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The *Treaty of Lisbon*: amendments to the *Treaty on European Union*

The *Treaty of Lisbon*, also referred to as the 'Reform Treaty', was concluded in Lisbon on 19 October 2007 by EU Member State governments meeting as an informal European Council and signed on 13 December 2007. The 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, by means of amendments to the present Treaties.

The Lisbon 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 revised TEU contains provisions which apply inter-governmentally, that is to say, by Member State governments acting together according to the principles of international law and largely without the involvement of the EU institutions (e.g. the Common Foreign and Security Policy). It also contains articles on general principles, institutional arrangements, treaty ratification, amendment and withdrawal from the EU.

This paper replaces Research paper 07/80.

Vaughne Miller and Claire Taylor

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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 and the new Treaty was signed on 13 December 2007, just ahead of the European Council meeting on 14 December. The texts are collectively known as the "Treaty of Lisbon" (referred to earlier as the "Reform Treaty").

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 EU 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.

This paper considers only amendments to the TEU. Amendments to the TEC are the subject of Research Paper 07/86, "The *Treaty of Lisbon: amendments to the Treaty Establishing the European Community*, 6 December 2007. The paper updates and replaces Research Paper 07/80, *The EU Reform Treaty: amendments to the Treaty on European Union*, to take account of new terminology and Article numbering.

The Treaty of Lisbon is available as Cm 7294[1] or OJC 306.[2] In January 2008 the Government also published a consolidated text incorporating Lisbon into the present

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1 European Communities No. 13 (2007) *The Treaty of Lisbon amending the Treaty Establishing the European Union and the Treaty Establishing the European Community, including the Protocols and Annexes, and Final Act with Declarations* Lisbon, 13 December 2007, Cm 7294 at http://www.fco.gov.uk/Files/kfile/TREATY%20FINAL%20TEXT.pdf

2 OJC 306 Volume 50 17 December 2007 at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML

EC/EU Treaties,[3] and a comparative table of the current EC and EU Treaties as amended by Lisbon.[4]

The main features of the Lisbon Treaty are outlined below.

- **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: the Constitution moved 15 Articles from unanimous voting to QMV and introduced 24 new Articles with QMV.[5]
  - 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

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3 Cm 7310 at http://www.fco.gov.uk/Files/kfile/FCO_PDF_CM7310_ConsolidatedTreaties.pdf

4 Cm 7311

5 See Appendix 2 for tables showing how QMV would be applied. Figures vary from 39 to 60 for the number of QMV innovations, depending on various factors, such as whether sub-paragraphs of articles are included, and whether new articles are counted or only transfers from unanimity.

- 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 of the total 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' in the EU Constitution (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 were 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
TFEU	Treaty on the Functioning of the European Union
IGC	Intergovernmental Conference
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

CONTENTS

I Background

A. The Intergovernmental Conference Process

On 19 June 2007 the German European Union (EU) Presidency, following an unconventional (the British Government called it "distinctive")[6] approach to proposals for Treaty reform, released a draft Intergovernmental Conference Mandate which was submitted to the European Council as the basis for a revision of the European Community and European Union Treaties. The European Council (meeting of EU Heads of State and Government) reached agreement on 23 June on a draft Reform Treaty in largely the same terms as the draft mandate. An Intergovernmental Conference (IGC) was launched on 23 July 2007 under the Portuguese EU Presidency to discuss and refine technicalities according to the IGC Mandate. The EU published a memo on the particular nature of this IGC, compared with preceding ones:

> This term is used to describe negotiations between the Member States' governments with a view to amending the Treaties. This is a special procedure outside the normal Council discussions. The procedure for an Intergovernmental Conference is set out in Article 48 TEU. These conferences are convened, at the initiative of a Member State or the Commission, by the Council of Ministers acting by a simple majority (after consulting the European Parliament and, if appropriate, the Commission). The European Central Bank will also be consulted in the case of institutional changes in the monetary area. The preparations for the current IGC mandate were made by a group of focal points from each member state, the Commission and European Parliament under the responsibility of the German Presidency. The IGC of 2007 will be significantly different from previous IGCs. In the past, IGCs have been given a mandate which sets the scope of the discussions, but which leaves a large margin for negotiation. The mandate agreed in June is extremely precise, detailed to the point of setting out Treaty language to be inserted.[7]

The working group of legal experts appointed by Member States and the EU Institutions to examine the draft Reform Treaty completed its first reading of the text on 6 September 2007.[8] Their task was to examine the draft text in accordance with the IGC mandate agreed by the European Council in June, the existing Treaties, and the text of the 2004 Constitution.

The working group was reported to have agreed by consensus some 200 amendments to the Presidency's original draft text at first reading, many of these minor changes to punctuation. The Presidency took a particularly firm line on the admissibility of substantive amendments at this stage, maintaining that the European Council's "clear

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6 Foreign Secretary, David Miliband, to Foreign Affairs Committee, Uncorrected evidence 10 October 2007 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/uc166-iv/uc16602.htm

7 MEMO/07/284, Brussels, 10 July 2007 at http://www.europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/284&format=PDF&aged=0&language=EN&guiLanguage=en

8 The group comprised two legal experts per Member State, three each from the EP and Commission Legal Services, four from the Council Legal Service and a separate team from the Presidency.

and precise" mandate could not be amended. The Presidency did not publish a revised text after first reading, so there was no published record of amendments agreed in the working group. The British Government was reported to have submitted a formal Opinion to the working group. Several issues were reserved for consideration by the working group in a second reading of the text.

On 3 October 2007 it was reported that the IGC legal expert working group had reached technical agreement on the revised text, which would be published (in French) within days. The English translation would not appear until later. These texts were published on the *Europa* site in French and English, dated 5 October. The revised text formed the basis for political discussions at the General Affairs Council in Luxembourg on 15 and 16 October, and thereafter at the European Council in Lisbon on 18 and 19 October.

The European Parliament (EP) representatives at the IGC, Elmar Brok, Enrique Baron Crespo and Andrew Duff, formally reported to the EP Constitutional Affairs Committee on 11 September and 2 October 2007. Members of national parliaments were invited to both meetings. The meeting on the morning of 2 October was attended by national parliamentarians from Belgium, Bulgaria, the Czech Republic, Estonia, Hungary, Italy, Lithuania, Malta, Poland, Portugal, Romania, Slovenia and Spain.

In the British Parliament the Commons European Scrutiny Committee was critical of a lack of transparency in the IGC process (in particular the lack of availability of proposed Treaty amendments in English) and in the Government's reporting of that process to the House. Although the Government had said in February 2007 that it would welcome "parliamentary contributions to the debate",[9] the Committee maintained that the Government had not been forthcoming in briefing it on the proposed reform, distinguishing narrowly between words such as 'negotiation', 'discussion' and 'talks' in response to questions about the meetings and events leading up to the opening of the IGC and beyond.

In the early hours of Friday 19 October 2007 the European Council, meeting informally in Lisbon under the Portuguese EU Presidency, agreed the final text of the Reform Treaty.[10] The text was translated into the 23 official languages of the European Union and checked for technical and legal consistency. The *Treaty of Lisbon* was signed on 13 December and the ratification process then began in the 27 Member States. Hungary became the first to ratify the Lisbon Treaty on 17 December 2007.

B. UK "Red Lines"

In its July 2007 White Paper, *The Reform Treaty: The British Approach to the European Union Intergovernmental Conference* the Government set out its preconditions for agreement on a new Treaty:

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9 Letter from Foreign Secretary, Margaret Beckett, to Chairman of European Scrutiny Committee, 22 February 2007.

10 The treaty has also been referred to as the "Lisbon Treaty" but is, for the purposes of this paper, called the Reform Treaty or the RT.

- protection of the UK's existing labour and social legislation
- protection of the UK's common law system and police and judicial processes
- maintenance of the UK's independent foreign and defence policy
- protection of the UK's tax and social security system
- national security is clearly established as a matter for Member States[11]

In 2003 the Government had insisted in a White Paper on the Constitution[12] that foreign affairs, taxation, social security and defence matters should remain subject to national vetoes. These were its non-negotiable 'red lines'. Other matters required "further technical, including important legal, work".[13] The present red lines are thus the same as those the Government established with regard to the Constitution.

Further details regarding the UK's 'red line' issues were provided in an annex to a letter dated 11 October 2007 from the Foreign Secretary to the Chairman of the Foreign Affairs Committee.[14]

C. Outstanding Issues

Outstanding Issues In early October 2007 press reports stated that British and Polish demands had caused the most controversy during the IGC, although demands from Italy, Austria and Bulgaria were also complicating the final weeks of discussion. The main outstanding issues are outlined below. Some of these are discussed in more detail elsewhere in the paper.

1. Charter of Fundamental Rights

One area of disagreement was the UK's 'opt-outs' from the Charter of Fundamental Rights and judicial cooperation in criminal matters, and the extent to which the European Court of Justice (ECJ or the Court) should have jurisdiction over Member States' compliance with rules in this area.

2. Decision-blocking mechanism

The Polish Government had indicated that it would not accept a loss of national influence in the decision-making process under the system of weighted votes in the Constitution, which it was now proposed would be incorporated into the new Treaty. The Polish electoral campaign in the run-up to elections on 21 October 2007 added to the pressure on the European Council to deliver concessions that would allow Poland to ratify the new Treaty. Poland insisted that a revised 'Ioannina compromise'[15] mechanism allowing States to delay QMV agreements in the Council for up to two years when a blocking

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11 http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

12 Cm 5934 *A Constitutional Treaty for the EU: The British Approach to the European Union Intergovernmental Conference* September 2003

13 Ibid

14 DEP2007-0010

15 The so-called "Ioannina compromise" originated in 1994 and allowed States which did not have quite enough votes to form a blocking minority to ask the Council to continue discussion in order to find "within a reasonable time" a compromise agreement with broader support. It has been rarely used.

minority cannot be formed, be written into the new treaty. A revised form of Ioaninna had been included in a declaration in the Final Act of the 2004 IGC, whereby 75% of Member States or Member States representing 75% of the EU's population could request the Council to continue negotiations to find agreement with broader support, "within a reasonable time" and "without prejudicing obligatory time limits laid down by EU law".[16] The EP and several Member States insisted that this mechanism should not form part of the EU's primary (Treaty) legislation. In response to the Polish demands the IGC mandate envisaged that the QMV system set out in the Lisbon Treaty would be supplemented by a Council decision, which would be adopted when the Treaty entered into force and the draft of which was contained in the 2004 declaration.

3. Advocate-General for Poland

Poland also wanted the ECJ to have an extra advocate-general to give the eastern European Member States special representation. The ECJ currently has eight advocates-general, of whom five are drawn from Germany, France, the UK, Italy and Spain, with the other three posts rotating between the smaller States.

4. Number of EP seats

The Italian Senate had criticised the EP's proposed new distribution of the seats and did not want to lose parity with the UK. The re-allocation had been proposed by the French MEP Alain Lamassoure on the basis of Eurostat data on the number of 'residents' in each Member State. The definition of 'resident' differs in each State, but on that basis France was given 74 seats, the UK 73 and Italy 72 (they all currently have 78). The European Council agreed to give Italy one extra EP seat, but in order to maintain the 750-seat ceiling, the EP President will not be counted in decision-making processes, making him/her a non-political post. From 2009 Italy will have 73 seats, along with the UK. This is confirmed in a Declaration on the composition of the European Parliament.[17]

5. Freedom of movement

Austria, which objected to the large number of German nationals studying medicine in Austria, wanted to set quotas for foreign students. This issue appears to have been settled, at least temporarily, before the summit. According to a Federal Chancellery press release: An interim solution seems likely in the conflict about the quota system governing access to Austrian medical faculties. In a letter to Federal Chancellor Alfred Gusenbauer European Commission President José Manuel Durão Barroso announced that the proceedings before the European Court of Justice (ECJ) against Austria would be suspended for five years. The respective decision would be prepared in the next weeks. A "prospect" was raised that "the Commission could come to another decision", explained the Federal Chancellor on 17 October 2007 at a press conference in Parliament. This was the first time that Brussels signalled acceptance of and understanding for this specific Austrian problem. The suspension of the action for five years gave Austria time "to substantiate the arguments presented by us more clearly"

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[16] Declaration on Article I-25 CIG 87/04 ADD 2 6 August 2004 at http://www.consilium.europa.eu/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf

[17] DS 869/07, 19 October 2007

and to find a permanent solution for quotas for medical students from other EU Member States entering Austrian universities, said Gusenbauer. The recognition of the problem indicated by the Commission President also meant legal certainty during the suspension of the proceedings.[18]

6. Spelling of the word 'euro'

Bulgaria insisted on its right to use the word 'evro' for the euro, which had been resisted by the European Central Bank. Bulgaria's right to use 'evro', its spelling of 'euro', in EU legal documentation was agreed by the European Council.

7. European Parliament concerns

The EP also had a number of concerns, which were aired by the Constitutional Affairs Committee. Some MEPs were critical of the new post of High Representative for Common Foreign and Security Policy, which they viewed as a *de facto* foreign minister, similar to the one proposed in the Constitution. There were also concerns about the timing and method of the appointment. The High Representative would take up office as soon as Lisbon was implemented, envisaged for the beginning of 2009. This could mean he/she would be technically in place before the EP elections in mid-2009 and before the new Commission was in place (later in 2009). This situation raised questions about the composition of the current Commission (the High Representative will also be a Commission vice-president), who the High Representative is likely to be and how he/she will be chosen. The EP wanted a say in the appointment,[19] which was opposed by the Council Secretariat. The EP was also critical of the Justice and Home Affairs (JHA)/Judicial cooperation in criminal matters provisions, insisting that existing JHA legislation which has been adopted under "third pillar" procedures (consultation with the EP and unanimity in the Council) should be transposed quickly to a legal basis in the "first pillar". The EP also wanted co-decision to apply to the procedure, with ECJ jurisdiction over the transposed legislation. The EP and other Member States, including Italy and Spain, were concerned about the way the UK and Irish opt-outs and opt-ins to third pillar legislation would be dealt with under the transposition procedure. A separate concern was how the UK's opt-out would operate in practice: could the UK decide to participate in negotiations on a proposed measure, seek to influence negotiations on the measure but still decide not to opt into the final decision? The EP remained concerned about the influence of the UK opt-out on other elements of the EU's legal order, such as the Charter of Rights. The EP was concerned at the provisions for legislation on the use of personal data of European citizens in the context of international agreements. New article 24 TEU provides that regulation in this area shall be the sole preserve of the Council. The EP also sought to secure a specific reference to EU citizenship in Article 8 TEU.

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18 http://www.austria.gv.at/site/infodate 22.10.2007/5396/default.aspx

19 http://euobserver.com/9/24897/?rk=1

8. European Central Bank concerns

The European Central Bank (ECB), supported by Germany, was concerned that Lisbon did not protect its independence. Other governments, including the French, did not perceive a problem with the proposed settlement, which would put the ECB on an equal footing with the EU's other institutions, with no particular provisions to protect it from political influence. The ECB head, Jean-Claude Trichet, wrote to the Portuguese Presidency expressing concern that the Bank's independence may be undermined by the new wording. In the days before the IGC summit, there was optimism that all outstanding issues would be resolved. One report stated that: "Ahead of Lisbon, most EU governments regard points of disagreement as small compared with the difficulties that have turned previous summits into diplomatic battlegrounds".[20]

II Structure of the Lisbon Treaty

The 2004 *Treaty Establishing a Constitution for Europe* (referred to here as the Constitution) aimed to repeal and replace the *Treaty on European Union* (TEU) and the *Treaty Establishing the European Community* (TEC), consolidating them into one text. Under the Lisbon Treaty the TEU keeps its present name and the TEC is renamed the *Treaty on the Functioning of the European Union* (TFEU). The word "Community" is replaced throughout by the word "Union", but two separate Treaties are preserved.

The IGC Mandate agreed by the European Council in June 2007 adopted the following structure for the amended TEU:

Six Titles divided as follows:

I Common Provisions
II Provisions on democratic principles
III Provisions on institutions
IV Provisions on enhanced cooperation
V General Provisions on the Union's External Action and specific Provisions on the Common Foreign and Security Policy (CFSP)
VI Final Provisions

Titles I, IV (present VII), V and VI (present VIII) follow the structure of the existing TEU, with the amendments agreed in 2004. The other two titles (II and III) are new and introduce innovations agreed in the 2004 IGC.[21] The current Title IV of the TEU (third pillar) is transferred to the amended TEC, the TFEU. The current Title VII of the TEU (enhanced cooperation) is transferred to Title IV TFEU.

The structure of the Lisbon Treaty, in the form of amendments to the current TEU and TEC Treaties, makes it look different compared with the Constitution. However, the content is largely the same. Some current TEU articles have been deleted and appear in

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[20] *FT.com* 16 October 2007 at http://www.ft.com/cms/s/0/aaa2d79e-7c05-11dc-be7e-0000779fd2ac.html?nclick_check=1

[21] IGC Mandate, doc 11218/07 26 June 2007 at http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf

the amended TFEU. For example, 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, and other specific foreign policy and justice and home affairs restrictions are found in amendments to Articles 235 and 240 TEC (Constitution Articles III-371, 376 and 377).

Some Constitution articles are included out of order in the new texts. For example, Constitution Article I-4 prohibiting "any discrimination on grounds of nationality" appears much later in Article 17 of the TFEU, "Non-discrimination and Citizenship".

Some moves reflect political innovations agreed by the 2007 IGC to move some areas from intergovernmental decision-making to EU decision-making procedures. The Constitution would have abandoned the three-pillared structure altogether, whereas Lisbon retains intergovernmental elements, above all in the CFSP. However, articles *have* moved from the TEU to the TFEU, thereby blurring the distinction between the pillars without completely dismantling them: the present Title VI on "police and judicial cooperation in criminal matters" is put into the Title on the "area of freedom, security and justice" in the TFEU.

Some controversial Constitution articles deleted in line with specific Member States' demands appear in amended form in declarations, which are not legally binding, attached to the main texts. For example, the Constitution Article on the primacy of Union law is not reproduced, but the IGC agreed on a Declaration accepting the primacy of EU law "in accordance with well settled case-law of the EU Court of Justice" (see also below).

The final draft texts contain a blend of present and amended TEU and TEC Articles, Constitution articles, amended Constitution articles and entirely new articles, as directed by the IGC Mandate.

Daniel Gros and Stefano Micossi of the Centre for European Policy Studies commented on the structure of the new Treaty:

> A potentially important improvement in the text agreed by the IGC, and one that is often overlooked, is the fact that there will be two treaties: a Treaty on the EU, which contains most of the institutional provisions, and a second treaty 'on the functioning of the Union'. The first is close in character to a 'fundamental law', or constitution at the national level, whereas the second is closer to implementing legislation. It is thus fitting that certain provisions (e.g. passage by qualified majority voting in new areas) of the second treaty can be modified by a simplified procedure. And herein lies the germ for an important innovation: a true two-level treaty structure with a fundamental law on which everyone must agree, and provisions on specific policies on which dissent is normal and can thus be modified more easily.[22]

[22] "Two for the Price of One?" CEPS Commentary, 22 October 2007 at http://shop.ceps.eu/BookDetail.php?item_id=1550

III Amendments to the *Treaty on European Union*

A. Overview

The differences between the Lisbon Treaty and the Constitution range from superficial to substantial, even 'constitutional'. The Commission stated in its Opinion on the reform pursuant to Article 48 TEU, that the Reform Treaty was a compromise "package agreement which could be subscribed to by all Member States".[23] Minor, symbolic changes could be summarised as follows:

- References to the symbols of statehood which had been included in the Constitution, such as flag, anthem, motto, holiday, are no longer in the text
- The word 'constitution' is not used and the reference to the primacy of Union law is transferred to a declaration, rather than stated in the body of the treaty
- The structure of Lisbon is a set of amendments, rather than a comprehensive text replacing the current Treaties
- Lisbon retains the present categories of legislative acts (regulations, directives, decisions), rather than using the categories of framework decisions, decisions and conventions in the Constitution
- The title of Union Minister for Foreign Affairs is abandoned in favour of High Representative of the Union for Foreign Affairs and Security Policy, but the roles are virtually the same.
- The Charter of Rights formed Part II of the Constitution. Its rights are "recognised" in amended Article 6 TEU, which states that it "shall have the same legal value as the Treaties".

In a report for Statewatch, Professor Steve Peers lists what he describes as "substantive changes" from the Constitution:

> a) the procedure for the EU to accede to the European Convention of Human Rights would change, from qualified majority voting in the Council (i.e. Member States' ministers) in the Constitutional Treaty, to unanimity and national ratification in the Reform Treaty;
>
> b) the procedure for conferring jurisdiction on the EU courts to rule on patent disputes between private parties would, in the Reform Treaty, remain (as at present) unanimity in the Council and national ratification, whereas the Constitutional Treaty provided for qualified majority voting in the Council and co-decision with the EP;
>
> c) the provisions on foreign policy would be separated from the other provisions of the Treaties to a greater extent, by: keeping them in the EU Treaty, rather than placing them in the main text of the Treaty on the Functioning of the EU (or in Part III of the Constitutional Treaty); more fully excluding the jurisdiction of the Court of Justice; preventing the application of the 'flexibility' clause in Article 308 EC (Article I-18 of the Constitutional Treaty) to EU foreign policy; including a

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[23] "Reforming Europe for the 21st Century",11625/07, 13 July 2007 at http://register.consilium.europa.eu/pdf/en/07/st11/st11625.en07.pdf

separate clause on foreign policy data protection rather than applying Article 286 of the EC Treaty (as amended by Article I-51 of the Constitutional Treaty) to foreign policy; it is not clear whether some of the general foreign policy provisions in the Constitutional Treaty (Article I-16 on foreign policy competence, and Article I-40 on specific procedures) would be retained (the point is significant because Article I-40(5) contains a controversial requirement for a Member State to consult other Member States before taking foreign policy action); it is also not clear whether foreign policy instruments would be the same as all other EU acts, as the Constitutional Treaty provided for (the point is significant because 'normal' EU acts are generally directly effective or directly applicable under certain conditions, ie they create rights and obligations within the domestic legal system by themselves, regardless of national law);

d) national parliaments would have eight weeks, rather than six, to scrutinise proposed EU legislation, and in the event of objection to a proposal by a third of them to a proposal, the Commission would have to give a 'reasoned opinion' on their objection;

e) the provisions for an 'emergency brake' on certain criminal law measures (allowing a Member State to block decision-making on criminal procedure or substantive criminal law, where voting will take place by a qualified majority) would be altered to make it explicit that EU leaders must act by consensus if the issue is referred to them; new clauses also provide that if there is no agreement on proposed legislation concerning the European public prosecutor or on police operations (issues which have to be decided by unanimity), then a group of Member States (at least one-third) will have automatic approval to go ahead without the others if they wish (this same proviso is retained, as in the Constitutional Treaty, for cases of deadlock over criminal law legislation);

f) the provision on social security for migrant workers, which would also be made subject to qualified majority voting and which also contains a similar emergency brake (but without a provision for 'flexibility'), would be altered to provide that EU leaders could decide not to take action on a proposal; a declaration would also confirm that the EU leaders must act by consensus if the issue is referred to them;

g) there will be a 'clarification' on the issue of 'public services' (Articles 16 and 86 EC) but this has yet to be drafted;

h) the clause conferring competence on the EU to adopt measures on 'supporting, coordinating or supplementary action' in various areas (such as education and aspects of health) will more clearly emphasise the competence of Member States;

i) the new EU power over space policy will be limited so that the EU will not have power to harmonise national laws;

j) the new EU power over monitoring, etc. health threats will be limited so that the EU will not have power to harmonise national laws;

k) the new provisions allowing for legislation to be adopted on passports, ID cards and residence permits will be moved from the 'citizenship' Part to the immigration chapter of the JHA Title; this will mean that the UK, Ireland and Denmark can opt out;

> l) also, the new provision allowing for the freezing of assets of domestic 'terrorists', etc. will be transferred to the JHA Title, although it is not clear what this will mean for opt-outs; and
>
> m) the power for the EU to adopt measures on diplomatic and consular protection will be altered so that the EU's power is weaker, and so that the EU will have to act by using Directives (which must be implemented by national parliaments), rather than Regulations.[24]

Although it has been estimated that as much as 96% of the new Treaty text is the same as the 2004 Constitution,[25] the different structure of Lisbon compared with the Constitution means that the former looks more like a conventional amending treaty.

The British Government is satisfied that the new Treaty is a different entity altogether and therefore does not propose to hold a referendum on ratification. The Foreign Secretary, David Miliband, set out the main differences between the two treaties as follows:

> […] there are two significant changes-well, there are actually three. They are changes of structure, of content and of consequence. The change of structure that has occurred is that the attempt to collapse all previous existing EU treaties-notwithstanding the interesting debate you can have about Euratom; but, none the less, we know what we are talking about-into a new treaty refounding the European Union. The constitutional concept has gone; it has been abandoned. Secondly, in terms of content, there are significant differences, not least for the UK, which has a number of derogations, opt-outs and other significant issues that make our treaty different. Thirdly, the consequence of the new reform treaty is different as well, because I think that it settles the debate about whether Europe is going to be a coalition of nation states, or whether it is going to move in a more federalist direction. I think it settles it in a way that is not just the British point of view, but the long-standing point of view of other countries as well.[26] A little later he told the European Scrutiny Committee: It is different in terms of legal precedence because the Constitutional Treaty was legally unprecedented because it rolled together all preceding treaties of the European Community and treaties of the European Union into a single, new re-founding document (with the addition of the Euratom Treaty). The Reform Treaty in front of us is not legally unprecedented, it is legally precedented in many ways - single European Act, Maastricht, et cetera - because it amends the existing law on constitutions. The third aspect of difference, which is important for all these discussions, is the consequences of the Constitutional Treaty versus the consequences of the Reform Treaty, and these are political consequences, I think. The "period of reflection" that has happened since the defeat of the referenda in France and Holland has meant that the old debate which was still going around at the time of the Constitutional Treaty, which is whether Europe would continue to be a

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24 Statewatch analysis "The proposed "Reform Treaty" for the European Union", Steve Peers, Professor of Law, University of Essex, 13 June 2007 at http://www.statewatch.org/news/2007/jun/sw-analysis-reform-treaty-21-06-07.pdf

25 Open Europe provided this estimate, but also found that only 10 out of 250 proposals in the treaty were different from the proposals in the Constitution, which is not quite the same necessarily as 96% of the text, unless the proposals are of equal length.

26 Foreign Affairs Committee, Uncorrected Evidence 10 October 2007 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/uc166-iv/uc16602.htm

> coalition of nation states or whether it was on the road to a super-state, is ended by the Reform Treaty, because the current voting and other measures will not come in until the middle of the next decade (2017), and the reason why there are some people who are so disappointed by this Reform Treaty is precisely because it does end that debate in favour of not just the British vision of the future of the EU but other countries as well, and I think that is relevant.[27]

Other political leaders and commentators point, in many cases proudly, to the similarities between the 2004 and 2007 texts. For example, the German Chancellor, Angela Merkel, who had supported the Constitution, said "The substance of the Constitution is preserved. That is a fact".[28] Another supporter, the Spanish Prime Minister, José Zapatero, said in a speech on 27 June 2007, "We have not let a single substantial point of the Constitutional Treaty go […]. It is, without a doubt, much more than a treaty. This is a project of foundational character, a treaty for a new Europe".[29] The Irish Taoiseach, Bertie Ahern was reported in the *Irish Independent* on 24 June as saying: "90 per cent of it is still there... these changes haven't made any dramatic change to the substance of what was agreed back in 2004". [30]

B. Preamble

The Preamble is largely similar to the present TEU preambular text, but includes references to the completion of the process "started by the Treaty of Amsterdam and by the Treaty of Nice of adapting the institutions of the European Union to function in an enlarged Union".[31] The Preamble also inserts references to the historical and cultural heritage of Europe using the same declaratory statement as the EU Constitution.

> Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.[32]

In spite of efforts in 2003-2004 and again in 2007 by the Vatican and the governments of several Roman Catholic Member States headed by Poland, the Preamble still makes no reference to Europe's Christian heritage. Also omitted is the lofty 2004 paragraph promoting the belief that Europe:

> reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning

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27 Q142: Uncorrected evidence to European Scrutiny Committee, 16 October 2007 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/uc1015-ii/uc101502.htm

28 *Daily Telegraph*, 29 June 2007

29 *El Pais* 23 June 2007 and speech in Parliament 27 June 2007

30 Reactions widely cited in the press, e.g. *timesonline*, 21 October 2007 at http://www.timesonline.co.uk/tol/news/politics/article2702595.ece#cid=OTC-RSS&attr=797084

31 Draft Preamble, CIG 4/07, 24 July 2007 at http://www.consilium.europa.eu/uedocs/cmsUpload/cg00004.en07.pdf

32 Draft Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community, 23 July 2007 CIG 1/07 at http://www.consilium.europa.eu/uedocs/cmsUpload/cg00001.en07.pdf

> and social progress; and that wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world.[33]

C. General Provisions

General Provisions Amended **Article 1** (Lisbon Article 1(2)) on the Establishment of the Union includes the 2004 statement that the Member States confer competences on it "to attain objectives they have in common" but removes the aim of building a "common future" in the 2004 text.

This Article also states that the Union will be founded on the two Treaties and will "replace and succeed the European Community". The removal of the "Community" from the new Treaty will formally and legally end the distinction between the European Union and the European Community, with the exception of the CFSP, although this distinction has been blurred for some time. A new **subparagraph 3** (not in the Constitution) concerns the relationship between the two Treaties, stating that they will have the same legal value. At present Article 47 TEU determines that the TEU is subsidiary to the TEC. Article 47 TEU is largely replaced by Article 25b TEU, except for the special status of the CFSP as against the other Treaty competences.

Amended **Article 1a** (Lisbon Article 1(3)) on the Union's values states:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

These values are currently contained in various Treaty Articles, including the TEC Preamble and Article 2 TEC and Article 6 TEU.

Amended **Article 2** (Lisbon Article 1(4)) sets out the Union's objectives in almost identical language to the 2004 Constitution. They include the aims of promoting peace and well-being for EU citizens, an area of freedom, security and justice without internal frontiers, the free movement of persons, but with measures on external border controls, asylum, immigration and the prevention and combating of crime. This Article states in **subparagraph 3** that the Union "shall establish an internal market", work for the "sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment". In line with the competences conferred upon it by the Treaties, the Union will combat social exclusion and discrimination and promote scientific and technological advance, social justice, equality, solidarity, the rights of the child, economic, social and territorial cohesion. It will also respect cultural and linguistic diversity and ensure that Europe's cultural heritage is safeguarded and enhanced.

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

In **subparagraph 4** the Article reinforces the euro as the EU's currency and refers in **subparagraph 5** to the EU's relations with the wider world, in which it will uphold and promote its values and interests and adhere strictly to international law, including respect for the principles of the United Nations Charter.

The Union's objectives are presently set out in Articles 2 TEU and 3 TEC in the "Common Provisions" and "Principles". The EU's ability to act and limitations on its competence to act are contained in Article 5 TEC, which states that: "The Community shall act within the limits conferred upon it by this Treaty and of the objectives assigned to it therein". The Treaties are the basis for Community competence and there is no suggestion of a 'competence competence' (the responsibility for deciding who has competence in an area).[34]

The aim of peace is "declared" in the current Preambles to the TEC and TEU and is contained in Articles relating to the CFSP. The Preamble to the TEU currently states that the States Parties (i.e. the States which have ratified the Treaty) are: "Resolved to implement a common foreign and security policy […], thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world", and the TEC Preamble states that the States Parties are: "Resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts".

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

There is a significant amendment to both the TEC and the 2004 Constitution. The present Article 3(1)(g) TEC states that the activities of the Community shall include *inter alia* "a system ensuring that competition in the internal market is not distorted".[35] The 2004 Constitution stated in Article I-3(2), "The Union's Objectives": "The Union shall offer its citizens […] an internal market where competition is free and undistorted".[36] The French Government objected to the emphasis on competition and succeeded in removing "free and undistorted" from this Article. However, an additional *Protocol on the*

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34 From the German *Kompetenz-Kompetenz*

35 http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf

36 http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/c_310/c_31020041216en00110040.pdf

Internal Market and Competition annexed to the Treaties allows the use of Article 308[37] to achieve the aim of an undistorted market (see also below).

The Confederation of British Industry (CBI) expressed concern about dropping the reference to "free and undistorted" competition. John Cridland, Deputy Director-General of the CBI, had said prior to the European Council: "This is a regrettable and frustrating last-minute development. It is not just a cosmetic change - it represents a long-term threat to free competition and will strengthen the hand of protectionists within the EU in the years ahead".[38] However, the competition Commissioner, Neelie Kroes, insisted: "The Commission will continue to enforce Europe's competition rules firmly and fairly, to bust cartels and monopolies, to vet mergers, to control state subsidies".[39]

The new, legally binding Protocol states:

> The High Contracting Parties, considering 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 Have agreed that, to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 308 of the Treaty on the Functioning of the Union.[40]

In July 2007 the Government Minister, Lord Evans of Temple Guiting, said that the Protocol would confirm "that the internal market includes a system ensuring that competition is not distorted. This means that there is no substantive change to the legal position under the existing EC treaty".[41]

In fact, the present reference to competition being undistorted is in the list of EC "activities" in Article 3.1(g) TEC (see above). The Constitution gave "undistorted competition" the additional status of objective, so the present text probably reflects the *status quo*.

A new **Article 3b** (Lisbon Article 1(6)), on relations between the Union and the Member States, amends present Article 5 TEU (the subsidiarity Article) and states that "competences not conferred upon the Union in the Treaties remain with the Member States". As in the Constitution, Lisbon spells out that the Union "shall respect the equality of Member States before the Treaties as well as their national identities". This is already contained in Article 6 TEU, which states: "The Union shall respect the national identities of its Member States". However, the 2004 and 2007 texts expand on this to include regional and local structures, and respect for State provisions to maintain internal law, order and national security. In addition, and of particular importance to the British

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37 The 'catch-all' Article used as the basis for legislation to achieve an aim of the internal market where there is no relevant Treaty provision.

38 CBI News release 22 June 2007 at http://www.cbi.org.uk/ndbs/press.nsf/0363c1f07c6ca12a8025671c00381cc7/1c85e727956001c38025730200446c69?OpenDocument

39 *Euractiv* 25 June 2007 at http://www.euractiv.com/en/future-eu/eu-treaty-deal-meets-praise-criticism/article-164921

40 Cm 7294 p.171

41 HL Deb 3 July 2007 c 901 at http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70703-0001.htm#07070332000430

Government, Lisbon adds that "In particular, national security remains the sole responsibility of each Member State".

The maintenance of internal law and order is an element of current Article 33 TEU, which states that Title VI TEU (Provisions on Police and Judicial Cooperation in Criminal Matters) "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". Current Article 35 TEU further limits EU action and the jurisdiction of the ECJ in this context, stating: "The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". In those former Third Pillar areas that were moved to the First (Community) Pillar under the *Treaty of Amsterdam* in 1997, there are further reminders that internal law and order are the responsibility of the Member States.

The Union's duty in **Article 3a** (Lisbon Article 1(5) to ensure "the territorial integrity of the State", also contained in the Constitution, builds on Article 11 TEU (CFSP) on the objectives of the CFSP, which include safeguarding the "independence and integrity of the Union in conformity with the principles of the United Nations Charter". This provision could have special resonance for Gibraltar, a British Overseas Territory claimed by Spain.

Subparagraph (3) refers to the principle of "sincere cooperation", mutual help and respect, and the requirement that Member States fulfil Union obligations and do not jeopardise the attainment of Union objectives. The expectation of "sincere cooperation" is not new to the Treaties, although it is expressed in Lisbon (and in the Constitution) as a guiding principle. Present Article 11 TEU (CFSP) currently states: "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity". Article 1 TEU obliges the Union to act with "consistency and solidarity". Article 23 TEU requires that Member States: "In a spirit of mutual solidarity", shall not do anything likely to conflict with or impede Union action if they decide to abstain from participation in a CFSP measure. Article 10 TEC requires Member States "to abstain from any measure which could jeopardise the attainment of the objectives" of the Treaty.

D. Competences

New **Article 3b** Lisbon Article 1(6)), on principles relating to competence, explicitly defines the limits of Union competences, which are *conferred* by the Member States on the basis of subsidiarity and proportionality (see page 25 below). The Article stipulates that competences not conferred upon the Union remain with the Member States. In other words, there is a statement, rather than just a presumption, in favour of Member State competence, which the present subsidiarity Article 5 TEC does not make clear. Article 5 states:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the

> Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Defining the broad areas of competence should help to clarify the subsidiarity principle, which has sometimes been difficult to argue, and will also influence ECJ rulings on questions of competence. As in the Constitution, Lisbon gives an explicit Treaty base to the method of applying the principles of subsidiarity[42] and proportionality[43] via the two protocols mentioned in this Article (see below).

Article 3b(3) reproduces existing Article 5 TEC with one significant addition: it includes regional and local government within the sphere of application of subsidiarity. The Article does not prescribe how subsidiarity should be applied at sub-state level, but does not ignore this level, as the present Treaty Article does. It also states that "National Parliaments ensure compliance with that principle in accordance with the procedure set out in that Protocol", removing the earlier contentious "shall ensure" which appeared to suggest the EU was mandating national parliaments to act (see below).

The Subsidiarity Protocol

The Protocol sets out, in very similar terms to the Constitution Protocol, a procedure involving the Union Institutions, national and regional legislatures for applying the subsidiarity principle to draft legislation.

Article 1 of the Protocol asserts that the EU institutions will "ensure constant respect for the principles of subsidiarity and proportionality".

Article 2 requires the Commission, except in cases of "exceptional urgency", to "consult widely", taking account, where appropriate, of regional and local dimension of the proposed action, and accounting for any failure to consult.

Article 3 defines "draft legislative act" as:

- Commission proposals initiatives of groups of Member States
- initiatives of the European Parliament
- requests from the Court of Justice
- recommendations from the European Central Bank, and
- requests from the European Investment Bank for the adoption of a legislative act.

Article 4 sets out the subsidiarity application and monitoring procedure as follows:

> The Commission shall forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.

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

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

> The European Parliament shall forward its draft legislative acts and its amended drafts to national Parliaments.
>
> The Council shall forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.
>
> Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

Article 5 requires that draft legislative acts must be "justified with regard to the principles of subsidiarity and proportionality" and should contain "a detailed statement making it possible to appraise compliance with" these principles. The statement should include an assessment of the proposal's financial impact and, for a directive, of "its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation".

Reasons for concluding that a Union objective can be better achieved at Union, rather than national, level, must be substantiated by qualitative and, if possible, quantitative indicators. Draft legislative acts must take account of the need for any financial or administrative burden on the Union, national, regional or local government, economic operators and citizens, to be minimised, and be "commensurate with the objective to be achieved" (proportionality).

Article 6 gives national parliaments an eight-week period, as opposed to six weeks in the Constitution, to submit a "reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity". National parliaments will be responsible for consulting regional parliaments on compliance. If the draft legislative act originates from a group of Member States, the Council President will forward the opinion to those Member State governments. If it originates from the ECJ, the ECB or the EIB, the Council President will forward the opinion to the institution or body concerned.

The devolved legislatures have long been interested in developments in the application of subsidiarity, but successive IGCs until now have ruled out a Treaty base for its application at sub-State level.[44] The Scottish Executive Minister for Europe, Linda Fabiani, was cautiously optimistic about the new subsidiarity provisions in the Lisbon Treaty, provided a role for Scotland was facilitated by the British Government. She said in a debate on 19 September 2007:

> On many of the issues currently under consideration, the challenge to us following any ratification will be to ensure that the UK Government implements the treaty framework in a way that allows Scottish interests to be reflected properly. The same is true of this Parliament and its Westminster equivalent in relation to the new subsidiarity proposals. I hope that this Parliament will be able

[44] The Scottish First Minister, then Jack McConnell, set out the Scottish Executive's views on subsidiarity in a speech in June 2002 on "The Future of Europe Debate: a Scottish perspective" at http://www.scotland.gov.uk/about/FCSD/ExtRel1/00014768/page1239857280.aspx

> to build a constructive relationship with Westminster to ensure that Scotland's voice is present in the operation of the new mechanism.[45]

Rhodri Morgan, the Welsh Assembly Government First Minister, made a statement on 18 July 2007 on the Lisbon subsidiarity provisions:

> The Welsh Assembly Government has lobbied intensely and consistently for practical effect to be given to subsidiarity principles. The subsidiarity monitoring mechanism has actually been strengthened by the Brussels Council. The period given to national parliaments to examine draft legislative proposals will be extended from 6 to 8 weeks (we expect the UK Parliament to refer proposals that involve devolved responsibilities onwards to the Devolved Administrations and to take their views into account). If a simple majority of the votes allocated to national parliaments contests a proposal on subsidiarity grounds, the Commission must withdraw it and reconsider against a specified procedure.
>
> From the outset I have made Wales' position in Europe one of my high priorities. The Welsh Assembly Government has engaged actively with the process leading up to the current Reform Treaty for 6 years. A good part of what we contributed to the Convention on the Future of Europe in 2002 became a substantive part of the Constitutional Treaty. A negotiation among 27 Member States must inevitably produce compromises but, so far as "regional" considerations are concerned, I believe the mandate outlined for the Reform Treaty is very positive.

Article 7 requires the EP, Council and Commission (and, where appropriate, the Member States, ECJ, European Central Bank or European Investment Bank), to take account of the reasoned opinions of national parliaments on their drafts. This Article allocates two votes to each parliament, with bicameral parliaments having one vote for each chamber. If the reasoned opinion on non-compliance with subsidiarity represents at least one third of all allocated votes, the draft must be reviewed. The threshold is a quarter in the case of draft legislative acts submitted under **Article 68** (Constitution Article III-264), on the area of freedom, security and justice. After this review the Commission, or one of the other initiators, *may* decide to maintain, amend or withdraw the draft, stating their reasons.

Article 8 gives the ECJ jurisdiction in actions on grounds of infringement of subsidiarity, brought under **Article 230** (Constitution Article III-365) on the role and procedures of the ECJ, or notified by Member State governments "on behalf of their national Parliament or a chamber of it". The Committee of the Regions may also bring an action before the ECJ in an area in which it is consulted.

Article 9 requires the Commission to submit to the European Council, EP, Council and national parliaments, an annual report on the application of subsidiarity. This report will be forwarded to the Committee of the Regions and the Economic and Social Committee.

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[45] SP 19 September 2007 col 855
http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0919-02.htm

E. Primacy of European law

Article I-6 of the Constitution had referred explicitly to the primacy of Union law over national law.[46] It stated simply: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".[47] A Declaration annexed to the Final Act of the 2004 IGC recalled that "Article I-6 reflects existing case law of the Court of Justice of the European Communities and of the Court of First Instance".[48]

The Lisbon Treaty does not contain the primacy Article, but includes instead a Declaration (No.17) concerning primacy, which states:

> The Conference recalls that, in accordance with well settled case law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.
>
> The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):
>
> "Opinion of the Council Legal Service of 22 June 2007
>
> It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/6411) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."
>
> 1 "It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question." [49]

Constitution Article I-6 would have given the primacy (or supremacy) of EC law an explicit legal and constitutional basis.[50] The new declaration incorporating the Council Legal Service Opinion confirms the *status quo* with regard to the relationship between EC and national law. The *principle* of primacy was established in the early case-law of

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

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

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

49 http://register.consilium.europa.eu/pdf/en/07/st11/st11197.en07.pdf

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

the ECJ, notably in *Costa v ENEL*[51] (although not in respect of the Second or Third Pillars). On this occasion the ECJ ruled:

> […] in contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal system of the member States and which their courts are bound to apply. […] The transfer by the States from their domestic legal systems to the Community legal systems of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[52]

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

> 23. The Community law having direct internal effect is designed to take precedence over the domestic law of the Member States. From this it follows that the legislation of the Parliament of the United Kingdom giving effect to that law would have to do so in such a way as to override existing national law so far as inconsistent with it. This result need not be left to implication, and it would be open to Parliament to enact from time to time any necessary consequential amendments or repeals. It would also follow that within the fields occupied by the Community law Parliament would have to refrain from passing fresh legislation inconsistent with that law as for the time being in force. This would not involve any constitutional innovation. Many of our treaty obligations already impose such restraints – for example, the Charter of the United Nations, the European Convention on human Rights and GATT.[53]

The 1967 White Paper went on to consider the role of national courts and the ECJ in interpreting EC law, stating that, by means of the Court's preliminary rulings, "provisions of Community law raising difficulties in their application to our legal system would in time become clarified by decisions of the European Court".

The significance of the statement of primacy in the Constitution was, in view of (or perhaps in spite of?) the established principle of EC legal supremacy, a matter of dispute. Professor John McEldowney, in a Memorandum to the Lords EU Committee 9th Report, *The Draft Constitutional Treaty for the European Union*, thought that the effects

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

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

53 Cmnd. 3301, May 1967

of the primacy article on judicial psychology might be a significant factor. Its formulation, giving the Constitution legal authority and primacy,

> […] reinforces the argument that interpreting the draft Constitution will be a matter of law- with the subsequent notion that the courts will make every attempt to give primacy to that law and by its nature will seek to uphold the Constitution when there are doubts and uncertainties. This gives rise to the possibility of the development of various Constitutional presumptions as a means of interpreting the European Constitution.
>
> 3.6 Constitutional interpretation by judges has a long history distinguishing it from ordinary statutory interpretation.[54] Generally a more dynamic or flexible approach is adopted, most likely employing other jurisprudence from other countries and systems.[55] This may give rise to a degree of judicial incremental law making commensurate with the organic growth of the constitution itself that has the potential for developing constitutional rights, immunities and powers beyond the literal meaning of the words adopted. The potential for a possible jump in judicial interpretation towards a more purposive approach to legal rights under the constitution should not be under-estimated.[56]

The British Government had consistently maintained that the Constitution did not fundamentally change the relationship between the EU and the Member States in this respect.[57] However, there was parliamentary and public concern about the implications of the primacy article for national sovereignty.[58] Bill Cash raised the issue of primacy at the Standing Committee on the IGC in October 2003. The then Europe Minister, Denis MacShane, rebutted his argument that the Constitution meant a different relationship with Member States than under the existing EC Treaties:

> The notion that there is anything new in the reference to the primacy of EU law is unsustainable. It is a long-established principle of international law that the state may not plead its national law to escape its obligations under international law, including its treaty obligations. The Permanent Court of Arbitration, the Permanent Court of International Justice and the International Court of Justice have produced a consistent jurisprudence upholding that principle, which is also clearly recognised in academic writings. [Interruption.] The hon. Member for Stone (Mr. Cash) mutters "Nonsense." He must have that debate with those authorities. It is a matter of UK constitutional law that international treaties have effect in national law to the extent that they have been implemented in national law.

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

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

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

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

58 In March 2004 the House of Lords Select Committee on the European Union published a report on The Future Role of the European Court of Justice, which looked among other things at the implications of (then) draft Article I-10HL 47, *The Future Role of the European Court of Justice* 2003-4 at http://pubs1.tso.parliament.uk/pa/ld200304/ldselect/ldeucom/47/4706.htm#note7

> […] Britain will uphold its treaty obligations. Pacta sunt servanda is an old phrase, and an important principle. If Britain enters into a solemn treaty with 24 other nation states, I hope that it will never resile from or renege on those treaty obligations. If it does, the notion of honour will be stripped from all our international legal obligations.[59]

Mr Cash said in a Westminster Hall debate on 24 March 2004 that the primacy article was more significant than the Government had acknowledged and gave the ECJ new, superior powers over national courts, to which the then Foreign Office Minister, Mike O'Brien, replied as follows:

> First, the principle of the primacy of EU law is […] well established […]. The principle has been accepted since at least 1964, when the European Court of Justice ruled in the case of Costa v. ENEL […]. That is what Britain signed up to when the Conservative Government of the day joined the then European Community. This House gave effect to the principle of the primacy of European Community law through the European Communities Act 1972. […] our position has been entirely clear, and we have held it throughout. Parliament already has the power to legislate contrary to our treaty obligations, but we should be in no doubt about what that would mean: withdrawal from the EU, which would be a disaster for the UK.
>
> As far as we are concerned, the draft constitutional treaty explicitly states the principle of primacy, and that makes those on the Opposition Benches nervous. One of the purposes of the treaty is to lay out clearly EU principles and our relationship with the EU. […]
>
> The primacy of EU law is a well-established principle that has sat alongside the principle of sovereignty of this Parliament for 30 years. Nothing in the proposed treaty will change that. Most lawyers will be familiar—I am sure that the hon. Gentleman is—with Lord Denning's view expressed in his judgment in the Bulmer v. Bollinger case in 1974. He said:
>
> "When we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law . . . The governing provision is section 2 (1) of the European Communities Act 1972 . . . The statue is expressed in forthright terms which are absolute and all-embracing."
>
> […]
>
> In order to give the provisions of the new treaty effect in UK law, they will have to be passed by Parliament. If Parliament so chooses, it can refuse to pass this legislation. Indeed, it could repeal the European Communities Act 1972. As Lord Denning also said in the case of Macarthys Ltd *v.* Smith, it is always within Parliament's power to legislate contrary to the UK's treaty obligations, but we must be clear that to pursue that course would be to breach our treaty obligations, and we would be signalling our withdrawal from the EU.[60]

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

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

In June 2007 the English Lord Justice of Appeal, Bernard Rix, addressing the EP Committee on Legal Affairs, confirmed the English Courts' approach to EC law:

> Community law is of course regarded in England as English law. It is part of the English legal corpus. It may derive from Brussels, Strasbourg or Luxembourg, but it is part and parcel of our law. And of course, where it applies, it takes precedence over any inconsistent provisions of English law of domestic origin. All of that goes without saying. The principles are founded in the originating statute, the European Communities Act 1972, and in the binding case-law of highly important and extremely well known House of Lords decisions.[61] These cover such matters as the precedence of Community law over national law and the manner in which domestic legislation must be interpreted, in an area covered by Community law, so as to render the English statute, if it is at all possible to do so, consistent with the Community law. That is a style of interpretation with which for some decades now we have been growing increasingly familiar. It has been given a still further impetus by the similar rule which applies to the interpretation of any English statute on which the European Convention on Human Rights (ECHR) bears.[62]

F. Fundamental rights

Part II of the 2004 Constitution had incorporated the text of the European Charter of Fundamental Rights, which had been 'proclaimed' at Nice in 2000. The Charter is currently not enforceable by the ECJ, even though it has informed the judgments of that Court on several occasions.[63] It is also referred to explicitly in recitals to EC legislation, generally in the form of a statement that the proposal complies with fundamental rights and the principles recognised in the Charter.[64] In addition, the EU has already established a Fundamental Rights Agency, based in Vienna, to monitor the EU Institutions and Member State governments for compliance with EC law and human rights obligations and to issue opinions to the institutions or governments concerned.

The inclusion of the Charter in the Constitution had been accepted by the British Government on condition that the 'Explanations' of Charter Articles were given sufficient legal status to prevent the Court from increasing Union competence and overruling or amending national law.

Under amended **Article 6** (Lisbon Article 1(8) the Charter will have "the same legal value as the Treaties", but will not be reproduced in the Treaties. It was solemnly proclaimed

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61 FN1: See for instance: *Garland v. British Rail Engineering Ltd* [1983] 2 AC 751, *Pickstone v. Freemans plc* [1989] AC 66, *Litster v. Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, and very recently *Dabas v. High Court of Justice in Madrid*, Spain [2007] 2 WLR 254.

62 EP Committee on Legal Affairs 11 June 2007 Presentation of Rt Hon Lord Justice Rix at http://www.europarl.europa.eu/comparl/juri/hearings/20070611/lordjusticerix_en.pdf

63 See, for example, cases C-540/03, *Parliament v Council* [2006], Case C-411/04 P, *Mannesmannröhren-Werke AG v Commission* [2007], Case C-432/05, *UNIBET (London) LTD v Justitiekanslern* [2007] and Case C-303/05, *Advocaten voor de Wereld* [2007].

64 For example, in proposal on criminal penalties for intellectual property infringements and recital 3 of draft Decision to establish the Culture 2007 programme

at a plenary session of the Parliament on 12 December 2007 by the Presidents of the Parliament, Council and Commission and published in the EU Official Journal.

In response to UK concerns about possible "competence creep" in giving the Charter legal status, Lisbon further specifies:

> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

A declaration specifies the scope of application of the Charter and its relationship with the European Convention on Human Rights (ECHR). The Declaration confirms that the Charter does "not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties".

A clarifying protocol on the application of the Charter to Poland and the UK states that neither the national courts of these countries nor the ECJ may declare UK law incompatible with the Charter. The protocol refers to the requirement that the Charter be applied in accordance with Title VII of the Charter itself and applied and interpreted by the national courts "strictly in accordance with the Explanations referred to in that Article". Reaffirming amongst other things that the Protocol is "without prejudice to the application of the Charter to other Member States" and without prejudice to other UK obligations under the two Treaties, it states:

> Article 1
> 1. The Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
> 2. In particular, and for the avoidance of doubt, nothing in [Title IV] of the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.
> Article 2
> To the extent that a provision of the Charter refers to national laws and practices, it shall only apply in the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom.[65]

The Government is confident that the Protocol will protect the UK against unwanted interference from the Charter and exempt the UK from all chapters of the Charter (ie not just Title IV)[66]:

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65 CIG 2/1/07 REV 1, 5 October 2007 at http://www.consilium.europa.eu/uedocs/cmsUpload/cg00002re01en.pdf

66 HC Deb 11 July 2007 c WH

> A UK-specific Protocol annexed to the Treaty, as set out in the IGC Mandate will clarify beyond doubt the application of the Charter in relation to UK laws and measures, and in particular its justiciability in relation to labour and social articles. This Protocol is legally binding and sets out clearly that the Charter provides no greater rights than are already provided for in UK law, and that nothing in the Charter extends the ability of any court to strike down UK law.[67]

However, some believe the effect of the UK exemption is questionable. The *Daily Telegraph* reported on 12 July 2007 that senior EU officials believed "Britain's 'red line' opt-out from the European Charter of Fundamental Rights is not worth the paper it is written on". The report cited Commissioner Margot Wallström who thought the Charter would apply to huge swathes of British law and that EU citizens would be able to claim before the courts the rights enshrined in the Charter. The Charter would be binding on the European institutions and Member States when they implemented EU law, "even if it did not apply to all of them".[68] On 12 July Ms Wallström was questioned about her assertions by the ESC and after a series of questions which revealed confusion as to the meaning of her statement on the previous day, she rejected the interpretation adopted by the media that the opt-out was "worthless" and suggested it might have been her "bad English".[69]

The EP Constitutional Affairs Committee, which considered the IGC process on 11 September 2007, was highly critical of the British Government's position on the Charter. They feared that it would "contaminate" the EU legal system, already partly evidenced by Poland's request to join the Protocol. The Committee wanted the new Treaty to make provision for the UK and Poland to opt in again later. MEPs also raised the issue of the legal protection of non UK EU citizens living and working in the UK jurisdiction and whether they would be able to claim their rights under the Charter.

The IGC was faced with deciding whether accepting the Protocol on the disapplication of the Charter in the UK and Poland, in an attempt to avoid difficulties with ratification, was on balance worth more than UK and Polish disapplication threatening the fundamental order of the EU. It has been suggested that the exemption may present problems for Germany if it breaches a principle of reciprocity under which the German Constitutional Court has in the past been prepared to accept the constitutionality of EU treaties.

There is, however, a serious issue regarding how the Court of Justice will interpret measures which apply in some but not all Member States. It would be difficult to validly waive human rights issues in some States. The possibility of the Court doing this would appear to undermine fundamental principles about the obligation of Member States to adhere to the *acquis communautaire*.[70] It has been suggested that the Charter could still have an indirect impact on UK law, particularly in cases where the Court ruled on

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67 White Paper on the Reform Treaty, July 2007, at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

68 SPEECH/07/484, 11 July 2007 at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/484&format=HTML&aged=1&language=EN&guiLanguage=en

69 See Oral Evidence, 4 July and 12 July 2007, HC 862-i-ii, 8 October 2007 pp.13-14

70 EC law, the Treaties and the case-law of the European Court of Justice

Charter-related issues in other EU Member States.[71] The Protocol also raises questions about whether citizens of other Member States living and working in the UK jurisdiction could claim legal protection under the Charter. The Commission's Opinion on the IGC Mandate did not clarify its view of the legally binding nature of the Charter when combined with the obligation to apply EU law uniformly in all Member States. It states:

> The Charter of Fundamental Rights will offer Europeans guarantees with the same legal status as the treaties themselves, bringing together civil, political, economic and social rights which the Union's action must respect. Its provisions will also apply in full to acts of implementation of Union law, even if not in all Member States.[72]

In the evidence session before the Foreign Affairs Committee (FAC) David Heathcoat-Amory (who had been one of the UK parliamentary representatives to the Convention on the Future of Europe which drew up the draft Constitution) presented a scenario illustrating possible problems in the application of the UK exemption:

> If there is a dispute in future about the validity or effectiveness of the opt-outs, who is going to decide it? For instance, suppose the Commission or another member state does not like the way that the charter of fundamental rights does not apply over employment law in some way, because it supposedly gives us an advantage, and it decides to challenge our opt-outs. Or, in the field of foreign policy, suppose that there is a claim that we ought to be bound by EU solidarity, and therefore there is a dispute. Which body or court will decide it?[73]

The Minister for Europe, Jim Murphy, said the protocol would be part of the Treaty and therefore part of EU law and subject to the oversight of the ECJ,[74] which led Mr Heathcoat-Amory to point to the requirement for the EU Institutions to practise "mutual sincere cooperation" and suggest that this would have implications for the UK if the ECJ were to rule on a matter relating to the Charter:

> I put it to you that there is a new provision in the new text that requires the deciding body-the ECJ-to practise "mutual sincere co-operation" with the very organisations that may bring a case against us. I do not think that that is a fair way of deciding British policy […].[75]

The Government wrote to the European Scrutiny Committee (ESC) on 13 July in reply to questions about possible inconsistencies between the requirements of the amended Protocol and the amended Treaties, stating:

> The UK-specific Protocol which the Government secured is not an 'opt-out' from the Charter. Rather, the Protocol clarifies the effect the Charter will have in the UK. The UK Protocol confirms that nothing in the Charter extends the ability of

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71 *EUObserver* 27 June 2007 at http://euobserver.com/9/24368/?rk=1

72 COM (2007) 412. See Commission press release at http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1044&format=PDF&aged=0&language=EN&guiLanguage=en

73 Oral evidence, HC 862 –i-ii, Q 273

74 Ibid

75 Q 274

> any court to strike down UK law. In particular, the social and economic provisions of Title IV give people no greater rights than are given in UK law. Any Charter rights referring to national law and practice will have the same limitations as those rights in national law. The Protocol confirms that since the Charter creates no rights, or circumstances in which those rights can be relied on before the courts, it does not change the status quo.[76]

The Committee was concerned about the possibility that, following a reference to the ECJ from some other Member State, the Court might find that, in the light of the Charter, the derogation from the Directive allowing such waivers had to be interpreted more restrictively than before the Charter had legal effect. The Committee gave the example of the Working Time Directive, which contains provisions limiting the weekly hours of a worker to 48 hours per week, but with the possibility of agreements to waive those limits. The Committee pointed out that:

> As Article II-91(1) of the Charter provides that "every worker has the right to limitation of maximum working hours" we have some concern that it seems quite possible that following a reference to the ECJ from some other Member State the Court might find that, in the light of the Charter, the derogation from the Directive allowing such waivers has to be interpreted more restrictively than before (i.e. before the Charter had legal effect).[77]

The Committee also referred to Article II-81 of the Charter, prohibiting discrimination "on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation", commenting:

> **We would be concerned that, following a reference to the ECJ from some other Member State, the Court might find that a measure adopted at EU level (such as Council Directive 200/43/EC) had to be given an extended interpretation in the light of the wide grounds[78] for prohibiting discrimination under the Charter.**
> 60. If the Member States have indeed agreed in the IGC Mandate that a ruling from the ECJ in such cases should have no effect in the UK, then this ought to be made clear. In our view, there is here at least an ambiguity which should be resolved and the UK's safeguards made firmer in the course of the IGC if the results claimed by the Government are to be secured. **We would wish the Government to show how they have secured the UK from such interpretations and ask that they secure the phrasing "notwithstanding other provisions in the Treaties or Union law generally" in the text of the Protocol.[79]**

The Foreign Secretary, David Miliband, told the ESC on 16 October how the Charter would not "extend the reach of European courts into British law":

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76 ESC 35th Report 2006-07 para. 57 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/1014/101403.htm#a9

77 ESC 35th Report para. 58

78 FN 47: The grounds of social origin, language, political or any other opinion, property and birth are not mentioned in Article 13 EC.

79 ESC 35th Report para. 60

> The first point is that the Charter, of course, only records existing rights; it does not create any new rights: it is a record of existing rights under domestic and international law. Secondly, the Protocol is important because it has legal status as much as an Article, and the Protocol is absolutely clear that there can be no extended reach before the ECJ or anyone else, and that is why, in the case of working time or anything else, any judgment of the court cannot have reach into changing the laws that apply in this country. So, it is a generic answer and it goes to the heart of what the Charter is about. As I say, the Charter records existing rights but there is a double-lock, because the Protocol records that the Charter shall not be used to extend the reach of the Court of Justice.[80]

The FCO Legal Adviser, Mike Thomas, set out to clarify the position, insisting on a holistic approach rather than a simple "will it or won't it" question in the abstract:

> What one must do in seeing what the effects of the Charter will be in relation to any example is a process of analysis of the various parts of what I think last time I called the package of measures to do with the Charter; that is to say one has to look at Article 6 of the Treaty on the European Union as to be revised in the proposed Treaty. One needs to look at the specific Charter provision that is in issue, one needs to look at the so-called horizontal articles of the Charter, in particular Articles 51 and 52, one needs to look at the explanations which run alongside the Charter and one needs to look at the Protocol; so one needs to look at the entire package in relation to the situation under review. In the report you have taken the example of a provision in the Working Time Directive, which relates to weekly hours of work and the possibility that exists under the Directive for Member States to provide for waivers by certain classes of employee, and you considered whether the effects of the Charter might be to alter the interpretation of that provision in the future. It seems to me the answer to that question is that there would not be any alteration, and I will take you through the elements in the package which lead me to that conclusion. I need not say anything much, I think, about Article 6 of the Treaty, which introduces the Charter and indicates that the Union will recognise the rights and principles set out in the Charter, but it is worth noting, I think, in passing that the Treaty article itself is clear that the Charter cannot extend EU competences and that it is to be interpreted in accordance with the horizontal articles and the explanations.[…]. Perhaps just before getting on to the Charter article, in Articles 51 and 52 there are certain important provisions about the interpretation of the Charter. One is clearly (and that is why we are discussing this in relation to the Working Time Directive) that it applies to Member States, but only when implementing EU law - not when they are doing their own thing domestically in other words - also that the Charter does not modify powers in the Treaty and, finally, that rights that are provided for in the Treaty are exercised in accordance with what the treaties say. It is a point about sourcing of rights that are recorded in the Charter. In relation to the Working Time Directive, the relevant article of the Charter is Article 31, paragraph two, "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and an annual period of paid leave." That is the basic right. One needs to read this in accordance with the relevant explanation, which is (and I can read it because it is very short), "Paragraph two", which I have just read out, "of the

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[80] Uncorrected evidence 16 October 2007 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/uc1015-ii/uc101502.htm

> Article is based on Directive 93/104 concerning certain aspects of the organisation of working time" - that is the very directive that is in issue - "Article 2 of the European Social Charter, and point eight of the Community Charter on the rights of workers." I think one could perhaps make the point that it has all got a bit circular in that one is referred by the explanations in the very directive that you are interested in but I think the circularity indicates why the wording of the Directive is consistent with the Charter. It is one of the very sources that the Charter drafters had in mind. So, I see no prospect that the European Court would alter its interpretation of the Directive, even were it referred to the Charter as a source of that interpretation.[81]

Mr Cash thought the UK would nevertheless be "in the position where, despite what you put in by way of a protocol, there will still be a requirement for the national judges and an opportunity for them to, effectively, give effect to this Charter as part of English law?" Mr Thomas's view was that nothing had changed: "the Charter is sourced in the existing rights and principles, so the content has not grown" and "as to content, I think the ability of the European Court to interpret laws is effectively unchanged".[82]

Subparagraph (2) of amended **Article 6** states that the Union will accede to the Council of Europe's *European Convention on Human Rights* (the European Convention). The new text specifies that the EU's accession to the European Convention must be agreed unanimously, and with national ratification, whereas the Constitution had provided for a qualified majority vote on this issue. Current Article 6(2) states that the Union "shall respect fundamental rights, as guaranteed by the European Convention …, but does not provide for accession". The ECJ ruled out EC accession in 1994 on the grounds that the Community lacked competence to become a party to the European Convention.

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

> 132.[…] Various commentators[83] have expressed fears that the Charter and the ECHR could become competing catalogues of rights with different definitions of the rights, leading to confusion amongst the intended beneficiaries, and, quite possibly, to conflicting judgments from the ECJ (on the basis of the Charter) and the European Court of Human Rights (on the basis of the ECHR). Thus, it is felt, far from providing clarification and protection, the Charter might unintentionally create lack of certainty and undermine confidence in human rights protection in Europe. The EP's resolution on the Charter therefore calls upon the IGC:
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> > "to enable the Union to become a party to the ECHR so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights".

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81 ESC Uncorrected Evidence Q110 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/uc1015-ii/uc101502.htm

82 Ibid, Q131 and Q112

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

> 133. Currently, it is not possible for either the European Community or the European Union to become a party to the ECHR. In Opinion 2/94[84] the ECJ distinguished between the Community's duty to comply with fundamental rights as general principles of Community law and a competence to act internally in the field of fundamental rights which, according to the Court, the Community lacked. It followed that it also lacked the competence to become a party to the ECHR. In the case of the Union there is a more fundamental objection; its founding Treaty did not confer on it a legal personality, and hence the capacity to enter into international relations. Although it could acquire that capacity by practice, it has not yet been recognised to have done so. In either case, then, Treaty amendment is necessary to enable accession to the ECHR. Advocates for EU accession to the ECHR point out that, without it, protection of fundamental rights within the EU remains deficient by comparison with the protection available in respect of acts of Member States, where decisions of domestic courts are subject to an external check by a Court specialised in human rights. Even if the Union were to adopt a legally binding Charter, decisions of the ECJ would escape that supervision unless the *Union* at the same time became party to the ECHR. If only the European *Community* became party to it, Union action under the Third Pillar would not be subject to external supervision: in other words, the sensitive issue of EU actions in the field of police and judicial co-operation in criminal matters would be excluded.[85]

Although they duplicate each other in some respects, the Charter and the European Convention have different enforcement mechanisms and different jurisdictions. The rights set out in the Charter could not be applied universally, but only in relation to Union law or action taken under the Treaty. The Convention, on the other hand, has no direct relation to Union law, although there may be an overlap in the subject matter of complaints.[86] The Charter provides that, insofar as it contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the Convention which drew it up. This should help to avoid conflicting interpretations of the two texts. The ECJ would rule in cases of alleged breach of the Charter, including, presumably, in cases where the complaint would also be admissible under the Convention. However, as some commentators have observed, there is scope for duplication and confusion as to which would be the relevant Court.

There has been some friction between the two Courts in recent years. The Council of Europe (CoE) body has been concerned about the expansion of EU activities into areas once in its preserve. A Memorandum of Understanding (MoU) signed on 11 and 23 May 2007 by the EU and the CoE sought to mend fences by agreeing common purposes and principles of cooperation, shared priorities, focal areas and arrangements for cooperation, better communication with the public and an evaluation of the implementation of the MoU.

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84 1996 ECR 1-1759

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

86 There have been conflicts of jurisdiction. In the case of *Matthews v UK*, in which the European Court of Human Rights found the UK in breach of the ECHR, but in remedying this situation the UK found itself in breach of an EC obligation, which it then had to rectify.

The Government has some doubts about accession, noting in the July 2007 White Paper that "There are complex legal issues involved in EU accession to the ECHR. These problems would have to be resolved before the Government could support it".[87]

Amended **Article 7** (Lisbon Article 1(9)) concerns Union action in the event of a "clear risk of a serious breach" by a Member State of the Treaty's human rights principles. It corresponds with current Articles 7 TEU and 309 TEC, and is similar to Constitution Article I-59. A reasoned proposal that a Member State risks breaching the Union's values may be put forward by one third of the Member States, by the EP or by the Commission, for consideration by the Council. The latter may adopt a decision by a four-fifths majority, and having obtained the consent (rather than the present, slightly weaker, 'assent') of the EP, to determine that there is a "clear risk of a serious breach" by a Member State of the Union's values.

Further, the European Council may adopt a decision by unanimity, having obtained the consent of the EP and on a proposal by one third of the Member States or by the Commission, determining the existence of a serious and persistent breach of the values mentioned earlier. The State in question may "submit its observations."

Questions remain over the definition of a "serious breach".

A new **Article 7a** (Lisbon Article 1(10)), identical to Constitution Article I-57, concerns the Union and its neighbours. The article develops the "wider Europe" dimension in the EU's relations with neighbouring countries.[88] The aim is to establish an area of prosperity and good neighbourliness, based on the Union's own values and peaceful cooperation. It provides for the Union to conclude agreements with its neighbours containing reciprocal rights and obligations and for the possibility of joint activities.

The EU has established over the years a number of cooperative partnerships with non-EU states and regional groups. Examples include the northern Dimension, the Euro-Mediterranean Partnership based on the Barcelona Declaration adopted in November 1995, the Stabilisation and Association Process of 2000, which aimed to help bring peace, prosperity and democracy in the Western Balkans, and a number of Partnership and Co-operation Agreements (CPAs) with Eastern European countries, such as Russia, Ukraine and Moldova in 1994-95 and with the new Member States. Some of these agreements have helped to integrate neighbouring states into the EU, while others have aimed to bring about more stability in the region.

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87 White Paper on the Reform Treaty, July 2007, at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

88 In a Communication "Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours" the Commission proposed that "the EU should aim to develop a zone of prosperity and a friendly neighbourhood ... with whom the European Union enjoys close, peaceful and co-operative relations. COM(2003)104, 11 March 2003 at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2003&nu_doc=104. A more developed Strategy Paper on the European Neighbourhood Policy followed in 2004. See COM(2004) 373, 12 May 2004 at http://ec.europa.eu/world/enp/pdf/strategy/strategy_paper_en.pdf

There is no current Treaty provision in this area, although Article 310 TEC provides for the Community to "conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure".

G. Democratic principles and the role of national parliaments

A new **Title II** (Lisbon Article 1(12)) comprising **Articles 8, 8A, B and C** concerns "democratic principles" (Constitution Title VI Articles I-45, 46 and 47 and to some extent I-42.2 on "The democratic life of the Union"). Democratic principles are enshrined in the present Treaties in a range of Articles (e.g. Principles, Articles 6 and 11 TEU and others outlined below). The principle of democratic equality (the "equality of citizens", who "shall receive equal attention from the Union's institutions, bodies, offices and agencies") was a response to the aim expressed in the *Laeken Declaration* of 15 December 2001 of bringing the EU and its mechanisms closer to its citizens. This is contained to some extent in current Article 1 TEU, under which decisions should be taken "as openly as possible and as closely as possible to the citizens", which is repeated in Lisbon **Article 8A**.

Article 8A(4) conveys the aspirations of present Article 191 TEC on political parties at European level contributing to "forming a European awareness and to expressing the political will of the citizens of the Union" and conforms with the wording of Declaration No. 11 on Article 191 TEC, annexed to the Final Act of the Treaty of Nice. In 2004 the British Government helped to secure the Conference Declaration to ensure that the provisions of the proposed Statute on European Political Parties under Article 191 would not conflict with the UK's *Political Parties, Elections and Referendums Act*, which bans foreign parties, or discriminate against European political parties on account of their attitudes to European integration.

Article 8B provides for openness and transparency, particularly in the workings of the Union Institutions. In 2004 the Government thought the draft text on participatory democracy provided "an appropriate means of recognising the dialogue between the Union's institutions and civil society".[89] **Article 8B(4)** contains the first opportunity for indirect popular participation in the European process. As in Constitution Article I-47, not less than one million Union citizens "of a significant number of Member States" will be able to invite the Commission, under procedures to be set out in legislation at a later date and within the framework of the Commission's powers, "to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required to the purpose of implementing the Constitution".[90] This 'Citizens' Initiative' was largely a response to the poor public perception of the EU evidenced in the low turnout in EP

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

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

elections, increasing numbers of calls for referendums on EU treaties and an increase in the number of citizens' complaints to the European Ombudsman.[91]

The present Treaty already provides for a citizen's petition in Articles 21 and 194 TEC, but this is to the EP, not the Commission. The new Article gives citizens the same right the EP currently has to petition the Commission and the wording is almost identical to that granting the EP this right under Article 192.2 TEC.

Article 8C is on the role of national parliaments. Successive Treaty amendments have tried to tackle the problems raised by national parliamentarians dissatisfied with the failure of the EC legislative process to take their views into account. The problem lies to some extent in the way that national governments inform their own parliaments about EU matters, while the lack of national parliamentary representation at EU level has led to a feeling of alienation and the criticism of a lack of democratic legitimacy in the EU. On the former point, the Government has announced a policy of keeping Parliament better informed about EU business.[92]

Declaration No 13 annexed to the *Treaty on European Union* and Protocol 13 annexed to the *Treaty of Amsterdam* both purported to involve national parliaments to a greater extent in EU matters. Declaration 23 annexed to the *Treaty of Nice* invited national parliaments to participate in the debate on the future of the Union and the Laeken Declaration proposed specific questions about the role of national parliaments that the Convention should tackle.[93] The Convention on the Future of Europe Working Group on the role of national parliaments had identified some basic factors influencing the effectiveness of scrutiny and acknowledged that national parliaments did not always make use of the powers they had to scrutinise their governments.[94] In addition to recommendations on the provision of documents directly to national parliaments, more time for parliamentary scrutiny and regular exchanges of information between the EP and national parliaments, the Group had also suggested that national parliaments should be involved early in the legislative process and in possession of all the relevant information, using a simple mechanism that would not delay the legislative process unnecessarily.

In February 2005 the Commission adopted a ten-point plan which aimed to involve all relevant parties, particularly national parliaments, in European integration. This was developed in 2006 as part of "Plan D", as a result of which Commissioners attended over 100 meetings with national parliaments. Commissioners also participated in inter-parliamentary meetings between the EP and national parliaments. In its Communication, "A Citizens' Agenda: Delivering Results for Europe"[95] the Commission stated that it would "transmit directly all new proposals and consultation papers to national parliaments,

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91 Ombudsman statistics record an increase in the number of complaints up to 2004, slowing in 2005 and falling slightly in 2006. See 2006 Annual Report at http://www.ombudsman.europa.eu/report06/pdf/en/rap06_en.pdf

92 See HC Deb 13 September 2004 c1451W and references to the Modernisation Committee below

93 http://ue.eu.int/en/Info/eurocouncil/index.htm

94 The acronym is from the French "Conférence des organes spécialisés dans les affaires communautaires".

95 COM (2006)211, 10 May 2006

inviting them to react so as to improve the process of policy formulation". This commitment was welcomed by the European Council in June 2006 and the Commission began to provide national parliaments directly with non-legislative and consultative documents and its new legislative proposals (except classified documents) in September 2006. The Commission also introduced a new internal procedure for taking action to respond to feedback from national parliaments under the new arrangement.[96] Amended

Article 8C of Lisbon refers to the "Protocol on the Role of National Parliaments" (see page 44 below) and to various other relevant Treaty Articles on the importance of national parliamentary scrutiny and participation in EU processes.

In the early Reform Treaty drafts there was a requirement that "National Parliaments shall contribute actively to the good functioning of the Union" followed by a list of ways in which this would happen. The Chairman of the European Scrutiny Committee, Michael Connarty, was critical of the new obligation assigned to national parliaments:

> This is a hardening, this is a takeover of the rights of this Parliament by the people who drafted this IGC document and I hope that you will give us a pledge that you will free us from this burden as a Parliament. We should be able to decide how we participate in the European Union and in dialogue with other parts of the European Union and we should not be instructed by any treaty and I hope that you as a Government minister and the Government entirely will reject anything that instructs us as a Parliament how we shall behave.[97]

Gisela Stuart, who had been one of the UK parliamentary representatives on the Convention on the Future of Europe, was also sceptical:

> The new treaty also claims to give more power to national Parliaments, but that is extremely misleading. What it does is extraordinary. For the first time, the Union tries to put a duty on national Parliaments to behave in a particular way. We do not bind our successor Parliaments, yet we are being asked to accept a document that says: "National Parliaments shall contribute actively to the good functioning of the Union"."
>
> There is a whole list of ways in which we are supposed to fulfil that role—we will be informed, we will be seeing to things, we will taking part, and we will be notified, but will have no teeth other than in facilitating the functioning of the Union. I am sorry, but I have never perceived having a duty to serve the Union to be my role as a national parliamentarian—I thought that it was supposed to be the other way round.[98]

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96 According to the Commission's annual report on relations with national parliaments, during the first eight months of implementation (up to April 2007), 83 opinions were expressed by 22 parliaments on 44 Commission proposals. 55 of these were from second chambers or both chambers together. During this period the French Senate, which alone accounted for 30 requests, asked for additional information regarding the Commission's replies on four proposals. Memo to Interinstitutional Relations Group, SP (2007) 2202/4, 8 May 2007.

97 Uncorrected evidence on the Outcome of the European Council, 4 July 2007 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/uc862-i/uc86202.htm

98 HC Deb 26 July 2007 c1113 at http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070726/debtext/70726-0013.htm#07072638000502

The Shadow Europe Minister, Mark Francois, was reported as saying that if this clause were left in the new treaty, there would be "a real threat to the independence of Parliament".[99] Jim Murphy found the proposed text "broadly positive" and a "move in the right direction", but he added: "We have to work through some of the detail as to how this would work in practice".[100] Asked by Lord Roper if he thought it "constitutionally appropriate for the Treaty to tell national parliaments what they "shall" do?" Mr Murphy conceded "there is a welcome improvement in the role of national parliaments but I do not think this phrase fits that category.[101] Mr Murphy told the FAC in September: "It involves a specific word; the problem is one of drafting rather than one of purpose and intention".[102] He insisted: "the issue is about translation from French into English. In the French text there is no obligation, so there is no equivalent in the French version of the text to the word that has now found its way into the English version".[103] The original French text states: "Les parlements nationaux contribuent activement au bon fonctionnement de l'Union",[104] which translated uses a simple present tense, "National parliaments contribute actively to the good functioning of the Union".

The wording and its implications were pursued by the FAC in a session with the Foreign Secretary on 10 October. Mr Miliband thought the wording was a "misunderstanding about the intention of the mandate" and that

> it is clear to us that we need to make clear that, when the text states that Parliaments shall contribute to the functioning of the Union, that means that they shall be able to choose to do so in their own way and time. It is obviously for Parliament to choose how it does its own business.[105]

The Lawyer-linguists' provisional working draft dated 30 October removed the word "shall", stating only: "National Parliaments contribute actively to the good functioning of the Union". This re-wording would appear to resolve the issue in this particular case, while highlighting the importance of translation in the interpretation of Treaty language.

The **Protocol on the Role of National Parliaments** contains two titles, on information to national parliaments and inter-cooperation between national parliaments. The Government has commented that "There is some lack of clarity on how the IGC Mandate provisions enhancing the role of national parliaments will apply in practice. The Government will seek early clarification of this in the IGC".[106]

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99 *Daily Telegraph* 10 July 2007 at http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/07/10/neu110.xml

100 Ibid

101 Evidence to the Lords European Union Committee on the June European Council and the 2007 Inter-Governmental Conference, HL Paper 142, 28th Report of Session 2006–07, 23 July 2007, at http://10.160.3.10:81/PIMS/Parliamentary%20Information/PARLIAMENTARY_PAPER/2007/HL%20142.pdf

102 Uncorrected evidence to FAC, 12 September 2007

103 Ibid

104 http://www.consilium.europa.eu/uedocs/cmsUpload/cg00001.fr07.pdf

105 Q309 Uncorrected evidence 10 October 2007 at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/uc166-iv/uc16602.htm

106 Government White Paper on the Reform Treaty, July 2007, at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

Under ***Article 1*** all Commission consultation documents (green and white papers and communications) will be forwarded directly by the Commission to national Parliaments upon publication. The Commission will also forward to national parliaments the annual legislative programme and "any other instrument of legislative planning or policy", at the same time as to the EP and Council. Whereas the current Protocol only refers to Commission proposals for legislation and Commission consultation documents, the Lisbon Treaty increases the range of documents that will have to be submitted to national parliaments.

Under ***Article 2*** draft legislation from the Commission, Member States and the EP, Court of Justice requests and ECB or European Investment Bank (EIB) recommendations will be sent to national parliaments directly by the Commission, EP or Council. The Protocol also clarifies the matter of who sends the documents to national parliaments. The existing Amsterdam Protocol provides that Commission consultation documents should be "promptly forwarded" to national parliaments, but does not stipulate that the Commission should do this. It is left up to Member State governments. The Lisbon Protocol clearly attributes this responsibility, with certain exceptions, to the Commission. This will help national parliaments to carry out more timely scrutiny of proposals emanating from the Commission.

Under ***Article 3*** national parliaments may send to the Presidents of the EP, the Council and the Commission a "reasoned opinion" on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality (see above). If the draft is from a group of Member States, the Council President will forward the reasoned opinion or opinions to the governments of those Member States. If the draft originates from the ECJ, the ECB or the EIB, the reasoned opinion will be sent to the institution concerned.

Article 4 provides for an eight-week period – an increase on the Constitution's six-week period - between a draft legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional Council agenda for adoption, or for adoption of a position under a legislative procedure, such as a common position. There will be exceptions to this in cases of urgency, but the reasons for exceptions must be stated in the act or position of the Council. In all other cases no agreement may be reached on a draft proposal during the eight-week period. For urgent cases for which "due reasons" have been given, there will be a ten-day period before adoption.

Article 5 provides for the agendas and outcomes of Council meetings, including the minutes of meetings where the Council is deliberating on draft legislative acts, to be sent directly to national parliaments at the same time as to Member State governments.

Under ***Article 6***, when the European Council intends to make use of **Article 33(3) TEU** (Constitution IV-444.1 and 2) allowing the move from unanimous voting to QMV, without amending the Treaty under Article IV-443), national parliaments will be informed of the initiative of the European Council at least six months before any decision is adopted.

Article 7 requires the Court of Auditors to forward its annual report to national parliaments at the same time as to the EP and Council.

Article 8 stipulates that, for bilateral parliaments, the preceding Articles will apply to both component chambers.

Articles 9 and ***10*** are on inter-parliamentary cooperation. *Article 9* provides that the EP and national parliaments will "together determine the organisation and promotion of effective and regular inter-parliamentary co-operation within the Union".

Article 10 provides that a conference of parliamentary committees dealing with EU affairs "may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission". Furthermore, this conference will promote the exchange of information and best practice between national parliaments and the EP, including their special committees, and may also organise inter-parliamentary conferences on specific topics, in particular CFSP, including defence policy. The conference contributions will not be binding on national parliaments, nor "prejudge their positions".

Asked how the process involving national parliaments would work in practice, Mr Murphy told the FAC:

> It is a new proposal, a new protection and a new brake. It is an important new power. We will have conversations through the usual channels, Select Committees and others, about the detail of it and the most appropriate way of proceeding.[107]

H. The Institutions

The current Article 9 TEU setting out amendments to the European Coal and Steel (ECSC) Treaty is repealed.[108] In the new **Article 9** (Lisbon Article 1(14)), based on current Articles 5 TEU and 7(1) TEC, the European Central Bank and the Court of Auditors are added to the list of the EU's Institutions. Article I-19 of the Constitution did not include these bodies in the list of EU Institutions. The inclusion of the ECB has been criticised by the German Government and the President of the Bank, Jean Claude Trichet, who thought it could threaten the independence of the Bank, suggesting that "Because of its specific institutional features, the ECB needs to be differentiated from the union's institutions".[109]

1. EP seats

New **Article 9A** (Lisbon Article 1(15); Constitution Article I-20) concerns EP seats. The composition of the EP is currently set out in Articles 189 and 190 TEC. The Article

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[107] Uncorrected evidence to FAC, 12 September 2007 at http://pubs1.tso.parliament.uk/pa/cm200607/cmselect/cmfaff/uc166-iii/uc16602.htm

[108] The ECSC Treaty expired in 2002.

[109] *EUObserver* 1 October 2007, *Telegraph.co.uk* 14 August 2007 at http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/08/11/weu111.xml

states that the EP "shall, jointly with the Council, exercise legislative and budgetary functions", two important functions that it currently has under Articles 251 and 272 TEC, but which are not established as general principles. This Article also states that the EP "shall elect the President of the Commission", a significant new task.[110]

Article 9A(2) (Lisbon Article 1(15)) is based on present Article 190 TEC and the Nice Protocol on the Enlargement of the European Union. It retains the Constitution formula for the allocation of EP seats on the basis of 'degressive proportionality'.[111] The total number of EP seats shall not exceed 750 (it is currently set at 732 under Article 189 TEC).[112]

The maximum number of seats for a Member State is capped at 96 and the minimum threshold is six. The final composition is fixed by a unanimous European Council decision on a proposal from the EP. The EP Constitutional Affairs Committee agreed a proposal on 2 October on the distribution of seats,[113] which was adopted on 11 October by the EP in plenary. This sets out the distribution of seats from 2009 as follows:

Member State	Population (1) (in millions)	% of EU-27 Population	Seats until 2009	"Nice" (2) 2009-2014	Report in plenary (3) 2009 - 2014	Proposal rapp (4)
Germany	82,438	16,73%	99	99	*96*	*-3*
France	62,886	12,76%	78	72	**74**	**2**
United Kingdom	**60,422**	**12,26%**	**78**	**72**	**73**	**1**
Italy	58,752	11,92%	78	72	72	
Spain	43,758	8,88%	54	50	**54**	**4**
Poland	38,157	7,74%	54	50	**51**	**1**
Romania	21,61	4,38%	35	33	33	
Netherlands	16,334	3,31%	27	25	**26**	**1**
Greece	11,125	2,26%	24	22	22	
Portugal	10,57	2,14%	24	22	22	
Belgium	10,511	2,13%	24	22	22	
Czech Rep.	10,251	2,08%	24	22	22	
Hungary	10,077	2,04%	24	22	22	
Sweden	9,048	1,84%	19	18	**20**	**2**
Austria	8,266	1,68%	18	17	**19**	**2**
Bulgaria	7,719	1,57%	18	17	**18**	**1**
Denmark	5,428	1,10%	14	13	13	
Slovakia	5,389	1,09%	14	13	13	
Finland	5,256	1,07%	14	13	13	
Ireland	4,209	0,85%	13	12	12	
Lithuania	3,403	0,69%	13	12	12	
Latvia	2,295	0,47%	9	8	**9**	**1**
Slovenia	2,003	0,41%	7	7	**8**	**1**
Estonia	1,344	0,27%	6	6	6	
Cyprus	0,766	0,16%	6	6	6	

[110] At present the Commission President is appointed by the Council, following a vote of approval of the whole Commission by the EP (Article 214)

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

[112] The actual current number of EP seats is 785 including a temporary raised ceiling from the previous 736 to accommodate the membership of Bulgaria and Romania.

[113] Co-rapporteurs Alain Lamassoure (EPP-ED, FR) and Adrian Severin (PES, RO), A6-0351/2007,. See procedure file at http://www.europarl.europa.eu/oeil/file.jsp?id=5511632

Luxembourg	0,46	0,09%	6	6	6	
Malta	0,404	0,08%	5	5	*6*	*1*
EU-27	**492,881**	**100,00%**	**785**	**736**	**750**	
(1) Population figures as officially established on 7 November 2006 by the Commission in Doc. 15124/06 on the basis of Eurostat figures.						
(2) "Nice": Distribution of Seats according to Art. 189 TEC as modified by Art. 9 of the BG/RO - Act of Accession.						
(3) "New": New Proposal on the basis of Art. 9A TEU new (I-20).						
(4) The new figures concerning Germany and Malta derive automatically from the draft reform treaty provisions.[114]						

Following Italy's demand for an extra EP seat to bring it into line with the UK, the ceiling of 750 is now followed by "plus the President".[115] A Declaration on the composition of the European Parliament specifies that: "The additional seat in the European Parliament will be attributed to Italy".[116]

2. European Council and President

Article 9B (Lisbon Article 1(16); Constitution Articles I-21 and I-22) concerns the European Council and its President.

The *Stuttgart Solemn Declaration* of 1983 explicitly put the European Council within the Community framework by stating that, when the European Council acts in matters within the scope of the EC, "it does so in its capacity as the Council within the meaning of the Treaties".[117] Successive Treaty revisions have incorporated into the Treaty the European Council's composition, mission and specific tasks. It was partially formalised in Article 2 of the 1986 *Single European Act* and its existence and role are defined more broadly in present Article 4 TEU. Many would argue that it has virtually acquired the status of an EU Institution, as since 1974 its meetings have become regular and 'institutionalised'. Joseph Weiler and Martina Kocjan have commented:

> The European Council has remained formally outside the structures of the European Community (i.e. the supranational pillar), not subject to the control of the Court of Justice. Conversely it has no legal power to act in pursuance of the Community's objectives or power of decision (Case T-584/93 Roujansky v. European Council [1994] ECR II-585). Of course, there would be nothing to prevent the Heads of State or Government meeting as the Council of the European Union, and in limited circumstances the Council must meet in that composition (4.8); however, one of the strengths of the European Council, which has increasingly come to fulfil a troubleshooting role in pushing forward the process of European integration and resolving the conflicts between the Member States at the highest level, lies precisely in its informality. Indeed, it was originally intended as a relatively low key meeting, and is somewhat undermined in its effectiveness by the high levels of expectation and media interest which now generally accompany its meetings. It has also been gradually co-opted in parts of the legislative process in the EC Treaty, notably in relation to the determination of

[114] http://www.europarl.europa.eu/news/expert/briefing_page/10863-283-10-41-20070927BRI10862-10-10-2007-2007/default_p001c002_en.htm
[115] DS 869/07, 19 October 2007 at http://www.consilium.europa.eu/uedocs/cmsUpload/ds00869.en07.pdf
[116] Ibid
[117] EC Bulletin 1983, n° 6

> the broad guidelines of economy policies under Article 99 EC and, since the Treaty of Amsterdam, the formalised consideration of the employment situation in every Member State under Article 128 EC. Many of its 'decisions', embodied in the Presidency Conclusions have longstanding consequences for the shape and direction of the EU. Perhaps the best example are the so called 'Copenhagen Criteria' of 1993, establishing the basis for accession to the EU and now enshrined in Article 6(1) TEU as the very liberal constitutional cornerstone of the Union itself as well as appearing in Article 49, which governs accession.[118]

The main functions of the European Council are broadly similar to existing provisions. Its voting procedure will generally be by unanimity and it will not adopt legislative acts.[119]

The custom that has developed of holding European Council meetings in March and October, in addition to those at the end of each Presidency in June and December, is formalised in the statement that it will meet quarterly.

There will be a President of the European Council with a 2½ year term of office, renewable once. There is a bar on him/her having a national mandate. This is a new position and replaces the six-monthly EU Presidency. One of the main criticisms of the full-time Presidency in 2003-4 came from the smaller States, which believed it suited the aspirations of the large Member States and would marginalise their influence.[120] The President will "ensure the external representation of the Union" on CFSP issues, but without interfering with the mandate or powers of the High Representative of the Union for Foreign Affairs and Security Policy.

In 2004 the British Government supported the creation of a full-time President of the European Council, which, it believed, would mean "greater accountability to national parliaments, as well as greater efficiency".[121] They did not think that either the European Council President or the new High Representative represented any great change from existing procedures.

Commenting in 2005 on the Union President provision in the Constitution, Kirsty Hughes, of the European Institute and London School of Economics, was more sceptical: "[T]he new president will only be held accountable behind closed doors to the European Council so no democratic breakthroughs with this potentially powerful new post".[122] She continued:

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

119 The European Council does not currently adopt directives or regulations, although it does adopt intergovernmental Decisions.

120 According to a report in the *EUOBserver* 22 October 2007, Tony Blair, the Luxembourg Prime Minister, Jean-Claude Juncker, the Danish Prime Minister, Anders Fogh Rasmussen, and Poland's former president ,Aleksander Kwasniewski, are likely candidates for the post. http://euobserver.com/9/25009/?rk=1

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

122 Kirsty Hughes, Associate Fellow, Birkbeck College; Visiting Fellow, European Institute, London School of Economics, "The British debate on the EU Constitution: Can the Referendum be Won?", January 2005.

> Nor looking forward is it clear that the new president will anyway act in the way the UK hopes. As a new permanent and full-time position in Brussels, with the Council secretariat at its service, it is quite possible that such a new president may prove more pan-European and less biddable than the current rotating part-time presidency.

The Government remains positive about the new post, stating: "It will bring much greater coherence and consistency to the EU's actions. Moreover, it will give the Member States, through the European Council, much greater capacity to give direction and momentum to the EU's agenda".[123] The Government also stated in its 2007 White Paper that the President could not also hold the job of President of the Commission. The 'Open Europe' organisation suggested that the "new EU President of the European Council could be merged with the President of the Commission to create a US-style President for Europe". Lisbon sets out distinct and separate roles for the two posts and there is no suggestion that these could merge. Any attempt to do so without the unanimous agreement of Member States would almost certainly be a breach of the Treaty.

3. Council of Ministers

Article 9C (Lisbon Article 1(17); Constitution Articles I-23, I-25 and I-24) is headed "The Council, its Presidency and the definition of a qualified majority". It is based on current Articles 202, 203, 205 and 207(1) TEC and the Nice Protocol and Declaration on EU Enlargement. The new Article states with similar wording to Article 9(a) on the EP that "The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions", emphasising the importance of the EP in the legislative process.

As in the Constitution, the rotation of the Presidency is retained for Council configurations other than the Foreign Affairs Council. The Council will meet in public when carrying out legislative functions and each Council meeting will be divided into two parts, dealing either with deliberations on legislative acts or with non-legislative activities. The Council will meet in two formations: either as the General Affairs Council, which will "ensure consistency in the work of the different Council configurations, … prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission", or as the Foreign Affairs Council, which will "elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent". There is a reference to **Article 201 TFEU** regarding the future decision by QMV on other Council formations. These will be led by groups of three Member States for 18 months. The groups will be made on the basis of equal rotation among Member States, taking into account their diversity and geographical balance within the Union. Each Member will chair all Council configurations, except the Foreign Affairs Council, for six months, assisted by the other group Members. Members of the team may decide alternative arrangements among themselves. The Government argues that: "This change should provide a longer-term, more stable perspective to help deliver policy outcomes through the sectoral Councils".[124]

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[123] Government White Paper, July 2007, at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf
[124] Cm7174 July 2007 at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

The **Protocol on transitional provisions** sets out the voting system from entry into force until 31 October 2014, including provisions for a qualified majority with all or only some Member States, and concedes to Poland's objections by allowing this system to be used in the period from 2014 to 2017 at the request of a Council Member:

> 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.

4. Composition of the Commission; Commission President

The Nice Treaty in 2000 provided new institutional and decision-making arrangements to prepare the EU for enlargement of up to 27 members. Article 4 of Protocol A required the large Member States (the UK, France, Germany, Italy and Spain) to relinquish one Commissioner in January 2005. From this date, the Commission comprised one national from each Member State. The Nice Protocol also provided that when the Union expanded to 27 members new provisions would apply, requiring the Commission to have fewer members than the number of Member States, who would be rotated "on the principle of equality". The Council would decide unanimously on the size of the Commission and on implementing measures.

Article 9D (Lisbon Article 1(18); Constitution Articles I-26 and I-27 and transitional measures) concerns the European Commission and its President. It amends current Articles 211, 213, 214 and 217 TEC and the Nice enlargement provisions. The first Commission after Lisbon enters into force and until 31 October 2014 will contain one member from each Member State (including the President and the High Representative for Foreign Affairs). As from 1 November 2014 the whole Commission will be reduced to two thirds of the number of Member States unless the European Council decides by unanimity to alter this figure. The current Treaty, as amended by the Nice Treaty, requires a reduction in the number of Commissioners from 2009. The Government has stated that it "has consistently supported a smaller, stronger and more effective Commission, and is therefore content with this change".[125]

The wording in **subparagraph 5**, on the principle of equal rotation and ensuring geographical and demographic balance, is transferred from Article 3 of the Nice Protocol on enlargement.

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

There is a requirement that the Commission President be elected or rejected by the EP. Under present Article 214 TEC the Commission President nomination requires the

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[125] Cm 7174 July 2007

approval of the EP, but Lisbon, like the Constitution, stipulates that the candidate "shall be elected" by the EP by a majority of its members. As at present, the Council and the Commission President-elect will adopt the list of the other Commissioners proposed by the Member States, and the whole Commission, together with the CFSP High Representative, will be appointed by the European Council acting by QMV, following EP consent. The provisions for adopting the rules on rotation of the Commission will be decided unanimously by the European Council.

Daniel Gros and Stefano Micossi of the Centre for European Policy Studies commented on changes to the role of the Commission compared with the Council and EP:

> Relative to these two institutions, the European Commission loses power: it keeps his role of guardian of the treaties but forfeits in part the power to initiate legislation by sharing it with the new President of the European Council. Also the life of the President of the Commission will be harder, squeezed between his Vice President who will be also foreign affairs minister and coordinator of the external policy and the new President of the European Council. Discussions about who will be the true 'President' of Europe and who can speak for Europe abroad will be unavoidable.[126]

5. Qualified Majority Voting

A number of Treaty Articles currently subject to unanimous voting will become subject to QMV. In 2004 estimates of the number of transfers varied from around 40 to as many as 60 or 70.[127] The number varies depending on whether procedures within the main procedure are also taken into account. The Government insists it supports QMV where it is in the UK's interest. In the July 2007 White Paper it stated:

> The Government supports QMV to unlock decision-making in the right areas where it is in Britain's interest. Without the use of QMV, a single country can veto any policy proposal making the EU decision-making process slower and more cumbersome.
>
> Without QMV, for example, the EU's single market could not have been built. But the UK has always insisted on maintaining ultimate national control in key areas of justice and home affairs, social security, tax, foreign policy and defence.
>
> The Government believes that the package of decision-making as set out in the IGC Mandate is a good one for the UK. The UK has safeguards on key areas. Several of the new articles that will be subject to QMV reflect the existing practice for EU legislation in that field. And QMV in many areas is in line with the Government's wish to see improved decision-making – for example on energy policy, humanitarian aid, and urgent financing of CFSP measures. The Reform Treaty will also streamline and speed up decision-making in a number of technical areas (e.g. comitology and appointments to the European Central Bank's executive board).

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[126] Daniel Gros and Stefano Micossi, "Two for the Price of One" CEPS commentary 22 October 2007 at http://shop.ceps.eu/BookDetail.php?item_id=1550

[127] See Appendix 1 for table showing QMV moves.

> The second pillar remains based on decision-making by unanimity. It also retains provisions for an 'emergency brake'. The UK keeps its veto on CFSP matters. Overall, the impact of QMV under the Reform Treaty will be significantly less than, for example, under the Single European Act or the Treaty of Maastricht.[128]

The Nice Treaty's "Declaration on the Enlargement of the European Union" set out a new weighting of votes in the Council, grouping the four large States together with 29 votes each and allocating a range of votes for other States, depending on their size. This allocation altered the relative voting power of the Member States in favour of the smaller States in the EU-27. The QMV threshold provisions are contained in Article 3 of Protocol A, the Enlargement Declaration and also in Declaration 21. The formula is complex and forming a majority requires clearing at least two hurdles. Under a 'population safeguard', a Member State may request, in a QMV matter, verification that a decision has the support of countries representing at least 62% of the total population of the enlarged EU. If this condition is not met, the decision in question will not be adopted.

The Nice Treaty is favourable to Poland in terms of voting weights. Germany (the largest Member State) has 29 votes and Poland (a medium sized State) has 27, but this privilege was removed in the Constitution, under which Germany has 82 votes and Poland 38, according to a complex double majority formula. Following the collapse of the Constitution in 2005 Warsaw promoted its own alternative model, which gave Germany nine votes and Poland six, based on the so-called "Penrose square root law". Whereas to adopt a decision the Constitution 'double majority' system required at least 15 out of 27 EU states which represent at least 65% of the total EU population, the Penrose square root law would require at least 14 out of 27 EU states representing at least 62% of national votes, awarded on the basis of square roots of population.

The Constitution system has prevailed, but at the request of Poland the implementation of the new system will be delayed until 2014 at the earliest and possibly until 2017. The decision-blocking mechanism, a revised 'Ioannina compromise', is in a decision (which can be amended only by unanimity)[129] written into a declaration and linked to a protocol. The Declaration on Article 9C(4) TEU and Article 205(2) TFEU includes the formula up to 2014 and beyond in a draft Decision to be adopted by the Council, as follows:

> (1) Provisions should be adopted allowing for a smooth transition from the system for decision-making in the Council by a qualified majority as defined in Article 3(3) of the Protocol on the transitional provisions, which will continue to apply until 31 October 2014, to the voting system provided for in Article 9c(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union, which will apply with effect from 1 November 2014, including, during a transitional period until 31 March 2017, specific provisions laid down in Article 3(2) of that Protocol.
> (2) It is recalled that it is the practice of the Council to devote every effort to strengthening the democratic legitimacy of decisions taken by a qualified majority.
>
> Section 1

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[128] Cm 7174 July 2007
[129] See Protocol 9bis DS 878/07 19 October 2007 at http://www.consilium.europa.eu/uedocs/cmsUpload/ds00878.en07.pdf

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. […][130]

The *European Voice* commented:

Blocking tool or psychological reassurance? Senior politicians are confident that the revised Ioaninna compromise will not be used to block EU decisions once the new treaty is ratified.
German Socialist MEP Jo Leinen, who drafted the European Parliament report on the IGC mandate, says that Ioaninna will not lead to "deadlock". "It's intended to be an exception rather than the rule," he says. Leinen points out that the

[130] DS 871/07, 19 October 2007 at http://www.consilium.europa.eu/uedocs/cmsUpload/ds00871.en07.pdf

> mechanism has "never been used" despite being around since 1994 because in the Council of Ministers "they have always tried to form a consensus and not infringe on sensitive interests".
> Leinen's view is shared by German centre-right MEP Elmar Brok, one of those who will represent the Parliament on the IGC. "Ioaninna is not another form of blocking instrument, it's an instrument for rethinking for a reasonable length of time," he says.
> When the proposal was made to revise the Ioaninna compromise at the summit and lower the thresholds for triggering its use, it was intended to reassure the Poles further that their fears of having decisions imposed on them in the Council were misplaced. But the expectation was that it would never actually be used or only very rarely. One senior diplomat said after the summit that the measure was meant to "provide psychological reassurance and build confidence" in the run-up to the move to double majority voting.
> The reality is that decisions in Council are rarely put to the vote and efforts are being made to ensure the widest possible consensus for agreements, as Leinen points out.
> The hope therefore is that Ioaninna should remain more famous as a tourist destination than as a means to block EU decision-making.[131]

To summarise, 55% of the Member States representing at least 65% of the Union's population will be necessary for the adoption of a decision. These rules will apply from 2014, but until 2017 a Member State may ask to vote according to the present rules. In addition, until 2017 75% of Member States representing 75% of the Union's population will be able to ask the Council "which will do everything it can (...) to answer the concerns raised". After 2017, this compromise will remain with lower percentages of States and populations reduced to 55%. The Government is "content with the introduction of Double Majority Voting, which provides a reasonable balance between passing and blocking legislation. It will be a clearer, simpler and more democratic voting system. This should lead to greater transparency and more effective decision-making. The UK's share of votes in the Council of Ministers will increase".[132]

I. External relations

1. Common Foreign and Security Policy (CFSP)

Under the Lisbon Treaty the CFSP remains an intergovernmental process distinct from other policy areas. Unanimity remains the norm for decision-making and CFSP provisions remain in the TEU. They are supplemented by an IGC Declaration confirming that the provisions on CFSP will not affect the responsibilities of the Member States, as they currently exist, for the formation and conduct of their foreign policy, or of their national representations in third countries and international organisations.[133]

Present Articles 11-28 TEU outline the framework for the development of a Common Foreign and Security Policy (CFSP). The majority of the Constitution CFSP provisions

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[131] *European Voice* 19 July 2007
[132] Cm 7174, July 2007
[133] Declaration 30, CIG 3/1/07 REV 1, 5 October 2007 at http://www.consilium.europa.eu/uedocs/cmsUpload/cg00003re01en.pdf

remain unchanged, although a few articles have been amended to improve clarity. The creation of the Union High Representative for Foreign Affairs and Security Policy, the inclusion of a 'solidarity clause' and the extension of QMV in certain CFSP matters, with the agreement of the European Council, are, however, significant additions.

New **Article 9E** (Lisbon Article 1(19)) concerns the mandate of the High Representative of the Union for Foreign Affairs and Security Policy (the "High Representative"), the renamed Union Minister for Foreign Affairs, and the text is otherwise identical to Constitution Article I-28. The High Representative will conduct the Union's common foreign and security policy, sitting in the Commission as a Vice President and using its resources, but answerable to Member States in the Foreign Affairs Council, over which he/she will preside. The High Representative will be appointed by the European Council by QMV, with the agreement of the Commission President. He/she will be bound by Commission procedures only if they are compatible with his/her Council mandate.

In a report in May 2003 the Lords EU Committee drew attention to "the significant and powerful role of the proposed Foreign Minister" and questioned the Government's support for the merger of the present roles of the EU High Representative and the External Affairs Commissioner (Javier Solana and Benita Ferrero-Waldner, respectively). The Committee thought:

> significant questions remain unanswered about the Foreign Minister and in particular where the right of initiative will lie; who will actually determine policy; the relationship between the Foreign Minister and the Commission; and, in particular, the impact on the Foreign Minister's role of proposals to extend qualified majority voting […]. We cannot give our full support to the proposed post of Foreign Minister of the European Union unless these questions are answered and unless the uncertainties that they indicate are satisfactorily resolved.[134]

The Committee was also concerned at the time about the 'double-hatted' role of the new post in his/her relations with the Commission:

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

[134] Lords Select Committee on the European Union, *The Future of Europe: Constitutional Treaty – Draft Articles on External Action,* HL Paper 107, 13 May 2003, p.6-7 at http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/107/10702.htm#a2

> **we propose that a better job title be found, perhaps "Foreign Affairs Representative".[135]**

The then Foreign Secretary, Jack Straw, told the Standing Committee on the IGC in November 2003:

> We would have preferred to have explicit separation of those two posts. I do not believe that, in practice, they will merge. The institutional balance between the Council and the Commission is absolutely fundamental to the proper operation of the EU, and, for a variety of reasons member states would not accept that they should merge into one position.[136]

Following the abandonment of the EU Constitution in 2005-06 the Government ruled out the creation of the post of an EU 'foreign minister' combining the roles of High Representative and external affairs Commissioner outside the Constitution, and, although it was in principle not averse to such a role, could "see no prospect of their being brought into force, save through the vehicle of a constitutional treaty".[137] However, the Government maintains that the reintroduction of this post under the name of High Representative does not represent a constitutional change, stating merely that it "will give the EU a clearer voice in promoting the agreed objectives that member states want to deliver around the world, without impacting on the independence of member states' foreign policies".[138]

The IGC tackled the issue raised by the EP about the timing of the appointment of the High Representative by agreeing a **Declaration on Article 9E of the Treaty on European Union**, under which the choice of the High Representative will be subject to "appropriate contacts" (as distinct from "consultation") with the EP. The European Policy Centre suggested that this was a "form of words which is open to interpretation and suggests this argument is far from over".[139]

Article 10 (Lisbon Article 1(22) is on Enhanced Cooperation, the procedure whereby groups of Member States may cooperate on specific issues when all Member States do not wish to, subject to certain rules and safeguards to protect the interests of the Union and the Member States. The wording of Article 10 corresponds with Constitution Article I-44, except that it specifies the participation of at least nine Member States rather than a third of Members (although nine currently represents a third of the EU-27) and it does not detail the voting procedure, referring instead to the process to be set out in the TFEU. The present Treaty provisions on enhanced cooperation are contained in both the TEU

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

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

137 HC Deb 6 June 2005 c1001

138 HC Deb 23 July 2007 c 596 at: http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070723/debtext/70723-0009.htm

139 "Treaty Reform: Over and done with - at last" 23 October 2007 at http://www.epc.eu/en/pub.asp?TYP=ER&LV=294&see=y&t=15&PG=ER/EN/detail&l=&AI=749

and the TEC (11 and 11(a) TEC, 27(a)-(e) on CFSP and 40-45 TEU) to take account of different decision-making mechanisms in the Community and intergovernmental areas.

The procedures are generally the same as the present Articles 43-45 TEU. Conditions such as respect for the treaty, the aims of the Union and the rights of non-participating States remain. The use of such arrangements only as a last resort and only in areas of non-exclusive competence, the need for authorisation by the Council (i.e. intergovernmental) and for openness, and the requirement that the costs be borne by the participating States, remain guiding principles.

Title V sets out general provisions on the Union's external action and specific provisions on the CFSP. **Article 10A, B and C** (Lisbon Articles 1(24)-(27); Constitution Articles III-292-293, I-16 and III-376 and I-40) corresponds with current Articles 3(2) TEC and 11 TEU. They define the provisions which have a general application across all matters of external action. **Article 10A** establishes the guidelines and strategic objectives behind the external actions of the EU, based on the "principles which have inspired its own creation", namely "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for the principles of the United Nations Charter and international law". The Article refines and elaborates on Article 11 TEU. In particular, several additions on social, economic and environmental development are made in **10A(2)(a)-(d)**.

The decision-making process in matters relating to external action is set out in **Article 10B** (Lisbon Article 1(24)), which reflects the current provisions for the CFSP in Article 13 TEU. However, it has been refined to present a clearer framework for the whole area of external action. The Article states that "the European Council shall act unanimously on a recommendation from the Council, adopted by the latter under arrangements laid down for each area".[140]

Article 11(1) ((Lisbon Article 1(27)(a)) amalgamates Constitution Articles I-16, I-40 (1) and III-376, but adds a paragraph on the special procedures to which the CFSP is subject and which will be defined and implemented by the European Council and the Council, generally acting unanimously. It calls for the "progressive framing of a common defence policy that might lead to a common defence". This corresponds largely with existing Articles 2 and 11 (2) TEC. The adoption of legislative acts is excluded and the roles of the EP and Commission in the CFSP will be specifically defined by the Treaties. The ECJ will not have jurisdiction in CFSP, but it will have jurisdiction to monitor compliance with the Article concerning the exercise of Union competences and to rule on proceedings reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council. The ESC welcomed "the clarification […] that the ECJ will not have jurisdiction, save in respect of monitoring compliance with the provisions Article III-308 [new Article 25 TEU] which preserve the non-CFSP competences of the institutions) and in relation to the legality of restrictive measures imposed on natural or legal persons".[141]

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[140] For CFSP those arrangements are set down in greater detail in Article 17 (current Article 23 TEU).
[141] ESC 35th Report 2006-07, para. 64

In September 2004 the then Shadow Foreign Secretary, Michael Ancram, had insisted that the ECJ would have jurisdiction over the CFSP because the relevant Article on the ECJ (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 had told the House of Lords EU Committee in October 2003 that the Court would probably have some role in reviewing compliance with Article I-16.[142] 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.[143] The Lisbon Treaty text is perhaps clearer than that of the Constitution, stating that the ECJ "shall not have jurisdiction with respect to these provisions", with the exception of the two areas mentioned above.

Amended **Article 11(2)** adds an emphasis not in the 2004 Constitution text that the CFSP will be carried out, like the Common Commercial Policy (CCP, see Article III-314 of Constitution) "Within the framework of the principles and objectives of its external action".

Article 11(2) (Constitution Article I-16) also calls on Member States to support the CFSP "based on the development of mutual political solidarity", which will be monitored by the Council and the High Representative. References to solidarity are already scattered through the existing EU treaties. Article 11 TEU (CFSP) currently requires Member States to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity". Article 1 TEU obliges the Union to act with "consistency and solidarity". Article 23 TEU requires that Member States: "In a spirit of mutual solidarity", shall not do anything likely to conflict with or impede Union action if they decide to abstain from participation in a CFSP measure.

Article 12 (Lisbon Article 1(28); Constitution Article III-294(3)) sets out the remit for the conduct of CFSP, while **Article 13** (Lisbon Article 1(29); Constitution Articles I-40 and III-295) sets out the decision making arrangements for CFSP matters. Under the provisions of that article the European Council will define the strategic interests of the Union, determine the objectives and general guidelines for the conduct of CFSP, including matters with defence implications, and adopt the necessary decisions. The Council of Ministers will frame the policies of the CFSP with reference to the strategic guidelines laid down by the European Council, while the High Representative will have joint responsibility, with the Member States, for putting those CFSP policies into effect "using national and Union resources".

Article 13 includes a new provision allowing for the President of the European Council to convene an extraordinary meeting of the European Council when an international situation so requires, in order to define the Union's policy on this matter.

New **Article 13a** (Lisbon Article 1(30); Constitution Article III-296) sets out the role of the High Representative and the provisions for establishing the European External Action

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[142] 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

[143] HC Deb 9 September 2004 c 898

Service to assist the High Representative in fulfilling the CFSP mandate. He/she will conduct the EU's common foreign and security policy through the implementation of decisions adopted by the European Council and the Council of Ministers (as opposed to the holder of the EU Presidency and the High Representative for CFSP under present Articles 18 and 26 TEU). The High Representative also has the right of initiative in CFSP matters, as outlined above. **Article 13a** provides that the High Representative will also preside over the Foreign Affairs Council,[144] represent the EU on CFSP matters, co-ordinate all matters relating to the EU's external action, conduct a dialogue with third parties on the EU's behalf and put forward the Union's position in international organisations and at international conferences. The High Representative will also be responsible for consulting the EP on the development of CFSP and under **Article 18** the High Representative has the right of initiative in proposing to the Council the appointment of a special representative, over whose work he would have overall authority (Constitution Article III-302).

The External Action Service will work in cooperation with the diplomatic services of the Member States – it will not replace them - and will comprise officials from the relevant departments of the General Secretariat of the Council and the Commission and seconded diplomatic staff from Member States. The organisation and functionality of the Service, which many observers have referred to as a European Foreign Ministry, will be established by a Council decision on a proposal from the High Representative, after consulting the EP and obtaining the consent of the Commission.

Article 14 (Lisbon Article 1(31); Constitution Article III-297) provides that, if an international situation requires operational action by Member States, the Council of Ministers will adopt the necessary decisions, setting out the objectives and scope of such action, the resources to be made available and, if necessary, the duration and conditions for implementation. Any Member State planning to adopt a national position or take national action prior to such a decision is obliged to inform and, where necessary, consult the Council. These procedures are already established under Article 14 TEU.

Article 15 Lisbon Article 1(32)) is virtually identical to the present Article 15 with only small changes in terminology proposed in order to simplify the article.

Articles 15a-b (Lisbon Article 1(33-34); Constitution Articles III-299 and III-300) reproduce current Articles 22 and 23 TEU with some amendments. **Article 15a** reflects the current provisions of Article 22 TEU, but amended to include reference to the High Representative. It defines the right of initiative in CFSP, whereby any Member State, the High Representative or the High Representative with the support of the Commission can refer questions or submit proposals on CFSP to the Council of Ministers and the European Council. **Article 15b** confirms that decisions on CFSP matters will continue to be taken in the European Council on the basis of unanimity, and emphasises that under this Chapter "the adoption of legislative acts shall be excluded".[145] Decisions adopted in

[144] This is currently the General Affairs and External Relations Council which is chaired by the Foreign Minister of the country holding the EU Presidency.

[145] The inclusion of this provision serves to clarify that the European Council does not have a role in adopting legislation.

the Council of Ministers will also be by unanimity, except in the following situations, where QMV will apply:

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

This Article expands the areas in which QMV would be applied to CFSP matters from those set out in Article 23(2) TEU to include decisions on proposals presented by the High Representative, either acting alone or with the support of the Commission. Under this Article any Member State is able to abstain from a vote in the Council of Ministers, but it is obliged to accept the decision that has been taken. If at least one third of the Member States, comprising at least one third of the population of the Union, constructively abstain then the decision would not be adopted. This provision already exists in Article 23 TEU. This "constructive abstention" could also theoretically be applied in the case of military operations, as the Council of Ministers under Article 14 adopts the necessary decisions for operational action on the basis of unanimity (see above).

As in the Constitution, any Member State can also oppose the adoption of a decision by QMV for reasons of "vital", rather than the present "important", reasons of national policy. In these cases if the High Representative, in consultation with the State concerned, is unable to agree an acceptable solution then the Council, acting by QMV, may request that the matter be referred to the European Council for a decision by unanimity.

Article 15b(3) is a *passerelle*, or bridging clause, allowing for the extension of QMV in CFSP matters beyond those already outlined above, following unanimous agreement within the European Council. Under **subsection (4)** QMV is not applicable to decisions "having military or defence implications".

Article 16 (Lisbon Article 1(35); Constitution Articles I-40(5) and III-301) amends current Articles 14(5) TEC, 16 and 20 TEU. Under this Article Member States are obliged to consult on any CFSP matter which is of general interest in order to determine a common approach. However, before taking any action on the international scene, or fulfilling any commitment that could be perceived as affecting the Union's interests, each Member State will be obliged to consult within the Council of Ministers or the European Council. The EU and Member State diplomatic missions in third countries and international organisations will cooperate and contribute to formulating and implementing the common approach.

However, during negotiations on the draft constitutional treaty in 2003, concerns were raised by the FCO with respect to this obligation to consult the Council. The Explanatory Memorandum on *The Praesidium Draft of the Articles of the Constitutional Treaty*

relating to External Action, published by the Foreign and Commonwealth Office on 29 May 2003, stated:

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

Article 19 (Lisbon Article 1(38); Constitution Article III-305) defines the roles of the High Representative and the Member States in international organisations and at international conferences. It provides for Member State coordination of action in international organisations and at international conferences, where they will be obliged to uphold the Union's position coordinated by the High Representative. This requirement for solidarity is currently provided in Article 19 TEU. However, the new Article (and the Constitution) adds a further clause, that:

> When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position.

Some commentators have viewed this clause as an obligation on Member States on the United Nations Security Council (UNSC) to give up their seat in favour of the EU when there is a common Union position on an issue. In its May 2003 report on *the Future of Europe: Constitutional Treaty – Draft Articles on External Action*, the Lords EU Committee commented:

> We can see that the aim is to provide a single voice for the European Union in the United Nations, but there are serious questions about this Article. First, surely who appears before the UN Security Council is a matter for them and not for the European Union. Secondly, the requirement on Member States who are members of the Security Council to defend positions in the interests of the Union, albeit derived from an existing Treaty provision, seems to ignore the fact that discussion in the Security Council is organic. Members' positions develop during the course of discussion and debate and it is inconceivable that one player would be expected to do no more than defend the pre-agreed position which they had no mechanism to adapt.
>
> The Committee was under the impression that Member States who have dissented from decisions taken (perhaps by QMV) in the Council cannot be under an obligation to support and defend the council's position in the United Nations Security Council. The Committee considers that the proposal to give a special status to the proposed Foreign Minister within the UN Security Council would be impracticable in present circumstances. We are also concerned that there is insufficient regard to the need for positions to develop during debate in the Security Council. Member States, and in particular those who are permanent members of the Security Council, must be free to act independently within the Security Council.[146]

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

In December 2003 the then Foreign Secretary assured the Standing Committee on the IGC that: "Nothing in the provisions will lead to our seat or autonomy in the Security Council being usurped".[147] The Government has recently refuted a claim by the eurosceptic think-tank *Skeptica*, which accused it of misleading the public over Britain's UN Role. Skeptica claimed that the fine print of the Lisbon Treaty would force the UK to surrender vital diplomatic power and that Britain and France would be expected to defer to the High Representative. The FCO maintained that the EU would only speak when Member States with a seat on the UNSC (including UK and France) requested it, and on a policy they supported. The FCO counter-argument was as follows:

> The EU can already speak at the UN. The EU Presidency (now Portugal) and High Representative (Javier Solana) can already address the UN Security Council, where invited to do so, on an issue where EU Members have a policy agreed by consensus. The German Presidency, during the first 6 months of 2007, addressed the Security Council on behalf of the EU on 8 occasions. The UK will keep our seat on the Security Council and exercise our right to make national statements in the UN.
>
> The EU can not take our seat on the UN Security Council. Articles 3 and 4 of Chapter 2 of The UN Charter is clear that only States can be members of the UN, therefore hold seats on the UN Security Council. The EU is not, and will not be a State.
>
> EU Member States will still be responsible for their own foreign and defence policy. The Reform Treaty will include a clear Declaration, agreed by all 27 EU Member State Heads of Government, stating that the new Treaty will not affect the responsibilities of the Member States for the conduct of their foreign and defence policy - including at the UN. We keep our veto on Foreign Policy matters.
>
> If anything, the new Treaty will give the UK a stronger position. When the EU agrees a policy position and is invited to speak at the UN, other UN members are aware that the EU speaks on behalf of all 27 member states - 1 in 7 members of the UN - in addition to the national statements of those individual states. We therefore have much greater influence where EU Member States make their collective voice heard. The recent EU statement supporting the UK on the Litvinenko murder case is a good example.
>
> FCO Ministers are crystal clear on the UK's role in the UN: Jim Murphy, Minister for Europe said 'Skeptica are wrong. The UK is proud of its seat at the Security Council, and voice in the UN. We will continue to make our voice heard and exercise our influence in the UN. Nothing would make us relinquish that voice, or our seat at the table. The new EU Treaty does not make us give up our seat or defer to the EU in UN meetings. The EU has already spoken at the UN 8 times this year, and only when all 27 Members agree'.[148]

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147 Standing Committee on the IGC 1 December 2003 c 107

148 FCO website, 16 August 2007 at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1140686158855&a=KArticle&aid=1186675952671

Article 21 (Lisbon Article 1(40)) gives the EP a greater role in foreign policy and defence issues than in Constitution Article III-304 and present Article 21 TEU. It provides for regular consultation between the EP and the High Representative on CFSP/CSDP issues, with the EP's views duly being taken into consideration, and a twice-yearly EP debate on CFSP and CSDP, compared with the current annual debate.

Article 22 (Lisbon Article 1(41); Constitution Article III-303) replaces current Article 24 TEU and provides for the Union to conclude agreements with one or more States or international organisations in areas within the CFSP chapter. Attempting to clarify this provision, the Director of European Political Affairs at the FCO, Anthony Smith, stated during an evidence session with the European Scrutiny Committee in June 2007:

> The European Union will be able to sign international agreements but that is not as a result of new powers. It is simply a matter of them being able to sign the international agreements instead of it being the Community and Member States. However, there needs to be agreement of the Council and when that is a CFSP issue and when it is an agreement with a third country, that is on the basis of unanimity, so it is not extending new powers, it is a procedural matter.[149]

Article 25 (Lisbon Article 1(44)); Constitution Article III-307) amends current Article 25 TEU. It defines the role of the Political and Security Committee (PSC) in CFSP decision making. As in Article 25 TEU, the PSC will be responsible for monitoring the international situation, delivering opinions to the Council of Ministers at their request, at the request of the High Representative or on their own initiative, and for monitoring the implementation of agreed policies. Under the authority of the Council and the High Representative, the PSC will exercise political control and strategic direction over crisis management operations.

Article 25a (Lisbon Article 1(45); Constitution Article I-51) replaces current Article 26 TEU on the protection of personal data as it relates to activities that fall within the scope of the CFSP chapter. **Article 25b** (Lisbon Article 1(45); Constitution Article III-308) replaces current Article 27 TEU with a clause amending Article 47 in the Final Provisions of the TEU on the distinction between the three pillars. The new Article distinguishes between foreign policy measures on the one hand and other EU measures on the other hand.

Article 28 (Lisbon Article 1(47); Constitution Article III-313) contains financial provisions for CFSP and CSDP activities. The terms of funding are largely unchanged. The common costs arising from CFSP and CSDP activities are met from the general EU budget and divided among Member States on a GNP-related basis.[150] Expenditure arising from military operations will be met by the individual Member States as determined by the Council.[151]

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[149] European Scrutiny Committee, *Outcome of the June 2007 European Council,* HC 862 i-ii, 8 October 2007, Ev. 11

[150] In 2007 the UK's share of common costs is approximately 17%.

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

Any Member State that has constructively abstained from a decision taken with regard to a military operation is not obliged to contribute to its financing. However, **Article 28(3)** allows for the rapid financing of activities in this area, and in particular for the preparatory phases of a crisis management operation, through a start-up fund based on Member States' contributions. Decisions on the financing of the fund, and in particular the scale of contributions by Member States, will be taken by QMV in the Council after consulting the EP.

2. Common Security and Defence Policy (CSDP)

Article 28A (Lisbon Article 1(49); Constitution Article I-41) sets out the basic principles for the development of the Common Security and Defence Policy (CSDP),[152] building largely upon Article 17 TEU.

Under **Article 28A(1)** CSDP will be an integral part of the Union's CFSP agenda. It will provide the Union with an operational capability for use in peacekeeping missions outside the Union's sphere of influence, for use in conflict prevention and in strengthening international security. The military and civilian capabilities required for performing these tasks will be agreed upon and provided by the Member States, while decisions on the implementation of the CSDP, including the launch of operations, will be adopted by unanimity within the Council of Ministers. The High Representative will have the right of initiative alongside Member States and will also be able to make proposals to the Council of Ministers in conjunction with the Commission.

The current Treaty provisions establishing CSDP are contained within the terms defining the CFSP. Article 17 TEU, in particular, makes provision for "the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide". While amended **Article 11** also refers to the "progressive framing of a common defence policy that might lead to a common defence", **Article 28A(2)** states more decisively that the CSDP "will lead to a common defence, when the European Council, acting unanimously, so decides".

In order to improve European military capabilities **Article 28A(3)** provides that the European Armaments, Research and Military Capabilities Agency (the European Defence Agency or EDA)[153] will:

- Identify operational requirements;
- Promote measures to satisfy those requirements
- Contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector
- Define a European capabilities and armaments policy;
- Assist the Council in evaluating the improvement of military capabilities.

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

[153] The European Defence Agency was established 2004, although only achieved full operational status in January 2005. Library Research Paper RP06/32, *European Security and Defence Policy: Developments since 2003,* 8 June 2006 examines the structure and role of the Agency in more detail.

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

The provision for "permanent structured cooperation" between a smaller group of Member States is laid down in **Article 28A(6)**, which allows greater cooperation in the area of capabilities.[154] **Article 28A(7)** establishes a clause for mutual defence but without a security commitment along the lines of NATO's Article V.[155] The provision for mutual defence is limited under Article 27(7) to "the obligation of aid and assistance, by all means in their [Member States'] power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States".

The detailed provisions governing these basic principles of CSDP are set out in Article **28 B-E**.

Article 28B(1) (Lisbon Article 1(50); Constitution Article III-309) defines the operational remit of the Union in CSDP. Tasks in which the Union may use civilian and military means include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping, and tasks of combat forces undertaken for crisis management, including peace making and post conflict stabilisation. All of these tasks may contribute to the fight against terrorism, including support for third countries in combating terrorism. Under **Article 28C** (Lisbon Article 1(50); Constitution Article III-310) the Council of Ministers may entrust the implementation of a task to a smaller group of Member States which have both the necessary capabilities and political will to undertake that task. The Council will, in these instances, be kept regularly informed. Should any amendments to the scope, duration or objective of the tasks be necessary, the Council will adopt the necessary decisions. This emphasis on closer cooperation could foster the predilection towards 'coalitions of the willing' when planning and implementing EU operations. The need for unanimity in the Council, however, would ensure the political support of all Member States for any operation.

The detailed remit of the EDA is set out in **Article 28D** (Lisbon Article 1(50); Constitution Article III-311) on the tasks of the then proposed Agency. Under the authority of the Council of Ministers, the Agency would:

- Evaluate the progress made by each Member State in fulfilling its capability commitments;
- Promote the harmonisation of operational requirements and put forward measures to satisfy those requirements, including compatible procurement

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

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

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

Article 28E (Lisbon Article 1(50); together with **Article 28A(6)** sets out the arrangements whereby Member States can engage in permanent structured cooperation in defence matters. The criteria and capability commitments for doing so are set out in the *Protocol on Permanent Structured Cooperation*.[156] **Article 1(b)** of that Protocol states that participating Member States should have the capacity to supply by 2010 at the latest,[157] either at national level or as a component of multinational force groups, combat units and supporting elements, including transport and logistics. These would be capable of deployment within 5 to 30 days, in particular in response to requests from the UN. They would be sustained for an initial period of 30 days and extended up to a period of 120 days.[158]

The Protocol also sets out provisions in the area of capability harmonisation, the pooling of assets, cooperation in training and logistics, regular assessments of national defence expenditure and the development of flexibility, interoperability and deployability among forces. The possible review of national decision making procedures with regard to the deployment of forces is also emphasised.

The Council will decide by QMV, after consulting the High Representative, to establish permanent structured cooperation and determine the list of participants. Once established only participating Member States will be able to take part in adopting decisions relating to the development of structured cooperation, including the future participation of other Member States. Decisions and recommendations will be taken by unanimity by those participating Member States, except with regard to the list of participating Member States, which will be decided by QMV. The conditions for QMV are defined in the TFEU.

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

Jean-Yves Haine, of the Institute for Security Studies, commented on permanent structured cooperation when it was introduced in the Constitution:

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156 Cm 7294 p 167

157 In the final Constitution text this had originally been set at 2007.

158 This provision is a conclusion of the Franco-British initiative on rapid reaction capabilities that was first announced in November 2003. See Library Research Paper RP06/32, June 2006 for background information.

> The criteria governing this cooperation are stringent, at least on paper: among other things, member states must have an adequate level of defence expenditure, take concrete measures to enhance the availability, interoperability, flexibility and deployability of their armed forces and commit resources to address shortfalls identified by the ECAP mechanism. The real novelty lies in the encouragement to coordinate the identification of military needs, to specialise national defence and to pool capabilities. Given the weakness of defence budgets and the chronic under-investment in R&T, collective procurement and multinational forces are obvious solutions. If implemented, permanent structured cooperation could offer a precious framework in which to change the dynamics of European defence.[159]

The Centre for European Reform also suggested:

> This clause makes a lot of sense. Military capabilities and ambitions vary widely among the member states. So the EU should rely on a smaller group of the most willing and best-prepared countries to run its more demanding military missions. The defence group will in some respects resemble the eurozone: some countries will stay outside because they choose to and some because they do not fulfil the entry criteria.[160]

J. Final provisions

Title VI, Final Provisions, corresponds with current Title VIII and contains elements of Parts I and IV of the Constitution, including Treaty revision procedures, duration, legal personality, withdrawal from the Union, territorial scope, ratification and entry into force.

1. Legal personality

Article 46A (Lisbon Article 1(55); Constitution Article I-7) gives the EU legal personality. At present only the European Community (and Euratom) has express legal personality under Article 281 TEC,[161] enabling it to sign treaties such as the World Health Organisation (WTO) treaty, environmental treaties, association treaties and readmission and visa facilitation treaties. Current Article 282 TEC further stipulates:

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

This means that only the Community, represented by the Commission, currently has rights and obligations under international law. The Commission negotiates international agreements, such as trade and commercial agreements, on behalf of the Community with the authorisation of the Council. Member States decide the negotiating mandate by unanimity or QMV, depending on the policy area in question, and approve any final

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

160 "The CER's guide to the constitutional treaty", *Centre for European Reform,* 7 July 2004. ECAP stands for European Capabilities Action Plan.

agreement on the same basis. The EU has no express legal personality at present, but Articles 24 and 38 TEU provide a treaty negotiation procedure on the basis of which treaties have been signed in the name of the EU.

In 2004 the British Government supported the granting of legal personality to the Union, but with some reservations. The Europe Minister, Denis MacShane, thought it would "have the advantage of clarity and simplicity", but added that "the Government would only accept it on the basis that the distinct arrangements for the Common Foreign and Security Policy and aspects of Justice and Home Affairs were fully safeguarded, along with the existing arrangements for representation in international bodies.[162] The Government would not accept, for instance, "any proposal that meant giving up its permanent membership of the UN Security Council and the rights which go with that".[163]

The present Government is confident that the new situation will not create new powers for the EU:

> The Reform Treaty will formally give the EU a single legal personality. This will be simpler than the existing situation and will therefore allow the EU to act in the international arena in a more coherent way. This should lead to streamlined procedures for negotiating agreements through the EU.
>
> **However, it does not create any new powers for the EU. The Reform Treaty will contain a Declaration by all Member States stating explicitly that "the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or act beyond the competences conferred upon it by the Member States in the Treaties".**
>
> This will not impact on the independence of Member States' foreign policies. The IGC Mandate also includes a Declaration stating that nothing in the Treaty affects the responsibilities and powers of Member States in foreign policy.[164]

Some have argued that this could have implications for the agreements and treaties that the Community has already concluded and for those that the Union will conclude with non-EU states. The rights and obligations of the European Communities which arose before the entry into force of the Lisbon Treaty would be transferred to the Union. The Union would be able to accede to the European Convention on Human Rights.

Bill Cash submitted the view to the ESC that the merging of the TEU and the TEC into a single legal personality "is at the very least the kind of 'substantial constitutional change'" to which the Minister for Europe had referred in his evidence to the Foreign Affairs Committee in September 2007.[165] The amendment was not accepted, but the Committee was concerned about certain aspects of the granting of legal personality to the Union:

> […] it should be noted that Article III-323 of the Constitutional Treaty (now reproduced as Article 188l of the Reform Treaty) confers a wide power on the

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161 And corresponding articles in the Euratom Treaty and the former Coal and Steel Community Treaty.

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

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

164 Government White Paper, July 2007, at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

> Union to conclude international agreements, not only where the Treaties expressly provide, but also where "the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope". In relation to Title IV EC matters, (i.e. justice and home affairs) a declaration (No.25) will be adopted confirming that Member States are entitled to conclude agreements with third countries and international organisations in these areas,[166] in so far as such agreements are consistent with Union law.[167] In the case of Title IV matters where the UK has not 'opted in', it seems to us that the freedom of the UK to enter into agreements with third countries will not be affected, but we invite the Minister to confirm if this assumption is correct. **We would wish the Government to make clear whether or not these powers will in any way prevent the UK from concluding its own treaties in the same areas as the Union, despite the provisions of the new Article 3(2) EC on exclusive external competence.**

The Treaty is also supported by a Declaration (No.24) confirming that "the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties".

2. Treaty amendment

Amended **Article 48(1)-(7)** (Lisbon Article 1(56); Constitution Articles IV-443-IV-445) introduces different Treaty amendment methods: the ordinary revision procedure and the simplified revision procedure, which are consolidated into one Article as stipulated by the IGC mandate. This Article replaces current Article 48 TEU, which provides only for the convening of an IGC to amend the Treaties.

Under the Ordinary Revision Procedure, proposals for amendment may come from a Member State, the EP or the Commission. A significant addition to the 2004 text required in the IGC Mandate is the provision in **Article 48(2)** that: "These proposals may serve either to increase or to reduce the competences conferred on the Union in the Treaties". The proposals are submitted to the Council of Ministers, which passes them to the European Council. National parliaments are informed. The European Council then has to decide whether to submit the proposals for further examination, which it does by means of a decision by simple majority, after consulting the EP and Commission.

If a decision is adopted to consider the proposals further, the President of the European Council calls a Convention. The Convention includes representatives of the national parliaments, the Heads of State or Government, the EP and the Commission. If the proposals concern institutional changes in the monetary area, the ECB will also be consulted. The Convention then makes a recommendation, adopted by consensus, to a

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165 ESC 35th Report, Formal Minutes, p 50

166 FN 33: The requirement that such agreements must be consistent with Union law is an aspect of the primacy of Union law and appears to reflect the 'AETR' doctrine of EC law derived from the ECJ judgment in Case 22/70 Commission v. Council [1971] ECR 263 and the provisions of Article 10 EC.

167 FN 34:The new Article 3(2) EC (as inserted by the Reform Treaty) confers an exclusive competence on the Union to conclude an international agreement "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusions may affect common rules or alter their scope".

conference of government representatives. This conference is convened "for the purpose of determining by common accord the amendments to be made to this Treaty"

An alternative procedure is available under the same Article. If the European Council feels that the "extent" of the proposed amendments is not such as to justify consideration by a Convention, it may make a decision to this effect, by simple majority and after obtaining the EP's consent. The European Council then defines the terms of reference for a conference of government representatives and there is no Convention. The amendments take the form of a treaty, which must be ratified by all Member States before it can enter into force.

There is a procedure in case of difficulty in gaining universal ratification. The matter is referred to the European Council if, two years after signature of an amendment treaty, four-fifths of the Member States have ratified it, but one or more have "encountered difficulties in proceeding with ratification". This will not, of course, apply to ratification of the Lisbon Treaty itself.

Article 48(6) (Constitution Article IV-445) on the Simplified Revision Procedure, which has been called the "ratchet clause", allows Treaty changes to be made without the necessity of a new, amending treaty and universal ratification, as required under **Article 48(2)-(5)**. However, some of the features of a treaty amendment are preserved. This Article provides a simplified way of changing the Treaty's provisions in the main areas of Union policy set out in the TFEU. Either Member State governments or the EP or the Commission may submit to the European Council proposals for changes to these policies. For the proposals to be adopted the European Council must first consult the EP and the Commission (plus the European Central Bank if the proposals are for institutional changes in the monetary area) and then it must act by unanimity. The decision thus adopted must be "approved by the Member States in accordance with their respective constitutional requirements." This is not the same thing as treaty ratification, but it creates a possibility for national input and for a national veto.

Under **Article 48(6)** "the decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties"; that would require an amending treaty, using Article 48(2)-(5).

In 2003-04 the British Government supported the simplified revision process, telling the FAC in December 2003 that "You do not have to have the whole panoply of an IGC to have them amended".[168] The present Government has stated: "We support this increased flexibility in decision-making but would only agree to its use when clearly in British interests. The UK will insist that any fundamental change to the Treaties will still require an IGC". **Article 48(7)** provides for so-called *passerelle* procedures. *Passerelle* is a French word meaning "footbridge" and has been called a "bridging" or "escalator" clause in the present context. A *passerelle* clause allows the parties to move from the position set out in the Treaty to a different position by means of a provision in the text itself, without amending the Treaty under Article 48 TEU. There is a provision allowing

[168] Jack Straw, Foreign Affairs Committee Minutes of Evidence, 11 December 2003, at http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmfaff/1233/3102814.htm

national parliaments to block these changes. Supporters of this technique point to efficiency gains, since the process of negotiating a new treaty may be laborious. Opponents argue that a detailed process of negotiation under the terms of treaty law is necessary for important substantive changes.

The second subparagraph of **Article 48(7)** contains an equivalent provision for those laws adopted under the special legislative procedure, providing that if a national parliament makes known its opposition to an initiative within six months the decision will not be adopted. If a decision is adopted the European Council acts by unanimity after obtaining the EP's consent by a majority of its component members.

The Lisbon Treaty has a number of *passerelle* clauses, which allow changes to be made to the TFEU, the main substantive policy and procedure provisions. The present EC Treaty also contains *passerelle* provisions in Articles 42 TEU and 67 TEC, but Lisbon broadens the range of matters which may be transferred from unanimity to QMV. The *passerelles* do not create a free-for-all, however, since they specify procedures that must be satisfied in order for changes to be made.

The broad intention behind amended **Article 48** is to clarify, and to some extent to simplify, the amendment procedures, and thus to move away from the sometimes cumbersome IGCs. The use of the Convention process, already rehearsed in drawing up the Charter of Fundamental Rights and the draft constitution, is aimed at widening input to the process and making it more transparent. Under general treaty law, where a treaty provides for its own amendment, those procedures should be followed.[169] This means that Article 48(2)-(5) would become the method for amendment. The IGCs of the past would be replaced by intergovernmental meetings working (in those cases deemed sufficiently weighty) on the basis of a recommendation made by a Convention.[170] It is debateable whether this system will be simpler or more efficient than the existing one under Article 48 TEU. It has more stages and more actors, which may lead to greater scope for disagreement. On the other hand, it may allow wider input and enhanced credibility.

In the evidence session with the FAC in September 2007 Gisela Stuart expressed concern that certain "minor" amendments could under these provisions become law in the UK through secondary legislation and without any opportunity for parliamentary scrutiny: "The question is [whether] the amending of treaties, changing from unanimity to QMV, could in the UK context be achieved through statutory instruments, which European Standing Committees do not deal with".[171]

3. EU membership and accession

Amended **Article 49** (Lisbon Article 1(57); Constitution Article I-58) concerns eligibility and accession to EU membership. Lisbon sets out changes to the details of the procedure, but accession remains subject to ratification by all the existing and

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169 *Vienna Convention on the Law of International Treaties 1969*, Article 40

170 The EU has used the Convention method twice in recent years, to draft the EU Charter of Fundamental Rights and the Constitution.

171 Q 256, Uncorrected evidence to FAC, 12 September 2007

prospective member states. Under current procedures a state wishing to accede makes an application to the Council. The Council decides the matter by unanimity after consulting with the Commission and having received the assent of the EP, by an absolute majority of its members. Under Lisbon the application would still be made to the Council, but it would then notify the EP and the national parliaments of the application. The Council would act by unanimity, again after consulting the Commission and obtaining the consent of the EP by an absolute majority of its members. The accession arrangements would be embodied in a treaty, as at present, and would be subject to ratification by all Member States and by the acceding state(s).

An addition to this Article requires that: "The conditions of eligibility agreed upon by the European Council shall be taken into account". The IGC Mandate had added, following a proposal by the Dutch Government, a requirement that the 'Copenhagen criteria' for EU membership be taken into account in membership applications.

4. Withdrawal from the Union

Article 49A (Lisbon Article 1(58); Constitution Article I-60) sets out a procedure for a voluntary withdrawal from the Union according to a State's "own constitutional requirements". A State wishing to withdraw must notify the European Council, which will consider the matter and set out negotiating guidelines. The Union will conduct negotiations with the State on this basis, and will conclude an agreement setting out the arrangements for withdrawal and taking into account "the framework for its future relationship with the Union." The Council of Ministers, having obtained the consent of the EP, will conclude the agreement, acting by QMV. The withdrawing state will not participate in discussions or decisions about it in the European Council or in the Council of Ministers.

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

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

New **Article 7a** on the Union and its neighbours may be relevant to the nature of the withdrawal agreement, since the withdrawing state would remain a part of the Union's immediate environment. The explanatory notes from the Convention Praesidium in 2003 argued that this removed the need to create a special associate status for withdrawing states.

There is no provision for withdrawal in the existing EC Treaty. Under general treaty law a state may withdraw from a treaty lacking a withdrawal clause if all the states parties

consent.[172] It must give at least three months notice, except in cases of emergency, and if another state party objects during that time, arbitration must be sought.[173] A state may withdraw without consent if it is established that the parties intended to admit the possibility of denouncing the Treaty or withdrawing from it, or if "a right of denunciation or withdrawal may be implied by the nature of the treaty."[174] The final point is a matter of interpretation. A state withdrawing in this way must give at least 12 months' notice,[175] and this notification must be given to all the other states parties.[176]

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

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

Under **Article 49A(5)**, if a State which has withdrawn from the Union asks to rejoin, it must re-apply under the procedure referred to in Article 49. In other words, it will be dealt with as if it were a new applicant, with no automatic right to rejoin and no special advantages.

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

> We see no need for the Treaties governing membership of the Union to include a specific provision on unilateral withdrawal. It remains open to Parliament to repeal the European Communities Act 1972, the logical consequences of which would be to withdraw from the EU. The terms of such a withdrawal would be for the Government to negotiate with the other member states.[177]

In 2003-4 the Government supported the inclusion of the article in the Constitution and argued that it should be welcomed by 'Eurosceptics' and Europhiles alike. The Foreign Secretary reminded Bill Cash about the 'benefits' of the withdrawal clause for Eurosceptics in the (then) draft constitution because "you could effect [withdrawal from

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172 *Vienna Convention on the Law of International Treaties* 1969, Article 54
173 *Vienna Convention* Article 65, citing Article 33 of the UN Charter on arbitration
174 *Vienna Convention* Article 56
175 Ibid
176 *Vienna Convention* Article 65.
177 HL Deb, 11 January 2000, WA 96-7.

the Union] without having to do it outside of the Treaty".[178] In an article in *Die Welt* in July 2004, Mr Straw wrote that the streamlined procedure for withdrawal was "proof, if more were needed, that this is an organisation of freely co-operating nations.[179]

5. Other final measures

Article 49B (Lisbon Article 1(59); Constitution Article IV-442), like present Article 311 TEC, states that the Protocols and Annexes will form an integral part of the Treaties. This is a new clause in the TEU, extending the application of current Article 311 TEC, which is repealed. It means the Protocols and Annexes will have the full legal effect of the Treaty articles themselves. This is not the case for Declarations attached to the Treaties.

Article 49C (Lisbon Article 1(60); Constitution Article IV-440(2) to (7)) extends the application of the current Article 299 TEC. It includes in the territorial scope of the Treaties all the current EU Member States, referring to the TFEU for specific detail for the various arrangements for Member States' overseas territories.

Amended **Article 53** (Lisbon Article 1(61); Constitution Article IV-447) corresponds with current Article 52 TEU and 313 TEC. It concerns the translation of the Treaty text into the languages of the EU and is supported by a Declaration maintaining the EU's support for the "Union's rich cultural and linguistic diversity" and calling on Member States to inform the Council within six months of Treaty signature of any languages into which translations of the Treaties will be made.

A new **paragraph 2** (Constitution Article IV-448 and Article 53 TEU) provides that the Treaty may be translated into any other languages with official status in particular Member States and deposited in the Council's archives. The British Government said in 2004 that it would consider which languages it would translate the Treaty into nearer the time of the publication of an official version of the Treaty.[180] This Article is supplemented by a Declaration (No. 16) underlining the importance the Union attaches to cultural and linguistic diversity, which is illustrated by the provision on translation.

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

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

180 HC Deb 13 July 2004 c1378-9W

Appendix 1 Parliamentary Scrutiny of the Lisbon Treaty

In its White Paper published in July 2007 the Government stated: "Throughout the process, the Government will also keep Parliament informed in terms of scrutiny, evidence sessions and debates".[181]

In the run-up to the European Council in June 2007 the FAC and ESC asked the Government about the negotiating process for the proposed reform treaty. The then Foreign Secretary, Margaret Beckett, insisted there was no negotiation underway and pointed to the forthcoming IGC as the forum for negotiations. In the FAC evidence session in September 2007 Mr Murphy emphasised Parliament's role in the treaty ratification process, but denied that the IGC was about negotiation:

> The negotiations were in June, we got a deal that we are comfortable with, and it is now about us ensuring that the detail is reflected. The relevant parliamentary Select Committees will want to make sure that we have achieved the detail of our mandate, and that is entirely right and proper, but there are now no negotiations.[182]

The issue as to whether there were or were not negotiations on the mandate was pursued at this and at subsequent Select Committee hearings, along with the question of the provision of the relevant documentation in English to Parliament. Jim Murphy agreed with Richard Younger-Ross that the whole of the IGC process, including the mandate, had been agreed in less than a week[183] and the rushed nature of the process was tackled by the ESC in its October 2007 Report.[184]

Since EU governments agreed the Mandate in June 2007 EU reform in general or the new Treaty in particular has been the subject of ESC and FAC reports and parliamentary debate. Details are as follows:[185]

<u>Debates & Statements on the Reform/Lisbon Treaty</u>

Lords debate on Queen's speech (second day) on foreign and European affairs, international development and defence, HC Deb 7 November 2007 cc23-138

Prime Minister's Statement on the informal European Council meeting in Lisbon, HC Deb 22 October 2007 cc19-38

Statement by Jim Murphy on the General Affairs and External Relations Council, HC Deb 19 October 2007 cc61-4WS

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181 Cm 7174, July 2007 at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

182 Uncorrected evidence to FAC, 12 September 2007 at http://pubs1.tso.parliament.uk/pa/cm200607/cmselect/cmfaff/uc166-iii/uc16602.htm

183 Q 233

184 ESC 35th Report paras 7-12

185 This information was compiled by Christine Fretten, International Affairs and Defence Section.

Nigel Evans, Westminster Hall adjournment debate on the case for a referendum on the proposed EU Constitutional Treaty, HC Deb 11 July 2007, cc479-86WH. European

Commons Scrutiny Committee

HC 179 2007-08, First Special Report, "European Union Intergovernmental Conference: Government Responses to the Committee's Thirty-Fifth Report of Session 2006-07 and The Committee's Third Report of Session 2007-08", 17 December 2007

HC 16-iii 2007-08, Third report, with minutes of proceedings and memoranda, "Intergovernmental Conference for a Reform Treaty" 14 November 2007

HC 41-xxxvi 2006-07, Thirty-eighth report, with minutes of proceedings. (Votes and Proceedings for 24 October gives the paper number as HC 41-xxxviii) 24 October 2007

HC 1014 2006-07, Thirty-fifth report with memoranda and minutes of proceedings, "European Union Governmental Conference", 8 October 2007

Foreign Affairs Committee

HC 120-I & II, Third Report "Foreign Policy Aspects of the Lisbon Treaty", 20 January 2008

HC 120-iii, "Developments in the European Union", Oral Evidence given the Foreign Secretary, David Miliband, 12 December 2007

HC 166-iv, "Developments in the European Union", Oral Evidence given by the Foreign Secretary, David Miliband, 10 October 2007

HC 166-iii 2006-07, "Developments in the European Union", Oral Evidence given by Jim Murphy MP, Minister for Europe, Ms Shan Morgan, Director, EU and Ms Shelagh Brooks, Legal Adviser, Foreign and Commonwealth Office, 12 September 2007

HC 166-ii, 19 June 2007, Developments in the European Union, Oral Evidence given by Rt Hon Margaret Beckett MP, Mr Anthony Smith and Mr Patrick Reilly

21 November 2007, Oral Evidence Session on "Developments in the EU: Foreign Policy Aspects of the EU Reform Treaty".

Lords EU Committee

"Impact of the Reform Treaty", Oral Evidence 3, 6, 10, 13 and 19 December, 14, 20 and 27 November 2007

Command Papers

Cm 7294, EC Treaties No. 13 (2007), *The Treaty of Lisbon*, 13 December 2007

Cm 7310, *Consolidated Texts of the EU Treaties as Amended by the Treaty of Lisbon*, January 2008

Cm 7311, *A Comparative Table of the Current EC and EU Treaties as Amended by the Treaty of Lisbon*, January 2008

Deposited Papers

DEP2007-0010: EU Reform Treaty: annex to a letter dated 11/10/2007 from the Foreign Secretary to the Chairman of the Foreign Affairs Committee regarding the UK's "red line" issues in the treaty. Date Laid: 11.10.2007

DEP2007-0025: Advice issued by the Dutch Council of State on the mandate of the Intergovernmental Conference to revise the Treaty on the European Union and the Treaty establishing the European Community. Date Laid: 09.10.2007

DEP 07/1720;HINF 2007/1502: Letter dated 10/07/2007 from Jim Murphy MP to John Redwood MP regarding the Charter of Fundamental Rights. Date Laid: 10.07.2007.

Appendix 2 Qualified Majority Voting Extensions

The Minister for Europe, Jim Murphy, stated in July 2007:

> The Government expect the new Reform treaty to contain extensions of qualified majority voting (QMV) under 50 articles. However, the number of extensions that will apply to the UK will be significantly less than 50. We expect 13 extensions will not apply to the UK. Nine of these relate to Justice and Home Affairs (where we have secured an extension of our existing opt-in mechanism). Three relate to the euro (where our opt-out applies). One relates to social security (where we will have an emergency brake including a veto power).[186]

He set out 50 areas of QMV as follows:

Existing areas of policy activity moved from unanimity to QMV

1. Immigration and frontier controls (UK opt-in)
2. Judicial co-operation in criminal matters (UK opt-in)
3. Minimum rules for the definition of criminal offences and sanctions (UK opt-in)
4. Eurojust (structure, operation, field of action and tasks) (UK opt-in)
5. Police co-operation (data sharing and training) (UK opt-in)
6. Europol (structure, operation, field of action and tasks) (UK opt-in)
7. Social security measures to facilitate free movement of workers (emergency brake including a veto power)
8. Co-ordination of measures to facilitate self-employment in other member states
9. Measures implementing the common transport policy (removes existing limited derogation on the common transport policy)
10. Incentive measures to promote cultural awareness and diversity

Existing institutional/procedural measures moved from unanimity to QMV

11. Appointment of European Central Bank (ECB) executive board (UK opt-out)
12. The procedures for Comitology processes (rules enabling member states to oversee the Commission's exercise of its implementing powers)
13. Adoption of detailed financial rules for the establishment and implementation of the budget (including accounting and budgetary principles)
14. Specialised courts (establishment of specialised first instance courts)
15. Proposals for amending the statute of the European Court of Justice (ECJ) (the statute governs the terms of appointment, organisation and procedures of the ECJ)
16. Proposals from the Commission for amendments to certain parts of the statute of the European System of Central Banks
17. Presidency of Council configurations (arrangements for rotation)

Existing areas of policy activity where there is a new specific legal base subject to QMV

18. Measures necessary for the use of the euro (UK opt-out)

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[186] HC Deb 24 July 2007 c1057W at http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070726/text/70726w0055.htm#0707302007571

19. Measures relating to euro group co-ordination and surveillance (applicable only to eurozone members) (UK opt-out)
20. Establishment of integrated management system for external borders (UK opt-in)
21. Mechanism for peer review of member states' implementation of policies in the Justice and Home Affairs (JHA) area (UK opt-in)
22. Measures to promote crime prevention (UK opt-in)
23. Implementation of own resources decisions
24. Provisions enabling repeal of the aspects of an article related to state aids policy and the effect of the past division of Germany
25. Procedure for entry into the euro (applies only to recommendations from eurozone members to the Council on authorising entry)
26. Provisions enabling repeal of an article on transport policy as it affects areas of Germany affected by its past division
27. Authorisation, co-ordination and supervision of EU-level intellectual property rights protection
28. Clarification of how EU rules and principles apply to services of general economic interest (broadly, public services)
29. Measures to facilitate diplomatic and consular protection
30. EU humanitarian aid operations
31. Energy (measures on energy markets, energy security and energy saving)
32. Tourism (promotion of competitiveness and best practice)
33. Civil protection (promoting co-operation among member states to prevent or protect against natural or man-made disasters)
34. Implementation of solidarity clause (assistance, if requested, in the event of a natural or man-made disaster)
35. Creation of a 'start-up fund' for urgent Common Foreign and Security Policy (CFSP) measures (for 'Petersberg' tasks)
36. Urgent EU aid to third countries
37. Definition of a general framework for implementing the existing Common Commercial Policy

New areas of EU policy activity subject to QMV

38. European Research Area (removal of barriers to free flow of research)
39. Space policy (measures to promote joint initiatives and research and development)
40. Incentive measures to promote sport
41. Administrative co-operation (capacity-building measures in new member states)
42. Membership of structured co-operation in defence (procedural issues relating to its establishment)

New institutional/procedural measures subject to QMV

43. Appointment of European Council President by the European Council
44. Appointment of High Representative of the Union for Foreign Affairs and Security Policy by the European Council
45. Council review of general rules on composition of the Committee of the Regions and European Economic and Social Committee
46. Citizens' initiatives (petition procedure)
47. Ensuring an open, efficient and independent European administration
48. Negotiation of withdrawal agreement
49. Operating rules for a consultative EU Judicial appointments panel (including

composition)
50. Role of the High Representative of the Union for Foreign Affairs and Security Policy in CFSP implementing measures (measures proposed by the High Representative following a specific request from the European Council).

The following table looks in more detail at QMV changes. The Article numbers in the left hand column are those of the consolidated Treaty, incorporating the Lisbon amendments. Treaty articles marked in bold are new articles, or those that will move from unanimity or cooperation to QMV. The equivalent Article in the EU Constitution is given in brackets.

Qualified Majority Voting as amended by the Lisbon Treaty (consolidated text)	**Present Procedure**
Treaty on European Union	**Treaty on European Union**
11 (I-47(4)): determining procedures for citizens' initiative, including minimum number of Member States required	New article
15: European Council to elect full-time President	New article
16(6) & 236 TFEU (I-24(4)): European Council to establish list of Council configurations other than Foreign Affairs Council	New article
16(9) & 236 TFEU (I-24(7): European Council to set conditions for rotation of Council Presidency	Article 203 TEC, unanimity
17(7) (I-27(1)): European Council proposal to EP for candidate for Commission President or for new candidate	Article 214 TEC: QMV
18(1) (I-28): European Council to appoint High Representative of the Union for Foreign Affairs and Security Policy	New article
41: setting up start-up fund for some CSDP activities	New article
46(2) (III-312(2)): decision to set up "permanent structured cooperation", join it or suspend it. Decisions within the cooperation by unanimity Council decision by QMV on permanent structured cooperation and 31(2) (III-312(2)) on list of participating Member States after consulting Foreign Affairs Minister **46(3) (III-312(3)): Council will confirm participation of Member State fulfilling the criteria for permanent structured cooperation (QMV of participating states)** **46(4) (III-312(4)): Council may suspend a Member State from a structured cooperation (QMV among participating states)New article**	New article
50 (I-60): conclusion of agreement with Member State wishing to withdraw from Union and with the Union, with EP consent	New article

Treaty on the Functioning of the European Union	Treaty Establishing the European Community
14 (III-122): establish principles and conditions, especially economic and financial, on which services of general interest should operate	16 TEC: general statement on making sure that such services operate within the requirements of the Treaty
15(3) (I-50(3) and (4)): general principles and limits governing the right of access to Union documents and institutions' rules of procedure on access to documents	Article 255 TEC (co-decision with QMV)
16 (I-51(2)): protection of personal data by Union institutions and by Member States when carrying out Union law	Article 286 TEC: co-decision with QMV
18 (III-123): rules to prohibit discrimination on grounds of nationality	12 TEC: co-decision with QMV
19(2) (III-124): basic principles for incentive measures to support Member State action in 18, excluding harmonisation	13 TEC: co-decision with QMV
20 (III-125): measures on freedom of movement	18 TEC: co-decision with QMV
21(2) (III-134): freedom of movement	TEC: co-decision with QMV
24 (I-47(4)) Procedures for citizens' initiative	New article
31(III-201(2): Council adoption of decision defining Union action or position	23 TEU: QMV for decisions adopting a Union action or position
33 (III-152): measures to strengthen customs cooperation between Member States and between Member States and the Commission.	135 TEC: co-decision with QMV
43 (III-231(2)): common organisation of agricultural markets and other CAP and CFP measures	Article 37 TEC: QMV with EP consultation
46 (III-134) Freedom of movement for workers	40 TEC: co-decision with QMV
48 (III-136b): freedom of movement for migrant workers – social security provisions (2) contains referral clause: if Member State thinks its own social security system would be affected, QMV procedure suspended and matter referred to European Council, which may refer draft back to Council or ask Commission to submit new proposal	42 TEC: co-decision with unanimity
50 (III-138): freedom of establishment as regards a particular activity	44 TEC: co-decision with QMV
51 (III-139): exempting activities from application of sub-section excluding "exercise of official authority" from freedom of establishment rules	45 TEC: QMV
52 (III-140): coordinate national provisions on treatment of foreign nationals	46 TEC: co-decision with QMV
53 (III-141): measures to make it easier for persons to take up and pursue activities as self-employed persons	47 TEC: co-decision with QMV; unanimity in specific circumstances regarding training and conditions of access
56 (III-144): measures to extend freedom to provide services within Union to third country nationals in the Union	49 TEC: QMV
59 (III-147): liberalisation of a specific service	52 TEC: QMV
64(2) (III-157): movement of capital to and from third countries involving direct investment, establishment, provision of financial services or admission of securities to capital markets	57 TEC: QMV
75 (III-160): administrative measures regarding	60 TEC: QMV

capital movements and payments (e.g. freezing funds, assets etc)	
77(2) (III-265(2)): measures on common visa policy, short-stay residence permits, border controls, freedom of third country nationals to travel in Union for short period; gradual establishment of integrated external border management; absence of internal border controls.	62 TEC: unanimity for 5-year transitional period under Article 67; then decision by unanimity to decide which areas to be decided by co-decision with QMV. Certain elements of this Article by QMV from entry into force of Amsterdam (May 1999). QMV for elements of 67(1), except for family law aspects
78(2) (III-266(2)): measures on: uniform status of asylum for third country nationals, uniform status of subsidiary protection for third country nationals, common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for granting or withdrawing uniform asylum/subsidiary protection; standards for conditions for reception of asylum applicants; cooperation with third countries to manage inflows.	63(1) and (2), 64(2) TEC: unanimity for 5-year transition period, under Article 67, then QMV. UK opt-in.
79(2) (III-267(2): measures on: conditions of entry/residence, standards for long-term visas/permits, including for family reunion; definition of rights of third country nationals living legally in Union; illegal immigration and residence in Union, including removal and repatriation; combating person trafficking, especially women and children.	
79(4) (III-267(4): incentive and support measures to promote integration of legal third country nationals, excluding harmonisation.	
81(2) (III-269): judicial cooperation in civil matters, especially for the proper functioning of the internal market (except for family law measures – see below)	65 and 66 TEC: as above
82(2) (III-270(1)): judicial cooperation in criminal matters, except aspects of criminal procedure identified by a European decision	31(1) TEU
83(1) & (2)(III-271): minimum rules on definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions and (2), minimum rules regarding definition of criminal offences and sanctions in the area concerned, but with referral mechanism to European Council and possible withdrawal.	New article
84 (III-272): measures to support Member States in crime prevention.	New article
85 (III-273): Europol's structure, operation, field of action, tasks, arrangement for EP and national parliament involvement in evaluating Eurojust activities, taking into account national rules and practices regarding criminal investigations.	31(2) TEU: Council to encourage cooperation
87(1) (III-275(2)): police cooperation: collection, storage, processing, analysis and exchange of information; staff training and exchange, equipment research; common investigative techniques, but operational cooperation between authorities by unanimity.	30(1) TEU: cooperation among Member States but under conditions and limitations laid down by Council for operations in another Member State (Article 32)

88 (III-276): Europol's structure, operation, field of action and tasks; procedures for scrutiny by EP and national parliaments.	30(2) TEU: as above
91 (III-236): transport across Member States: conditions for non-state carriers to operate in Member State; improving safety, other appropriate measures. Measures must take account of effects on standard of living.	Articles 70,71 TEC: co-decision with QMV, except unanimity for where serious effect on standard of living or employment
100 (III-245): appropriate measures for sea and air transport. **No unanimity derogation**.	80 TEC: QMV, but derogation as for 71
157 (III-279): support measures to achieve competitiveness, excluding harmonisation	157 TEC: co-decision with QMV
165(4) (III-282(3)): incentive actions in education, exchanges, cooperation, mobility, development of sport, distance learning, excluding harmonisation	149 TEC: co-decision with QMV
166(4) (III-282(3): measures to improve vocational training	150 TEC: co-decision with QMV
168(5) (III-278): public health measures to contribute to objectives of safety of organs, substances of human origin, blood etc; veterinary and phytosanitary measures, and incentive measures to combat major cross-border health scourges, including tobacco use and abuse of alcohol.	152 TEC: co-decision with QMV
169 (III-235): consumer protection measures which support or supplement and monitor Member State policy	153 TEC: co-decision with QMV
172 (III-247): guidelines and measures for Trans-European Networks (TENs)	155 TEC: coordination among Member States and with Commission
175 (III-221): specific actions outside Structural Funds	159 TEC: co-decision with QMV
177 (III-223) defining tasks, priorities and organisations of Structural Funds and to set up Cohesion Fund, but first Cohesion Fund after entry into force of Constitution will be by unanimity.	161 TEC: unanimity; QMV after January 2007 if multiannual financial perspective adopted by then.
178 (III-224): implementing measures regarding the ERDF	162 TEC: co-decision with QMV
182 (III-251(3) and (5): establishing programmes to implement multi-annual framework programme and establishing measures to implement European Research Area	166 TEC: co-decision and QMV
188 (III-252-3): rules for participation of undertakings, research centres, universities; rules for dissemination of research results for implementing multi-annual framework programme; for establishing supplementary programmes to the above; for participating in the above.	172 TEC: co-decision and QMV
189(2) (III-254(2)): measures for drawing up a European space policy	New article
194(2) (III-256(2)): energy measures, except if primarily of a fiscal nature	New article
195(2) (III-281(2)): measures in tourism to complement Member State action (excluding harmonisation)	New article
196(2) (III-284(2)): measures to encourage cooperation in civil protection, to protect against man-made and natural disasters, excluding harmonisation	New article
197(2) (III-285(2)): measures to help Member States to implement Union law	New article

207(2) III-217: measures to implement the Common Commercial Policy and negotiating and concluding agreements with one or more states or international organisations	133 TEC: QMV; but unanimity for agreements where provisions require unanimity for internal rules or where Community does not have conferred powers; by unanimity for agreements on intellectual property
209 (III-317): measures to implement the development cooperation policy	179 and 181 TEC: co-decision with QMV; unanimity when internal rules are decided by unanimity (ref. to Article 300)
212(2) (III-319(2)): measures to implement economic, financial and technical cooperation, especially aid, with third countries other than developing countries	181a TEC: QMV, but unanimity for association and accession agreements
214(3) (III-321(3)): measures defining framework in which Union's humanitarian operations are implemented	New article
215(1) (III-322): measures breaking economic or financial relations with a third country on proposal from Foreign Affairs Minister	301 TEC: QMV
218(8) (III-325): concluding agreements to which the ordinary legislative or special legislative procedure applies and for adoption of agreements with third parties: QMV in procedure but unanimity where there is a unanimity requirement for the adoption of a Union act in that area, also for Association Agreements and accession to European Convention on Human Rights and others in this Article.	300 TEC: QMV, with certain provisions for unanimity
224 (III-331): rules on political parties at EU level	191 TEC
245 (III-381): amend ECJ Statute, except title 1 and Article 64	245 TEC: unanimity
257 (III-359): establish specialised Court attached to High Court (Former CFI); rules on organisation and jurisdiction of Court	225a TEC: unanimity
261 (III-363): giving ECJ unlimited jurisdiction regarding penalties	229 TEC: EP and Council to adopt under Treaty provisions
283 (III-382) European Council to appoint by QMV executive board of ECB and President, Vice-President, and executive board	112, 113 TEC: common accord of heads of state or government
291 (I-37): arrangements for control of implementing powers	202 TEC: unanimity with EP opinion
298 (III-398): establish provisions for an open, efficient, independent European administration to support institutions, bodies, offices and agencies of the Union	New article
314(5) (III-404)(5): joint text with EP on law establishing budget	272 TEC: QMV special procedure
322 (III-412): procedure for adopting and implementing budget and auditing accounts; rules for checking responsibilities of financial actors, especially authorising and accounting officers	279 TEC: unanimity, with EP consultation. QMV after January 2007
325 (III-415): measures to combat fraud against the financial interests of the Union	280 TEC: co-decision with QMV
336 (III-427): staff regulations of officials and conditions of employment of other servants of the Union	283 TEC: QMV
338 (III-429): measures for the production of statistics	285 TEC: co-decision with QMV