

## AMENDMENT FORM

### Suggestion for amendment of Article : 11

By Mr Hain

Status : Member

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1. The Union shall have exclusive competence in the following areas:
    - customs union,
    - common commercial policy, except as provided in Article [equivalent of present Article 133]
    - monetary policy for the Member States who have adopted the euro,
    - the conservation of marine biological resources under the common fisheries policy.
  2. *Delete. This is currently case law. Attempting to codify it in this way results in oversimplification. So best left for case law. All the caveats that would be required to make this accurate would also make it far too complex for a constitution.*
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### Explanation (if any) :

*The Community does not have exclusive competence in relation to measures to ensure free movement in the internal market. This was recently confirmed by the European Court of Justice in the case of R (British American Tobacco & Imperial Tobacco) –v- Secretary of State for Health – Case C-491/01; judgement, 10 December 2002, not yet reported. In that case, the Court said of Article 95: “...that provision does not give it [the Community legislature] exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning...” (paragraph 179). On the same principles, it follows that the Community does not have exclusive competence in the area of competition, under Articles 81-86 EC.*

*If the Community were to have exclusive competence in these areas, the Member States would have no power to take any measures (eg, in relation to the protection of health or consumer protection) which could affect free movement, nor to establish rules to promote competition. Plainly the Member States currently exercise powers in these areas. The Community has power to harmonise the rules in these areas, but authority to take action in these areas is effectively shared.*

*While the ECJ has held that the Common Commercial Policy is an area of exclusive competence, its decisions were based on Article 133 EC (formerly Article 113 EC) in its pre-Nice form. The changes to Article 133 introduced by the Treaty of Nice both add new areas of Community competence and introduce exceptions – see paragraphs (5) and (6) of Article 133. Draft article 11 must take account of these changes, in order accurately to codify the jurisprudence. This draft does so by way of a general exception. It is contrary to the aim of simplification to refer the reader to another part of the Treaty, as this draft does, but the alternative would be a relatively lengthy exposition, which would unbalance article 11.*