union members decide that they no longer wish to exercise them in common".[22]

A Protocol on the Exercise of Shared Competence states that "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the act of the Union in question and therefore does not cover the whole area".[23] Further clarification is provided by a "Declaration in relation to the delimitation of competences", which confirms that "competences not conferred upon the Union in the Treaties remain with the Member States",[24] and continues:

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.

Article 2D together with **Article 2A(3)** (Constitution I-15 and I-12(3) respectively) concern the coordination of Member States' economic policy. Present Article 99 TEC states: "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council". The Foreign Secretary told the Standing Committee on the IGC in November 2003 that "it is in every member state's interest to be able to co-operate as far as it judges best with the economic policies of every other member state".[25] The Government insisted it would not agree to any changes that would "harm the UK's economic interest" and would "preserve the ability of member states to conduct their own economic policy, within rules agreed by member states in the Council".[26] The emphasis in both Articles is on the Member States, rather than the Union, taking the initiative in the coordination.

4. Supporting, coordinating or complementary action

Article 2E (Constitution Article I-17) sets out a category of areas of supporting, coordinating or complementary action:

> (a) protection and improvement of human health;
> (b) industry;

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22 HC Deb 16 June 2004, c786 at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/cm040616/debtext/40616-22.htm

23 CIG 14/07 3 December 2007

24 CIG 15/07 3 December 2007

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

26 HC Deb 9 July 2003 c871-2W

(c) culture;
(d) tourism;
(e) education, youth, sport and vocational training;
(f) civil protection;
(g) administrative cooperation.

Action in these areas must not supersede the competence of Member States to act and must not entail the harmonisation of national laws.

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

B. Provisions having general application

Title II (Constitution Articles III-115-122 and I-52), contains general provisions on aspects to be taken into account in the formation and implementation of all Union policies and action. **Article 2F** (Constitution Article III-115) is new. It calls for consistency between policies and for the Union's objectives to be taken into account, but puts special emphasis on the principle of the conferral of powers by the Member States on the Union in its efforts to ensure this consistency. **Article 2F** inserts a new **Article 5a TFEU** (Constitution Article III-117), which requires that policies take into account the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. Amended **Article 5b** (Constitution Article III-118) is about combating discrimination on a wide range of grounds. The present Article 13 TEC allows the EU to take action to combat discrimination, whereas Lisbon, like the Constitution, makes an anti-discrimination element integral to the defining and implementing of all Union measures.

Amended **Article 6** (Constitution Article III-119) and new **Article 6a** (Constitution Article III-120), like Articles 6 and 153(2) TEC respectively, require environmental protection and consumer protection to be integral to the law-making process.

Article 6b (Constitution Article III-121) is new and includes respect for animal welfare, while also respecting Member States' religious rites and cultural traditions. It incorporates the contents of Protocol 10 to the Amsterdam Treaty, requiring Member States to "pay full regard to the welfare requirements of animals, as sentient beings, while respecting the legislative or administrative provisions and customs of Member States relating in particular to religious rites, cultural traditions and regional heritage." The wording suggests that it could not be used to ban the religious slaughter of animals without pre-stunning or Spanish bullfighting, for example. This Article requires that full regard to animal welfare be taken into account in devising policies.

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

> – the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
> – the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
> – a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.[27]

A higher profile for services of general interest was one of the Dutch Government's 'red lines' at the IGC. The *European Voice* reported in July 2007:

> During the 36-hour-long summit on 21-23 June, the Dutch delegation negotiated directly with the Commission to find appropriate language on services of general interest. The French and Belgian delegations wanted to go further towards giving public service providers an exemption from competition and state aid rules but the Commission opposed this.
> The protocol does not change the substance of EU law. In particular, it does not state that services of general interest should enjoy any exemption from internal market or competition rules. Like many of the other 'changes' negotiated at the summit the protocol is there to give visibility to the issue. The protocol can also be used by governments, for domestic political consumption, to show that they put up a fight for an important principle.[28]

The new provisions were welcomed by trade union representatives. *Euractiv* reports:

> Trade-union confederation ETUC and public employers' organisation CEEP Secretaries-General John Monks and Rainer Plassmann jointly declared: "High performance services of general interest are a key factor for sustainable growth in Europe, for a more competitive European economy, for more and better employment, for greater social and territorial cohesion in an enlarged Europe, for addressing the demographic challenges and for improving the quality of the environment. This means in short: Legal clarity for public service providers and users, thereby contributing to sustainable economic, social and environmental development in Europe." Monks added: "Public services are a pillar of the

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[27] CIG 14/07 3 December 2007

[28] *European Voice* Vol 13 No. 27 12 July 2007 "Services of General Interest: Saving the face of social Europe" Simon Taylor at http://www.europeanvoice.com/archive/article.asp?id=28498

> European Social Model. We launched our petition for high quality public services accessible to all to push the Commission in the right direction."[29]

It is not clear which public services are economic and what is non-economic and therefore whether competition rules will apply.

A new **Article 16A** (Constitution Articles I-50 and III-399) on institutional transparency and access to documents corresponds with present Article 255 TEC. Article 255 TEC currently specifies EP, Council and Commission documents and Article 255(3) TEC requires that each of these institutions "elaborate in its own Rules of Procedure specific provisions regarding access to its documents". Under present Article 207(3) TEC the Council is authorised to elaborate the conditions for public access to Council documents, defining when it is acting in its legislative capacity and providing for the publication of votes, explanations of votes and statements in the minutes.

Under **Article 16A(2)** the EP is required to meet in public (as at present), as is the Council "when considering and voting on a draft legislative act". Council secrecy has long been a contentious subject. National parliaments and the public have pressed for more Council transparency, including access to meetings and documents, in order to hold governments to account over the adoption of legislation. The Seville European Council in June 2002 decided to open up Council legislative meetings to the public, but this was only for parts of the co-decision process. The British Government has supported Council openness, telling the European Scrutiny Committee (ESC) in October 2003 that it continued "to press for Council meetings to be held in public for all legislative proceedings" (i.e. not just in the co-decision procedure).[30] During the UK EU Presidency in the second half of 2005, the Prime Minister had proposed a transparency programme. However, the Government later opposed a plan to televise ministerial negotiations, and in June 2006 the then Foreign Secretary, Margaret Beckett, was reported as saying that this "threatened to result in important bargaining taking place in corridors and by phone, rather than in meetings in front of cameras".[31] The British Government finally accepted a compromise under which the system of televising would be reviewed after six months.

Article 16A also requires that each institution must "ensure that its proceedings are transparent", and the ECJ, the ECB and the European Investment Bank are subject to these provisions when they are exercising administrative tasks. Lisbon, like the Constitution, also provides for conditions to be set on public access, which might be limited on grounds of public or private interest.

New **Article 16B** (Constitution Article I-51) guarantees the right to the protection of personal data and provides for rules to be decided according to the Ordinary Legislative Procedure (OLP, the present co-decision procedure) on "the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the

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29 *Euractiv* 16 July 2007 "Public services 'safeguarded' in draft EU Treaty" at http://www.euractiv.com/en/socialeurope/public-services-safeguarded-draft-eu-treaty/article-165402

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

31 *Irish Times* 17 June 2006

scope of Union law, and the rules relating to the free movement of such data". Compliance will be subject to the control of independent authorities.

Article 16C (Constitution Article I-52) is a compromise solution to the "Christianity issue". It states that the Union will "respect" and "not prejudice" the status of churches and religious associations or communities, but that it equally respects the status of "philosophical and non-confessional organisations". It recognises their "identity and specific contribution" and will maintain "an open, transparent and regular dialogue" with them. It was adapted from Declaration 11 annexed to the 1997 Treaty of Amsterdam.

Its inclusion in the Constitution in 2004, and particularly the addition of paragraph 3 on the EU maintaining a dialogue with the Church, was largely a response to intensive lobbying by religious groups. In 2003 the Vatican had regretted the absence of reference to Christianity in the Preamble[32] and continued to lobby for a specific reference in the run-up to the June 2007 summit. The Commission of the Bishops' Conferences of the European Community (COMECE) welcomed the article, noting in a press release issued on 19 June 2003, that "The provision for open, transparent and regular dialogue reflects the specific contribution of churches and religious communities, distinct from secular authority, at the service of European society as a whole".[33] Others, however, feared a possible threat to the neutrality of the EU's institutions that a dialogue with religious bodies might pose, and that this Article might institutionalise a right allowing them to interfere in the decision making processes of the European Institutions in matters relating to individual rights. Particular concerns were expressed about the implications of religious influence over any EU decisions relating to abortion, voluntary euthanasia, divorce, biomedical research (embryonic, human stem cell), equality between men and women, same-sex partnerships and contraception. Opponents of the Article in the Constitution wanted a clear separation between the Church and the EU's law-making bodies. The European Humanist Federation expressed strong views on this, lobbying governments and the EU for the removal of the article. In December 2003 101 Members of the European Parliament (MEPs) signed a resolution calling for the removal of the article.[34]

The Lords EU Committee commented on the draft Constitution Article in its 22nd Report in May 2003, believing that it "may give rise to greater problems than it is intended to solve".[35]

> 27. Article 37(3) places an obligation on the Union (and thus in turn on its Member States and the Union's institutions) "to maintain a regular dialogue with these churches and organisations". The scope and extent of application of this obligation is unclear. We query whether anything more than or different to Article 34 is required. According special positions *inter alia* to "churches and religious associations or communities" and to "philosophical and non-confessional

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

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

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

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

> organisations" without defining those terms might open the door to a wide range of bodies (including sects and cults), some of which might generally be considered to be harmful, and some actually dangerous, to society.
> 28. There are also problems with the drafting of this Article. It contains apparent internal inconsistencies. For example, Article 37(1) "respects and does not prejudice the status" of churches, while Article 37(2) only "respects the status" of philosophical organisations. There is also possible inconsistency with related Articles. Again Article 37(3) refers only to "those churches and organisations" and omits any mention of the "religious associations or communities" in Article 37(1). What is intended? It is noteworthy that maintaining "a regular dialogue" suffices for Article 37(3), while Article 34(3) requires "an open, transparent and regular dialogue with representative associations and civil society". It is doubtful, however, whether anything different is intended. It may be suggested, not least by lawyers, that the omission of the adjectives "open" and "transparent" can hardly be an accident, given the close proximity of Article 34(3). The greater clarity required for Article 34(3) (see paragraph 12 above) is required also here. [36]

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

C. Non-discrimination and citizenship

Non-discrimination is a long-established principle of the EU and one of the cornerstones of the internal market. Elements of EU citizenship, such as free movement within the EU in order to exercise economic activity in any of the Member States (Articles 39, 43, 49 TEC), were established in the 1957 *Treaty of Rome*. Citizenship was formally introduced in the Maastricht Treaty in 1992 in Article 2 TEU, which states that the Union aims to "strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union". In addition to the earlier right to move and reside freely in any Member State, Maastricht introduced voting and election rights in EP and local elections, and extra consular protection. The *Treaty of Amsterdam* extended citizens' rights with a new anti-discrimination clause on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 16D (Constitution Articles I-4 and III-123) on non-discrimination and citizenship corresponds with present Article 12, providing that the Council may lay down rules to prohibit discrimination on grounds of nationality. **Article 16E** (Constitution Article III-124), like present Article 13 TEC, provides for the Council, acting unanimously, to take action to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. **Article 17** (Constitution Article I-10) on

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

citizenship of the Union retains the present wording of Article 17. There is a reminder in **Article 17(b)** that such rights are subject to the conditions and limits defined by the Treaties. In 1998 the ECJ ruled that nationals of a Member State can rely on their European citizenship for protection against discrimination by another Member State on grounds of nationality.[37] EU citizenship was strengthened because the Court found that Mrs Martinez Sala could benefit from the non-discrimination provisions of the EC Treaty because she was a citizen of the Union, even though not a worker. The ECJ has indicated on several occasions that "citizenship of the Union is destined to be the fundamental status of nationals of the Member States".[38]

The Constitution spelt out that EU citizenship was additional to, and did not replace, national citizenship. This is expressed in present Article 17 TEC and Lisbon as "Citizenship of the Union shall complement and not replace national citizenship". The Lisbon Treaty also specifies the rights and duties contained in the Constitution and the present Treaty. The ECJ established in *Micheletti v Delegación del Gobierno en Cantabria*[39] that "it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality". The Court also concluded on this occasion that dual nationality with only one nationality of a Member State was sufficient to fulfil the requirements for citizenship of the Union.

Article 18 (Constitution Article III-125), like present Article 18 TEC, allows the Union to enact the necessary legislation to ensure freedom of movement, even where the Treaty does not expressly provide for it, specifying measures concerning social security or social protection for which the Council must act by unanimity after consulting the EP.

Article 19 retains the wording of present Article 19 TEC rather than adopting that of Constitution Article III-126. However, the basic provision is for Union citizens to have the right to vote and to stand as a candidate at municipal elections in the Member State in which s/he resides, under the same conditions as nationals of that State. The Council will decide on the detailed arrangements "acting unanimously in accordance with a special legislative procedure".

The Council might act either by QMV or by unanimity in a "special legislative procedure". In an explanation of new terms used in the Constitution, the Commission defined "special legislative procedures" as follows:

> The special legislative procedures relate to a certain number of other legal bases and cover the equivalent of the former consultation, cooperation and assent procedures. Consequently, they apply above all in the following areas:
>
> justice and home affairs, e.g. any matters concerning the European public prosecutor's office, operational police cooperation, measures relating to

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37 Case C-85/96, *Martínez Sala v Freistaat Bayern*

38 See for example Case C-148/02 *Garcia Avello v Etat Belge* [2004] 1 CMLR 1); Case C-413/99 *Baumbast and R* [2002] ECR I-7091; Case C-184/99 *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001]

39 (C-396/90) [1992] ECR I-4239 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990J0369:EN:HTML

> passports, identity cards and residence permits, and family law measures with cross-border implications;
>
> budget (own resources, multiannual financial framework, etc.) and taxation (movement of capital to or from third countries and harmonisation of legislation on indirect taxation);
>
> specific aspects of certain policies, such as environmental measures of a fiscal nature, research and technological development programmes (however, the multiannual framework programme is adopted according to the ordinary legislative procedure), social security and social protection for workers.[40]

Article 20 (Constitution Article III-127) provides for the diplomatic and consular protection of Union citizens abroad, but omits from present Article 20 the provision that Member States "shall establish the necessary rules among themselves". It also adds that the Council will act in accordance with a special legislative procedure and may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

Article 21 concerns the arrangements for the citizens' initiative set out in **Article 8B TEU**. It also confirms citizens' rights to petition the EP under Article 194; to apply to the Ombudsman under Article 195; and to write to any of the Union institutions, offices or agencies in one of the Union languages and receive an answer in the same language.

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

Professor Steve Peers summarises the Lisbon citizenship provisions as follows:[41]

> Under the Reform Treaty, the citizenship provisions of the TEC will be enlarged to cover non-discrimination on various grounds. In fact, these 'new' provisions have merely been moved into the citizenship Part of the Treaty from Part One of the Treaty. Conversely, in accordance with the mandate for the Reform Treaty negotiations, part of one clause would be moved out of Part Two: the new 'legal base' to adopt legislation on passports, ID cards and the like would be moved to the JHA provisions of the Treaty. The only genuinely 'new' clause in Part Two relates to the 'citizens' initiative', a form of mass petition to request the Commission to propose an EU legal act.
>
> It should be kept in mind that like some of the existing citizenship rights, most of the additions to Part Two will not be restricted in scope to EU citizens. This is clearly true of the provisions on non-discrimination on grounds of sex, race, etc., and arguably true of the clause concerning non-discrimination on grounds of nationality. In fact, this is reflected by the new title of Part Two: non-discrimination and citizenship.

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40 http://europa.eu/scadplus/constitution/procedures_en.htm#SPECIAL

41 Some of the Treaty Article numbering may be different in Professor Peers's account.

Apart from adding 'new' clauses, the Reform Treaty would make a number of substantive changes to the citizenship and non-discrimination provisions, as follows:

a) the EP has consent powers, rather than consultation powers, over non-discrimination legislation (Article 17a);

b) there is a new 'legal base' for legislation concerning social benefits in relation to the free movement of citizens (Article 18(3));

c) there is a new 'legal base' for legislation relating to protection by diplomatic and consular authorities (Article 20);

d) there is a 'legal base' for adopting legislation to implement the new TEU Article providing for the possibility of 'citizens' initiatives' (Article 21); and

e) the European Parliament has the power of consent, instead of consultation, as regards the extension of citizenship rights (Article 22).

All of the amendments which the draft Reform Treaty would make to this Part of the TEC follow the text of the Constitutional Treaty, except for:

a) a redraft of the new legal base concerning consular protection (to limit its scope);

b) the transfer of the legal base relating to citizens' initiatives to this Part of the Treaty; and

c) the transfer of the legal base relating to passports, ID cards, etc. to the JHA Title.

The second of these changes is purely cosmetic, but the others are substantive: the first change limits the EU's powers and the third change means that the UK, Ireland and Denmark have opt-outs as regards these measures.

Of course, it should be recalled that a significant proportion of the Constitutional Treaty simply repeated the text of the existing Treaties. The following analysis makes it easy to determine which provisions of the Reform/Constitutional Treaty are simply repetitive, or make merely cosmetic changes, and which make genuinely substantive amendments to the existing rules.[42]

D. Community policies and internal actions

1. Internal Market

Part three of the Lisbon Treaty, **Community Policies and Internal Actions** (Constitution Article III-130) corresponds with the present Part Three, "Community Policies". **Articles 22(a)** and **(b)** establish the basis for the internal market. The expiry date of 31 December 1992 for completion of the single market has been removed, and the voting procedure is defined as a special legislative procedure (it is QMV at present), but otherwise the provisions are similar to Articles 14-15 TEC. **Articles 23-27** (Constitution Article III-151) correspond with present Articles 23 – 31 TEC. **Articles 23-24** on the free movement of goods are almost identical to Articles 23-24 TEC. **Articles 25-7** are similar to present Articles 25-7, except that in **Article 27(a)** (Constitution Article III-152) under a new heading, **Customs Cooperation** present Article 135 (except the reference to criminal law and justice) provides that the Council will establish measures to strengthen customs cooperation between Member States and between them and the Commission.

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[42] *Statewatch* analysis, "EU Reform Treaty Analysis no. 3.2: Revised text of Part Two of the Treaty establishing the European Community (TEC)" Professor Steve Peers, University of Essex, 23 October 2007 at http://www.statewatch.org/news/2007/oct/eu-reform-treaty-part-two-tec-3-2.pdf

2. Agriculture and fisheries

In **Title II, agriculture and fisheries, Articles 32-36** (Constitution Articles III-225 - 230) **Article 32** (Constitution Article III-225) contains one new sentence: "The internal market shall extend to agriculture, fisheries and trade in agricultural products" and also that references to the common agricultural policy, agriculture and the term 'agricultural' will include fisheries. This was already implicit in the TEC, but the explicit statement does raise one particular issue. The definition of the objectives of the EU's agricultural policy dates back to the *Treaty of Rome* and was drafted with agriculture, not fisheries, in mind. Thus, the first objective of the CAP in present Article 33 "to increase agricultural productivity by promoting technical progress… ." might be used as the legal base for a policy involving, for example, subsidising new and more efficient fishing vessels. Yet such a (hypothetical) policy would make little sense in the current context of declining fish stocks and the closure of some fishing areas. The objective in Article 33(1)(d) "to assure the availability of supplies" is likely to be interpreted as favouring conservation.

Although Lisbon, like the present Treaty, does not provide the Common Fisheries Policy (CFP) with its own objectives, the EU appears to be moving in this direction. In June 2006 the Commission published a Communication, *Towards a future maritime policy for the Union: A European Vision for the oceans and seas*.[43] This was a Green Paper to encourage debate on proposals for a new policy. The Commission adopted the Communication on 10 October 2007 and an accompanying document on 31 October, *Energy policy and maritime policy: ensuring a better fit*.[44] In its proposed Action Plan, the Commission set out a range of possible future developments, as follows:

> A European Maritime Transport Space without barriers
> A European Strategy for Marine Research
> National integrated maritime policies to be developed by Member States
> An integrated network for maritime surveillance
> A Roadmap towards maritime spatial planning by Member States
> Elimination of pirate fishing and destructive high seas bottom trawling
> Promotion of a European network of maritime clusters
> A review of EU labour law exemptions for the shipping and fishing sectors
> A European Marine Observation and Data Network
> A Strategy to mitigate the effects of Climate Change on coastal regions.[45]

On 22 October 2007 EU fisheries ministers attended a Conference on the Maritime Policy for the EU to discuss the Commission's proposals and to prepare recommendations for the December European Council. Joe Borg, the Commissioner for Fisheries and Maritime Affairs, told a press conference that there had been unanimous acceptance of the need for an integrated approach to maritime affairs in Europe. He denied that there would be no change in competences, insisting instead on a better coordination of maritime policy.

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43 11510/06 (COM(2006) 275 final) 7 June 2006,
44 14631/2007/ADD5;SEC(2007)1283
45 See EU Maritime Affairs press release 10 October 2007 at http://ec.europa.eu/maritimeaffairs/press/press_rel101007_en.html

Article 37 substantially amends present Article 37 and largely adopts the wording of Constitution Article III-231. Until the *Treaty of Nice* in 2000, the TEC had retained the paragraph from the 1957 *Treaty of Rome* calling for a conference of Member States "with a view to making a comparison of their agricultural policies". It then called for proposals for working out and implementing the CAP within two years of the entry into force of the Treaty. In other words, it was a passage whose relevance had long since passed. Amended **Article 37(3)** (Constitution Article III-231(3)) takes realistic account of the CFP for the first time:

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

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

Probably the most important matter for fisheries is **Article 2B** under which the Union is given exclusive competence for "the conservation of marine biological resources under the common fisheries policy". This would allow the Union to introduce any new policy regulating catches or banning fishing altogether in certain areas. This is not really different from the current position, but opponents of the CFP might consider that it would make the EU's conservation policy more permanent.

The inclusion of marine biological resources in the list of exclusive competence areas in the Constitution was of concern in the UK, especially in Scotland, as legislation in this area would further reduce fishing quotas in order to conserve stocks. According to the Scottish Executive, 68% of the UK's fishing catch is represented by Scotland. This makes fisheries one of the Scottish Executive's main European political objectives. According to the Scottish Executive website:

> In the short run there is urgent action to be taken concerning the Cod Recovery Plan. In the longer run radical reforms in the Common Fisheries Policy (CFP) should be pursued with the objective of returning competence over conservation of marine resources to coastal states, thereby repealing the main part of the present CFP. To these ends, securing that Scotland's fisheries minister acts as the UK lead minister in Fisheries Council is of capital importance.[46]

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[46] "Scotland's priorities in Europe" at http://www.scotland.gov.uk/News/Releases/2007/10/02083914

The question of exclusive competence in the area of fisheries and marine conservation was highlighted in a debate on the (then) Reform Treaty in the Scottish Parliament in September 2007. The Scottish Minister for Europe, Linda Fabiani, suggested that making fisheries conservation an exclusive Union competence might prevent the Scottish Executive supporting the Lisbon Treaty.

> As it is a reform treaty and not a constitution, we should welcome the clear delineation of competences. However, this Government profoundly opposes where things have got to with the common fisheries policy. The identification of conservation of marine biological resources as an exclusive competence of the EU is a measure to which we continue to object. It puts the objectionable common fisheries policy directly into the treaty base for the first time and would make it all the harder to retreat from that policy, as we wish to.[47]

Linda Fabiani also reiterated the Scottish Executive's opposition to the CFP as currently constructed:

> My party made its opposition clear when the issue was discussed during the drawing up of the previous treaty, and this Government will continue to make the case for reform of the common fisheries policy and for returning competence over the conservation of marine biological resources to coastal states. Had we been at the negotiating table directly, we could have made clear to all concerned the depth of our opposition.[48]

The Foreign Secretary David Miliband told the Commons European Scrutiny Committee in October 2007 that:

> The Treaty in itself, and I will make this clear to the Europe Minister from the Scottish Executive, does not change the role and purpose of the Common Fisheries Policy and the Treaty itself does not change the nature of the Common Fisheries Policy.[49]

3. Free movement of persons, services and capital

Title III concerns the **free movement of persons, services and capital. Articles 39 - 42** (Constitution Article III-133) correspond with present Articles 39 – 42. Article 39(3)(d) is amended to state that implementing regulations will be "adopted", rather than "drawn up" by the Commission, which indicates that these regulations will be adopted under powers delegated to the Commission under the Treaty. **Article 42** (Constitution Article III-136) is concerned with social security for migrant workers. The provisions are presently contained in Article 42 TEC and given effect by Council Regulation 1408/71 on the application of social security schemes to employed persons and their families moving

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47 Scottish Parliament Plenary Debate on the EU Reform Treaty 19 September 2007 c1854 http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0919-02.htm#Col1852

48 Ibid

49 ESC Third Report 2007-08 *European Union Intergovernmental Conference: Follow-up report* 14 November 2007 at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf

within the Community.[50] On 29 April 2004 the Council and the EP adopted a new Regulation[51] (the "Basic Regulation") which updated and simplified the rules. On 31 January 2006 the Commission put forward a proposal for a Regulation implementing the Basic Regulation, which was adopted in December 2006 and entered into force in January 2007.[52]

Under present Article 42 TEC, the Council has to act unanimously throughout the co-decision procedure when adopting the social security measures necessary to provide freedom of movement for workers and their dependants. The British Government had been opposed to the extension of QMV in this area.[53] The TFEU (and the Constitution) provides for the adoption of laws using the OLP with QMV, although there will be an 'emergency brake' mechanism which is set out in the last paragraph of **Article 42** (See below). The Government maintains that this arrangement meets its 'red line' criterion:

> It is long-standing Government policy that tax matters should continue to be decided by unanimity. The Reform Treaty proposal meets this commitment; there is no change to the status of unanimous decision-making on tax.
> The Government sought to ensure that the UK would have the final say on any matters affecting important aspects of its social security system – including cost, scope, financial balance or structure. It achieved this; the IGC Mandate includes a strengthened 'emergency brake' mechanism.[54]

Under **Article 42**, where a Member State "declares" (as opposed to the Constitution's "considers") that a draft measure would "affect fundamental aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system", QMV is suspended and the matter referred to the European Council, which may then refer the draft back to the Council or ask the Commission to submit a new proposal.[55] The TFEU also provides for the European Council to take no action following a referral to it, an option the Constitution did not offer.

Articles 43 – 48a (Constitution Articles III-137 – 143) on the right of establishment for business people, the self-employed, agencies, branches and subsidiaries, are similar to present Articles 33 – 48. In **Article 45** the OLP replaces a QMV decision by the Council. **Article 46** (Constitution Article III-140), like Article 46 TEC, allows Member States to make provision for special treatment for foreign nationals on grounds of public policy, public security or public health. However, **Article 47** (Constitution Article III-141) removes the requirement of present Article 47(2) TEC for the Council to act unanimously under the co-decision procedure in situations where a directive would require a Member State to change its legal requirements on professional training and conditions of access. QMV will apply instead.

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

51 883/2004, OJL 166 30 April 2004

52 Regulation 1992/2006

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

54 Cm 7174 p. 11 at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

55 A Declaration on this paragraph confirms that the European Council will act by consensus here.

Article 48 on companies registered in the EU is identical to present Article 48 TEC, but an additional **Article 48a** (Constitution Article III-143) adopts the wording of present Article 294 and applies the equal treatment principle to participation in the capital of companies or firms..

Articles 49–55 (Constitution Articles III-144 – 150) concern the freedom to provide services and correspond with present Articles 49 - 55 TEC. The OLP is introduced in **Article 49** for decisions extending the provisions on services to third country nationals "who provide services and who are established within the Union". In **Article 52** the OLP replaces the current procedure. **Article 53** states that Member States "shall endeavour to" instead of "declare their readiness to" liberalise services beyond the requirements of directives adopted under Article 51 if they are able to. The stronger terminology is in line with the general requirement for solidarity.

Articles 56 – 59 (Constitution Articles III-156 – 159) correspond largely with present Articles 56 – 59 TEC. They deal with the movement of capital and payments, including the provision of financial services, real estate establishment and the admission of securities to capital markets. As at present, where movements of capital threaten to cause serious difficulties for the operation of economic or monetary union, safeguard measures lasting up to six months may be implemented against third countries, after agreement with the European Central Bank (ECB). In **Article 57(2)** the OLP replaces the present Council decision by QMV, but retains unanimity for measures which constitute a step backwards with regard to the liberalisation of capital movement to or from third countries. **Article 58** contains an additional paragraph **(4)** under which the Council, acting by unanimity, may adopt a decision on restrictive tax measures by a Member State concerning a third country. Robert Oulds of the eurosceptic Bruges Group thought this Article "could also be used by the EU to pressurise and damage the economies of developing nations".[56]

In **Article 59** the requirement to act by QMV when taking safeguard measures with regard to the movements of capital to or from third countries cause is removed.

Present Article 60 TEC, on unilateral measures against a third country by Member States for urgent and serious political reasons is amended as **Article 67(a)** (see below).

E. Area of freedom, security and justice

Title IV, the Area of Freedom, Security and Justice replaces present Title IV TEC, "Visas, Asylum, Immigration and Other Policies related to Free Movement of Persons" and present Title VI TEU "Police and Judicial Cooperation in Criminal Matters". This Title is structured in five chapters: General provisions, policies on border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation.

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[56] The Bruges Group, "The Economic Implications of the Revived and Renamed EU Constitution" at http://www.brugesgroup.com/mediacentre/releases.live?article=14008

Title IV TEC was created by the 1997 *Treaty of Amsterdam*. It gave the EU powers to adopt legislation on immigration and asylum, by moving these areas out of the inter-governmental Justice and Home Affairs (JHA) "Third Pillar" into the Community "First Pillar".[57] Immigration and asylum were therefore no longer matters for inter-governmental coordination but subject to EU decision-making procedures. Under the *Protocol on the position of the United Kingdom and Ireland*, which is annexed to the TEU and the TEC, the UK does not participate in and is not bound by measures under Title IV TEC unless it exercises its right to opt in. Title VI is what remains of the Third Pillar, which is currently subject to unanimity and the right of veto. This is consolidated into the new **Title IV TFEU**, representing a collapsing of the pillar structure in this area and the general application of QMV. The current TEU category of "framework decisions" disappears as a result of this transfer.

The present voting procedure for Title IV TEC, as amended by the Treaty of Nice, is contained in Article 67 TEC. It provides for a transitional period of five years (1999-2004), during which Member States would share the right to initiate proposals with the Commission, and actions would be adopted by the Council acting unanimously after consulting the European Parliament.[58] When this five-year period ended on 1 May 2004, Member States lost their right of initiative, which has since rested solely with the Commission. In addition, the Council is now able to decide unanimously to change the voting procedure for Title IV measures to the co-decision procedure under Article 251 TEC. On 1 May 2004 Article 251 TEC was automatically applied to Article 62(2)(b) TEC on visas (two aspects of the rules on visas for intended stays of no more than three months) and to Article 66 TEC (these changes were authorised by Article 67(3) and (4) and Protocol 35 TEC). A Council Decision of 22 December 2004[59] provided for the following areas in Title IV TEC to be governed by co-decision under Article 251.

- the crossing of internal EU borders (EC Treaty art. 62(1)
- standards and procedures for checking persons crossing external EU borders (art. 62(2)(a))
- measures relating to third country nationals travelling within the EU (art. 62(3)).

In June-July 2004 the Commission published Communications inviting proposals for the second five years of an area of freedom, security and justice,[60] and launched further discussion on a single asylum procedure.[61] In July 2004 the Commons European Scrutiny Committee published a report the on the EU's Justice and Home Affairs work programme for the following five years which looked at the Commission's proposals

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

58 Except for two aspects of the provisions on visas for intended stays of no more than three months, which were governed by co-decision with QMV right from 1999: Article 67(3) and (4) TEC

59 OJL 396 22 December 2004

60 COM (2004) 401 final, 2 June 2004 "Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations" at http://ec.europa.eu/justice_home/doc_centre/intro/docs/com_2004_401_en.pdf

61 COM (2004) 503 ""A More Efficient Common European Asylum System: The Single Procedure As The Next Step" at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c_157/c_15720050628en00960098.pdf

relating to visas, asylum and immigration; civil and criminal justice; border controls and police and customs cooperation.[62]

Lisbon, like the Constitution, changes the legislative procedure to the OLP for most measures on border controls, asylum and immigration. According to the Foreign Secretary at the time, the British Government supported the extension of QMV to the area of asylum and immigration.[63] The emergency brake in criminal matters, whereby a Member State may refer a matter to the European Council if a proposal poses a particularly serious difficulty, remains.

1. General provisions

General Provisions are set out in amended **Articles 61 – 68** (Constitution Articles III-257 – 263, III-160 and III-264).

Article 61 (Constitution Article III-257) reproduces the main elements of the "area of freedom, security and justice" found in the present TEC and TEU, but there is an express reference to the need to respect fundamental rights and to take account of "the different legal systems and traditions of the Member States". There is a new requirement for "solidarity between Member States" in this area in **Article 61(2). Article 61(3)** corresponds with present Article 29 TEU and the measures on asylum and immigration in Articles 62-63 TEC. **Article 61(4)** contains a new requirement for the Union to facilitate "access to justice". The House of Lords Select Committee on the European Union noted in its report on the then draft constitutional text in March 2003 that "The implications (most notably financial) of these statements on access to justice may be considerable".[64] **Article 61A** gives the European Council the task of defining the "strategic guidelines for legislative and operational planning" in the area of freedom, security and justice.

Article 61B (Constitution Article III-259) provides that national parliaments ensure that the proposals and legislative initiatives in Judicial Cooperation in Criminal Matters and Police Cooperation (Chapters 4 and 5) comply with the principle of subsidiarity, in accordance with the Subsidiarity Protocol. The wording of this Article, which originally stated that national parliaments "shall ensure" proposals and initiatives complied with subsidiarity (together with similar wording relating to Article 8cTEU and Article 9 of the Protocol on the Role of National Parliaments) caused concern because of its apparent intention to mandate the UK Parliament to act.[65] The clause was amended to remove the word "shall", but the ESC was not convinced by the change, believing that the replacement of "shall" with "may" would have been more appropriate. The Committee concluded:

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62 ESC 28th Report 2003–04, HC 42-xxviii, 14 July 2004 at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/42-xxviii/42-xxviii.pdf

63 Jack Straw, HC Deb 9 July 2003 c 1208

64 "The future of Europe: Constitutional Treaty—Draft Article 31 and draft articles from Part 2 (Freedom Security and Justice", 16th report of 2002-03, 27 March 2003, paras 19-33 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/81/8101.htm

65 See Research Paper 07/80 for more detailed information on this.

> The statement "National parliaments contribute to the effective functioning of the European Union" is one from which an obligation can readily be inferred. Given its constitutional significance, we must emphasise that this is not an area in which any ambiguity is tolerable and we shall look to the Government to ensure that its original undertakings are met in any new text.[66]

Article 61C (Constitution Article III-260) provides for an "objective and impartial evaluation" of initiatives and measures in this area by the Member States and the Commission. **Article 61D** (Constitution Article III-261) provides for the establishment of a standing committee "to ensure that operational cooperation on internal security is promoted and strengthened within the Union". **Article 61E** (Constitution Article III-262) confirms that this title will not affect the responsibility of Member States with regard to the maintenance of law and order and the safeguarding of internal security. It adds a new element not in the Constitution that Member States may decide to cooperate and coordinate among themselves in safeguarding national security. **Article 61G** amends present Article 66 TEC (Constitution Article III-263) providing for the Council to adopt measures on administrative cooperation between Member States and between Member States and the Commission.

Article 61H (Constitution Article III-160) adds the grounds of "preventing and combating terrorism and related activities" to the current provisions in Article 60 TEC on sanctions against a third state, specifying "the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities". An addition to the Constitution text specifies that "The acts referred to in this Article shall include necessary provisions on legal safeguards". The UK has an opt-in arrangement with regard to this Article, but in a Declaration the UK states that, in accordance with the Protocol on the UK's position regarding the area of freedom, security and justice, it intends to take part in the adoption of all proposals made under Article 67a TFEU.[67] **Article 61I** (Constitution Article III-264) specifies that administrative measures adopted in Chapters 4 and 5 (see above) will be either following a proposal from the Commission, or on the initiative of a quarter of the Member States.

2. Border checks, asylum and immigration

Chapter 2 of this Title is on **border checks, asylum and immigration**. The UK has the option to opt into measures under this Article

Article 62 (Constitution Article III-265) on checks on persons at border controls corresponds with Articles 61(a) and 62 TEC. Whereas many measures under the old provisions were adopted by the Council acting unanimously (though there was provision for QMV to be applied should the Council so decide), Lisbon states that measures on border controls will be taken by the Council and the European Parliament under the OLP. There is an additional provision for the Council, acting by unanimity under a special legislative procedure, to adopt provisions concerning passports, identity cards, residence permits or other such documents.

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66 ESC 3rd Report 2007-08 14 November 2007 para. 16
67 CIG 14/07 3 December 2007

62(1)c contains a major departure from the TEC, namely the gradual introduction of an "integrated management system for external borders". This was introduced in the 2004 text following several EU initiatives, primarily the Commission Communication on the "integrated management of external borders and a subsequent Council Action Plan". In June 2002 the Seville European Council called on the Council, Commission and Member States to implement steps by June 2003.

In 2005 a European Borders Agency, Frontex, was set up to manage co-operation between the Member States at the external borders. It became operational in 2006, with its headquarters in Warsaw. The UK is not a full member of Frontex. The agency was deemed to be a Schengen-building measure integral to the Schengen acquis on borders. As such the UK can apply to participate, and a unanimous decision is taken by the full Schengen Member States whether to allow it to. The UK did so apply, but the Schengen states refused the application, a judgment which the UK has challenged in the European Court of Justice. The Home Affairs Committee recently said it believed that "on balance the UK is right to remain outside the Schengen border-control regime".[68]

Another major part of the EU's external border policy is the Schengen Information System (SIS), soon to be replaced by SIS II. The House of Lords EU Select Committee published a report on SIS II in March 2007 [9th Report of 2006–07, *Schengen Information System II*, HL 49, 2 March 2007]. The two Regulations for SIS II were adopted under QMV and co-decision, though a third-pillar Decision concerning policing and criminal law data was subject to unanimity.

Article 62(3) amends Article 18(3) TEC, which presently specifies that legislation on passports, identity cards, residence permits or other such documents cannot be adopted. Professor Steve Peers notes: "In fact, the current practice is to adopt legislation on passports pursuant to the EC's border control powers". There are several measures on the format and security features of passports and residence permits.[69]

Article 63 (Constitution Article III-266) on asylum corresponds with present Articles 61(a) and (b), 63(1) and (2) and 64(2) TEC. There is a provision in Lisbon (as in the Constitution) to allow the Commission to act without using the OLP if there is an emergency situation in which a sudden influx of third-country nationals arrives in a Member State. In this situation the Commission may, after consulting the EP, "adopt provisional measures for the benefit of the Member State(s) concerned".

Progress towards establishing minimum standards for refugees and asylum seekers has already been made under Article 63 TEC, although Lisbon, like the Constitution, goes further in aiming to establish a "common European asylum system". The Tampere European Council in 1999 reached political agreement on a common European asylum system that would be established by a two-stage process. Member States agreed on minimum standards for certain matters that would be addressed in the short term. In the long term a truly common asylum procedure and a unified status for refugees, valid

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[68] Home Affairs Committee, 3rd report 2006-07, "Justice and Home Affairs Issues at European Union Level", 5 June 2007, para. 270 at http://10.160.3.10:81/PIMS/Parliamentary%20Information/PARLIAMENTARY_PAPER/2007/76i.pdf]

[69] See http://ec.europa.eu/justice_home/fsj/freetravel/documents/fsj_freetravel_documents_en.htm

throughout the Union, would be established. In the first stage some key measures were adopted, including:

- a Directive on minimum standards in asylum procedures for granting and withdrawing refugee status (the Asylum Procedures Directive)
- a Directive on minimum standards for reception of asylum seekers (the Reception Conditions Directive)
- a Regulation on criteria and mechanisms for determining the State responsible for examining asylum requests (the Dublin Regulation, replacing the Dublin Convention)
- a Directive on qualification and content of refugee status and on subsidiary forms of protection (the Qualification Directive)

The Commission's Green Paper on the future Common European Asylum System,[70] which considers the first phase of legislation and asks what more needs to be done, was debated in the House of Commons on 29 November 2007 (HC Deb 29 November 2007 cc493-520). The Government's view is that proper implementation and full evaluation of the first phase is needed before embarking on further legislation. Further proposals from the Commission are due to be published in early 2008.

Article 63a (Constitution Article III-267) on immigration expands on present Articles 61(a) and (b) and 63(3) and (4) TEC and introduces the term "common immigration policy". The objective of the "efficient management of migration flows" is a new concept, although it was used by the Commission in the Communication on integrating migration issues in the EU's relations with third countries and in the Conclusions of the Seville European Council. The UK has generally decided to opt in to measures on illegal immigration, but not to those on legal immigration.

Article 63a(1) refers to the general objective of "fair treatment" of Third Country Nationals (TCNs) and action to prevent and combat illegal immigration and trafficking in human beings by "enhanced measures". EU competence regarding legally-resident TCNs is extended. Present Article 63(4) is the legal basis for the adoption of measures defining the rights and conditions under which legally resident TCNs may reside in other Member States. The Council Directive "concerning the status of third-country nationals who are long-term residents" sought to define such measures. **63a(2)(b)** provides for the adoption of measures defining the rights of legally resident TCNs including "the conditions governing the freedom of movement and of residence in other Member States". Member States retain control over the number of third country nationals permitted to enter and take up employment, but the EU gains in **Article 63(a)(4)** competence for "incentives and support" to help Member States with the integration of legally resident TCNs. **Article 63a(5)** states that an EU-wide immigration policy "shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed." These provisions clarify the rights of Member States and, arguably, strengthen their position.

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[70] COM (2007) 301 final at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0301:EN:NOT

For the first time the Treaty would provide for the "prevention" of illegal immigration, in addition to the "enhanced measures" to combat illegal immigration and trafficking in human beings. The broad term "enhanced measures" in paragraph 1 and the specific reference to removal and repatriation (see below) imply a greater emphasis on control measures than the present Article 63(3)(b). **Article 63a(2)(c)** refers to illegal immigration and unauthorised residence, and includes the "removal and repatriation of persons residing without authorisation". This is thought to have resulted from the Seville European Council's prioritisation of expulsion policies and pressure to conclude readmission agreements between the EU and third countries. **Article 63a(3)** provides the legal basis for the conclusion of agreements enabling the readmission of TCNs residing without authorisation to their countries of origin or provenance. Member States retain the right under present Article 63(4) TEC to introduce national measures in this area, although Lisbon specifies the right of States to determine the volumes of admission of TCNs, whereas the current provision refers to national measures which are compatible with the Treaty and with international agreements.

An 'Open Europe' analysis of the Lisbon Treaty commented:

> In a major alteration to the old Article 62 TEC, Article 69B (2b) TFEU **[now 63a(2)(b)]** (original Constitution Article III-267 (2b)) says that European laws or framework laws decided by QMV shall establish "the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States". During the original Constitution talks the UK unsuccessfully asked for this article to be brought back under unanimity.
>
> Peter Hain argued that "Article 2(b) allows for decisions on all aspects of the rights of third country nationals including access to the labour market and social security – this is a considerable extension of the Union's competence from that in the current treaty. The UK accepts that this legal base could be used for measures relating to the rights of third country nationals legally resident in one Member State who move to another Member State, provided that social security provision for third country nationals is still on the basis of unanimity. Our amendment is intended to make this clear." However, the government has given way.
> […]
> In the article on the common immigration system (Article III-267, becoming 69B TFEU) the Government called for the deletion of a new EU power which would have implications for migrants' access to labour markets and social security. Peter Hain wrote, "Article 2(b) allows for decisions on all aspects of the rights of third country nationals including access to the labour market and social security – this is a considerable extension of the Union's competence from that in the current treaty." When the article was not deleted the UK Government called for any such powers at least to be kept under unanimous voting. But the article was not changed.

Article 63b (Constitution Article III-268) requires that the principle of solidarity and the "fair sharing of responsibility" be observed in this area. This is new and has no equivalent in Title IV TEC. The need for solidarity had been raised at the negotiations of the so-called 'Dublin-II" regulation and in the debate on the need for an integrated EU management of external borders. The explicit reference to the "financial implications" of solidarity will most likely have implications for the UK opt-outs in this title.

3. Judicial cooperation in civil matters

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

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

The UK has the option to opt in to measures under this Article. With regard to decisions on family law, the TFEU retains the requirement to act by unanimity under the OLP, but expands on the 2004 text with a 'red card' mechanism by which proposals will be notified to national parliaments, which will be able to make known their opposition within six months and thereby prevent its adoption.

4. Judicial cooperation in criminal matters

Article 69A, B, C, D and E (Constitution Article III-270-274) concerns judicial cooperation in criminal matters. The UK has the option to opt in to measures under these Articles.

Article 69A (Constitution Article III-270) replaces provisions in Articles 61(e) TEC and 31(1) and 34 TEU. The Article restates the principle of mutual recognition of judicial decisions as one of the ways in which the Union is to ensure an area of freedom, security and justice (Article 31 TEU), and adds a new provision for the adoption of measures using the OLP to:

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

On criminal procedures, **Article 69A** goes much further than the existing Article 31(1)(c) TEU, which merely includes in the list of common actions "ensuring compatibility in rules applicable in Member States as may be necessary to improve [judicial] cooperation". **Article 69A(2)** states:

> 2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:
> (a) mutual admissibility of evidence between Member States;
> (b) the rights of individuals in criminal procedure;
> (c) the rights of victims of crime;
> (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

This is a new and potentially controversial provision. It would permit the EU to establish minimum rules relating specifically to mutual admissibility of evidence, the rights of individuals in criminal procedure, and the rights of victims of crime.

In 2003 the Lords EU Committee considered that the reference to "the [definition of the] rights of individuals in criminal procedure"[71] (**sub-paragraph (b)**) was unexceptionable, but noted evidence that weight was being placed on maintaining security, to the perceived exclusion, or neglect, of freedom. Moreover, the Committee doubted the need for this provision, in the light of the Commission's then recent Green Paper on *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*.[72] The Committee expressed particular concern about the power to adopt measures relating to the admissibility of evidence, pointing out that:

> Rules on the admissibility of evidence may be closely related to the mode of trial (for example, in England and Wales, to trial by jury). That such rules could be changed without the consent of a Member State is, we believe, unacceptable.[73]

It recognised that, even with a restriction to cases having cross-border implications, any EU legislation under this draft article "would most likely have substantial effects on procedure in purely domestic criminal cases".[74] In practice, it could be difficult to apply different standards in purely domestic cases, on the one hand, and those with a cross-border dimension, on the other. The Article does not seek harmonise admissibility or the taking into account such evidence, which are matters exclusively for national courts. The word "mutual" was inserted to clarify this.

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71 Lords EU Committee 16th Report, 27 March 2003 at http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/81/8108.htm

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

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

74 Ibid

Although the new power was restricted to cases with cross-border implications, it could still be argued that EU law could legitimately establish minimum rules which would apply to purely domestic cases, if doing so would (or was intended to) facilitate cooperation etc in cases which had a cross-border dimension. The text spells out that the rules shall take into account the differences between the legal traditions and systems of the Member States. In responding to the Lords EU Committee's concerns, the Government said:

> 23. The Government shares the serious reservations of the Committee about the proposed article on criminal procedural law, including the Committee's concern that rules on evidence could be changed without the consent of a Member State.
>
> 24. The Government remains firmly opposed to giving the EU wide-ranging competence to harmonise criminal procedural law. Judicial co-operation in criminal matters should be based on the principle of mutual recognition and respect for the diversity of Member States' legal systems. Common procedures should therefore be pursued only where they are a necessary consequence of implementing that principle.
>
> 25. We recognise that it may be necessary to develop some light minimum standards in the areas where people facing criminal proceedings in a Member State of which they are not a national would be disadvantaged by virtue of that fact. The Government has therefore tabled an amendment to provide for this in the areas of legal advice, information, interpretation and access to diplomatic and consular authorities. The amendment would also make any approximation in this limited area subject to the use of framework laws and unanimity.[75]

The ESC in 2003 considered the voting procedure for matters in this area:

> 50. We share the view that the proper operation of a system of criminal justice depends on a degree of ownership by the people of the country concerned and on democratic accountability. Accordingly, we do not believe that the subject-matter of criminal procedure is appropriate for QMV or the co-decision procedure. In particular, we do not accept that rules on the admissibility of evidence can properly be adopted in this way, since such rules are so closely connected with the different modes of trial in the Member States. As they stand, the provisions of Article III-166(2) (formerly Article 16) create a risk that, should the UK be outvoted on the issue, a more flexible EU standard on the admissibility of evidence would have to be applied in a jury trial in this country, and we do not consider this an acceptable risk.[76]

Extension to other aspects of criminal procedure would be limited to those identified in advance by the Council, acting unanimously with the approval of the EP. The Government's view, set out in the September 2003 White Paper, was that "qualified majority voting would not be the most appropriate way of proceeding where significant harmonisation of criminal procedural law was concerned.[77]

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

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

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

The emergency brake set out in **Article 69A(3)** (Constitution Article III-270(3)) provides that where a Member State considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft be referred to the European Council, which would decide by unanimity. In the case of judicial cooperation in criminal matters, if the European Council fails to agree within four months, a sub-group of at least nine Member States can move ahead with the proposed policy on their own in an "enhanced cooperation" arrangement.

5. Approximation of criminal law

The current substantive provisions on criminal law are contained in Articles 29, 31(1)(e) and 34 TEU and the existing power to adopt framework decisions for the approximation of criminal law requires unanimity. **Article 69B** (Constitution Article III-271(1)) would allow for approximation by the OLP and QMV of minimum rules for the definition of, and penalties for, offences, initially in areas of crime which correspond with those now set out in Article 29 TEU. Racism and xenophobia, the prevention and combating of which are specified in Article 29 TEU, are not in the list in paragraph 1. In November 2001 the Commission presented a proposal for a Council Framework Decision on combating racism and xenophobia, which aimed to harmonise national laws on offences involving racism and xenophobia. For six years the Council could not agree on the draft Framework Decision and scrutiny reserves prevented its adoption. In April 2007 the Council agreed a general approach on the framework decision.[78]

Other areas of "particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis" may be identified by a unanimous decision.

Article 69B(2) also allows for approximation of national criminal laws and regulations if it proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. The procedure for adopting these laws will be the same as that for the adoption of the harmonisation measures. The ESC's principal concern was about proposals for the harmonisation of criminal law was with the proposed legislative procedure:

> 58. … We consider that the scope of criminal liability within a Member State is primarily a matter for the national parliament. […] it remains the case that the scope of a range of serious offences can still be determined against the wishes of the national parliaments of Member States in the minority. We agree with Statewatch that effectively removing those parliaments from the debate raises a serious question of principle and undermines the legitimacy of the criminal law. In our view, harmonisation of criminal law within the European Union should proceed by agreement of all Member States, or it should not proceed at all.[79]

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[78] Press release of Justice and Home Affairs Council 19-20 April 2007 at

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

6. Crime prevention

Article 69C (Constitution Article III–272) on crime prevention provides that EU measures may promote and support Member State action in the area of crime prevention, excluding any harmonisation of such laws or measures in the Member States. Although Article 61(e) TEC currently provides that the Council shall adopt measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security *by preventing* and combating *crime*, the new Article provides a legal base (not requiring unanimity) limited to incentive and supporting measures for the prevention of crime.

7. Eurojust

Article 69D (Constitution Article III-173) is on Eurojust (European Judicial Cooperation Unit), which is an agency of judicial cooperation for the investigation and prosecution of serious cross-border crime. The UK has the option to opt in to measures made under this Article. Each Member State is represented either by a senior prosecutor, judge or police officer. This body was established by Council Decision in February 2002 but had been preceded by a provisional unit, Pro-Eurojust, operative from March 2001, and before that by the European Judicial Network, which replaced more informal arrangements for cooperation.

The 2002 Council Decision emphasised the need for Eurojust to act in a co-ordinated way with the other European agencies, and provided that Eurojust and Europol should maintain close co-operation.[80] The offences covered by Eurojust include the types of crime and offences within the scope of Europol, as set out in Article 2 of the Europol Convention of 26 July 1995, and other specified crimes, such as computer crime, money laundering and environmental crime.

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

Its remit and powers would be substantially increased by **Article 69B**. **Article 69D(1)** sets out its "mission", which is to support and strengthen coordination and cooperation between national prosecuting authorities "in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases". Lisbon, like the Constitution, extends Eurojust's mission to include investigating authorities. The Article provides that regulations adopted by the OLP will determine its structure, workings, scope of action and tasks, which may include:

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

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

> regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities.

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

A Declaration on this Article states: "The Conference considers that the European laws referred to in the second subparagraph of Article 69(1) **[now 69D(1)]** should take into account "national rules and practices relating to the initiation of criminal investigations".[81] However, the Article is silent about the national authorities' powers to discontinue prosecutions.

The tasks of the European Police Agency (Europol, see below) are to be, "where appropriate, in liaison with Eurojust" (**Article 69G**). Relations between Eurojust and Europol (which has an intelligence-gathering but not an operational function) are now regulated by an agreement signed on 9 June 2004 which enables personal data to be exchanged.

> Based on the agreement's provisions as well as on the legal frameworks of both organisations, new horizons are opened in supporting and coordinating Member States' international criminal investigations and prosecutions. Both parties may participate in setting up of joint investigation teams and coordinate their further action in the field of their competences. A new dynamic intelligence approach is also initiated as Eurojust may also provide Europol with information for the purpose of its Analysis Work Files or even to present requests to Europol for opening an Analysis Work File. On the other hand, Europol may also supply to Eurojust analysis data and analysis results which may be required for the tasks of Eurojust. Last but not least, Eurojust and Europol are now able to support Member States' criminal investigations and prosecutions on a day-to-day basis by exchanging information and intelligence including personal data with respect to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.[82]

In July 2004 the House of Lords EU Committee published its report *Judicial Cooperation in the EU: the role of Eurojust*,[83] reviewing Eurojust's first year of full operation, and noting that, in a remarkably short time, it had established itself as a highly effective means of facilitating cooperation between investigating and prosecuting authorities in serious criminal cases. The Committee said that, by having senior prosecutors from each Member State available full-time to facilitate communication between prosecutors, to provide a high level of expertise in mutual legal assistance procedures, and to co-ordinate complex cases, Eurojust was meeting an undoubted and growing need. The UK was one of the main users. Not all Member States had implemented the Decision setting up Eurojust,[84] but in those which had, there were considerable differences in the powers given to their national members.

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81 CIG 15/07 3 December 2007

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

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

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

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

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

> 87. In its written evidence, Eurojust noted that the use of the word "initiate" prompted much discussion when the Eurojust Decision was being negotiated as it is interpreted as meaning the commencing of an investigation or proceedings. "Request" was preferred as it offered a capacity to influence rather than to take charge or responsibility for starting investigations or prosecutions, which many felt would bring Eurojust too close to being a European Public Prosecutor…
>
> 89. The increase in powers of investigation may have significant implications for the relationship of Eurojust with OLAF. The Treaty gives Eurojust powers regarding "criminal investigations", whereas the work of OLAF finishes before this stage, as OLAF conducts preparatory investigations which may lead to a criminal investigation and prosecution. In practice, however, it is difficult to see how the investigations of the two bodies in fraud cases differ. There is certainly an overlap, especially in view of the fact that the proposed Constitutional Treaty stresses the role of Eurojust in combating offences against the EU's financial interests. It remains to be seen how the two bodies will interact in practice after the increase of Eurojust's powers. One possibility is that OLAF would become the investigative branch of Eurojust, at least in cases affecting the Community's financial interests.[85]

On 23 October 2007 the Commission published a Communication to the Council and the European Parliament on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the EU. The Communication made a number of proposals for improvement including that, in order to give the organisation a measure of stability, national members should be appointed for a harmonised period of at least three years (full time) and that there should be a shared base of minimum powers. It also suggested that every Member State should develop the legal machinery to allow the national members access to the national files on persons in custody, criminal records, and DNA records.[86] A legislative proposal may follow in 2008.[87]

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85 http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/138/13802.htm
86 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0644:EN:NOT
87 http://www.libertysecurity.org/article1680.html

8. European public prosecutor

Article 69E (Constitution Article III-274) would allow the Council to establish the European Public Prosecutor's Office. The UK has the option to opt in to this measure. The creation of a new authority, the European Public Prosecutor Office (EPPO), was one of the proposals of a research report, *Corpus Juris*, published in April 1997. It also proposed a uniform code of criminal offences to deal with fraud against the Community's finances, and that for the purposes of the investigation, prosecution, trial and execution of sentences relating to an act which constitutes an offence under the code, "the territory of the Member States of the Union" would constitute "a single legal area". In May 1999 the *Corpus Juris* was the subject of a report by the House of Lords Select Committee on the European Communities.[88] They were not persuaded that the *Corpus Juris* offered, at the time, a practically feasible or politically acceptable way forward, having regard to the state of the Union and public opinion. In particular, the creation of a separate prosecution authority with no accountability to Parliament would raise very difficult issues.

The European Commission then presented an outline of its proposal to establish a European Public Prosecutor at the Nice IGC in 2000, but the proposal was not taken up. In 2001 the Commission published a Green Paper on "Criminal Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor".[89] The Commission believed that the IGC had not been given the necessary time to examine the proposal. Its press notice explained:

> In this Green Paper the Commission fleshes out its contribution to the Nice Intergovernmental Conference. It suggested there that the EC Treaty should provide for the establishment of a European Public Prosecutor […] who would be responsible for the criminal-law protection of the Community's financial interests. In the Commission's view, the EC Treaty should govern solely the appointment and removal from office of the European Public Prosecutor, his functions and the salient features of his office. All other rules such as those governing the European Public Prosecutor's status and his modus operandi, would be laid down in secondary legislation. These are the questions considered in the Green Paper.
> […]
> The tasks of the European Public Prosecutor would be the following:
>
> - He would gather all the evidence for and against the accused, so that proceedings can be commenced where appropriate against the perpetrators of common offences defined in order to protect the Community's financial interests. He should also be responsible for directing and coordinating prosecutions. He would have specialised jurisdiction, prevailing over the jurisdiction of the national enforcement authorities but meshing with them to avoid duplication.
>
> - He would have recourse to existing authorities (police) to actual conduct the investigations but would direct investigation activities in cases concerning him. He would further reinforce the judicial guarantee as regards investigations conducted within the European institutions.

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88 Lords EU Committee 9th Report, HL Paper 62, 1998-99, 8 May 1999

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

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

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

- When cases come to trial, he must prosecute cases in the national courts in order to defend the financial interests of the Communities. The Commission considers it essential that the trial stage remain in national hands. There is no question of creating a Community court to hear cases on the merits.[90]

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

> considered that the time had not come to take such a radical step. It was generally felt that newly created institutions such as Eurojust and OLAF needed time to affirm themselves in the fight against offences committed against the financial interests of the Communities. Misgivings were also voiced about the idea that the European Public Prosecutor remit, if such an institution were to be set up, should be limited to the narrow area of the protection of the Community's financial interests. Finally, the discussion highlighted the extremely complex constitutional implications raised by the Green Paper. [91]

The ESC considered the Green Paper in June 2002 and

> did not think that any sufficient case had been made out for the Commission's proposals, and agreed with the Government that the establishment of Eurojust made these proposals unnecessary. We identified a number of concerns of principle, such as the ready assumption by the Commission that the function of prosecuting offences should be combined with that of investigation, the notion that the European Public Prosecutor would have the power to commit a person for trial, and to determine the Member States in which the trial is to be held and the creation of differing standards of criminal responsibility for fraud according to whether or not the offence concerns the Community's financial interests. We were particularly concerned that the proposals had the effect of putting the prosecution function completely beyond the reach of democratic accountability. [92]

The Committee also commented on, and strongly supported, the points made in the Minister's reply, which underlined that the detailed questions about how the office might be set up were based on a presumption that the establishment of the office had been

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90 Council press release 6533/02 28 Feb 2002
91 Ibid
92 ESC 34th Report 2001-02, June 2002

agreed, which it had not. The proposals appeared to conflict with the subsidiarity principle, the EPPO would not be accountable to national law officers or Parliament, and there were numerous practical concerns. The Committee concluded:

> We continue to believe that this proposal is impractical and that it raises serious issues of principle. We see no reason for creating an institution at EU level, which will have the effect, on the one hand, of diluting the responsibility of Member States to deal with fraud and, on the other, of putting the function of criminal prosecutions beyond the reach of democratic accountability.[93]

In a subsequent Report, the ESC challenged the Commission's analysis that a majority favoured the proposal and presented an alternative view.[94] The Government also disagreed with the Commission's claim that a majority of Member Stated supported an EPP.[95]

Nevertheless, the proposal was brought forward again for inclusion in the EU Constitution. The British Government remained opposed and tabled an amendment to remove the article from the draft constitution. It stated in both its September 2003 and September 2004 White Papers on the Constitution that it saw "no need" for such a post.[96] In their report on the role of Eurojust, the House of Lords EU Committee appeared to endorse witnesses' suggestions that the extension of Eurojust's powers alone would be a step towards having an EPPO, even without Article III-274. They set out the Attorney-General's views and the reasons given by the Prime Minister for agreeing to the inclusion of the Article, but were not convinced that it was desirable:

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

In his statement on the outcome of the Intergovernmental Conference on 21 June the Prime Minister was more positive in explaining why the Government had accepted the inclusion of a reference in the Treaty to a European Public Prosecutor. He said:

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93 ESC 34th Report 2001-2 June 2002
94 ESC 21st Report 2002-3 May 2003
95 Ibid
96 Cm 5934 *A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference* September 2003, and Cm 6309 *White Paper on the Treaty establishing a Constitutions for Europe* September 2004 p.31

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

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

> 96. We remain doubtful of the need or desirability for a European Public Prosecutor. As we have pointed out, there is already overlap between Eurojust and OLAF and to introduce another player would be likely to cause further overlap and confusion. But if, despite the reservations we have expressed, an EPP is eventually created, we agree that, as the proposed Constitutional Treaty implies, it should build on Eurojust. Eurojust is an institution which in our view is already showing its effectiveness: it works with the grain of different national legal systems and different criminal codes (as opposed to an approach which would seek to harmonise them) and it is highly desirable that an EPP should follow a similar approach. [97]

However, the Article was included in the final Constitution text, albeit modified so that the initial authorisation to set up an EPPO would apply only to combating crimes affecting the financial interests of the Union, not cross-border crime as well. The Constitution and Lisbon provide in **Article 69E(4)** for the EPPO remit to be extended:

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

Lisbon also provides in **Article 69E(1)** for enhanced cooperation between nine Member States on the basis of a draft regulation establishing the EPPO. The Constitution had no such provision.

9. Police cooperation

New **Article 69F, G** and **H** (Constitution Articles III-275 – 7) contain provisions on police cooperation and police operations on the territory of another Member State. The UK has the option to opt in to measures under these Articles. The wording is based on existing

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

provisions in Article 30(1)TEU, Article 30(2) TEU and Article 32 TEU. The TFEU sets out a framework, while the detailed provisions will be contained in secondary legislation. Currently, detailed measures are set out in the *Europol (European Police Office) Convention*.

Currently, under Article 34 TEU, voting in the Council on police cooperation, except on implementing measures, must be unanimous. The TFEU changes this to the OLP with QMV, with some exceptions for more sensitive areas, such as legislation concerning "operational cooperation" between national law enforcement authorities, and the rules under which police authorities may operate in the territory of another Member State under (Constitution Article III-277). In both these cases, the Council must act unanimously after consulting the EP. **Article 69F(3)** provides for enhanced cooperation in this area if a consensus cannot be reached. The Constitution did not make this provision.

Article 69G (Constitution Article III-276) concerns Europol, the agency responsible for supporting EU Member States in combating serious organised crime. Europol's current remit is to "improve the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organised crime".[98]

Europol's website lists the following organised criminal activities as coming within its remit:[99]

- drug trafficking
- illegal immigration networks
- terrorism
- vehicle trafficking
- trafficking in human beings, including child pornography
- forgery of money and payments, Euro counterfeiting
- money-laundering
- crimes against persons
- financial and cyber crime

Europol's role was discussed in the Home Affairs Committee's June 2007 report, *Justice and Home Affairs Issues at European Union Level*.[100] This noted that in recent Commission proposals, references to scrutiny of Europol by national parliaments had been omitted:

> 96. An internal debate on the future of Europol has been taking place within EU institutions over the past 18 months. The Commission has argued that there is a need to put Europol on a firmer legal footing by replacing the current patchwork system of conventions with a "fully fledged legislative system". In December 2006 it put forward a proposal for a Council Decision to re-establish Europol on a new

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98 Europol Convention, Article 2.1

99 http://www.europol.europa.eu/index.asp?page=facts

100 Home Affairs Committee, *Justice and Home Affairs Issues at European Union Level*, HC 76-1, 2006-07, 5 June 2007, http://www.publications.parliament.uk/pa/cm200607/cmselect/cmhaff/76/76i.pdf

legal basis. As the Commission explained, "the main advantage of a Decision over a Convention is that it is relatively easy to adapt to changing circumstances because it does not require ratification" by national parliaments. The proposed Decision would also further extend Europol's mandate, to cover crime which was not specifically linked to organised crime, and would give it power to gather and handle information "as necessary to achieve its objectives".

97. Our UK police witnesses did not support any significant further extension of the organisation's current, recently expanded, powers and remit. For instance, SOCA told us that what was needed was for Europol to do better "what it already does pretty well". And Europol itself commented "we have to stabilise our work, and not to expand too much".

98. The European Parliament's Civil Liberties, Justice and Home Affairs Committee (LIBE) held a hearing on the future of Europol on 10 April 2007. At this meeting, concerns were expressed about a lack of democratic scrutiny in the Commission's proposal. The proposal gave only a marginal role to the EP and did not mention national parliaments at all. This contrasted with the provision in the stalled Constitutional Treaty for joint scrutiny of Europol by the EP and by national parliaments. MEPs on the LIBE Committee also criticised the Commission's proposal for lacking safeguards on the handling of personal data.

99. **We believe that the creation of Europol has been a positive development in facilitating police co-operation, particularly by building confidence and knowledge between Member States. We do not believe Europol has yet achieved its full potential. A significant aspect of this is a lack of full trust and co-operation between Member States. Although the UK is fully engaged with the work of the agency, its work appears to be hampered by the varying degrees of co-operation it receives from other Member States. It is disappointing that the Commission has not done more to address the evident reluctance of some Member States to supply their national Europol liaison officers with needed information. We recommend that the UK Government should take such steps as are open to it to encourage all Member States to co-operate fully with Europol. We recommend that the Commission should consider practical ways to promote Member States' confidence in Europol and encourage better data-sharing; and also that it should draw public attention to the failure of some individual Member States fully to cooperate with Europol.**

100. **The Commission's recent proposal further to extend the powers of Europol will require careful examination by the UK Government. In the light of the evidence we have received from UK police, it does not appear to us that there is a pressing need for a further extension of powers on top of the significant extension recently approved.**

101. We are also concerned that the Commission's proposal contains no reference to scrutiny of Europol by national parliaments. In this respect it marks a step backwards from the proposals in the Constitutional Treaty. We recommend that the UK Government should not give its approval to any changes in the status of Europol unless provision is made for a scrutiny role for national parliaments in conjunction with the European Parliament.

In its response to the Committee, the Government stated that it agreed that parliamentary oversight was important, but that existing provisions provided for a "significant amount of regulation at varying levels":

> The Government agrees that parliamentary oversight of Europol is important. However, existing provisions and those contained in the draft Council Decision already provide for a significant amount of regulation at varying levels. For instance there are very clearly defined data protection roles for the National Supervisory Body and the independent Joint Supervisory Body, and we welcome the formal introduction of an independent Data Protection Officer. There is already a role envisaged for the European Parliament to be consulted when Europol proposes establishing new systems for processing personal data; as well as in the development of implementing rules for storing additional personal details on Analysis Work Files; and where Europol wishes to establish new relations with third bodies for the exchange of information. There is also a clearly defined role for both the Council and the Commission in the adoption of Europol's budget, its work programme and its annual report. And with the introduction of Community financing of Europol the European Parliament will have a voice in the ongoing activities and future direction of the organisation. The Government remains to be convinced that any additional oversight would add further value and believes that a sensible balance has been achieved that delivers the required safeguards whilst not unduly hampering Europol in the achievement of its objectives.[101]

Article 69F provides for the European Union to establish police cooperation involving relevant Member States' authorities. **Article 69G** states that Europol's mission will be to support and strengthen action by Member States' police authorities and other law enforcement services and "their mutual cooperation in preventing and combating serious crime affecting two or more Member states, terrorism and forms of crime which affect a common interest covered by a Union policy". A new clause **(3)** is added, on the responsibilities of national authorities for operational action and coercive measures. The new wording in **Article 69G(2)(b)** provides a legal base for the adoption of measures to enable the scrutiny of Europol's activities by the EP and national parliaments.

In 2003 the Lords EU Committee had been concerned about the extension of Europol's mandate to cover "serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy".[102] A previous attempt to extend the mandate of Europol beyond organised crime had been made by the Danish Presidency in 2002, but this had been abandoned[103] and the Lords Committee was concerned at the re-emergence of this policy:

> 66. Article 22 [now III-276(1)] **[now Article 69G]** introduces a number of changes to the existing legislative framework. A potentially far-reaching development concerns the extension of Europol's mandate, in Article 22(1), to cover 'serious crime affecting two or more Member States, terrorism and

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101 *Government Response to the Committee's Third Report: Justice and Home Affairs Issues at European Union Level*, HC 1021 2006-07, at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmhaff/1021/1021.pdf

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

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

> forms of crime which affect a common interest covered by a Union policy' (wording similar to Eurojust's proposed mandate—see Article 19 above). The proposal to extend Europol's remit to 'serious crime' is not new, but was put forward in 2002 by the Danish Presidency in its proposals to amend the Europol Convention. The Committee strongly criticised such extension as being detrimental to legal certainty, potentially leading to significant differences of interpretation of what constitutes 'serious crime' among national authorities, and leaving the interpretation of the term—and hence the delimitation of Europol's remit—to Europol itself, and ultimately the Court of Justice. We welcomed the abandonment, in the course of negotiations, of the reference to 'serious international crime' in favour of a definition which is similar to Article 2 of the Europol Convention and is based on specifically enumerated offences. The re-introduction of 'serious crime' in Article 22 is a matter of concern and somewhat surprising in view of the "general approach" reached in the Council not to extend Europol's remit in these terms. [104]

The Government's views and those of the Commons European Scrutiny Committee were set out in the July 2004 Report on the Commission's five-year programme in the area of freedom, security and justice:

> The Commission's proposals include strengthening the role of Europol, improving the sharing of intelligence, stronger action on crime prevention and reduction in the demand for drugs.
> The Government supports most of what the Commission proposes, though, on drugs, it does not agree with the emphasis on demand reduction.
> We recognise the potential benefits of operational cooperation. But we object to giving Europol its own investigative powers, which would change it from an agency for the exchange and analysis of criminal intelligence into a European police force. Proposals concerning crime prevention should go ahead only if fully consistent with the principles of subsidiarity and proportionality.[105]

Article 69H (Constitution Article III-277), on operations on the territory of another Member State, largely reproduces the wording of present Article 32 TEU, which is subject to unanimity and consultation with the EP.

The ESC, in its November 2007 follow-up report on the EU Intergovernmental Conference, discusses the 'red line' in relation to the protection of the UK's common law system and the protection of police and judicial processes.[106]

10. Opt-ins and opt-outs

a. Schengen

With the incorporation of the Schengen *acquis*[107] into the TEC by the *Treaty of Amsterdam*, the UK, Ireland and Denmark secured various opt-in/opt-out arrangements

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[104] Lords EU Committee 16th Report para 65
[105] ESC 28th Report 2003-04 p.4
[106] European Scrutiny Committee, *European Union Intergovernmental Conference: follow-up report,* HC 16-iii, session 2007-08, 27 November 2007.

in matters comprising the area of freedom, security and justice. Elements of the Schengen *acquis* went into Titles IV TEC and VI TEU. The Schengen arrangements in Title IV do not currently apply as EC law in all Member States. Denmark is outside Title IV but remains a party to Schengen and is therefore bound by it in international law. Under the *Protocol on Schengen* attached to the Treaties the UK and Ireland are not parties to Schengen but may, with the agreement of the Schengen States, opt in selectively to individual measures..

Three Lisbon Treaty Protocols relate to the Schengen *acquis* and to the special position of the UK and Ireland on border controls, asylum and immigration, judicial cooperation in civil matters and police cooperation.[108] The Protocols state that the UK will not be involved in measures under Articles on border checks, asylum, immigration and certain other measures, unless it notifies the Council in writing of its intention to do so. Four new Declarations clarify the position regarding participation in Schengen measures. The Government will have three months in which to state its intention not to participate in a measure. Jim Murphy, told the Foreign Affairs Committee (FAC) on 12 September 2007,

> … it would be a case of the United Kingdom Government considering the detail of any proposal and deciding at that point whether it would be appropriate for the UK to opt in if it were in our national interest. It will be on a strictly case-by-case basis.[109]

A new Declaration provides for the Commission to examine the situation under Article 96 in a case where a Member State decides not to opt in to a Title IV measure. Article 96 allows the Commission to take action against a Member State for distorting the conditions of competition in the internal market and the Council to act by QMV to eliminate the distortion. The ESC was concerned that this might "expose the UK to the risk of unpredictable consequences if it chose not to opt in".[110] It concluded:

> We consider that, by being party to the proposed declaration, the UK may have weakened its position, since it will no longer be able convincingly to argue that Article 96 EC should not apply at all in circumstances where the UK decides not to opt-in. As Article 96 EC provides for directives adopted by QMV and binding on the UK to "eliminate the distortion in question" caused by a UK decision not to opt-in, we raise the question of whether some new and possibly unquantifiable risk may have been introduced.[111]

b. Third Pillar

There is currently less need for an opt-out from Third Pillar areas because decision-making is by unanimity and every Member State has a right of veto. However, the Lisbon Treaty moves JHA measures from the Third Pillar (police and judicial cooperation in

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[107] The *acquis* included the 1985 Schengen Agreement, the 1990 Schengen Convention and the decisions of the Executive Committee established by the Schengen agreements. See the Protocol No 2 TEU. The UK's participation is set out in Council Decision 2000/365/EC of 29 May 2000. See Lords EU Committee Report *Incorporating the Schengen Acquis into the European Union* 31st Report, Session 1997-98, HL Paper 139.

[108] CIG 14/07, 3 December 2007

[109] Q 284 at http://pubs1.tso.parliament.uk/pa/cm200607/cmselect/cmfaff/uc166-iii/uc16602.htm

[110] ESC 3rd Report 2006-07 "European Union Intergovernmental Conference: Follow-up report", 14 November 2007 para. 56

[111] Para. 61 http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf

criminal matters) to the First Pillar measures on freedom, security and justice (see above), involving a move to decision-making by the OLP with QMV. This has raised the question of whether the UK opt-in arrangement in the present Title IV TEC areas will be extended to the newly transferred areas. The answer is not straightforward.

In his statement to the House on 25 June 2007, Tony Blair was confident, not only that the UK's opt-in/out arrangements were secure, but that they would also apply to Third Pillar areas moved to the First Pillar:

> In respect of our criminal law system and police and judicial processes, we obtained an extension of the opt-in rights that we secured in an earlier treaty on migration, asylum and immigration issues. This means that we have the sovereign right to opt in on individual measures, where we consider it would be in the British interest to do so, but also to stay out, if we want to. It is precisely the pick and choose policy often advocated. It gives us complete freedom to protect our common law system, but it also allows us to participate in areas where co-operation advances British interests. In asylum and immigration, for example, we have opted in on measures dealing with illegal immigration, and in measures allowing us to return asylum seekers to other European countries—both unquestionably in Britain's interests. But it will be within our exclusive power to decide on a case-by-case basis, which is exactly what we wanted. [112]

The **Protocol on the position of the UK and Ireland** sets out the position of the UK opt-out with regard to amendments to laws in the JHA area in which the UK already participates. A new **Article 4(a)** is inserted to the effect that, if an existing law in this area is amended and the UK wants to opt out of the amendment, but the other Member States decide by QMV (without the UK or Ireland) that this makes the measure "inoperable", the previously existing law could cease to apply in the UK or Ireland. In addition, unlike the equivalent 2004 text, the Protocol now states that there will be financial consequences for the UK in these circumstances.[113]

Under **Article 10** of the **Protocol on transitional provisions** The ECJ will not have jurisdiction over existing legislation in the area of police and judicial cooperation in criminal matters (e.g. the European Arrest Warrant) unless measures in these areas are amended, or for five years after the entry into force of the new Treaty (envisaged for 2009). This situation is set out in Declaration 44, on Article 10 of the Protocol on transitional provisions, which states:

> The Conference invites the European Parliament, the Council and the Commission, within their respective powers, to seek to adopt, in appropriate cases and as far as possible within the five-year period referred to in Article 10(3) of the Protocol on transitional provisions, legal acts amending or replacing the acts referred to in Article 10(1) of that Protocol.

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[112] HC Deb 25 June 2007 c 21. When MEPs on the EP Constitutional Affairs Committee considered the IGC on 11 September 2007, they were critical of the UK's opt-out, which many thought set a poor precedent. Some raised the European variant of the West Lothian Question: if JHA legislation would not apply in the UK, was it right for UK MEPs to vote on JHA legislation in the European Parliament?

[113] CIG 14/07 3 December 2007

At the end of the five-year period, any Third Pillar measures which have not been transposed will become subject to ECJ jurisdiction. The UK must notify the Council six months at the latest before the expiry of the five-year period that it does not accept the jurisdiction of the ECJ over existing, unamended measures. In this case, *all* the remaining unamended measures will no longer apply to the UK at the end of the transitional five-year period, and the UK will have to bear any direct financial costs incurred. The UK may subsequently apply to participate in acts from which it had been excluded (there will be no automatic right to rejoin) on a case-by-case basis, and the Union institutions "shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence". Where the UK rejoins, it must also accept the Commission's enforcement powers and the jurisdiction of the ECJ in respect of the measure in question.

The ESC raised its concerns about the UK opt-in arrangements at two sessions in October and November 2007.[114] In relation to the above, it concluded:

> 64. We do not understand why the UK did not interpret the red line on protection of the UK's position in a firmer form by insisting on a provision which would have preserved the effect of existing EU measures in relation to the UK, in circumstances where the UK decides not to opt in to an amending or repealing measure. This would have ensured that the UK would keep what it now holds and would more effectively
> have protected the UK's interests. It would have been open to the UK to keep its existing EU measures in their present form indefinitely as an alternative to opting in to a measure which would be subject to the enforcement powers of the Commission and the jurisdiction of the ECJ.[115]

The Committee also noted that Denmark had preserved its position by an amendment to the Protocol on the position of Denmark providing that existing EU measures in police and judicial cooperation would continue to apply to Denmark "unchanged" in their present form, even if they were subsequently amended or replaced under the Lisbon Treaty. The Committee did not understand "why the UK did not press for a provision along these lines in conjunction with the right to opt in".[116]

Commenting generally on the UK opt-ins, the Committee stated:

> Under the system to be established by the Reform Treaty, a Member State will lose the ability finally to determine its own law to the extent that measures are adopted at Union level. Such measures will become the subject of the Commission's powers to require changes in domestic law and will be subject to the interpretative jurisdiction of the ECJ. The ECJ will become, thereby, the conclusive arbiter of the meaning of Union measures and, by extension, of national law passed to implement such measures.

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[114] ESC 25th Report 2006-07, 2 October 2007 and ESC 3rd Report 2007-08, 14 November 2007
[115] Para. 64 at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf
[116] Para. 65

> 67. The 'opt-in' arrangements are only a means to ensure protection in the sense that the UK may choose not to opt in, which protection will be lost each time a decision to opt-in is taken. Once a decision to opt-in is taken, it now seems clear, on the evidence we have taken, that there is no right to opt-out, if the resulting measure is not thought satisfactory. The only remedy, which is not available in all cases, is the 'emergency brake', which was also proposed in the same areas in the previous constitutional treaty.
> It is important, therefore, that the consequences of any decision whether or not to opt in is clearly understood and open to full parliamentary scrutiny and approval and is kept free from any new external pressures and constraints.
> 68. We accept that provision is made for the UK to exercise a right to 'opt-in' in relation to measures which amend or replace existing EU measures, to measures which amend existing Title IV EC measures and to those which build upon the Schengen *acquis.*
> 69. We note the detailed explanations which have been provided on the operation of the proposed transitional arrangements, but we raise the question of whether these may have the unintended effect of exposing the UK to new and unpredictable consequences and risk if it decides not to opt in to any transposed or amended measure.
> 70. The 'opt-in' decision under these proposals will become one which may lead to serious consequences for the UK through the transfer of jurisdiction on important measures dealing with civil and criminal justice. It will therefore be important that the arguments for and against opting in are the subject of the closest scrutiny by Parliament and for the accountability of Ministers to the House.[117]

It concluded:

> 74. We draw attention to the provisions relating to the 'opt-in' on amendments to existing EU measures, where we consider that a stronger position could have been achieved.
> 75. We are concerned that the interpretation of the red line to "protect UK civil and criminal justice" as only requiring control of the decision to opt in or not does not recognise the loss of protection that will occur every time jurisdiction is transferred from UK courts to jurisdiction by the European Court of Justice and the Commission.[118]

F. Transport

Title V, Articles 70-80 (Constitution Articles III-236 – 245) are on transport and are based largely on Articles 70 – 75 TEC, but with a change in the voting procedure to the OLP with QMV, except for Article 72, which replaces unanimity in the Constitution Article III-237 with a "special legislative procedure". Other, minor, changes are **Article 75(c)**, which adds the EP to those bodies to be consulted, and **Article 78** (Constitution Article III-243), allowing the Article concerning German unification to be repealed after 5 years.

Present Articles 154 – 156 on Trans-European Networks (TENS) have been moved to Title VII and contain only minor amendments.

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[117] Paras. 66-70
[118] Paras. 74-5

G. Competition, taxation and approximation of laws

1. Competition

Articles 81- 97 (Constitution Articles III-161–III-178) on competition and taxation policies incorporate existing provisions set out in Articles 81-86 TEC. At French insistence, Lisbon does not refer to the objective of "free and undistorted competition" but a Protocol on the Internal Market and Competition confirms the principle that "the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted" and provides for the Union "if necessary, [to] take action under the provisions of the Treaties, including under Article 308 of the Treaty on the Functioning of the European Union". There was press speculation that, on a proposal from the French President Sarkozy, the reference to "undistorted competition" would be removed from the Protocol.

The Government's position has been that the removal of the objective from the Treaty does *not* amount to any change in policy. The following Lords exchange considered the implications:

> **Lord Campbell of Alloway:** My Lords, I beg leave to ask the Question standing in my name on the Order Paper, having declared my interest on 3 July.
> The Question was as follows:
> To ask Her Majesty's Government whether, notwithstanding their assurances given on 25 June and 3 July, they will reassess the possibility that the omission from the protocol agreed at the June European Council of the reference in the Treaty of Rome to free and undistorted competition may be interpreted by the European Court of Justice as a change of policy.
> **The Lord President of the Council (Baroness Ashton of Upholland):** My Lords, there is no need to reassess the situation. It is clear that the words used in the proposed protocol are substantially the same as the words used in the existing EC treaty. Moreover, the protocol is legally binding. Therefore, there has been no change of policy.
> **Lord Campbell of Alloway:** My Lords, I thank the noble Baroness for her reply. Was not the object of the omission of words which safeguarded the undistorted and free competition established by Article 85 to change EU competition law, as reported in *Le Monde* of 25 June, and enable Protocol 6 to foreclose on that fundamental principle to become but a matter for consideration, bereft of any legal efficacy, subservient to a series of obligations under Articles 1 to 3, which are wholly extraneous to competition law?
> **Baroness Ashton of Upholland:** My Lords, it is difficult for me to put before your Lordships' House what the French president had in mind when making his proposals. There could have been a number of reasons—political, economic and other. The noble Lord's underlying question is whether we are certain and secure in our understanding of undistorted competition. We agree with the Commission's lawyers that, as a result not only of the protocol but of other articles in the proposed reform treaty, that remains the case.
> […]
> **Lord Howell of Guildford:** […] Have not the objectives of the European Union been changed by the proposal of Mr Sarkozy to remove from the protocol the reference to free and undistorted competition? We all know that the treaty is, according to the House of Commons committee, substantially the equivalent of the previous constitutional treaty, but it has in this case been made worse. Surely

> the judges of the European Court of Justice are guided by the objectives of the Union—they keep referring to them. When they find that the objectives have changed, how does she know that they will not change their judgments? She does not know.
>
> **Baroness Ashton of Upholland:** […] My experience of working with the European Court of Justice and the European Union—the noble Lord will know that I served on the Justice and Home Affairs Committee for three years on behalf of the Government—is that there are many ways in which one is able substantially to protect important aspects of European Union law or the wishes of member states. Protocols are legally binding; I can find no precedent for the European Court of Justice saying that the protocol has less effect in a particular context than within the original articles. There may be a case in the future where the European Court looks at that matter, but we have no legal advice to suggest the opposite. The Commission's lawyers, too, have no difficulty with this position.
>
> **Lord Hannay of Chiswick:** My Lords, does not the noble Baroness agree that this whole matter shows how important strong institutions of the European Union are and that, in fact, the competition policy depends crucially on the attitude of the Commission? Therefore, the Commission stating that its powers have in no way been weakened is absolutely critical.[119]

Present Article 81 TEC prohibits agreements, decisions and concerted practices ("anti-competitive agreements") which prevent, restrict or distort competition. As one of the EU's two main competition provisions, a substantial body of case law surrounds the interpretation of this Article. It forms the basis in the *Competition Act 1998* for the Chapter I Prohibition of the UK's domestic competition regime (ss.2, 9). Article 82 TEC is the other main competition article, prohibiting abuse of a dominant position (i.e. monopolistic abuse), which forms the basis for section 18 of the *Competition Act 1998*. There are no significant changes to either of these provisions in the TFEU.

Article 85 (Constitution Article III-165) gives the Commission the authority to investigate competition infringements within its competence, and requires Member States to assist the Commission in this work. There is one addition to the text in **Article 85(3)** (Constitution Article III-165(3)) to the effect that, where the Council has adopted a regulation pursuant to this provision, the Commission is empowered to adopt a regulation or directive relating to the categories of agreement.

Articles 87– 89 (Constitution Articles III-167 – III-169) concern state aids. The provisions are as at present, except that **87(2)(c)** on aid granted to Germany after unification being compatible with the internal market now provides for the possibility of a decision to repeal that point five years after implementation of the Lisbon Treaty. A Declaration annexed to the Treaty notes that the provisions will be interpreted in accordance with ECJ case law. (Similar wording is included in amended **Article 78** on transport).

"Regions" are added to **87(3)** as possible qualifiers for aid "in view of their structural, economic and social situation". Amended **Article 88** (Constitution Article III-168) adds a new **paragraph (4)** on categories of aid considered exempt from the conditions set out in paragraph (3) on compatibility with the internal market.

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[119] HL Deb 9 October 2007 cc119-121 at http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/71009-0001.htm#07100933000005

In June 2004 the ESC had taken evidence from Patricia Hewitt, the then Secretary of State for Trade and Industry, who spoke about the competition elements in the draft constitution:

> As far as the subject we are looking at today is concerned, the draft Treaty says that the Union shall have exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market. We think that is right. It is a prime function of the European Union to deliver an effective internal market and that goal of a dynamic, open and competitive market across the European Union is of huge benefit to the United Kingdom and that is one of the main reasons why we have been at the forefront in developing a pro-active and effective competition policy in Europe drawing on our own significant efforts to remodel and modernise our competition regime which of course we did with the 1998 Competition Act, the 2002 Enterprise Act and the implementation of the modernisation regulations this year. Our view is that in a world where businesses and markets are increasingly global, most competition cases of concern to the authorities will have an impact beyond national borders. The European Commission and the national competition authorities including our own Office of Fair Trading already work very closely together on such cases. The framework for that of course is enshrined in significant recent reforms of the European competition regime through the modernisation of the application of Articles 81 and 82 and the amendments to the European merger regime. The changes that have been made clearly reflect the shared understanding between us and our European colleagues in the Commission that competition cases should be dealt with by the authority best placed to do so in accordance with the principle of subsidiarity. The new merger regime has introduced a simplified mechanism to reallocate cases between the Commission and the Member States. So, the Competition Directorate will consider cases with a significant European dimension, national authorities, those which are primarily orientated towards national markets. We do not believe that the Treaty will prevent us having additional domestic competition rules for other purposes that do not obstruct the effectiveness of the Community rules and are not aimed at the functioning of the internal market. Finally, the text of the Constitution as originally drafted by the Convention of the Future of Europe did raise some concerns in relation to competition. They were essentially of a technical nature; we sought to deal with them through the technical review in the IGC process overseen by Jean-Claude Piris, the Head of the Council Legal Service. We succeeded in our goal of getting that clause redrafted; we worked extremely hard with colleagues to get clarity into the text through that amendment and I think that the amendment we secured on competition does provide both the clarity we were seeking and the basis for the further effective operation of competition policy in the European Union. [120]

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

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

> … the view we took instead once we got into the technical review was that the exclusive competence should operate where it was necessary for the functioning of the internal market and we believe that clarifies the interface between domestic and community law … .[121]

2. Taxation

Articles 90–93 (Constitution Articles III-170 – III-171) concern taxation. They incorporate the existing tax provisions set out in Articles 90 to 93 TEC. There is a considerable body of European law concerning the harmonisation across Member States of indirect taxes: that is, VAT and excise duties on alcoholic drinks, hydrocarbon oils and tobacco products. At present the Treaty base for this legislation is Article 93 TEC, which states:

> The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.[122]

The new **Article 93** (Constitution Article III-171) has one substantive change. Legislation for harmonising indirect taxes may be adopted (*emphasis added*) "provided that such harmonisation is necessary for the establishment or the functioning of the internal market *and to avoid distortion of competition*." It remains the case that any such legislation must be agreed by the Council acting unanimously.

Articles 94–97 (Constitution Articles III-172 – III-176) are on the approximation of internal market laws. The general aims are unchanged and the Council will adopt measures for the approximation of laws, regulations or administrative provisions of the Member States that directly affect the internal market. The out-dated term "common market" is removed and replaced with "internal market".

Harmonisation in the sphere of direct taxes under Article 94 TEC is much more limited than in that of indirect taxes. Although directives introduced under Article 94 TEC may be approved under the co-decision procedure, this does *not* apply to fiscal provisions.[123] The TFEU, like the Constitution, maintains the requirement for unanimity in **Article 95** on any fiscal measure introduced under this Treaty base. The wording of Articles 94 and 95(2) (Constitution Articles III-173 and III-172) is fundamentally unchanged.

The possibility that all taxation measures might be subject to unanimity at some point in the future has been a controversial issue for some time.[124] The Government's position on the issue has been stated many times. In June 2003 the then Paymaster General,

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

122 Article 14 refers to the establishment of the single European market on 1 January 1993.

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

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

Dawn Primarolo, said the British Government would "not accept any changes that move away from unanimity on tax matters.[125] When the then Prime Minister, Tony Blair, made a statement to the House following agreement on the Constitution in June 2004, he underlined the point that "this treaty … keeps unanimity for the most important decisions … in particular for tax, social security, foreign policy, defence and decisions on the financing of the Union affecting the British budget contribution."[126] Tony Blair told the Liaison Committee on 18 June 2007 shortly before the June European Council which agreed the IGC Mandate: "we will not agree to anything that moves to qualified majority voting, something that can have a big say in our own tax and benefit system".[127]

Article 96 on Union action in the event of a distortion in competition becomes subject to the OLP. A new **Article 97(a)**(Constitution Article III-176) has been inserted which deals with setting "uniform intellectual property rights protection" throughout the Union. The Council and EP will adopt laws to establish this and central Union-wide authorisation, coordination and supervision arrangements. The Council will make the language arrangements for the instruments, acting by unanimity.

Some of these aims have already been achieved by the "European Copyright Directive". Directive 2001/29/EC on the "harmonisation of certain aspects of copyright and related rights in the information society" was adopted on 22 June 2001 and was supposed to be implemented in Member States by 22 December 2002. The UK, in common with almost every other Member State, was late in implementing the Directive. It was brought into force by Statutory Instrument on 31 October 2003.[128] The Directive harmonises the basic rights relevant to uses of copyright material in the information society and e-commerce, namely the rights of reproduction (copying) and communication to the public (electronic transmission, including digital broadcasting and "on-demand" services). It also limits the type and scope of permitted exceptions to these rights and provides legal protection for technological measures used to safeguard rights and identify and manage copyright material. The *Copyright, Designs and Patents Act 1988* already provides protection similar to many of the obligations contained in the Directive. However, the 2003 Regulations amend the Act "insofar as its provisions do not conform or comply with the Directive and regarding matters that are related to or consequential upon these obligations".

H. Economic and Monetary Policy

Article 97(b) (Constitution Article III-177) corresponds with the principles set out in Article 4 TEC in the "Principles of the Community" on the adoption of an "economic policy which is based on the close coordination of Member States' economic policies". **Articles 98-104** (Constitution Articles III-178 – 184) concern economic policy, while **Articles 105–111** (Constitution Articles III-185 – 191) are on monetary policy, including

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125 HC Deb 9 June 2003 c 602W
126 HC Deb 21 June 2004 c 1079
127 Liaison Committee Minutes of Evidence 18 June 2007 Q171 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmliaisn/300/7061805.htm
128 *The Copyright and Related Rights Regulations 2003* SI 2003/2498

the role and remit of the European System of Central Banks (ESCB) and the ECB. The present Articles are largely unamended.

In amended **Article 99** (Constitution Article III-179) the Commission may now "address a warning" to Member States if they are not following the broad economic guidelines. This is in addition to the Council being able to make recommendations to the Member State in question, a right which currently exists. The vote of the Member State being considered will not be counted in the Council and in the OLP to be used for mulitilateral surveillance rules a qualified majority will be defined under Article 205(3)(a) of the TFEU (at least 55% of the other voting Council members, representing Member States comprising at least 65% of the population of voting Council members). Lisbon **Article 100** adds to both the present Article and Constitution Article III-180 an explicit emphasis on difficulties with energy supply in Council solidarity measures.

Article 104 (Constitution Article III-184) covers excessive deficits. As in the Constitution, **Article 104(5)** (III-184(5)) has been changed to the effect that, if the Commission considers that an excessive deficit has occurred or may occur, it can address an opinion directly to the Member State concerned and inform the Council. Previously, the Commission would address this opinion to the Council. **Article 104(7)** (Constitution Article III-184(6)) adds that when an excessive deficit is established by the Council, recommendations to correct this will be brought forward without "undue delay". Council decisions relating to Member States will be made without the vote of the Member State concerned (sub-paragraph 13) by a qualified majority.

Articles 105 - 110 (Constitution Articles III-185 - 190) on monetary policy are largely the same as the present Treaty Articles. **Article 107** (III-107) introduces the OLP for a range of amendments to the ESCB and ECB Statutes.

Present Article 111 TEC, on the conclusion of exchange rate system agreements with third parties, is transferred to **Article 188(O)** (Constitution Article III-326) in Title V on International Agreements. New **Article 111a** (Constitution Article III-191) provides for the EP and Council, after consulting the ECB, to lay down the measures necessary for use of the euro as the single currency. **Article 112** (Constitution Article III-192(2b)) is present Article 114 and provides an additional task for the Economic and Financial Committee (formally the Monetary Committee), to report on financial relations with third countries and international institutions

Articles 114, 115 and **115(a)** (Constitution Articles III-194, 195 and 196), "Provisions specific to Member States whose currency is the Euro", are new.

Article 114 allows for measures on the coordination and surveillance of budgetary discipline and economic guidelines to be set specifically for the euro area. **Article 115A** allows for an informal 'euro group' to be set up, consisting of Ministers whose currency is the euro. In practice the 'euro group' already exists and meets informally prior to normal ECOFIN meetings. **Article 115C** allows the Council to adopt decisions establishing common positions relevant to EMU within international financial institutions and conferences as well as measures to ensure unified representation within international financial institutions and conferences. These measures will only cover the euro area and will be decided by Member States of the euro area. The Deutsche Bank thought the recognition of the group as a kind of Euro-ECOFIN Council would "moderately

strengthen the role of the Eurogroup and improve policy coordination within the euro area."[129]

Article 116a sets out the arrangements for Member States "with a derogation".[130] While the article has appears to have changed substantially from the original article, the content for the most part is the same and has been re-arranged or re-worded. The article sets out areas of the Treaty which do not apply to Member States with a derogation, including the following areas which are unchanged from the existing treaty:

- Adoption of broad economic policy guidelines concerning the euro area;
- Coercive means of remedying excessive deficits;
- The objectives and tasks of the European System of Central Banks;
- The issue of the euro and measures governing the use of the euro;
- Acts of the European Central Bank (ECB) and appointments to the Executive Board of the ECB;
- Monetary agreements and other measures relating to exchange rate policy; and,
- Exclusion from rights and obligations relating to the European System of Central Banks.

Two additional areas are covered by the Treaty in this article which are not in previous treaties: decisions establishing common positions relevant to EMU within international financial institutions and conferences and measures to ensure unified representation within international financial institutions and conferences (See **Article 115A**). Neither of these areas applies to Member States with a derogation.

A new provision is that the voting rights of Member States with a derogation are suspended in two areas:

- Recommendations to Member States within the euro area on the framework of multilateral surveillance, including stability programmes and warnings; and,
- All measures relating to excessive deficits for Member States whose currency is the euro.

Articles 116a–120 (Constitution Articles Article III-197 - 202) concern transitional provisions regarding the single currency. **Article 116a** (Constitution Article III-197) sets out the arrangements for Member States "with a derogation".[131] This has changed substantially in format but the content has been for the most part simply re-arranged. **Article 116a** and Article 99(2), which cover the adoption of broad economic guidelines in the euro area, does not apply to Member States with a derogation.[132] **Article 116a(4)** has

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[129] *Deutsche Bank Research* 10 October 2007, "Treaty Reform: consequences for monetary policy" at http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000216337.pdf

[130] i.e. those Member States who are not a Member of the euro area. The UK is officially a Member State with a derogation.

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

[132] The Member States with a derogation are currently Bulgaria, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovakia and Sweden. The derogations of Cyprus and Malta are abrogated with effect from 1 January 2008

been altered to include two further areas where Member States with a derogation cannot vote:

- recommendations made to those Member States whose currency is the euro in the framework of multilateral surveillance, including on stability programmes and warnings
- measures relating to excessive deficits concerning those Member States whose currency is the euro.

While the IGC did not agree on a new Stability and Growth Pact, a Conference Declaration regarding the Pact was annexed to the Treaty ("Declaration on Article 104 of the Treaty on the Functioning of the European Union"), in which the Conference confirms that the Pact is an "important tool" in the Union's economic and fiscal policy and "reaffirms its commitment to the provisions concerning the Stability and Growth Pact as the framework for the coordination of budgetary policies in the Member States".[133]

A new **Article 117a** (Constitution Article III-198) is based on present Articles 121(1),[134] 122(2) and 123(5),[135] but updated to remove references to 1996, 1997 and other dates relating to the introduction of the euro. A new **Article 118a** (Constitution Article III-199) updates present Articles 117(2) and 123(3), providing for Member States with a derogation from EMU the institutional machinery (including the European Monetary Institute and the General Council of the ECB) to monitor their progress towards the adoption of the euro. **Article 118(b)** (Constitution Article III-200) largely corresponds with present Article 124(1) on the exchange rate policy of Member States with a derogation.[136]

Articles 119–120 (Constitution Articles III-201 – 202) on difficulties in Member States with a derogation, which might threaten their balance of payments and might jeopardise the functioning of the internal market are largely the same as the present Treaty Articles, with minor amendments such as changing "common market" to "internal market".

I. Employment and Social policies

Articles 125 – 130 (Constitution Articles III-203 – 208) on employment policy remain essentially unchanged from the present Articles 125-130 TEC. Social policy is covered by **Articles 136–145** (Constitution Articles III-209 – 218) on social policy.[137] As in Constitution Article I-48, a new Article (**Article 136a**) is inserted on the Union recognising and promoting the role of the social partners, taking into account the diversity of national systems. This Article provides recognition at Union level of the role of the social partners

133 CIG 15/07 3 December 2007
134 The rest of Article 121 is repealed.
135 Article 123 is repealed, with the exception of sub-paragraphs (3) and (5)
136 The rest of Article 124 is repealed.
137 This Title replaces the current Title IX, the Common Commercial Policy, which becomes Title II in Part Five on the "Union's external action" and Articles 131 and 133 become Articles 188b and 188c respectively.

and the importance of the Tripartite Social Summit for Growth and Employment,[138] the forum at which the social partners help to define social standards in the EU.

The key social policy provision is **Article 137** (Constitution Article III-210), which is largely similar to present Article 137. This specifies the social policy areas in which the EU is committed to supporting and complementing the Member States, and the basis for decision-making. The policy areas remain:

> (a) improvement in particular of the working environment to protect workers' health and safety;
> (b) working conditions;
> (c) social security and social protection of workers;
> (d) protection of workers where their employment contract is terminated;
> (e) the information and consultation of workers;
> (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
> (g) conditions of employment for third-country nationals legally residing in Union territory;
> (h) the integration of persons excluded from the labour market, without prejudice to Article 150;
> (i) equality between men and women with regard to labour market opportunities and treatment at work;
> (j) the combating of social exclusion;
> (k) the modernisation of social protection systems without prejudice to point (c).

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

In the field of social policy Lisbon, like the Constitution, essentially maintains the existing position under Article 137 TEC. Retaining unanimity for social security decisions was in 2004 and remained in 2007 one of the Government's 'red lines'.[139] The Government set out its initial position in a Memorandum to the House of Lords European Union Committee in February 2003:

> 12. […] The Government does not believe that any extension of QMV in this area is necessary. It is not convinced that more QMV will create more and better jobs,

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[138] Social Dialogue Summits were established by Council Decision 2003/174/CE of 6 March 2003. They are high-level meetings of the Council Presidency and the two subsequent Presidencies, the Commission and the social partners, with European social partner organisations and their national members (trade union and employers organisations), chaired by the President of the European Commission. The results and developments of European social dialogue can be found on the *Europa* website at: http://europa.eu.int/comm/employment_social/social_dialogue/.

[139] For information on the Government's 'red lines' in 2003-04, see Standard Note SN/IA/2740, *The Intergovernmental Conference on the Draft Treaty Establishing a Constitution for Europe: issues, concerns and 'red lines'*, 7 November 2003 at http://hcl1.hclibrary.parliament.uk/notes/iads/snia-02740.pdf

> or help further alleviate social exclusion. The Government also considers that unanimity has not been a bar to the adoption of necessary legislation in the social field. Unanimity allows proportionate legislation to be adopted which respects the diversity of national traditions in EU Member States.
>
> 13. New decision-making arrangements in the social field under the Nice Treaty only came into effect on 1 February 2003. The new rules allow the Council to decide unanimously to move to qualified majority voting in some areas of social policy. The Government considers that it would be premature to consider changing these arrangements at this stage. Given that they have not yet been properly tested, the Government believes that the arrangements should be preserved in the new Treaty.[140]

The Committee commented that, while the Government's concerns about the extension of QMV in the social policy field were understandable, it was doubtful whether unanimity would be a viable basis for making decisions in this area following EU enlargement. It also argued that any discussion about extending QMV in social policy should be accompanied by an attempt to clarify the EU's competence in this area.[141] In its October 2003 Report, the Lords Committee called on the Government to "stand firm" against attempts to amend the draft Treaty to extend QMV to matters of tax or social security.[142] The Government has stood firm and EU enlargement to include twelve new Member States does not appear to have affected the viability of unanimous decision-making.

Article 137(4) upholds another of the British Government's 'red lines', retaining the current Treaty provision that laws adopted under this Article will not affect the right of Member States to define the fundamental principles of their social security systems.

One of the important issues surrounding the negotiations on the Lisbon Treaty was the question as to what status the *Charter of Fundamental Rights and Freedoms* will have in EU and domestic law. Chapter IV of the Charter contains provisions on the right to strike which UK trade unions hope, and UK employers fear, could be used to effectively overturn the Thatcherite reforms of trade union law if they became directly effective in UK law. Some consider that the Charter, agreed in 2000, may acquire legal force in all Member States through a reference to it in the Lisbon Treaty. It is not at all clear whether Lisbon will have that effect. The EU has arguably no power to adopt laws on the regulation of the right to strike. Article III-210(6) of the Constitution and paragraph 5 of the present Article 137 EC state that the EC's social policy powers as set out in that Article "shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs". There is accordingly no EC legislation regulating such aspects of trade union activity. **Paragraph 5** of Article 137 EC remains unchanged in Lisbon.

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

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

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

Article 138 (Constitution Article III-211) is essentially the same as the present Treaty Article, while **Article 139** (Constitution Article III-212) is largely the same as present Article 139 but specifies that the EP is to be informed of agreements with social Partners. Unanimity is retained for agreements where areas covered by it are subject to unanimity under Article 137(2). **Article 140** (Constitution Article III-213), on cooperation and coordination of social policy, action adds that the Commission will act with Member States by making studies, delivering opinions and arranging consultations on the "organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation" on which the EP will be kept fully informed.

Articles 141-145 (Constitution Articles III-214 -218) on equal pay for men and women, the Commission report on progress in social rights, the establishment of a Social Protection Committee and the Commission annual report to the EP on social developments, are largely the same as existing Treaty Articles. **Articles 146–148** (Constitution Article III-219) on the European Social Fund are also largely unamended.

J. Sport, culture and public health

1. Sport

Amended **Article 149(1)** adds sport to Union action on "education, vocational training and youth", stating that the Union "shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function". The provisions give sport a distinct profile for the first time. Union action will be aimed at:

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

EU measures already impinge on sport, notably football, in a variety of ways: for example in the transfer of players between clubs,[143] the sale of broadcasting rights[144] and in the listing of sporting events (providing the opportunity for wide TV coverage).[145] The Nice European Council in December 2000 adopted a declaration on the specific characteristics of sport, acknowledging its wider social function.[146]

The EU-critical think tank 'Open Europe' thought the Lisbon Treaty could, for example, mean the EU setting wage and transfer caps for professional football".[147] However, Richard Laming, the Director of the pro-EU body, 'Federal Europe', argued:

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143 See Library Research Paper 03/02, *Current Issues in Football*, 7 January 2003
144 See Library Standard Note SN/HA/2192, *Financing Football*
145 See Library standard note SN/HA/802, *Listed Sporting Events*
146 Nice European Council Conclusions December 2000 at: http://ue.eu.int/en/Info/eurocouncil/index.htm
147 Open Europe "The Constitution by any other name: An analysis of the draft EU treaty" Version 2.0 at http://www.openeurope.org.uk/research/byanyothername.pdf

> The crucial thing to realise, as many Eurosceptic critics appear not to have done, is that the EU has a policy on sport already. The single market that swept away national borders in economic life swept away borders in sporting life, too. In the eyes of the present treaties, professional sport is an economic activity and should not be subject to the kind of national protectionism from which the rest of the European economy is spared.[148]

He concluded:

> If sport is one of the factors that is uniting Europe, then Europe needs to return the compliment. t needs to give a higher priority to those aspects of life that cannot or should not be quantified in monetary terms. The provisions of the Reform Treaty will enable the EU to do this better than before. Its opponents should think again.

2. Culture

Article 151 (Constitution Article III-280) on culture differs only minimally from Article 151 TEC, but it does remove the unanimity requirement for the adoption of incentive measures and recommendations in this area.

There was no specific cultural policy until the TEU in 1993, although some aspects of culture were taken into account before this. The present Article 151 TEC authorises the EU to make use of instruments supporting cultural activities, such as the "Culture 2000" programme and the European City of Culture and European Cultural Month actions. An example of topical interest is the European Capital of Culture,[149] because of Liverpool's successful bid for the year 2008. The objective is twofold: to contribute to the "flowering of the cultures" of the Member States, while respecting their national and regional diversity, and at the same time to bring their *common* cultural heritage to the fore.

3. Public health

Article 152 (Constitution Article III- 278) is on public health. Article 152 TEC is the only current Treaty Article that explicitly mentions health issues, although the Treaty has affected national health policy through its provisions on the free movement of persons, services and capital. For example, Treaty provisions on social security have been interpreted to include health care for employed persons and their families moving within the Community. ECJ judgments have raised questions about the extent to which Treaty provisions on the freedom to provide services might also affect the provision of health care.[150] The House of Lords report on "Social Europe" of March 2003 commented:

> It may, however, be difficult to determine what is included under EU action in "public health" – whether, for example, it should cover areas such as tobacco advertising and the mobility of patients across the EU- and clarity will be needed

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148 *EUObserver* Comment 23 October 2007 at http://euobserver.com/7/25020

149 European Capitals of Culture took over from Cities of Culture in 2005.

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

> when drafting the relevant Title of the Treaty. This is particularly important in view of the legitimate concern of member States – expressed in the government's evidence to use – to retain control over the way that their national health systems are run. The Commission was, however, confident that a provision on public health could be drafted "to make clear that Union action would in no way impinge on the competence of the member State to manage and finance their own health systems".[151]

The Committee concluded that there was a case for extending EU competence in the area of public health, provided that such an extension was confined to issues that were genuinely cross-border and did not impinge on Member States' control over how their health services were run.[152]

The EU's current powers relating to public health are a mix of shared and supporting competences. Article 152(1) TEC, for example, envisages the Community taking action to complement national policies. Article 152(4) TEC enables the adoption of measures, by co-decision and QMV, setting standards of quality and safety for blood and blood derivatives (among other things).

The new **Article 152** (Constitution Article III-278) includes a number of changes, although, as before, there is a mixture of shared and supporting competences. There is an additional aim of encouraging "cooperation between Member States to improve the complementarity of their health services in cross-border areas". Initiatives to establish guidelines and indicators, exchange of best practice and periodic monitoring and evaluation are also added in **paragraph (2)**. **Article 152(4)(c)** includes the new objective of "measures setting high standards of quality and safety for medicinal products and devices for medicinal use". Present sub-paragraph (c) is expanded into a new **paragraph (5)** on incentive measures to be adopted under the OLP to protect and improve human health, combat cross-border health scourges, monitoring, early warning and the protection of public health with regard to tobacco use and abuse of alcohol.

There is also a stronger statement of the responsibilities of Member States for their own health services that may be a response to some of the ECJ judgments on this issue. In **paragraph (7)** it is no longer just action *in the field of public health* that must respect Member States' responsibilities for their own healthcare systems, but EU action in general. Although Lisbon, like the Constitution, removes the current "fully" respect the responsibilities of Member States for health care provision, organisation and delivery in this paragraph, it includes the clause in the Constitution on the national responsibility for the "management of health services and medical care"

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

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[151] Lords EU Committee 14th Report *The Future of Europe: "Social Europe"*
[152] Ibid para. 37

Treaty provisions regarding organisation and delivery of health services, and the prohibition of harmonisation.[153]

K. Consumer Protection

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

The statement in present Article 153(2) TEC that consumer interests must be taken into account in all EU policies and activities is moved to new **Article 6a** (Constitution Article III-120).

Lisbon does not alter the Commission's Consumer Policy Strategy, adopted on 7 May 2002, and the EU Action Plan for 2002 – 2006, setting out priorities for consumer policy. The Consumer Policy Strategy has three objectives:

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

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

It has been argued variously that the problem is not one of promoting consumer protection policies and adopting legislation, but that the monitoring and enforcement of consumer legislation has been inadequate, with Member States not providing systematic feedback on the impact of EU legislation, including the practical enforcement problems encountered. In 2002 the National Consumer Council (NCC) in the UK suggested that all Member States to be required to specify enforcement arrangements when EU legislation is transposed into domestic law.[154] The NCC also argued that Member States should be under an obligation to give assistance to the enforcement bodies of other Member States on the activities of companies whose headquarters or main place of business is in their jurisdiction.

Another criticism of EU consumer protection policy has been the preference for more legislation, instead of other forms of regulation. Various organisations (including the Advertising Association in the UK) have said that divergent national legislation is not, in

[153] Cm 6309 September 2004 p.28
[154] National Consumer Council, contributions to the EU consumer policy forum, 23 September 2002

itself, a sufficient reason for greater EU legislation.[155] Adding to existing legislation imposes burdens on industry that hinder market development and consumer choice.

The NCC called for a clear legal framework for self-regulation at EU level. Schemes should meet basic standards of independence, stakeholder representation, monitoring, sanctions and transparency. However, the NCC also acknowledged that statutory regulation will always be necessary in a number of situations where the use of self-regulation would be unacceptable (for example, where competition alone cannot deliver essential services to consumers who are not of commercial interest to suppliers, or where regulation is needed to make fair competition work).[156]

Some maintain that EU policy-making in this area has been fragmented, with no consideration of its impact outside the immediate policy area. Contributing to an EU consumer policy forum on 23 September 2002, the NCC said that it would like to see the full implementation of Article 153 TEC to ensure that all consumer policy becomes an integral part of all other EU policies. Lisbon seeks to achieve this in Article 6A.

The NCC welcomed the setting-up of a new permanent Inter-services Committee on consumer policy, but stressed that the Committee had to be an effective body which would ensure that consumer integration became an integral part of the development of all EU policies. Consumer impact assessments would be an important tool for the new Committee.[157] The NCC thought that the needs of disadvantaged and vulnerable consumer groups should be highlighted in the new Action Plan. It argued that strategies based on providing consumers with better information may fail to help the most vulnerable groups.[158]

The evaluation report on the EU's consumer protection strategy up to 2006 was published in December 2006. Its conclusions and recommendations met many of the NCC's demands.[159] In April 2005 the Commission adopted a joint strategy for health and consumer policy from 2007-2013.[160] The strategy, which is discussed in a 2007 Commission Communication,[161] tackled issues raised by the NCC, such as better monitoring and enforcement mechanisms. In addition, the Consumer Protection Cooperation (CPC) regulation,[162] adopted in 2004 to strengthen cross-border enforcement cooperation to tackle dishonest trading practices, came into force in 2005 and 2006. The CPC Regulation will establish a network of public authorities with powers to cooperate and share information with each other for the purposes of enforcing EC legislation that protects the 'collective interests of consumers'.

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

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

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

158 Ibid.

159 DG Health and Consumer Protection, Ex-post evaluation of the impact of the Consumer Policy Strategy 2002-2006 on national consumer policies, Final Report 22 December 2006 at http://ec.europa.eu/consumers/overview/cons_policy/ex_post_final22dec.pdf

160 "Healthier, Safer, more confident citizens: a health and consumer protection strategy", COM(2005) 115.

161 COM(2007) 99 final, 13 March 2007 at http://ec.europa.eu/consumers/overview/cons_policy/doc/cps_0713_en.pdf

162 Regulation (EC) No 2006/2004

The Commission has recently set up a "stakeholder dialogue group" on public health and consumer protection as part of the implementation of its March 2007 Communication, "Follow-up to the Green Paper 'European Transparency Initiative'"[163] and its 2001 White Paper on "European Governance".[164] The new group will advise the Commission on how to improve stakeholder consultation as required in the 1997 Protocol on subsidiarity and proportionality.

L. Industry; least favoured regions,

Article 157 (Constitution Article III-279) on industry is essentially the same as present Article 157, but like the Constitution, it expressly excludes harmonisation in **paragraph (3)**. It also adds in **paragraph (2)** a clause clarifying the Commission's initiatives in this area in establishing guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation; and keeping the EP fully informed.

Article 158 (Constitution Article III-220) adds "territorial" to this heading and extends the list of areas to which particular attention should be paid from the "least favoured regions or islands, including rural areas" in the TEC to:

> … rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions.

When the Government was asked in December 2003 what impact the territorial cohesion provisions in the draft EU Constitution Treaty might have on applications from peripheral and insular areas for regional European support and state aid, the then Foreign Office Minister, Denis MacShane, replied that the Government did not expect the references to territorial cohesion to have any impact on existing arrangements for the structural funds and regional aid.[165]

In amended **Article 161** unanimity is replaced by the OLP for decisions on the tasks, objectives, organisation and rules relating to the Structural Funds.

M. Research, technology, space

Articles 163–173 (Constitution Articles III-248 – 255) are on research and technological development and space. Space is added to the current research and technological development chapter. **Article 163** establishes a European research area

> in which researchers, scientific knowledge and technology circulate freely, and encourage it to become more competitive, including in its industry, while

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[163] COM(2007) 127 final 21 March 2007
[164] COM(2001) 428 final 25 July 2001
[165] HC Deb 16 December 2003 c797-8W

> promoting all the research activities deemed necessary by virtue of other Chapters of the Treaties.

This is a more ambitious rendering of Article 163 TEC, which simply provides that the EU shall "have the objective of strengthening the scientific and technological bases of Community industry". **Article 165(2)** contains the now familiar provision that the Commission may take initiatives in this area to establish "guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation", keeping the EP "fully informed".

Article 172a (Constitution Article III-254) is new and provides for the Union to draw up a "European space policy", to be underpinned by EP and Council measures which "may take the form of a European space programme". The vague wording of the paragraphs describes only what is already happening under the aegis of the European Space Agency, the coordinating body through which the UK's contributions to space research and exploration are channelled. This Article differs from the Constitution Article in excluding any harmonisation of the laws and regulations of the Member States.

In January 2003 the European Commission issued a *Green Paper on European Space Policy*,[166] with a public consultation period ending on 30 May 2003. The Green Paper asked how far Europe should aim to compete in the global space industry, given that Europe's current spending on space activities at that time was only €15 euros per head of population, while the US was spending €110 euros per head (p 17). At a meeting on 27 May 2003, ministers called for a framework agreement formalising institutional relations between the ESA and the EU to be completed by the end of 2003.[167] The UK's own draft "space strategy", published in January 2003, strongly focused on research likely to have an immediate economic and research benefit.[168]

N. The Environment and Energy

Articles 174–176 (Constitution Articles 233 – 234) cover the environment in substantially the same terms as the current Treaty Articles. **Article 174(1)** differs from the Constitution Article by adding an express reference to "combating climate change". Unanimity is preserved, but with consultation of the EP, Economic and Social Committee and Committee of the Regions, for provisions of a fiscal nature, town and country planning, quantitative management of water resources or affecting the availability of those resources, land use, except waste management; and measures significantly affecting a Member State's choice of energy sources and the general structure of its energy supply. **Article 175(2)** allows the Council to decide by unanimity to make the OLP applicable to those matters subject to unanimity.

Article 176A (Constitution Article III-256) on energy is new. The amended **Article 176A(1)** includes a "spirit of solidarity" to the Union's aims in this title and adds the aim of promoting "the interconnection of energy networks". **Article 176A(2)** states that Union

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166 5707/2003

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

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

laws will not affect the right of a Member State "to determine the conditions for exploiting its energy resources and the structure of its supply". The Declaration supplementing this Article safeguards national energy measures. It states that "The Conference believes that Article 176a does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the conditions provided for in Article 297".

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

> It now strikes a good balance between protecting our abilities to control UK energy resources and allowing the EU to act where appropriate to liberalise energy markets. In particular, the Chapter preserves a Member State's right to control the exploitation of its natural resources (such as North Sea oil and gas). It is also consistent with the Government's commitment to ensure unanimity is retained for tax matters decided at EU level. […] It also recognises the need to preserve and improve the environment, with one of its three aims being the promotion of energy efficiency and the development of renewable energy.[169]

However, in 2003-04 the energy article proved highly controversial in the UK, particularly with regard to control over the UK's North Sea oil and gas reserves. The British Government's energy policy, as set out in the Energy White Paper of February 2003,[170] largely fitted in with the objectives set out in the Constitution, although the text was silent in some areas key to UK policy, such as measures to address fuel poverty. In February 2004 the Leader of the House, Peter Hain, said:

> An Energy Chapter will bring European competence on energy together in a single legal base. We support the proposal on the basis that it is more transparent than existing legislation. We have, however, consistently set out our concern that any uncertainty about the impact of the Energy Chapter could undermine investment in North sea oil and gas. With that in mind, we proposed a series of amendments to this part of the Treaty with the aim of ensuring that European member states would retain the right to control the exploitation of their natural resources.[171]

In response to a question about the "likely effect of implementation of the new provisions on the control of UK oil reserves", the Government minister, Malcolm Wicks, insisted:

> Article 176a of the Treaty does provide for the EU to help manage the functioning of integrated European energy markets, but does not seek to move control of any nation's energy resources to the EU. A key passage included in Article 176 reads: ""Such measures shall not affect a member state's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply..."" It is clear from this that

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169 Cm 6309 September 2004 p.27

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

171 HC Deb 12 February 2004 c 1570W at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040212/text/40212w05.htm#40212w05.html_sbhd5

> the UK and other EU nations will continue to have control over their indigenous energy resources.[172]

Also relevant is the amended **Article 100** in the Title on Economic Policy, which now includes a clause on "Difficulties in the supply of certain products (energy)". Paragraph 1 is replaced by the following:

> Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

Although a reserved competence, EU energy policy is an area in which the Scottish Executive has taken a keen interest. According to the Scottish Government website:

> Scotland is well placed to contribute to the EU agenda - with its huge potential renewable energy resources and opportunities for carbon storage. Scotland has a major energy industry focus in the North-East. It also has world-class centres of energy research in Glasgow; Edinburgh; and Aberdeen.
>
> Commission programmes will create real opportunities for Scotland to seek additional funding and partnerships with other Member States - particularly in relation to offshore grids, carbon storage, clean coal and green and renewable energy.[173]

O. Tourism; civil protection; overseas countries and territories

1. Tourism

Tourism was added to Constitution Article I-17, areas where the Union has competence to carry out supporting, coordinating or complementary action, and a new **Article 176B** (Constitution Article III-281) states that Union complementary action shall help to create a favourable environment for tourism undertakings and promote good practice, but will exclude harmonisation.

2. Civil protection

Article 176C (Constitution Article III-284) on civil protection is new, although civil protection is listed in present Article 3(u) TEC as an area of Community activity. The Article encourages and supports Member States in their attempts to prepare for a range of natural and man-made disasters at local, regional and national levels. Although the definition of man-made disasters is open to interpretation, it is assumed that this would include the aftermath of terrorist incidents. It is not clear whether the definition would apply equally to the dislocation of vital supplies arising from industrial disputes or protest action.

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[172] HC Deb 14 November 2007 cc250-1W

[173] http://www.scotland.gov.uk/Topics/Government/International-Relations/Europe/Priorities

Since 11 September 2001 the threat of terrorist attack has heightened the level of preparedness in the Member States, and systems that had largely been left in abeyance since the end of the Cold War are being revived, reviewed and strengthened. In the UK new civil defence legislation was adopted by means of the *Civil Contingencies Act* in November 2004.[174] Local authorities will take the lead in dealing with most contingencies, with tiers of support designed to operate at the regional and national levels. Events that threaten the security of the country at a national level will be dealt with centrally. With regard to natural disasters, certain contingency measures are already in place, or are being strengthened, to alleviate the problems caused by severe weather and climatic events, such as flooding, along with the development of monitoring and alerting systems for those at greatest risk

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

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

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

Article 176D (Constitution Article III-285) on administrative cooperation is new. It states that the "Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest". The Union will help Member States to improve their implementation of Union law through information exchange and training schemes. This is possibly a response to disparities in Member States' implementation methods making some less efficient than others. While stating on the one hand that "No Member State shall be obliged to avail

[174] For information on the bill, see Library Research Paper 04/07, The Civil Contingencies Bill [Bill 14 of 2003-04], 15 January 2004 at http://www.parliament.uk/commons/lib/research/rp2004/rp04-007.pdf

itself of such support", **Article 176D(2)** also states that "the necessary measures to this end", excluding harmonisation, will be adopted.

3. Association of the overseas countries and territories

Articles 182 – 188 (Constitution Articles III-286 – 291) on the overseas countries and territories are largely the same as Articles 182-187 TEC. A Declaration by the UK and Spain confirms that the Treaties apply to Gibraltar "as a European territory for whose external relations a Member State is responsible", but adds "This shall not imply changes in the respective positions of the Member States concerned".

P. External Action (other than CFSP)

1. General provisions

Title 1 is on the Union's external action other than that under the CFSP. **Article 188A** refers to the principles set out in Chapter 1 of Title V of the revised TEU. These Articles (Constitution Articles III-292 – 293), define the provisions which have a general application across all matters of external action. The Common Commercial Policy (CCP), along with Articles on the Union's relations with third countries and treaty making powers all become part of this Title. Thus the provision in **Article 188C** (Constitution Article III-314) that the CCP "The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action".

At present the Community's relations with third countries and its powers to conclude agreements with them are placed in the General and Final Provisions of the TEC, together with Articles on the Community's legal personality, its legal capacity to act, Staff Regulations and conditions of employment of Community officials and staff, and other Articles affecting the EU institutions as bodies subject to the norms of international law.

Articles 300 and 301 TEC, on the conclusion of agreements between the Community and one or more states or international organisations and sanctions against third parties, are replaced by Articles 188n and 188k respectively. Articles 302 to 304 on the Community's relations with the United Nations, the Council of Europe and the Organisation for Economic Cooperation and Development (OECD) are replaced by Article 188p.

2. Common Commercial Policy

Article 188B adds to present Article 131(1)TEC the progressive abolition of restrictions on foreign direct investment. **Articles 188C** (Constitution Articles III-314-5) sets out the general aims of establishing the customs union, which include the harmonious development of world trade and the lowering of customs and other barriers.

The CCP is based on uniform principles, particularly with regard to changes in tariff rates and the conclusion of tariff and trade arrangements. Article **188C** expands upon Article 133 TEC to specify "relating to trade in goods and services and the commercial aspects of intellectual property and foreign direct investment…", making them subject to the exclusive competence of the Union. Decision-making will be by co-decision, rather than by the Council alone.

Under **Article 188C(3)**, where the Commission enters into negotiations on agreements with one or more states or international organisations, it will need to report regularly to the EP, as well as to a special committee established by the Council.

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

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

Unanimity is also specified in **Article 188C(4)** (Constitution Article III-315(4)) for the negotiation and conclusion of agreements:

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

3. Cooperation with Third Countries and Humanitarian Aid,

Article 188D (Constitution Article III-316) concerns development cooperation. It is largely the same as present Article 177(1) and (3) and 178 TEC, but a new emphasis is placed on the focus of Union development policy. The reduction and, in the long term, the eradication of poverty, are now its primary objectives. This is a welcome addition for the British Government, which has generally been critical of the focus of much EU development policy.

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

Under **Article 188E** (Constitution Article III-317) measures will be adopted using the OLP to implement development co-operation policy. The Union will be able to conclude agreements in this area with third countries and international organisations, but this will not prevent Member States from negotiating in international bodies or concluding agreements, as under present Article 181 TEC.

Article 188H (Constitution Article III-319) covers economic, financial and technical cooperation with third countries. References to the general objective of promoting

democracy, the rule of law and human rights and freedoms are removed from this part of the Constitution, as they are included in the general provisions. This Article is based largely on present Article 181(a) TEC, but introduces co-decision instead of merely consulting the EP.

Articles 188I and J (Constitution Articles III-320-1) on humanitarian aid are new. At present humanitarian aid rules are adopted as part of EU development policy. **Article 188I** provides for "urgent financial assistance" to third countries, by a decision of the Council. **Article 188J** allows measures to be decided by the OLP providing for ad hoc assistance, relief and protection for people in third countries and victims of man-made and natural disasters, to meet the resultant humanitarian needs. Operations will be conducted in accordance with international humanitarian law and the necessary and agreements may be made with third countries and competent international organisations. Measures will be adopted by the co-decision procedure. Humanitarian tasks are currently mentioned in Article 17 TEU as possibly arising under the CFSP.

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

Article 188K (Constitution Article III-322) is based on present Articles 60 and 301 TEC and provides for restrictive measures to be taken against third countries, natural or legal persons and groups or non-State entities. The Council would decide by QMV on a joint proposal from the Union Minister for Foreign Affairs and the Commission on the "necessary European regulations or decisions". The EP would be informed. At present there are provisions under Article 60 to impose financial sanctions on third countries, and in Article 301 TEC to take urgent measures against third countries under the CFSP. **Paragraph 1** amends Article 301 TEC to include information for the EP and a requirement for a joint proposal of the Commission and the High Representative. The current possibility under Article 60 of the Council overturning financial sanctions imposed nationally is excluded. **Paragraph 2** under which the Council "may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities", is new and such measures are currently adopted using the catch-all Article 308 TEC. This Treaty base has been challenged in cases before the ECJ and the Court of First Instance.[175] The Court of First Instance has upheld the practice, but its judgments are on appeal to the Court of Justice.[176] The question of legal safeguards has also been before the EC courts (in relation to Regulation 2580/2001), which have held that the EU does not have to guarantee safeguards if the persons or groups in question have been named by the UN Security Council as 'terrorists'.

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[175] See, for example, Joined cases T-120/01 and T-300/01; Case T-338/02 and Case T-47/03

[176] See, for example, C-415/05 P (Yusuf and Al Barakaat International Foundation v Council and Commission) - Appeal against judgment of the Court of First Instance of 21 September 2005

Articles 188L–O (Constitution Articles III-323 - 326) concern the conclusion of international agreements. These are currently set out in Article 133 TEC (on the CCP), 300 TEC and 310 TEC, Article 24 TEU on the CFSP and Article 34(d) TEU on police and judicial cooperation. Lisbon reorganises these provisions and adds some new elements. **Article 188L(1)** is new and reflects current ECJ case law regarding the existence of external competence within EC law,[177] the principles of which will now apply to all areas, including the CFSP and JHA. The Union may conclude an international agreement:

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

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

Under **Article 188N** (Constitution Article III-324) replaces present Article 310 TEC, providing that the Union may conclude association agreements with one or more States third countries or international organisations, in order to establish an association involving reciprocal rights and obligations, common actions and special procedures. This complements new TEU Articles on the EU's neighbours, which applies to all three pillars, as, in practice, EU Association Agreements have included provisions on EU foreign policy and policing matters. This Article (Constitution Article III-325) also sets out the procedures for concluding international agreements, which are currently contained in the various TEC articles mentioned above. It covers all international agreements concluded by the Union, except those in the monetary field. The Council of Ministers authorises the opening of negotiations, the adoption of negotiating directives, the authorisation of signature and the conclusion of agreements. The Article sets out the responsibilities of the Commission and High Representative with regard to the opening of negotiations, specifying in **Article 188N(3)** that the Minister for Foreign Affairs is responsible for negotiating agreements that relate exclusively or principally to the CFSP. However, this Article does not designate a negotiator, leaving it to the Council to nominate the negotiator or leader of the Union's negotiating team, depending on the subject matter of the agreement in question. At present the TEC gives the Commission the power to negotiate on behalf of the EU under Article 300 TEC.

The position of the EP is enhanced under **Article 188N(6)** by a right to be consulted on the following agreements:

(i) association agreements;
(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
(iii) agreements establishing a specific institutional framework by organising cooperation procedures;
(iv) agreements with important budgetary implications for the Union;

[177] Cross reference to Paper 1.

> (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

In other cases the EP will be consulted within a deadline set by the Council.

At present the EP's power of assent is limited to association agreements or agreements with significant budgetary implications (Article 300(3) TEC). QMV is retained under **Article 188N(8)**, except in cases where the agreement relates to an area in which unanimity is required for the adoption of a Union act ("parallelism"), and for association agreements and agreements with states which are candidates for Union accession (under **Article 188H**). There is one addition here, to the effect that the Council will also act unanimously for the agreement on accession of the Union to the European Convention on Human Rights, and the decision on this agreement will not come into force until it has been approved by the Member States in accordance with their respective constitutional requirements.

Article 188O (Constitution Article III-326) provides for agreements on an exchange rate system with currencies of third states, as under present Article 111 TEC. The Council will decide by unanimity, as at present, on a recommendation from the European Central Bank or from the Commission and after consulting the ECB. Whereas the TEC currently requires that the Council should act by QMV to adopt, adjust or abandon the central rates of the euro within the exchange rate system, the Constitution simply states that the Council "may decide" to act. This Article will not apply to the UK unless or until it adopts the euro.

4. Union delegations and relations with international organisations and third countries

The various elements of **Articles 188P–Q** (Constitution Articles III-327 – III-328) are presently referred to in several Treaty Articles (e.g. 177 TEC, 302 - 4 TEC, 19(2) TEU, 20 TEU). The High Representative and the Commission will be responsible for maintaining the Union's relations with organisations such as the United Nations (UN), the Council of Europe (CoE), the Organisation for Security and Cooperation in Europe (OSCE) and the Organisation for Economic Cooperation and Development (OECD). Union delegations in third countries and at international organisations will represent the Union, under the authority of the Minister for Foreign Affairs and in cooperation with Member States' diplomatic missions.

5. Solidarity

Article 188R (Constitution Article I-43 and III-329) establishes, for the first time, a solidarity clause whereby the Union and its Member States will act jointly in the spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster. It also outlines how the solidarity clause will be implemented.

Regular assessments of the threats facing the EU will be made by the European Council. However, decisions on the arrangements for implementing the provisions of the solidarity clause will be taken by the Council of Ministers, following a joint proposal for action from

the High Representative and the Commission. Where any decision has defence implications the Council of Ministers will act by unanimity under the TEU.

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

The establishment of a solidarity clause in the event of a terrorist attack was discussed in the immediate aftermath of 11 September 2001. It was also discussed at the Anglo-French summit at Le Touquet in February 2003. The inclusion of a solidarity clause in the European constitution in 2004 was therefore largely welcomed.

Q. The Union Institutions

1. European Parliament

Part Six contains Articles on the Union Institutions. **Articles 190–201** (Constitution Articles III-330 – 340) concern the EP and are largely the same as present Articles 190 – 201 TEC. Throughout the Lisbon Treaty the EP is given a greater role in decision-making by means of an increase in the number of legislative acts that will be decided using the Ordinary Legislative Procedure (co-decision) and other measures requiring its consent, rather than merely consultation.

Present Article 189 TEC, on the powers of the EP and its size, is transferred to **Article 9A TEU**. The rest of this section contains existing provisions on the drawing up of a proposal for EP elections "in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States" and the adoption of regulations and general conditions governing the performance of the duties of MEPs (**Article 190**); regulations governing political parties at European level, particularly the rules on their funding (**Article 191**); requests to the Commission to put forward "appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties" (**Article 192**); the setting up of temporary Committees of Inquiry to investigate "alleged contraventions or maladministration in the implementation of Union law" (**Article 193**); the right of citizens "to address, individually or in association with other citizens or persons, a petition" to the EP (**Article 194**); the election of a European Ombudsman and his/her duties (**Article 195**); and attendance by the Commission, European Council and Commission at EP sessions (**Articles 196–7**).

Article 198 (Constitution Article III-338) provides that the EP shall generally act by a majority of votes cast, rather than by the *absolute* majority under present Article 198 TEC. Although this will make it possible for the EP to act with less than half the support of votes cast, in a Union of 27 Members it will facilitate the passage of legislation.

Article 201 (Constitution Article III-340) on a censure motion against the Commission is amended to take account of the double-hatted position of High Representative in both the Council and the Commission. The High Representative would have to resign, along with the Commission, in the event of a censure motion being carried by a two-thirds majority of votes cast.

2. European Council

Article 201(a) (Constitution Article III-341) is a new Article, but reflects the current practice whereby one Member State may act on behalf of another Member State (see also **Article 206** – Constitution Article III-343 – on a similar provision for Council of Ministers members). The European Council usually acts by consensus, but on those occasions when it acts by a qualified majority, the calculation of the qualified majority and the blocking minority will be those set out in **Articles 9C(4)** and **205(2)**. This was also provided by the Constitution, although the Lisbon Treaty adds that when the European Council decides by a vote, its President and the President of the Commission shall not take part in the vote. Abstentions will not prevent the adoption of a decision for which unanimity is required. France and Germany have already cooperated in the spirit of **Article 201(a)** and such cooperation is already provided for in Article 206 TEC on voting in the Council of Ministers.

The European Council has not so far adopted Rules of Procedure, but under **Article 201(a)(3)** it will adopt such Rules by a simple majority. The European Council will be assisted by the General Secretariat of the Council, whereas at present the Treaty provides in Article 4 TEU that it shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission.

Article 201(b) (Constitution Article I-24) provides for the European Council to decide by QMV on the Council of Ministers configurations and the Presidency of the Councils, other than the General and Foreign Affairs Councils.

3. Council

Articles 204–10 (Constitution Articles III-342, I-25, III-343, 344, 345, 346 and 400) contain detailed provisions on the Council of Ministers, now called just "the Council". **Article 205** (Constitution Article 1-25) sets out the future qualified majority voting procedure from 2014. The formula is based on the double-majority system set out in the Treaty of Nice, which takes more account of the size of population than the present system. **Article 205** reads as follows:

> 1. Where it is required to act by a simple majority, the Council shall act by a majority of its component members.
>
> 2. By way of derogation from Article 9C(4) of the Treaty on European Union, as from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union.
>
> 3. As from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, in cases where not all the members of the Council participate in voting, a qualified majority shall be defined as follows:
>
> (a) A qualified majority shall be defined as at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.

> A blocking minority must include at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained;
>
> (b) By way of derogation from point (a), where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.

The rule governing the voting procedures from entry into force of the Lisbon Treaty until 2014 are set out in **Article 3** of the **Protocol on Transitional Provisions** in a Title called **Provisions concerning the qualified majority**.

> 1. In accordance with Article 9C(4) of the Treaty on European Union, the provisions of that paragraph and of Article 205(2) of the Treaty on the Functioning of the European Union relating to the definition of the qualified majority in the European Council and the Council shall take effect on 1 November 2014.
>
> 2. Between 1 November 2014 and 31 March 2017, when an act is to be adopted by qualified majority, a member of the Council may request that it be adopted in accordance with the qualified majority as defined in paragraph 3. In that case, paragraphs 3 and 4 shall apply.
>
> 3. Until 31 October 2014, the following provisions shall remain in force, without prejudice to the second subparagraph of Article 201a(1) of the Treaty on the Functioning of the European Union.
> For acts of the European Council and of the Council requiring a qualified majority, members' votes shall be weighted as follows:

Belgium	12
Bulgaria	10
Czech Republic	12
Denmark	7
Germany	29
Estonia	4
Ireland	7
Greece	12
Spain	27
France	29
Italy	29
Cyprus	4
Latvia	4
Lithuania	7
Luxembourg	4
Hungary	12
Malta	3
Netherlands	13
Austria	10
Poland	27
Portugal	12
Romania	14

Slovenia	4
Slovakia	7
Finland	7
Sweden	10
United Kingdom	29

Acts shall be adopted if there are at least 255 votes in favour representing a majority of the members where, under the Treaties, they must be adopted on a proposal from the Commission. In other cases decisions shall be adopted if there are at least 255 votes in favour representing at least two thirds of the members.

A member of the European Council or the Council may request that, where an act is adopted by the European Council or the Council by a qualified majority, a check is made to ensure that the Member States comprising the qualified majority represent at least 62% of the total population of the Union. If that proves not to be the case, the act shall not be adopted.

4. Until 31 October 2014, the qualified majority shall, in cases where not all the members of the Council participate in voting, namely in the cases where reference is made to the qualified majority as defined in Article 205(3) of the Treaty on the Functioning of the European Union, be defined as the same proportion of the weighted votes and the same proportion of the number of the Council members and, if appropriate, the same percentage of the population of the Member States concerned as laid down in paragraph 3.[178]

In addition, a Declaration on **Article 9C(4)** and **Article 205(2)** provides the text of a draft Decision relating to the implementation of these two Article between 1 November 2014 and 31 March 2017, which will enter into force along with the Treaty itself. This seeks to smooth the transition from the provisions that will apply under the new Protocol Article 3(3) until 31 October 2014, to the voting system in Article 9C(4) and 205(2), which will apply from 1 November 2014, including a transitional period until 31 March 2017 for specific provisions set out in Article 3(2) of the Protocol.

Section 1
Provisions to be applied from 1 November 2014 to 31 March 2017

Article 1
From 1 November 2014 to 31 March 2017, if members of the Council, representing:
(a) at least three quarters of the population, or
(b) at least three quarters of the number of Member States
necessary to constitute a blocking minority resulting from the application of Article 9c(4), first subparagraph, of the Treaty on European Union or Article 205(2) of the Treaty on the Functioning of the European Union, indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue.

Article 2
The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down

[178] http://www.consilium.europa.eu/uedocs/cmsUpload/cg00002re01en.pdf

by Union law, a satisfactory solution to address concerns raised by the members of the Council referred to in Article 1.

Article 3
To this end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her their assistance.

Section 2
Provisions to be applied as from 1 April 2017

Article 4
As from 1 April 2017, if members of the Council, representing:
(a) at least 55 % of the population, or
(b) at least 55 % of the number of Member States
necessary to constitute a blocking minority resulting from the application of Article 9c(4), first subparagraph, of the Treaty on European Union or Article 205(2) of the Treaty on the Functioning of the European Union, indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue.

Article 5
The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council referred to in Article 4.

Article 6
To this end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her their assistance.

Section 1
Provisions to be applied from 1 November 2014 to 31 March 2017
Article 1
From 1 November 2014 to 31 March 2017, if members of the Council, representing:
(a) at least three quarters of the population, or
(b) at least three quarters of the number of Member States
necessary to constitute a blocking minority resulting from the application of Article 9c(4), first subparagraph, of the Treaty on European Union or Article 205(2) of the Treaty on the Functioning of the European Union, indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue.
Article 2
The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council referred to in Article 1.
Article 3
To this end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake

any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her their assistance.
Section 2
Provisions to be applied as from 1 April 2017
Article 4
As from 1 April 2017, if members of the Council, representing:
(a) at least 55 % of the population, or
(b) at least 55 % of the number of Member States
necessary to constitute a blocking minority resulting from the application of Article 9c(4), first subparagraph, of the Treaty on European Union or Article 205(2) of the Treaty on the Functioning of the European Union, indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue.
Article 5
The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council referred to in Article 4.
Article 6
To this end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her their assistance.
Section 3
Entry into force and effect of the Decision
Article 7
This Decision shall enter into force on the date of the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community.[179]

To summarise: from 1 November 2009, for the adoption of a proposal from the Commission, a proposal will need to have the support of 55% of Member States (i.e. at least 15 out of the 27 Members), representing 65% of the EU's population (i.e. it could not be formed by a grouping of the States with the smallest populations). 45% of Member States, or Member States representing 35% of the EU's population, will be able to block a proposal. If a number of Member States representing at least three-quarters of either of these figures indicate that they oppose a proposal, the Council will delay adoption of the proposal and continue discussion in an effort to reach a satisfactory solution. This mechanism will be valid until 2014 and will then be removable by QMV.

The British Government had been content with the Nice formula but was open to suggestions for amendment. In the Government White Paper published in September 2004 the Government stated that it was "happy with the new mechanism", which "provides a reasonable balance between passing and blocking legislation, and ensures that the rights of small groups of Member States can be asserted when they need to be".[180]

[179] http://www.consilium.europa.eu/uedocs/cmsUpload/cg00003-re01co02.en07.pdf
[180] Cm 6309 September 2004 p.23

Article 207 (Constitution Article III-344) establishes the Committee of Permanent Representatives (COREPER) in similar terms to the present Article 207. The Secretary-General with responsibility for COREPER is not, however, stipulated as being the CFSP High Representative in the amended Article as it is at present. Also, the present paragraph 3 requiring the Council to set out in its Rules of Procedure the procedure for public access to Council documents, and the requirement that the Council must meet in public when acting in its legislative capacity, is removed, because it is included in the principles set out in **Article 16A** on institutional transparency.

Article 208 (Constitution Article III-345) adds to present Article 208 the requirement that the Commission should inform the Council of its reasons for not submitting a proposal, following a Council request that it should undertake a study that the Council believes would be desirable for the "attainment of the common objectives". Under amended **Article 209** (Constitution Article III-346) the Council will consult the Commission about the rules governing Committees, rather than obtaining its opinion.

Article 210 (Constitution Article III-400) brings together Articles 210, 247 and 258 TEC on the salaries, allowances and pensions of staff of the EU institutions and payments instead of remuneration. It adds the new offices created by the Lisbon Treaty and does not stipulate a QMV voting procedure.

4. Commission

Articles 211a, 213, 215 - 219 (Constitution Articles I-26, III-347 – 352) concern the term and duties of Commissioners and are similar to present Articles 212-219 TEC.

Provisions on the size of the Commission and appointment procedures are contained in **Articles 9D(1)–(6)TEU**, replacing present Article 214. **Article 211a** sets out the principles of the rotation system for the future Commission required in **Article 9D(5)TEU.** Commissioners will be chosen on the basis of a rotation system established by the European Council acting unanimously. Member States will be treated on a strictly equal footing in the sequence of, and the time spent by, nationals on the Commission, and each Commission will "reflect satisfactorily the demographic and geographical range of all the Member States".

Under **Article 213** (Constitution Article III-347) Commissioners continue to be required to be independent, competent, impartial and not engaged in any other occupation. **Article 215** (Constitution Article III-348) is largely the same as the present Article 215, except that it includes a new role for the Commission President and the EP in filling a Commission vacancy for the remainder of a term of office. A new **paragraph 5** provides for the replacement of the High Representative.

5. Court of Justice

The European Court of Justice (ECJ) was founded in the 1950s as the joint court for the three Communities (European Coal and Steel, Euratom and the EEC) that were

consolidated into the European Community in 1967.[181] The Court interprets the EC Treaties and legislation. It has jurisdiction in disputes involving Member States, EU institutions, businesses and individuals. Although it may attempt to reconcile differences between national and EU laws, ultimately its decisions overrule those of national courts and this has tended to expand the EU's domain. In 1989 a lower court, the Court of First Instance (CFI), was set up to take on some of the Court's workload.

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

The general principle contained in present Article 220 that the two EU Courts "each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed", is repealed, although the Courts' jurisdiction, including limitations, is spelt out in individual Articles relating to particular situations, as at present. **Articles 221-224** (Constitution Articles III-353 – 356) on the composition, term and number of judges and advocates-general are similar to Articles 220 – 224 TEC, but in response to demands from Poland for an Advocate-General to represent the recently acceded East and Central European States, a Conference Declaration on **Article 222** adds that the ECJ asks for an increase of three judges (from 8 to 11) to be agreed by the Council acting unanimously. Poland will, along with Germany, France, Italy, Spain and the UK, have a permanent Advocate-General and not take part in the rotation system. The existing rotation system will rotate five Advocates-General instead of the current three.[182]

The Lisbon Treaty changes the name of the European Court of First Instance to the "General Court" and under **Article 225a** (Constitution Article III-359) the present "judicial panels" become "specialised courts". The appointment procedure now includes in **Article 224a** (Constitution Article III-357) the establishment of a panel of seven members, chosen from among former ECJ, General Court and national court members or national lawyers, to give an opinion on candidates' suitability to be judges and advocates-general before Member State governments make the appointments referred to in **Articles 223-224**. **Article 225a** is amended to use the OLP and QMV instead of unanimity to establish specialised courts.

Present Article 226 TEC provides for the Commission to ask a Member State to remedy what it considers to be an infringement of EC law and for a possible referral to the ECJ. The possibility of imposing a financial penalty on a Member State that has failed to remedy an established infringement of an EC obligation was introduced in Article 228 (then Article 171) of the TEU in 1992. Article 228 is the follow-up procedure to present Article 226 and tackles post-litigation non-compliance. The Commission may act against a Member State that does not comply with a previous ECJ judgment by issuing a first written warning ("Letter of Formal Notice") and then a second and final written warning

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

[182] CIG 15/07 3 December 2007

("Reasoned Opinion"). Article 228 then allows the Commission to ask the Court to impose a financial penalty on the Member State concerned.[183] Anne Bonnie, of the University of Hull, has commented on Articles 226 and 228:

> The concept of post-litigation non-compliance refers to situations in which 'the non-compliance occurs after the judicial determination that certain conduct or absence of conduct does indeed constitute non-compliance with agreed rules'.[184] A more in-depth examination of that definition reveals that post-litigation non-compliance comprises three main elements. Firstly a breach of Community obligation(s) by a Member State, secondly the confirmation of the existence of the specific breach by a court of law, i.e. in our particular case the European Court of Justice, and finally a subsequent infringement consisting of the failure of the Member State to comply with the judgment of the Court. Within the EC Treaty, Article 228(2) ECT is specifically designed to address the issue of post-litigation non-compliance.[185] The innovation brought in by this provision resides in the fact that an enforcement procedure whose scope covers infringement of any EC Treaty provision now potentially leads to the imposition of monetary sanctions upon offending Member States.[186] In the immediate period following the entry into force of Article 228(2) ECT, the Commission's use of the new infringement procedure can at best be described as timid.[187] This may partly be explained by the fact that a number of clarifications were required, particularly regarding the method to be used in order to calculate the pecuniary sanctions attached to Article 228(2).[188] The number of infringement actions for non compliance with rulings of the ECJ has since steadily increased.[189]
>
> The Commission plays a pivotal role during both Article 226 and Article 228(2) ECT procedures, collating information regarding the detection of infringements from various sources such as complaints lodged by individuals, petitions presented by the European Parliament or 'own initiative' investigations.[190] It also provides Member States with advice on how to bring to an end a detected infringement. As far as the unfolding of the procedure is concerned, the Commission benefits from a wide

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183 Examples of Article 228 cases are C-387/97 Commission v Greece of 4 July 2000, C-278/01 Commission v Spain of 25 November 2003, C-304/02 Commission v France of 12 July 2005.

184 FN 14: Van den Bosche (1996) p.335.

185 FN 15: [text of Article 228]

186 With the exception of areas of EC law subjected to special enforcement provisions or procedures such as competition law or state aids.

187 FN 17: The provision came in force on 1st January 1993, with the Treaty on European Union. The first application of Article 228(2) occurred in 1997. The first imposition of a sanction upon a Member State occurred in 2000, in case 387/97 Commission v. Greece [2000] ECR I-5047.

188 FN 18: European Commission (1996 and 1997b) p.2.

189 FN 19: The data provided in the Annual Reports on Monitoring the Application of Community Law shows that 10 cases were under investigation for the year 1999, 32 in 2000, 47 in 2001, 62 in 2002, and 69 in 2003 respectively.

190 FN 20: In 2003, 1290 individual complaints were registered whereas the Commission initiated 253 cases on the basis of its own investigations. See European Commission (2004) p.4.

> discretion[191] in deciding whether and when to take the successive steps eventually leading to the closure or the referral of the case.[192] In using its discretion, the Commission exercises the power to decide upon the most appropriate means of ensuring the application of Community law.[193] The only limitations brought by the European Court of Justice to that discretion are based on the protection of the Member States' defence rights.[194]
>
> The Commission's autonomy in that area is supported by a variety of arguments ranging from the legal to the political and material. Legally, the wording of the Treaty does confer a degree of discretion to the Commission[195] and in its relevant case-law the European Court of Justice has consistently interpreted these provisions in a sense favourable to the Commission.[196] Politically, the Commission decides upon the areas to be targeted in priority through infringement actions, such as the single market for example.[197] Furthermore, purely material considerations may play an important role, as the Commission's available resources do not stretch to infinity. Finally, the need for and advantages of, flexibility in the dealings with the Member States are equally important factors.[198] As a consequence, the Commission enjoys a strong bargaining power in its relationships with the Member States.[199]

The Commission re-examined Article 228 and the penalty system in 2005. On 14 December 2005 the Commission published a Communication on the *Application of article 228 of the EC Treaty*"[200] (replacing Communications in 1996 and 1997) setting out new rules for the imposition of fines. The Communication acknowledged that the operation of the penalty system had not always been effective as a deterrent:

> 10.1. Experience shows, […], that Member States often comply only at a late stage, sometimes only at the very end of the Article 228 procedure. In these circumstances, the Commission feels that it needs to re-examine the question of the financial sanctions envisaged in Article 228. In effect, the Commission's practice only to apply to the Court for payment of a penalty for non-compliance after the Article 228 ruling means that late compliance before the ruling does not result in any sanction and so is not effectively discouraged.

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191 FN 21: Discretion is, in the present context, defined by the Court of Justice as 'a power to decide upon the most appropriate means of ensuring the application of Community law'. See Case 131/84, Commission v. Italy [1985] E.C.R. 3531.

192 FN 22: Evans (1979) p.446.

193 FN 23: See Case 131/84, Commission v. Italy [1985] E.C.R. 3531.

194 FN 24: Candela Castillo & Mongin (1996) p.51.

195 FN 25: See second indent of Article 169 'The Commission [..] may bring the matter before the Court of Justice' (emphasis added). A mandatory referral would be worded in a noticeably different way, such as 'the Commission shall bring the case before the Court of Justice.

196 FN 26: Case 7/71, Commission v. France [1971] E.C.R. 1003 and case 247/87, Star Fruit [1989] E.C.R. 291; see also Harden (2002) p.470; Tomkins (2003).

197 FN 27: Gil Ibañez (1999).

198 FN 28: For a socio-legal analysis of the Commission's enforcement role, see Rawlings (2000) p.4.

199 *Journal of Contemporary European Research* (UACES) Vol 1 Issue 2 November 2005, Anne Bonnie, "The Evolving Role of the European Commission in the Enforcement of Community Law: From Negotiating Compliance to Prosecuting Member States?" at http://www.jcer.net/vol1issue2.pdf

200 http://europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/sec_2005_1658_en.pdf

> Sticking with the penalty payment and not requesting a lump sum payment could mean accepting that, after the Court has found that a Member State has failed to fulfil its obligations, the same State could allow the situation to continue unchecked. But the Commission considers that every instance of prolonged failure to comply with a ruling of the Court of Justice in itself seriously undermines the principle of legality and legal certainty in a Community based on the rule of law.

The 2005 Communication clarified the policy of the Commission in asking the ECJ to impose both a periodic payment and a lump sum on a Member State which fails to comply with a judgment. The Commission considered that the decision to fine a Member State should be based on three fundamental criteria:

- the seriousness of the infringement
- the duration of the infringement
- the penalty must be a deterrent to further infringement

The 2005 Communication stipulated that in cases where a Member State rectified the infringement after the Court was seized and before the judgment had been delivered under Article 228, the Commission would no longer withdraw its action for that reason alone. The ECJ would still be able to impose a lump sum penalty for the duration of the infringement up to the time the situation was rectified, because this aspect of the case would not have lost its purpose. The Commission would endeavour to inform the Court without delay whenever a Member State terminated an infringement, at whatever stage in the judicial process. It would do the same when, after an Article 228 judgment, a Member State rectified the situation and the obligation to pay a penalty thus came to an end.[201]

Amended **Article 228** (Constitution Article III-362) strengthens the hand of the Commission in acting on a failure to implement. A new **paragraph (3)** sets out a procedure for the Commission to specify an appropriate lump sum[202] or penalty payment to be paid by a Member State which has not notified measures transposing a directive into national law. If the Court finds an infringement, it may impose such a fine on a Member State, which must not exceed the amount specified by the Commission.

Article 229a (Constitution Article III-364) concerns the granting of jurisdiction to the ECJ. The Article changes the words "Community industrial property rights" to "European intellectual property rights", thereby giving the ECJ jurisdiction in this area. Decision-making remains by unanimity and there is a requirement for a kind of ratification in the last sentence: "These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements".

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[201] http://www.europarl.eu.int/registre/commissions/juri/projet_rapport/2006/367694/JURI_PR(2006)367694_EN.doc

[202] The Commission calculates the amount of the lump sum on the basis of the effects on public and private interests of the Member State's failure to date to comply with its EU obligations. It takes special account of a breach which has persisted for a long period since the judgment which initially established it.

In **Article 230** (Constitution Article III-365) the European Council, now an official Union Institution, is added to the list of Institutions of whose acts the Court will review the legality, and the European Council is added to subsequent Articles concerning the jurisdiction of the Court and legal procedures. A new **paragraph (4)** is inserted providing for Acts to set out arrangements concerning actions brought by natural or legal persons against acts of the Union bodies, offices or agencies which produce legal effects in relation to them. As at present, the Court of Justice may declare the act concerned to be void under **Article 231** (Constitution Article III-366), but the new Article adds that the Court shall, if necessary, "state which of the effects of the act which it has declared void shall be considered as definitive".

Article 234 (Constitution Article III-369) concerns the Court's role in giving preliminary rulings on the interpretation of the Treaty and the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union. It now requires the ECJ to act "with the minimum of delay" if a question is raised in a case pending before a Member State court or tribunal with regard to a person in custody.

A new **Article 235a** (Constitution Article III-371) includes the same provision on the role of the ECJ as present Article 46(e),[203] and confers on the ECJ jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union (establishment of a clear risk of a serious breach of human rights by a Member State) at the request of the Member State concerned in respect of the procedural stipulations contained in that Article.

Articles 236–239 (Constitution Articles III-372 – 375) are similar to present Treaty Articles 236–238 on the ECJ's jurisdiction in disputes concerning Community staff, States' obligations in relation to the European Investment Bank, national central banks' obligations in relation to the ECB, and arbitration clauses in public or private contracts.

Article 240 (Constitution Article III-375) is the same as the present Article, but two new Articles concern the jurisdiction of the Court of Justice in the former Second and Third Pillars. **Article 240a** (Constitution Article III-376) states that the ECJ will not have jurisdiction in the CFSP, but it will have jurisdiction to monitor compliance with **Article 25bTEU** (Constitution Article III-308) concerning the exercise of Union competences in the CFSP, and to rule on proceedings reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council under **Article 230(4)**.

In the debate on the European Constitution on 9 September 2004 the Shadow Foreign Secretary, Michael Ancram, insisted that the ECJ would have jurisdiction over the CFSP because Constitution Article III-376 did not cover Article I-16 on the obligation of Member States to support the CFSP "in a spirit of loyalty and mutual solidarity". He cited the opinion of Professor Anthony Arnull, who told the House of Lords EU Committee in October 2003 that the Court would probably have some role in reviewing compliance

[203] Current Article 46 TEU, which sets out restrictions on the jurisdiction of the ECJ, is replaced by a specific restriction relating to foreign policy in new Article 11 TEU. Other specific foreign policy and justice and home affairs restrictions are found in amendments to Articles 235 and 240 TEC (corresponding with Constitution Articles III-371, 376 and 377).

with Article I-16.[204] The Foreign Secretary pointed out that, although Article III-376 did not specifically refer to Article I-16, it spelt out that the ECJ would not have jurisdiction over *any* CFSP matters.[205]

The jurisdiction of the ECJ is currently limited in the Third Pillar because of the wording of Articles 35 and 46 (final provisions) of the TEU.[206] Under present Article 35(5) TEU the ECJ has jurisdiction to give preliminary rulings on the validity and interpretation of decisions, framework decisions and conventions, but jurisdiction is restricted in a number of ways which are not reproduced in the TFEU. For example, Article 35(2) TEU allows Member States to accept the Court's jurisdiction, by making a declaration which specifies whether requests may be made by any court or tribunal, or only those against whose decisions there is no remedy in national law. The UK is not among the Member States which have done so. Present Article 35(5) TEU provides:

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

Present Article 68 TEU gives the ECJ a limited role in relation to asylum and immigration issues (and judicial co-operation in civil matters). It can exercise this role only in two circumstances:

- if there is a case in a national court or tribunal which cannot be decided without resolving a question about the interpretation of Title IV (or Community acts under that title), and there is no appeal from that court or tribunal, it must refer the question to the ECJ for a ruling; or
- a Member State or the Council or Commission of the EU can ask the ECJ at any time to issue a ruling on the interpretation of Title IV (or Community acts under that title).

It cannot rule on any measure or decision about abolishing internal borders which relates to the maintenance of law and order or the safeguarding of internal security.

This is much more limited than the ECJ's jurisdiction in other areas of EU policy. As a result of the tight restrictions, very few cases have so far been referred to the ECJ for a ruling under these provisions.

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

205 HC Deb 9 September 2004 c 898

206 ECJ case law has already established in Pupino (Case C-105/03 Criminal Proceedings against Maria Pupino [2005] ECR I-5285) that national courts, when interpreting national law, are obliged to strive to achieve a consistent meaning, not only with EC law, but also with Third Pillar framework decisions. For comment, see *German Law Journal* No. 5 1 May 2007 "Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino - Part II/II", Carl Lebeck, at http://www.germanlawjournal.com/article.php?id=825

The TFEU does not continue this special provision about the jurisdiction of the ECJ. However, new **Article 240b** states that the Court, in exercising its powers regarding provisions in the area of freedom, security and justice "shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

Under amended **Article 245** (Constitution Article III-381) the Statute of the Court will be amended (except in Title I and Article 64) by the OLP rather than the present unanimity.

6. European Central Bank

Article 245a (Constitution Article Ł30) is in a new **Section 4a** on the establishment of the European System of Central Banks (ESCB), composed of the ECB and national central banks. It establishes that they will constitute the "Eurosystem" and will conduct the Union's monetary policy, with the primary objective of maintaining price stability. The ECB will have legal personality, complete independence and the sole authority over the issue of the euro. The Article stipulates that "those Member States whose currency is not the euro, and their central banks, shall retain their powers in monetary matters". The ECB will be consulted on all draft Union acts within its remit and on "all proposals for regulation at national level, and may give an opinion".

A new **Article 245b** (Constitution Article III-382) contain provisions on the European Central Bank which are broadly similar to present Articles 112 – 3 TEC, but with one significant amendment. The President, the Vice-President and the other members of the Executive Board will be appointed by the European Council by QMV, rather than the present "common accord" in Article 112(2)(b) TEC. **Article 245c** (Constitution Article III-383) contains the wording of present Article 113, concerning *inter alia* the composition and role of the ECB Governing Council and the ECB annual report.

7. Court of Auditors

Article 246 summarises present Article 248(1) and (2) TEC, setting out the tasks and procedures of the Court of Auditors. **Articles 247- 8** (Constitution Articles III-385 and 384 respectively) are based largely on present Articles 247-8 TEC.

R. Legal Acts of the Union and their adoption procedures

The title of the present chapter 2, "Provisions common to several institutions", is amended to "Legal acts of the Union, adoption procedures and other provisions". **Article 249** (Constitution Article Ł33) retains the present EC legal acts: regulations, directives, recommendations and opinions, abandoning the Constitution's "European laws", "European framework laws", "European regulations" and "European decisions". The intergovernmental "framework decisions" disappear with the transfer of Title VI TEU into the First Pillar. Under **Article 249A** (Constitution Article Ł34) the Ordinary Legislative Procedure (co-decision) is established as the general procedure for adopting Union laws. The detailed co-decision procedures are set out in **Article 251** (Constitution Article III-396). There is an assumption that voting will be by QMV, if unanimity is not given as the basis for agreement in areas where the EU can legislate.

Special provisions apply to legislative acts taken under **Article 249A(4)**. These are not based on a Commission proposal, but on an initiative of a group of Member States or the EP, or on a recommendation of the ECB or at the request of the ECJ or the European Investment Bank (EIB). The role of the Commission is therefore reduced. Under the present TEC the Commission has the sole right of initiative in legislative proposals, the only exceptions being in intergovernmental areas, such as enhanced cooperation, police and judicial cooperation and elements of Title IV (visas, asylum, immigration etc).

In 2003–04 the British Government was in favour of making the OLP and QMV the norm for most decision-making in the Community pillar:

> 9. The Government considers that qualified majority voting and co-decision should be the general voting arrangement for Union decision-making in what is now the first pillar, except in areas of vital national interest, where unanimity should apply. The Government believes that this exception should operate in remaining areas of the social and employment fields where unanimity currently applies, in order to respect the diversity of national traditions in Member States.[207]

In November 2007 Jim Murphy maintained Government support for the general move to co-decision and QMV:

> The reform treaty provides, for the first time, an opportunity to unblock decision making. It will give the United Kingdom and the European Union the capacity to deliver change and effective improvements on one of the biggest issues facing the EU. That is one of the important parts of the reform treaty. It is one of the reasons why Labour Members support it so wholeheartedly.[208]

Article 249B (Constitution Article I-36) allows legislative acts "to delegate to the Commission the power to adopt non-legislative acts to supplement or amend certain non-essential elements of the legislative act". The Lords EU Committee commented on this Article, then draft Article 27, in March 2003:

> Article 27(1), however, raises the question as to what is "essential" and what "non-essential". We are sympathetic to the view that Community legislation can become overloaded with technical detail (matters which would not be dealt with as primary legislation in any national parliament) and may not be able to respond quickly and flexibly to technical and market development. There is a need to distinguish between core policy decisions and technical issues. In practice the legislator (the Council and the Parliament or, exceptionally, the Council acting alone) will decide in the particular case whether there should be any delegation under Article 27 and/or 28. What is "essential" (or "fundamental" or "important") is a subjective and imprecise concept. Similarly there will be differing views on what is "technical" in relation to any subject area. Under Article 27 the legislator is given a discretion, but is not under any obligation, to delegate. This is entirely sensible, both politically and in practical terms, but it shows the nonsense of the "legislative"/"non-legislative" split. If a technical/detailed rule is formulated by the

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

[208] HC Deb 9 October 2007 c 164

> Council and the Parliament and contained in the basic act it is part of a "legislative act", but if it is devised by the Commission and included in a delegated act it will be characterised "non–legislative".
> 32. The basic instrument, a European law or European framework law [here a legislative act], must specify the terms of the delegation and the "conditions of application", ie one or more of the means of exercising control over the Commission listed in Article 27(2). The decision of the legislator (the Council and the European Parliament) whether to "delegate" to (under Article 27) and/or to "confer implementing powers" on (Article 28) the Commission will have to be taken case by case. Whether the use of "delegated regulations" will improve the efficiency of Union law-making will have to be seen. Further, how the creation of the new category of measures, "delegated acts", will affect the balance of power as between the Commission and the Member States and, in co-decision cases, the European Parliament is unclear. Any assessment may need to await any reform of "comitology" procedures (see Article 28 below). In the meantime we welcome the overall objective of Article 27. [209]

The conditions attached to the delegation, such as the objectives, content, scope and duration of the delegation, will be explicitly determined by a legislative act, thus involving both the EP and the Council. Either of these bodies may revoke the delegation or subject its entry into force to their approval. Under **Article 249B(3)** where an act is adopted under delegated powers, the adjective "delegated" shall be inserted in its title.

A Declaration takes note of the Commission's intention to continue, as it does at present, to consult experts appointed by the Member States in the preparation of draft delegated European regulations in the financial services area. [210]

Article 249C (Constitution Article I-37) provides for Commission implementing acts, in accordance with present Article 202 TEC, the so-called "Comitology Article". The implementing powers of the Commission are subject to control by Member State representatives under the comitology procedures. The Commission outlines the history and application of comitology, drawing attention to reforms in the comitology process:

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

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

[210] CIG 15/07 3 December 2007

first "comitology" Decision dates back to 13 July 1987. In order to take into account the changes in the Treaty - and, in particular, Parliament's new position under the codecision procedure - but also to reply to criticisms that the Community system is too complex and too opaque, the 1987 Decision has been replaced by the Council Decision of 28 June 1999.

The new Decision ensures that Parliament can keep a eye on the implementation of legislative instruments adopted under the co-decision procedure. In cases where legislation comes under this procedure, Parliament can express its disapproval of measures proposed by the Commission or, where appropriate, by the Council, which, in Parliament's opinion, go beyond the implementing powers provided for in the legislation.

The Decision clarifies the criteria to be applied to the choice of committee and simplifies the operational procedures. Committees base their opinions on the draft implementing measures prepared by the Commission. The committees can be divided into the following categories:

- advisory committees: they give their opinions to the Commission which must take the utmost account of them. This straightforward procedure is generally used when the matters under discussion are not very sensitive politically.
- management committees: where the measures adopted by the Commission are not consistent with the committee's opinion (delivered by qualified majority), the Commission must communicate them to the Council which, acting by a qualified majority, can take a different decision. This procedure is used in particular for measures relating to the management of the common agricultural policy, fisheries, and the main Community programmes.
- regulatory committees: the Commission can only adopt implementing measures if it obtains the approval by qualified majority of the Member States meeting within the committee. In the absence of such support, the proposed measure is referred back to the Council which takes a decision by qualified majority. However, if the Council does not take a decision, the Commission finally adopts the implementing measure provided that the Council does not object by a qualified majority. This procedure is used for measures relating to protection of the health or safety of persons, animals and plants and measures amending non-essential provisions of the basic legislative instruments.

It also provides the criteria which, depending on the matter under discussion, will guide the legislative authority in its choice of committee procedure for the item of legislation; this is meant to facilitate the adoption of the legislation under the codecision procedure.

Lastly, several innovations in the new "comitology" Decision enhance the transparency of the committee system to the benefit of Parliament and the general public: committee documents will be more readily accessible to the citizen (the arrangements are the same as those applying to Commission documents). Committee documents will also be registered in a public register which will be available from 2001 onwards. The ultimate aim is, with the computerisation of decision-making procedures, to publish the full texts of non-confidential documents transmitted to Parliament on the Internet. From 2000

onwards, the Commission will publish an annual report giving a summary of committee activities during the previous year.[211]

Under **Article 249C(1)** (Constitution Article I-37(1)) the implementation of the Union's legally binding acts is generally within the competence of the Member States, as at present. The rules governing the exercise of Commission powers are presently decided by the Council acting unanimously under Article 202, whereas under **Article 249C(3)** they will be taken by QMV under the OLP. In addition, the word "implementing" will be inserted in the title of implementing acts.

Article 249D (Constitution Article I-35, except for sub-paragraph (1), which would have allowed the European Council to adopt "European decisions") concerns non-legislative acts of the Council, namely recommendations. Section 2 of this chapter concerns the "Procedures for the adoption of acts and other provisions".

Article 250 (Constitution Article III-395) amends present Article 250TEC in making additional exceptions to the unanimity rule for a Council amendment to a proposal from the Commission in the cases referred to in Articles on the multi-annual financial framework and the budget respectively, the conciliation procedure and the budgetary procedure.

Article 251 (Constitution Article III-396), which describes the Ordinary Legislative Procedure (co-decision), clarifies the stages of this complex procedure with the terms "first reading", "second reading" and "third reading". The following table shows how the two articles compare:

Present Article 251 TEC	**Amended Article 251 TFEU**
1. Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply. 2. The Commission shall submit a proposal to the European Parliament and the Council. The Council, acting by a qualified majority after obtaining the opinion of the European Parliament: — if it approves all the amendments contained in the European Parliament's opinion, may adopt the proposed act thus amended, — if the European Parliament does not propose any amendments, may adopt the proposed act, — shall otherwise adopt a common position and communicate it to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European	1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply. 2. The Commission shall submit a proposal to the European Parliament and the Council. First reading 3. The European Parliament shall adopt its position at first reading and communicate it to the Council. 4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament. 5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament. 6. The Council shall inform the European Parliament fully of the reasons which led it to

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

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

5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act within that period, it shall be deemed not to have been adopted. 6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted.	12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted. <u>Third reading</u> 13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that date in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.
7. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.	14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council. <u>Special Provisions</u> 15. Where, in the cases provided for in the Treaties, a law or framework law is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice or the European Investment Bank, paragraph 2, the second sentence of paragraph 6 and paragraph 9 shall not apply. In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee on the terms laid down in paragraph 11.

Whereas present Article 218 TEC states that "The Council and the Commission shall consult each other and shall settle by common accord their methods of cooperation", there is an emphasis on inter-institutional solidarity in **Article 252a** (Constitution Article III-397), which states that the EP, the Council and the Commission "shall consult each other and by common agreement make arrangements for their cooperation" and may conclude binding inter-institutional agreements.

Article 253 (Constitution Article I-38 and I-33) provides for the Institutions to 'select' the type of act to be adopted "on a case by case basis", taking into account the

proportionality principle and stating the reasons for the selection. Under present Article 253 TEC, the EU's Institutions "state the reasons on which they are based", with reference to "any proposals or opinions which had to be obtained under the Treaty". In the TFEU there is added emphasis on the need to respect the principle of proportionality in deciding on the type of act to be adopted.

Article 254 (Constitution Article I-39) concerns the publication of an act in the Official Journal and its entry into force. This Article is broadly similar to current provisions in Article 254 TEC, by which Regulations, Directives and Decisions are signed by the Presidents of the EP and Council and published in the 'L' (legislation) series of the Official Journal of the European Union (OJL). The amended Article also provides that legislative acts adopted under a special legislative procedure and non-legislative acts adopted as regulations, directives or decisions, but without specifying to whom they are addressed, are signed by the President of the institution which adopted them.

Another new element in **Article 254a** (Constitution Article III-398) requires that the Union should have the support of an "open, efficient and independent European administration". The need for more transparency in the workings of the EU's institutions was one of the elements mentioned in the Laeken Declaration in December 2001[212] and perceived to be one of the main reasons behind the growing public disenchantment with the EU. Transparency is further emphasised in new **Article 16A** (Constitution Articles I-50 and III-399), which amends and replaces Article 255 TEC on the requirement for the institutions' Rules of Procedure to determine access to documents. The institutions must "ensure transparency in their work."

S. Advisory bodies: Committee of the Regions, Economic and Social Committee, European Investment Bank

Articles on the Court of Auditors, the Committee of the Regions, the Economic and Social Committee and the European Investment Bank are similar to existing provisions in Articles 257–262 TEC (Economic and Social Committee), 263–5 TEC (Committee of the Regions) and European Investment Bank (Articles 266–7). Articles on the composition and role of all of these, except the Court of Auditors, are contained in a new chapter on "The Union's Advisory Bodies" **Articles 256a–268** (Constitution Articles I-32, III-389, 390, 391, 392, 386, 387, 388, 393, 394, I-53).

Article 256a (Constitution Article I-32) is a new general Article based on present Articles 7(2) and 263 TEC. There are a few differences: in **Articles 263** and **259** (Constitution Articles III-386 and III-390) the term of office for members of the Committee of the Regions and the Economic and Social Committee will be five years, instead of the present four. The opinion of the two Committees will now be forwarded to the EP, as well as to the Commission and Council and under **Articles 264** (Constitution Article III-387) and **Article 260** (Constitution Article III-391) the chairman and officers of the Committee of the Regions and the ECOSOC will be elected for a term of two and a half years, rather than the present two years.

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

Articles 266-7 (Constitution Articles 393 – 4) on the European Investment Bank are similar to present Articles 266-267 TEC. Under the Subsidiarity Protocol the Committee of the Regions' role is strengthened by the introduction of an ability to take subsidiarity questions directly to the ECJ.

T. The Union's Annual Budget

Article 268 stipulates that a legally binding act will be required as a legal basis for Union expenditure. It emphasises the importance of "sound financial management" and budgetary discipline, stating that the Union must not adopt legislation that is likely to have "appreciable implications for the budget" without an assurance that it can be financed by the Union's Own Resources (see below). This Article also requires the Union and Member States to counter fraud and other illegal activities affecting the Union's finances.

1. Own resources

Article 269 (Constitution Article I-54), which deals with the system of Own Resources, has been amended. A new line has been inserted at the start of the article which states that: "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies". This is taken directly from present Article 6(4) TEU. **Article 269(2)** is identical to the existing article, while **(3)**, which sets out the way Own Resources Decisions (ORDs) are established and developed, is in substance the same as existing Article 269(2). The ORD is decided by unanimity in the Council, with the EP consulted. The decision also has to be approved by Member States "in accordance with their respective constitutional requirements". In the UK this is by means of a bill amending the 1972 ECA. Implementing measures relate to decisions taken under sub-paragraph 3 (by unanimity) and include issues such as detailing the methodology used to calculate the UK rebate.

Present Article 270 has been repealed and replaced with a new **Article 270a** (Constitution Article III-402) on the Multi-Annual Financial Framework. The Framework sets out the longer term limits on expenditure; the annual EU Budget has to be set within the limits of the framework. This Article sets out the process for adopting a framework and gives it a Treaty base (it had previously been agreed through an Inter-Institutional Agreement). Each framework must last at least five years, and requires unanimity in the Council following a majority in the EP. The Article also makes provision annual budgeting to continue if no new framework is in place.

2. Procedure for the adoption of the budget

The Budget procedure set out in new **Article 270b** (Constitution Article III-404) is largely the same as present Article 272(1). The procedure specified in **Article 272** is as follows:

- The Budget will be set up by a special legislative procedure.
- The Commission will submit the draft budget to both the Council and EP at the same time, whereas it previously went to only the Council.
- The Council will forward its position on the draft budget to the EP by 1 October (was 5 October).

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

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

Article 273 (Constitution Article III-405) is largely the same as present Article 273(1). The third paragraph, on the EP's role in decisions on non-compulsory expenditure, is deleted, which takes account of the abolition of the distinction between compulsory and non-compulsory expenditure. The EP now gains greater powers over the whole EU budget, not just non-compulsory expenditure, through the ordinary legislative procedure. **Article 273a** (Constitution Article III-406) amends present Article 271 TEC, adding the European Council to the list of separate parts of the budget.

3. Implementation of the Budget and Discharge

Article 274 (Constitution Article III-407) provides for regulations to establish the control and audit responsibilities of Member States in the implementation of the budget and the resulting responsibilities. Under **Article 275** (Constitution Article III-408) the Commission will submit an additional evaluation report to the EP and Council on the results achieved, with particular reference to **Article 276** (Constitution Article III-409) on arrangements for the EP's discharge of the budget.

4. Common Financial Provisions

Article 279 (Constitution Article III-412) on the financial rules determining the procedure for establishing and implementing the budget and for presenting and auditing accounts, and rules for checks on the responsibility of financial actors, is changed from unanimity to the OLP with QMV.

Two new articles, **Articles 279a** and **279b** (Constitution Articles III-413 and III-414), ensure that third party financial obligations are met and that the Presidents of the EP, Council and Commission all work to ensure the provisions of this chapter are met.

5. Combating fraud

This is a new chapter (6) which contains amended **Article 280** (Constitution Article III-415). The fight against fraud affecting the financial interests of the Union is extended to "all the Union's institutions, bodies, offices and agencies" as well as the Member States. The final sentence in paragraph (4) that "these measures shall not concern the application of national criminal law or the national administration of justice" is deleted.

U. Enhanced Cooperation

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

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

The principles of enhanced cooperation are contained in **Article 10 TEU** (Constitution Article I-44)[213] and the detailed procedures are set out in **Articles 280A–I** (Constitution Articles III-416 to III-423). **Article 280A** (Constitution Article III-416) opens with the statement that "Any enhanced cooperation shall comply with the Treaties and the law of the Union". This is the legal framework for the arrangement, as set out in present Article 43(a), (b) and (c) TEU, but the references in this Article to furthering the objectives of the Union and reinforcing the process of integration are transferred to **Article 10 TEU**. **Article 280A** requires that enhanced cooperation "shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them" (present Articles 43(e) and (f) TEU).

Article 280B (Constitution Article III-417) requires that competences, rights and obligations of non-participating States should be respected and that those States should "not impede its implementation by the participating Member States", as in present Articles 43(h) and 44(2) TEU. **Article 280C** (Constitution Article III-418) on the need to make enhanced cooperation open to other Member States at any time is similar to existing Article 43(b) TEU, except that the Commission and participating Member States will "promote" participation by as many Member States as possible, rather than "encourage" it, as under Article 43(b) TEU. Under **Article 280C(2)** (Constitution Article

[213] This Article is discussed in more detail in Research Paper 07/80.

III-418(2)) the EP and the Council will be kept regularly informed about developments in enhanced cooperation.

The procedure for establishing enhanced cooperation is set out in **Article 280D** (Constitution Article III-419) and is similar to Articles 11 TEC and 40(a) TEU. The Article refers to two exceptions: areas of Union exclusive competence (Article 43(d) TEU) and the CFSP (Article 27(a)-(e) TEU). The procedure is as follows:

A request is made to the Commission, which may submit a proposal to the Council. Authorisation to proceed will be by the Council, on a proposal from the Commission and after obtaining the EP's consent. At present the EP is only consulted, except in a Treaty area where the co-decision procedure is used, in which case, its assent is required. **Article 280D(2)** (Constitution Article III-419(2)) concerns enhanced cooperation in the CFSP. The authorisation to proceed with enhanced cooperation in the CFSP will be by a decision of the Council, acting unanimously. Before the Council decision, the High Representative will give an opinion on whether the enhanced cooperation proposal is consistent with the CFSP and the Commission will give its opinion, in particular on whether the proposal is consistent with other Union policies. The proposal will also be forwarded to the EP for information. Under **Article 280E** (Constitution Article Ł44(3)), although all Council members can participate in the deliberations, only participating Member States will vote and unanimity will be constituted by their votes.

Article 280F (Constitution Article III-420) concerns participation in an enhanced cooperation arrangement already in progress. The TFEU provides for a four-month period for the Commission to confirm participation, whereas present Article 11a TEC currently allows only three. In addition, the Commission will "note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation". However, if the Commission considers that the conditions of participation have not been fulfilled, it will suggest arrangements to be adopted in order to fulfil those conditions and set a deadline for re-examining the request. When the deadline has expired the Commission will re-examine the request, but if, after this, it considers that the conditions of participation have still not been met, the Member State concerned "may refer the matter to the Council, which shall decide on the request". The Council may also adopt the transitional measures on a proposal from the Commission.

Article 280F(2) (Constitution Article III-420(2)) sets out a slightly different procedure for participation in a CFSP enhanced cooperation already in progress. The Member State concerned must notify the Council, the Union High Representative and the Commission. The Council will confirm participation, after consulting the High Representative and "after noting, where necessary, that the conditions of participation have been fulfilled". The Council, on a proposal from the High Representative, may adopt transitional measures with regard to the application of the acts already adopted within the framework of enhanced cooperation. If the Council considers that the conditions of participation have not been fulfilled, it will suggest what the State might do to fulfil those conditions and will set a deadline for re-examining the request for participation. The Council will act unanimously (by which is meant the votes of the representatives of the participating Member States only).

The principle that the costs for enhanced cooperation should be borne by participating Member States, contained in Article 44a TEU, is also set out in **Article 280G** (Constitution Article III-421).

Another innovation is the flexibility introduced by the possible extension of QMV among States participating in an enhanced cooperation arrangement. **Article 280H** (Constitution Article III-422(1)) is a *passerelle* clause, under which those States which have undertaken to participate in enhanced cooperation may, by a unanimous decision, introduce QMV among themselves in areas where unanimity is otherwise prescribed by the Lisbon Treaty. Similarly, in **Article 280H(2)** (Constitution Article III-422(2)), the Council may decide by unanimity to adopt the Ordinary Legislative Procedure where special procedures would normally apply. The Council must consult the EP in this case.

However, **Article 280H(3)** (Constitution Article III-422(3)) rules out any kind of extension to QMV for decisions having military or defence implications. There is also a Declaration for incorporation in the Final Act to the effect that Member States may indicate, when they make a request for enhanced cooperation, if they intend at that stage to make use of the QMV extension mechanism. The present Treaty text rules out enhanced cooperation in matters having military or defence implications in Article 27b.

Article 280I (Constitution Article III-423), as in present Article 45 TEU, requires the Council and Commission to cooperate in order to ensure the consistency of enhanced cooperation activities, and their consistency with other Union policies.

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

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

The Government opposed the use of QMV for enhanced cooperation in foreign policy (III-419.2). At the 2003-04 IGC its opposition to the use of QMV to trigger enhanced cooperation in CFSP (III-419.2) was successful and the proposal was amended to unanimity. It was unsuccessful, however, in changing the use of QMV through its wider use as a *passerelle* inside the core group (III-422).

V. General and final provisions

Articles 282-314 (Constitution Articles III-424-436) set out Common Provisions, some of which are currently provided in the General and Final Provisions of the TEC. The Final

Provisions will now also apply, with the exception of the non-application of Article 308 to the CFSP and ESDP, to the Second and Third pillars.

1. General Provisions

Present Article 281 giving the Community legal personality is repealed, as **Article 32 TEU** endows the Union with legal personality.[214]

Article 282 (Constitution Articles III-426, III-431 and III-434) concerns the legal capacity, contractual liability and privileges and immunities of the Union, expanding on **Article 46A TEU** (Constitution Article I-7), which confers legal personality on the Union. The Union may engage in the activities of legal persons under national and international laws, such as acquiring property, being party to legal proceedings or concluding treaties. At present legal capacity is contained in Article 282 TEC, contractual liability in Article 288 TEC, and privileges and immunities in Article 291 TEC. The Commission will generally represent the Union in legal proceedings, but **Article 282** (Constitution Article III-426) specifies that "the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation". **Article 283** (Constitution Article III-427) is on the adoption, now by the OLP, of the Staff Regulations defining the terms and conditions of Union officials and other staff. The other general and final provisions in Articles 284, 285, 287, 288, 289, 290, 291, 296 and 307 are largely unamended. In **Article 291** the reference to the European Monetary Institute, which ceased to operate in 1998, is removed.

Present Article 298 on the adjustment of certain measures which distort the conditions of competition in the internal market, and on how Member States' "improper" actions in this regard can be brought before the Court of Justice, is retained as at present. However, as Professor Steve Peers comments, "These provisions will now be applicable to the second and third pillar". He continues:

> The Constitutional Treaty would have moved the current Articles 297 and 298 TEC from the final provisions of the Treaty to the beginning of the internal market part of the Treaty. The draft Reform Treaty would not. This means that these provisions will not be subject to the possibility of a simplified revision pursuant to the new Article 33(2) TEU.[215]

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

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[214] See Research Paper 07/80 for further consideration of this point.

[215] Statewatch analysis, EU Reform Treaty Analysis no. 3.7: "Revised text of Part Seven of the Treaty establishing the European Community (TEC): Final provisions", Professor Steve Peers, University of Essex 6 August 2007 at http://www.statewatch.org/news/2007/aug/eu-reform-treaty-tec-part-seven-3-7.pdf

Barthélemy, Saint Martin). There are further provisions when a special legislative procedure is used.

Article 308 (Constitution Article I-18, the so-called 'flexibility clause') is the catch-all Article that allows the EC to decide, by unanimity, to act in an area not provided for specifically in the Treaty, in order to achieve a Treaty aim. The Article currently states:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate action.

Article 308 has been the subject of much debate and some criticism from those who see it as a way for the EU to extend its competence. Whereas it currently applies to the operation of the common market, the TFEU Article is open-ended, stating that "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers", it will act (by unanimity). Further amendments to this Article seek to limit the potential power of this Article to extend Union competence beyond that conferred upon it in the Treaty:

> 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
> 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
> 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and shall respect the limits set out in Article 25, second paragraph, of the Treaty on European Union.

In 2003-04 the corresponding Constitution Article had led to fears about 'creeping' Union competence. In her Memorandum to the Lords Select Committee on the Constitution, Sionaidh Douglas Scott indicated that worries about "creeping competence" were largely unfounded, as "there are probably enough safeguards written into it - the Council must act unanimously under it, and the national monitoring procedure for subsidiarity under Article 9(3) applies.[216]

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

> 82. First, the inclusion of a catch-all/fall back clause such as is being proposed casts doubt on the value of drawing up a list of competences. Even if it is accepted that that list cannot be definitive (the list in Article 11 above cannot by definition be exhaustive and that in Article 12 is merely illustrative) the desirability of including a provision which will inevitably affect the respective competences of the Union and the Member States needs the most careful consideration. There is

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

> also a danger that any "flexibility" clause could be used as a way of bypassing the need to amend the Constitution and the parliamentary democratic control and national constitutional requirements that would imply. On the other hand the absence of a power for the Union to take action might lead the Court of Justice to construe existing powers more widely and possibly even develop a theory of implied powers.
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> 83. The experience of Article 308 TEC (formerly Article 235 EC and once known as "*la petite révision*"), sometimes linked with other Treaty Articles, has been that the power has been used extensively over a range of matters (including social policy, the environment, consumer protection, external affairs and institutional and financial matters).[217] In addition to filling in gaps[218] in the Treaty, some quite substantial policy and regulatory measures have been developed and adopted where the "Treaty has not provided the necessary powers". For example, the creation of a Community trademark[219] and the European company,[220] establishing a Community action programme in the field of civil protection,[221] and creating a rapid-reaction mechanism (humanitarian aid).[222] The new Article 16 would be wider in scope. It would apply to the Union (not just the Community/First Pillar) and therefore confer power to act in relation to the Common Foreign and Security Policy (CFSP—Second Pillar) and Police and Judicial Cooperation (Third Pillar). The power would be exercisable at the initiative of the Commission, a factor which is politically significant in the context of the CFSP.[223]

The Committee also acknowledged the safeguards:

> 84. There are some safeguards in Article 16. First, any measure must be adopted by unanimity in the Council. Second, parliamentary control is strengthened. Article 16(1) requires the assent of the European Parliament and Article 16(2) makes explicit reference to national parliaments. As regards the role of the Parliament, it might be questioned why co-decision should not apply. The reason given in the Explanatory note (that it might slow down the procedure) seems unconvincing. Why should action under this provision be any more urgent than action under any other provision? Further, Article 16(2) is a weak provision, requiring only that the Commission draw Member States' national parliaments' attention to proposals. It seems clear to us that if national parliaments are to have a meaningful role in this context then their views on the *vires* and merits should also be respected.
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> 85. Finally, Article 16(3) prohibits the use of Article 16 to harmonise national laws where that is excluded by the Constitution. Article 16 cannot be used to get round Article 15(4).[224]

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

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

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

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

[221] Council Decision of 9 December 1999 [1999] OJ L327/53

[222] Council Regulation No 381/2001 [2001] OJ L57/5

[223] Lords Ninth Report, *The Future of Europe: Constitutional Treaty – Draft Articles 1-16*, 25 February 2003, at http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/61/6107.htm

[224] Lords Ninth Report, *The Future of Europe: Constitutional Treaty – Draft Articles 1-16*, 25 February 2003

The Commons European Scrutiny Committee (ESC) also commented that this Article went further than present Article 308 by extending flexibility to the former second and third pillar areas. They thought "The requirement for unanimity in the Council on the exercise of powers under this article is the minimum safeguard required".[225]

The ESC reported on Article 308 in July 2007.[226] In his written evidence to the Committee, Professor Dashwood, of Sidney Sussex College, Cambridge, commented on the expansion of the Community's objectives since the Treaty of Rome was signed in 1957 and observed that:

> A fairly convincing case can be made that Article 308 ought to be interpreted in an 'evolutionary' way, reflecting the change in the nature of the Community; at this time of day, it should be understood as authorising the creation of supplementary powers perceived as necessary not just for the purposes of the common market (whatever that now means) but over the whole range of policy areas in which the Treaty allows action to be taken by the Community … For convenience, I shall refer to this as 'the whole Treaty thesis' of the scope of Article 308.[227]

Professor Dashwood's evidence included references to ECJ case-law:

> Recently, the scope of Article 308 was considered by the Court of First Instance in the Yusuf and Kadi cases, which are now on appeal to the Court of Justice.[228] The cases concern Regulation (EC) No. 881/2002 freezing the assets of certain named individuals believed to be associated with international terrorism. A special mechanism is provided for by Article 60 and Article 301 EC making it possible for the necessary legal steps to be taken under the EC Treaty, in order to implement a decision of the Union's common foreign and security policy (CFSP) imposing financial or economic sanctions on a third country. Since those Articles do not explicitly authorise so-called 'smart sanctions' aimed at individuals, Regulation 881/2002 was given Article 308 as an additional legal base. In holding this was a proper use of Article 308, the Court of First Instance made no attempt to establish any connection with 'the course of the operation of the common market'. That is a further indication of the acceptance of the European judicature of the whole Treaty thesis of the scope of Article 308.[229]

Professor Dashwood later added that:

> Extending the Council's power under Articles 60 and 301 EC, from the imposition of economic and financial sanctions against third countries, to the imposition of sanctions against individuals, enabled the EU to fulfil its international obligations in line with the evolving practice of the UN Security Council. This … can be

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[225] ESC 24th Report at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxiv/6307.htm

[226] ESC 29th Report 2006-07, "Article 308 of the EC Treaty", 4 July 2007 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/41-xxix/41-xxix.pdf

[227] 29th Report 2006-07, "Article 308 of the EC Treaty", 4 July 2007

[228] FN 11: Case T-306/01, Yusuf v Council and Commission [2005] and Case T-315/01, Kadi v Council and Commission [2005]

[229] Ibid

> regarded as orthodox recourse to Article 308, if the whole Treaty thesis is accepted, which it appears to have been by the European Courts.

The Committee concluded:

> i. ultimately, only the European Court of Justice can give a definitive ruling on the application of the reference in Article 308 to "in the course of the operation of the common market";
> ii. while the ECJ Opinion 2/94 and the judgements in the Yusuf and Kadi cases may be indicative of the Court's likely view, the interpretation is still open to argument;
> iii. so it would be premature, in our view, to dismiss the literal approach to the interpretation of Article 308;
> iv. we shall continue, therefore, to examine proposals for which Article 308 is cited as the legal base to see if they have a connection with the operation of the common market and, if they do not, we shall draw the absence to the attention of the House;
> v. on the other hand, we recognise the weight of opinion in support of the purposive interpretation of Article 308 and accept that the purposive approach is not unreasonable.[230]

Two Conference Declarations clarify the remit of this Article. One confirms that legislative acts may not be adopted in the area of the CFSP, while another emphasises that it:

> cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.

A new **Article 308a** specifies that **Article 48(7)TEU** on Ordinary Revision Procedure proposals for amendment being used "either to increase or to reduce the competences conferred on the Union in the Treaties" will not apply to certain Articles or paragraphs on Own Resources, the multi-annual financial framework, or to Articles 308 and 309. **Article 309** (Constitution Article I-59) is based on present Articles 309 TEC and 7 TEU and sets out the voting procedure for a decision to suspend a Member State's voting rights in the Union and rules governing the calculation of a qualified majority.

Present Article 313 (Constitution Article IV-440) on the territorial scope of the Treaties is replaced by a text combining Article 299(2), first subparagraph, and Article 299(3) to (6). **Article 311a** supplements TEU Articles, setting out various arrangements for overseas territories and adding a new **paragraph (6)** stating that a Member State may ask the European Council to adopt by unanimity a decision amending the status with the Union of a Danish, French or Netherlands country or territory, but without amending the Treaties. This amendment does not apply to any territory linked to the UK (sovereign base areas in Cyprus, Gibraltar, the Isle of Man, or the Channel Islands).

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[230] Lords Ninth Report, *The Future of Europe: Constitutional Treaty – Draft Articles 1-16*, 25 February 2003

Article 313a provides that the provisions on the languages of the Treaties in **Article 53 TEU** will apply also to the TFEU.

2. Final Provisions

Present Article 312 TEC becomes **Article 3** of the **Final Provisions**, stating that the Treaty "is concluded for an unlimited period". Of the Community Treaties signed in the 1950s, only the ECSC Treaty was concluded for a specific period (50 years, now elapsed). **Article 4** of the Final Provisions refers to the Protocols containing amendments to the present Treaties and **Article 5** refers to the renumbering of Articles in the TEU and TFEU in accordance with the tables of equivalences annexed to the Treaty. **Article 6** of the final provisions (Constitution Article IV-447 and present Article 313 TEC) concerns ratification and entry into force of the Lisbon Treaty. The target date is 1 January 2009 or the first day of the month following the deposit of the instrument of ratification by the last signatory State. Universal ratification is maintained, although the **Article 33** procedure (providing for a referral to the European Council if Treaty amendments have not been ratified by one or more States) will not apply to ratification of the Lisbon Treaty itself; only to subsequent amendments once the Treaty has come into force. **Article 7** (Constitution Article IV-448 and present Article 314 TEC) provides that the texts of the Constitution in all the official languages of the Union shall be equally authentic and that it may be translated into any other languages with official status in particular Member States, although those will not be authentic texts, merely authorised translations. This Article is supplemented by a Declaration underlining the importance the Union attaches to cultural and linguistic diversity, which is illustrated by the provision on translation.