

CONV 598/03

CONTRIB 267

**BEGELEIDENDE NOTA**

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van: het secretariaat

aan: de Conventie

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**Betreft: Verslag van de Beperkte commissie Europese Unie van het Hogerhuis,  
ingediend door Lord Tomlinson en Lord MacLennan  
"Bijdrage aan de besprekingen van de Conventie"**

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De secretaris-generaal van de Conventie heeft van Lord Tomlinson en Lord MacLennan, plaatsvervangende leden van de Conventie, het verslag van de Beperkte commissie Europese Unie van het Hogerhuis ontvangen, dat zij in eigen naam als bijdrage aan de besprekingen van de Conventie indienen.

HOUSE OF LORDS

SESSION 2002–03  
9th REPORT

SELECT COMMITTEE ON  
THE EUROPEAN UNION

THE FUTURE OF EUROPE:  
CONSTITUTIONAL TREATY—DRAFT  
ARTICLES 1–16

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# NINTH REPORT

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25 FEBRUARY 2003

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By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

## THE FUTURE OF EUROPE: CONSTITUTIONAL TREATY—DRAFT ARTICLES 1–16

CONV 528/03 Draft of Articles 1 to 16 of the Constitutional Treaty

### PART 1: INTRODUCTION

#### 1. PURPOSE OF REPORT

1. The purpose of this Report is to bring to the attention of the House the draft Treaty Articles now being discussed in the Convention on the Future of Europe. The text of many if not all of the draft Articles is likely to change over the coming weeks and months. Nonetheless the Committee<sup>1</sup> takes the view that the House might welcome sight of the text as soon as possible together with the preliminary reactions and observations of the Committee.

2. It seems likely that the text of the new Treaty will appear in stages. As drafts of groups of Articles are settled by the Praesidium, the Convention steering group, they will be made available for discussion in the Convention plenary. The objective is to reach consensus on a draft (complete) Treaty by the end of June. Bringing forward draft Articles in groups may not be ideal—they cannot be considered in the round and the effect of the broad provisions in Part One (Constitutional Structure) of the draft Treaty may not be comprehensible without seeing the detail in Part Two (Union Policies and their Implementation).<sup>2</sup> But it appears to be the most practical way of achieving that objective and of enabling the fullest debate in the Convention, national parliaments and more generally.

3. Set out below is the text of each of the first 16 Articles. Each Article is followed by an Explanatory note (the text of which has been prepared by the Convention Secretariat) and a Commentary added by the Committee.

4. The ordering of the first 16 Articles follows that of the Preliminary draft Constitutional Treaty<sup>3</sup> (“the skeleton text”) published in October last year. The skeleton text is reproduced in Appendix 2.

**5. We make this Report to the House for information.**

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<sup>1</sup> See Appendix 1 for membership of the European Union Committee and of Sub-Committee E (Law and Institutions) which undertook the detailed scrutiny work.

<sup>2</sup> It is also proposed that there will be a Part Three (General and Final Provisions).

<sup>3</sup> Doc. CONV 369/02. 28 October 2002.

## 2. TITLE I: DEFINITION AND OBJECTIVES OF THE UNION

### Article 1: Establishment of the Union

1. Reflecting the will of the peoples and the States of Europe to build a common future, this Constitution establishes a Union [entitled ...], within which the policies of the Member States shall be coordinated, and which shall administer certain common competences on a federal basis.
2. The Union shall respect the national identities of its Member States.
3. The Union shall be open to all European States whose peoples share the same values, respect them and are committed to promoting them together.

#### Explanatory note

*“This Article establishes the Union and describes its fundamental characteristics. In response to requests made at the plenary, the wording proposed is designed to adequately express the dual dimension of a Union of States and of peoples of Europe in terms appropriate to a Constitutional Treaty.*

*Because of its fundamental political importance, it was deemed advisable to emphasise in Article 1 the Union's respect for the national identity of its Member States; Article 9(6) then lists certain features of national identity which more specifically require respect in the legal sense when the Union is exercising its competences.*

*It also seems appropriate already to list the conditions for membership of the Union in Article 1, although the procedures for accession of new Member States, suspension of rights and withdrawal from the Union would be dealt with in more detail in Title X.”*

### 2.1. Commentary

6. A preliminary point that needs to be made is that no draft preamble has yet been produced. Any preamble could be purely formal, reciting the history of the formation of the text that follows. But it might also contain (general) statements relating to the nature and objectives of the Union. Any such statements might colour the later Articles and could be used as an aid to interpretation, for example before the Court of Justice.

7. Article 1(1) leaves a space for the name of the Union to be inserted. It will be recalled that last October's skeleton text floated four possibilities: European Community, European Union, United States of Europe, and United Europe. We favour the retention of “European Union”. It is well-known and the least controversial.

8. As the Explanatory note indicates, Article 1(1) has been crafted so as to “express the dual dimension of a Union of States and of peoples of Europe”. But the new Treaty will be, and the Union will be established by an agreement between independent sovereign States, entered into by representatives of the governments of Member States. Whether and how the “peoples of Europe” will be consulted on the final text in advance of ratification will be a matter for the constitutional requirements of individual Member States. Given the paramount importance of this Treaty each Member State will no doubt consider through referendums or other constitutional means how best to ensure that the new Constitution reflects “the will of the peoples of Europe”. The term “peoples” is itself unclear (see paragraph 16 below).

9. Article 1(1) also defines the fundamental twofold function of the Union: coordinating the policies of the Member States; and administering certain common competences. It is noteworthy that the Article speaks of *the* policies of Member States being coordinated but only *certain* common competences being administered. Further, the draftsman has retained the words “on a federal basis” from the skeleton text. This phrase has, not unexpectedly, attracted much media attention and undoubtedly will be the subject of controversy. And, indeed, the words raise questions as to the intended basic character of the Union. “Federal” may have a different meaning in other languages and imply different things in the different national political cultures and psyches. The German, *föderal*, suggests decentralisation and a significant degree of regional autonomy whereas for some the English word, *federal*, when used in a European context, imports a high degree of centralisation. We wonder whether “on

a devolved/delegated basis” might not be nearer to what the draftsman had in mind. “At the Union level” might be a less politically sensitive alternative.

10. Article 1(2) is not new. It restates what is presently Article 6(3) of the Treaty on European Union (TEU). Cultural diversity is specifically recognised in Article 3(3) (below). Article 1(2) is repeated verbatim in Article 9(6), but there the statement is amplified to show how the obligation relates to the political and constitutional structures of the Member States.

11. Article 1(3) replaces Article 49 of the TEU (“Any European State which respects the principles set out in Article 6(1) [TEU] may apply to become a member of the Union”). It is noteworthy that while the Union appears to remain a Union of States the criterion for membership is defined by reference to “peoples sharing” the same values as the Union (set out in Article 2 – below) rather than “States respecting” those values. The change from “may apply” to “shall be open” also raises a question as to the continuing nature of the requirement in Article 1(3), especially if there is included in the new Treaty some provision for “expulsion” or withdrawal of States of the Union (see Articles 43-46 of the skeleton treaty).

12. Finally, as has been noted by a number of commentators, Article 1 contains no equivalent to the second paragraph of Article 1 of the TEU: “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe ...”. This is a significant omission. It waits to be seen whether such words will be reintroduced, perhaps via the preamble—“an ever closer union among the peoples of Europe” was mentioned in the first preambular statement to the Treaty of Rome. The reason for the omission may, however, be that the framers of the Constitution take the view that the desired “ever closer union” has been achieved.

## **Article 2: The Union’s values**

1. The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity.

### **Explanatory note**

*“This Article concentrates on the essentials – a short list of fundamental European values. Further justification for this is that a manifest risk of serious breach of one of those values by a Member State would be sufficient to initiate the procedure for alerting and sanctioning the Member State (see Article 45 of the preliminary draft Treaty which would incorporate the mechanism set out in Article 7 TEU), even if the breach took place in the field of the Member State's autonomous action (not affected by Union law). This Article can thus only contain a hard core of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society practising tolerance, justice and solidarity; on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are subject to sanction.*

*That does not, of course, prevent the Constitution from mentioning additional, more detailed elements which are part of the Union's "ethic" in other places, such as, for instance, in the Preamble, in Article 3 on the general objectives of the Union, in the Charter of Fundamental Rights (which, unlike this Article, does not, however, apply to autonomous action by the Member States), in Title VI on "The democratic life of the Union" and in the provisions enshrining the specific objectives of the various policies.”*

## **2.2. Commentary**

13. Article 2 is derived from Article 6 TEU. Some of the language has changed. So the Union now has “values”, rather than “principles”, to be respected. “Human dignity” has been added to “liberty, democracy, the rule of law and respect for human rights”. Respect for human dignity is also assured by Article 1 of the EU Charter of Fundamental Rights.<sup>1</sup> That “human dignity” should be added and take precedence is justifiable. The preamble to the 1948 Universal Declaration of Human Rights provides: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

<sup>1</sup> Article 1 of the Charter declares that “human dignity is inviolable. It must be respected and protected”.

14. The second sentence is new. The Union's aim to be "a society at peace" is not to be found in the earlier texts. Its inclusion reflects the endeavours of the founding fathers of the European Coal and Steel Community (ECSC) and the (then) Common Market, and takes on an added significance in the light of the forthcoming enlargement (particularly to the East) and further enlargement (into the Balkans) now beginning to be discussed. "Justice" and "solidarity" are terms already found in the Treaties. But "tolerance" is new. It is unclear what its practice is intended to embrace in the context of the Union.

### **Article 3: The Union's objectives**

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall work for a Europe of sustainable development based on balanced economic growth and social justice, with a free single market, and economic and monetary union, aiming at full employment and generating high levels of competitiveness and living standards. It shall promote economic and social cohesion, equality between women and men, and environmental and social protection, and shall develop scientific and technological advance including the discovery of space. It shall encourage solidarity between generations and between States, and equal opportunities for all.
3. The Union shall constitute an area of freedom, security and justice, in which its shared values are developed and the richness of its cultural diversity is respected.
4. In defending Europe's independence and interests, the Union shall seek to advance its values in the wider world. It shall contribute to the sustainable development of the earth, solidarity and mutual respect among peoples, eradication of poverty and protection of children's rights, strict observance of internationally accepted legal commitments, and peace between States.
5. These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competences are attributed to the Union by this Constitution.

#### **Explanatory note**

*"The philosophy of this Article is to set out the general objectives justifying the very existence of the Union and its action for its citizens in a more cross-sectoral fashion and not to list the specific objectives pursued by the various policies of the Union which are to be found in Part Two of the Treaty.*

*The fundamental difference between this Article and Article 2 therefore needs to be emphasised: while Article 2 enshrines the basic values which make the peoples of Europe feel part of the same "union", Article 3 sets out the main aims justifying the creation of the Union for the exercise of certain powers in common at European level."*

### **2.3. Commentary**

15. The Union's objectives are currently listed in Article 2 TEU and Article 2 TEC. Some of those listed in the new Article 3 are new, some well-established. The objective of promoting peace may be new. The TEU currently includes, as an objective of Common Foreign and Security Policy (CFSP): "to preserve peace and strengthen international security". The new reference in Article 3(1) may be intended to be more extensive but is not out of keeping with statements in the earlier Treaties. The Treaty of Paris (ECSC) referred to the safeguarding of world peace, the Treaty of Rome to "an increase in stability", and the Maastricht Treaty to "the historic importance of the ending of the division of the European continent". Does Article 3(1) "peace" mean peace in the EU or peace internationally or both? Should it be distinguished from "peace between States" in Article 3(4)?

16. "The well-being of its [the Union's] peoples" is new. Its meaning is also unclear. Does "peoples" refer to EU citizens only? Or does it also include third country nationals and, if so, only those lawfully in the Union? How does "peoples" differ from Member States or nations? What about minorities?

17. Article 3(2) refers to "sustainable development based on balanced economic growth and social justice". Currently in Article 2 TEC we have "harmonious, balanced and sustainable development of economic activities", and, in Article 2 TEU, "balanced and sustainable development in particular through the creation of an area without internal frontiers". The new reference to "sustainable development" appears to be a more general, broader term encompassing both economic and social policies.

18. There is language in the first sentence of Article 3(2) which may be understood as meaning that all Member States have an obligation to enter the Euro zone. We return to this issue when considering Article 13.

19. The term “social justice” is new, as is “aiming at full employment”. Article 2 TEC refers to “a high level of employment and social protection”. The new text may be controversial. The meaning of “full employment” is unclear and there are concerns that this objective could impinge on national economic policy. The reference to “scientific and technological advance including the discovery of space” is also new.<sup>1</sup> The provision would have significant financial implications if the underlying intention is that the EU should commit resources to a space research programme on US or Russian lines.

20. Solidarity has often been used in the Treaties, in various contexts<sup>2</sup>, but “solidarity between generations” is new and is of uncertain meaning. “Equal opportunities for all” is also a new objective.

21. Article 3(3) includes a reference to cultural diversity. But this has not previously been linked with the notion of an area of freedom, security and justice. Article 151(1) TEC provides: “The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.

22. Article 3(4) is new and emphasises the “external” dimension of EU policies and the potential role of the EU as an international actor with one voice (“defending Europe’s independence and interests”). Some of the terms are unclear. For example, what is sustainable development “of the earth” and to what extent is it different from “sustainable development” in Article 3(2)? Is Article 3(2) referring to sustainable development within the EU and Article 3(4) to sustainable development globally?

23. The various references to “peace” (Articles 2, 3(1) and (4)) raise similar questions. “Independence”, “values” and “peace” can all be found in Article 11 TEU, which states as CFSP objectives:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the UN Charter
- to strengthen the security of the Union in all ways
- to preserve peace and strengthen international security
- to promote international cooperation
- to develop and consolidate democracy and the rule of law

So “peace” can be found in the CFSP context, where it is linked to external action. But the word is now used to refer also to the EU itself. Article 2, setting out the Union’s values, provides that the Union’s aim is “a society at peace” (see Article 2 above).

24. Article 3(5) refers to the pursuit of the Union’s objectives by “appropriate means, depending on the extent to which the relevant competences are attributed to the Union by this Constitution”. It is unclear what is meant by “appropriate” in this context, and in particular whether Article 3(5) is doing anything more than stating the requirement that the Union must abide by the principles of conferral, subsidiarity and proportionality set out in Article 8(1).

25. It is noteworthy that Article 3 does not include, as an objective of the Union, “to maintain in full the *acquis communautaire* and build on it ...”. The no-ratchetting back provision (currently the fifth objective listed in Article 2 TEU) was a key element in the compromise reached at Maastricht between those Member States who wanted a federal Europe and those who did not. The omission is significant and, it would seem, not accidental. The new Treaty may not contain an explicit repatriation clause. But Article 12(3), considered further below, appears to contemplate the possibility of certain competences being returned to Member States (“Where the Union ... ceases to exercise its competence ... the Member States may exercise theirs”).

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<sup>1</sup> The Commission has recently published a Green Paper on European Space policy (COM (R003) 17 final). It gives an overview of the state of the European space sector and poses a series of questions as to how the Union’s role in this area should evolve, with particular reference to the respective roles of the Commission and the European Space Agency (ESA). The Green Paper suggests that it might be desirable to grant the Union competence in space and seeks views on this.

<sup>2</sup> There are references to solidarity in the preambles to both the TEU and TEC. The term is also used in Article 11(2) TEU and Article 2 TEC.



#### **Article 4: Legal personality**

1. The Union shall have legal personality.

#### **Explanatory note**

*“In accordance with the recommendation from Working Group III (CONV 305/02), this Article confers legal personality on the Union.*

*An Article on the Union's legal capacity (see Article 282 TEC), given its highly technical nature, should appear in Part Two of the Constitutional Treaty.”*

#### **2.4. Commentary**

26. The European Community has legal personality (Article 281 TEC) and has, in each of the Member States, “the most extensive legal capacity accorded to legal persons under their laws” (Article 282 TEC). Articles 184-5 of the Euratom Treaty are in identical terms to Articles 281-2 TEC. The Community therefore has capacity, within its field of competence, to enter into obligations binding in international law. The Community is party to a wide variety of international agreements and is also a member of a number of international organisations. However, the Treaties do not expressly confer legal personality on the European Union and consequently, some have argued, the Union has no power to enter into obligations binding in international law or to belong to international organisations.

27. In its Report, *The Future of the EU Charter of Fundamental Rights*<sup>1</sup>, the Committee agreed with the recommendation of Convention Working Group III<sup>2</sup> that the Union should expressly be granted legal personality. It would, for example, facilitate EU, as opposed to EC, accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This is addressed further in Article 5(2) (below).

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<sup>1</sup> 6th Report, 2002-03, HL paper 48.

<sup>2</sup> CONV 305/02.

### 3. TITLE II: FUNDAMENTAL RIGHTS AND CITIZENSHIP OF THE UNION

#### Article 5: Fundamental rights

1. The Charter of Fundamental Rights shall be an integral part of the Constitution. The Charter is set out [in the second part of/in a Protocol annexed to] this Constitution.<sup>1</sup>
2. The Union may accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession to that Convention shall not affect the Union's competences as defined by this Constitution.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

#### Explanatory note

*“The text proposed reflects two central recommendations by Working Group II (CONV 354/02), on the one hand to incorporate in the Constitution the Charter of Fundamental Rights so that it has constitutional status and is legally binding and, on the other hand, to enable the Union to accede to the European Convention on Human Rights.*

*As to the technique for incorporating the Charter, the fact that the complete text (with all the drafting adjustments mentioned in the Working Group's final report) will appear either in a separate second part of the Constitution or as a Protocol annexed to it will safeguard its fully binding legal nature and allow the general rules concerning future amendments of the Constitution to be applied to the Charter. Moreover, that technique will also keep the structure of the Charter intact and avoid making the first part of the Constitution more lengthy. At the same time, the reference to the Charter in the first few articles of the Constitution will underline its constitutional status.*

*The legal basis in paragraph 2 enabling the Union to accede to the ECHR also expressly provides that accession must not affect the division of competences between the Union and the Member States, in line with a recommendation from Working Group II. Only the European Convention on Human Rights is mentioned in this paragraph because of the fact that a Court of Justice opinion in 1996 had rejected Community competence to accede to that Convention on the basis of considerations specific to it. This paragraph is not therefore intended to rule out the possibility of Union accession to other international conventions relating to human rights on the basis of the competences conferred in Part Two of the Treaty.*

*Paragraph 3 draws on Article 6(2) TEU as it now stands and is intended to indicate clearly that, in addition to the Charter, Union law recognises additional fundamental rights as general principles resulting from two sources – the European Convention on Human Rights on the one hand and the constitutional traditions common to the Member States on the other. As stressed by various members of the Convention in Working Group II (see pages 9 and 10 of the final report, CONV 354/02) and at the plenary, the usefulness of this provision is to make clear that incorporation of the Charter does not prevent the Court of Justice from drawing on those two sources to recognise additional fundamental rights which might emerge from any future developments in the ECHR and common constitutional traditions. That is in line with classic constitutional doctrine which never interprets the catalogues of fundamental rights in constitutions as being exhaustive, thus permitting the development, through case-law, of additional rights as society changes.”*

#### 3.1. Commentary

28. We note that the Charter will be “an integral part of the Constitution”. As we said in our recent report on the future of the Charter<sup>2</sup>, modern constitutions contain bills of rights and the Charter could fulfil that role for the Union. As the Explanatory note indicates, the intention is to make the Charter legally binding. But not all the provisions of the Charter are capable of creating legally enforceable rights (some Charter Articles contain political aspirations) and even where they are those rights will be valueless if not supported by adequate remedies. We

<sup>1</sup> A footnote to the draft Treaty states: “The full text of the Charter, with all the drafting adjustments given in Working Group II's final report (CONV 354/02) will be set out either in a second part of the Constitution or in a Protocol annexed thereto, as the Convention decides”.

<sup>2</sup> *The Future Status of the EU Charter of Fundamental Rights*. 6th Report, 2002-03, HL paper 48.

have called on the Government to urge the Convention to undertake work on remedies, as a matter of urgency. We consider this to be a matter of critical importance and are pleased to note that a “circle of discussion” on the Court of Justice has now been established,<sup>1</sup> which will look, *inter alia*, at individual access to the Community Courts (*ie* the standing rule in Article 230(4) TEC).

29. A footnote to Article 5(1) provides: “The full text of the Charter, with all the drafting adjustments given in Working Group II’s final report<sup>2</sup> will be set out either in a second part of the Constitution or in a Protocol annexed thereto, as the Convention decides”. Whether the Charter is set out in Part 2 of the new Treaty or in a separate Protocol is largely cosmetic. Provided that the new Treaty contains a provision equivalent to Article 311 TEC, the legal effect will be the same. But from a legal draftsman’s viewpoint integration via a protocol would be the simpler. This is because the Charter was prepared as a coherent whole and has its own preamble. What is more important is that the necessary “drafting adjustments” are made to safeguard the division of competences between the Member States and the Union, as well as the supremacy of the ECHR. Provision also needs to be made to give the revised Explanatory Note to the Charter authoritative status. The importance of this was stressed in our recent Report.

30. Article 5(2) would help prepare the way to EU accession to the ECHR.<sup>3</sup> As we indicated in our recent Report, accession by the Union to the ECHR is likely to be difficult. There are many technical and political hurdles to be overcome. But Article 5(2) is an important and significant first step, which we welcome.

31. The question, raised in the Explanatory note, whether Article 5(2) should be amended so as to make clear that the Union could accede to other international conventions relating to human rights, should be answered positively. We recommend that the words “or any other international human rights instrument” should be inserted after the words “that Convention” in the second sentence of Article 5(2).

32. Whether the purpose of Article 5(3) would be better met by an amendment of the Charter itself should be considered. But if the Article remains (and we agree that it would be undesirable to appear to limit the sources on which the Court could draw in developing the general principle of respect for human rights) it should be amended by the insertion of the words “in particular” after “as guaranteed” and the addition, after the reference to the ECHR, of the words “and any other international human rights instrument to which Member States are party”. Finally, Article 5(3) points to the need to ensure that, as we said in our recent Report, the so-called “horizontal clauses”<sup>4</sup> in the Charter are clear and unambiguous, especially as regards the relationship between Charter rights and ECHR rights.

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<sup>1</sup> Doc. CONV 543/03.

<sup>2</sup> CONV 354/02.

<sup>3</sup> The question of Community accession to the ECHR has a long history. A formal proposal was put to the Council by the Commission in 1979 and renewed in 1990. Four years later, the Council decided to ask the ECJ for a formal opinion as to whether Community accession to the ECHR would be compatible with the EC Treaty. The Court’s view (in *Opinion 2/94* [1996] ECR I-1759) was that as Community law then stood accession would require Treaty amendment. In particular, no Treaty provision conferred on the Community institutions “any general power to enact rules on human rights or to conclude international conventions in this field”. There was no express or implied power for such purpose and Article 235 (now Article 308), though designed to fill gaps where no specific powers existed, did not permit the adoption of provisions that would in effect amount to Treaty amendment. Accession would entail the entry of the Community “into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order” and, as such, would be of “constitutional significance”.

<sup>4</sup> This term and the issues surrounding these clauses are explained in paras 88-92 of our Report on the future of the Charter.

### **Article 6: Non-discrimination on grounds of nationality**

1. In the field of application of this Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

#### **Explanatory note**

*“This Article takes over unchanged the prohibition on all discrimination on grounds of nationality, which is currently enshrined in Article 12 TEC. In line with the structure of the current EC Treaty and of the Charter, this prohibition is here placed in a separate Article rather than forming part of the provision on citizenship of the Union. Because of its fundamental importance for the development of Union law, this provision must be placed in Part One of the Constitution. The legal basis for rules prohibiting discrimination on grounds of nationality (see second paragraph of Article 12 of the current TEC) would be placed in Part Two of the Treaty, as would the current Article 13 TEC, which creates a legal basis for combating certain other forms of discrimination.”*

### **3.2. Commentary**

33. Non-discrimination *between citizens of the Union* on grounds of nationality is a fundamental and well-established principle of Community law. The wording of Article 6 is similar to Article 12(1) TEC, the main change being the replacement of the word “Treaty” by “Constitution”. If what is to be prohibited is discrimination between citizens of the Union, that could be made clear.

### Article 7: Citizenship of the Union

1. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it. All citizens of the Union, women and men, shall be equal before the law.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in this Constitution. They shall have:
  - the right to move and reside freely within the territory of the Member States;
  - the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections in their Member State of residence under the same conditions as nationals of that State;
  - the right to enjoy, in the territory of a third country in which the Member State of which they are a national is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
  - the right to petition the European Parliament, to apply to the Ombudsman, and to write to the institutions and advisory bodies of the Union in any of the Union's languages and to obtain a reply in the same language.
3. These rights shall be exercised in accordance with the conditions and limits defined by this Constitution and by the measures adopted to give it effect.

#### Explanatory note

*“The definition of citizenship of the Union in paragraph 1 follows that given in the current EC Treaty. This paragraph also establishes the principle of equality between all European citizens.*

*The citizens' rights listed in paragraph 2 include all those currently appearing in the “citizenship” part of the EC Treaty. The right of access to documents of the institutions, at present established in Article 255 of the TEC, would be placed in the Titles on “the democratic life of the Union” or “Union institutions” of the Constitutional Treaty. This could also be the case for the right to good administration established by the Charter (Article 41), since the Charter grants that right to “every person”.*

*More detailed provisions and the legal bases relating to the definition of the conditions for and limits on the exercise of those rights (see Article 18(2); the second sentences of Article 19(1) and (2); the second sentence of Article 20; Article 194 and Article 195 TEC) would appear in Part Two of the Treaty. The same would apply to the provision of the current Article 22 TEC concerning the possible subsequent development of citizens' rights.”*

### 3.3. Commentary

34. The notion of EU citizenship is not new, having been introduced by the Maastricht Treaty. Article 17 TEC expressly provides, as does the new text, that Union citizenship complements and does not replace national citizenship. Nationality remains a matter over which individual Member States have and retain control. In addition to the rights given to nationals of Member States by the EC Treaty, Union citizenship confers six particular rights listed in the new Article 7(2) (*nb* the last indent contains three separate rights). Those six rights are, as the Explanatory note indicates, presently to be found in Articles 18-21 TEC.

35. What is new is the third sentence of Article 7(1): “All citizens of the Union, women and men, shall be equal before the law”. Is this intended to restate the principle of equality as between men and women or that of equality before the law of all individuals? The drafting, at least in the English text, is ambiguous. The former principle is stated to be an objective of the Union in Article 3(2). The French text (the original) suggests that it is the latter and that “women and men” has been used to avoid gender-specific words in other language versions. The principle can be found in a number of Member States' constitutions<sup>1</sup> and is currently set out in Article 20 of the Charter.<sup>2</sup>

<sup>1</sup> For example, Article 3(1) of the German Constitution.

<sup>2</sup> Article 20 of the Charter is entitled “Equality before the law” and states: “Everyone is equal before the law”.

Importantly, the principle has been regarded by the Court of Justice as a general principle of Community law.<sup>1</sup> The third sentence of Article 7(1) thus appears to be consolidating existing Community law.

#### 4. TITLE III: THE UNION'S COMPETENCES

##### *Title III: The Union's competences*

##### **Explanatory note**

*"The Nice European Council called on the Convention to consider "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity". More specifically, the Laeken European Council called on the Convention to consider "how the division of competence can be made more transparent", "whether there needs to be any reorganisation of competence" and "how to ensure that a redefined division of competence" is maintained and "ensure at the same time that the European dynamic does not come to a halt".*

*These questions have been discussed in plenary sessions and in Working Groups. On the basis of those discussions, the Praesidium has drawn up a draft text of articles the aim of which is, inter alia, to:*

*Define clearly the fundamental principles governing the limits of the competences between the Union and the Member States and the way in which the Union's competences are to be used (as well as the rules for applying those principles).*

*Determine the different categories of the Union's competences. The key factor in establishing those categories is the extent of the legislative competence conferred on the Union in relation to that of the Member States, according to whether such competence is conferred on the Union alone (exclusive competence) or shared between the Union and the Member States (shared competence), or whether it continues to lie with the Member States (areas for supporting action).*

*Indicate the areas covered by each category of competences. The lists of areas of shared competence are not exhaustive, which takes account of the Convention's wish not to establish a fixed catalogue of competences. The reference in Article 12 to "principal areas" avoids having to define in detail each area of shared competence. The exact definition, and the extent of each area, are determined by the relevant provisions of Part Two.*

*In line with the wish of a large number of members of the Convention, include a provision introducing a measure of flexibility in order to enable the Union to react in unforeseen circumstances. But that flexibility is restricted to the areas already specified in Part Two. The provision requires that the Member States' national parliaments be informed explicitly whenever the Commission proposes to use the flexibility clause."*

##### **4.1. Commentary**

36. Title III (Articles 8-16) deals with the division of competences between the Union and the Member States. At its core lies the threefold classification: exclusive competence/shared competence/supporting action. What is especially noteworthy is that Title III does not seek to allocate competences in the way that a federal constitution might. Indeed it puts the principle of conferral at the head of the list of principles governing the relationship between the Union and the Member States.

37. How far Title III fulfils the demands of the Laeken European Council (transparency, reorganisation, maintenance of the division of competence and dynamism) is debatable. As will be explained below when dealing with the specific Articles, the basic threefold classification may be controversial, not least the definition of exclusive competence. Further, economic policy and the CFSP appear to be special cases outside the general scheme. More work may be needed to secure an adequate level of transparency. Any comment on the

<sup>1</sup> Case C-292/97 *Karlsson* [2000] ECR I-2737.

reorganisation of competences must necessarily await the debate on the detailed content of Part Two of the new Treaty.

38. Whether the right balance is struck between the maintenance of any “redefined division of competence” and ensuring that “the European dynamic does not come to a halt” turns in large part on Article 16, entitled “Flexibility clause”. Some confusion may arise here. “Flexibility” was one of the buzzwords of the Amsterdam Inter-Governmental Conference (IGC) and Treaty. It manifested itself in Title VII of the TEU—“Provisions on Closer Cooperation”. This sets out mechanisms to allow groups of Member States to take forward closer cooperation among themselves in certain circumstances. Whether close cooperation will have a place in the Treaty waits to be seen. The “Flexibility clause” in Article 16 is, as will be seen, quite different and potentially controversial.

#### **Article 8: Fundamental principles**

1. The limits and use of Union competences are governed by the principles of conferral, subsidiarity, proportionality and loyal cooperation.
2. In accordance with the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Constitution to attain the objectives the Constitution sets out. Competences not conferred upon the Union by the Constitution remain with the Member States.
3. In accordance with the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
4. In accordance with the principle of proportionality, the scope and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.
5. In accordance with the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other to carry out tasks which flow from the Constitution.

#### **Explanatory note**

*“Article 8 lists and defines, clearly and explicitly, the fundamental principles governing the limits and exercise of competences.”*

### **4.2. Commentary**

39. The exercise of Union competences is to be governed by four principles: conferral, subsidiarity, proportionality and loyal cooperation. This is not new, but the terminology now being used (in particular “loyal cooperation”) may raise concerns.

40. Article 8(2) defines the principle of conferral. Article 5(1) TEC currently states that “the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”.<sup>1</sup> The wording in 8(2) is similar (with the replacement of Union by Constitution etc), but a new sentence has been added: “Competences not conferred upon the Union by the Constitution remain with the Member States”. Its inclusion reflects the opinion of the Convention Working Group on Complementary Competences<sup>2</sup> that the new Treaty must ensure that powers not allocated to the Union remain within the Member States and that this should be expressly stated in the Treaty. Such an amendment would in itself “establish an assumption in favour of national competence”.

41. Article 8(3) defines subsidiarity, a term introduced into the Union Treaty vocabulary by the Maastricht Treaty to address the substantial increase in EC/EU competence brought about by the Single European Act and the Maastricht Treaty by restraining the use made by the Community of some of its competences. Article 5(2) TEC 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 insofar 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

<sup>1</sup> The principle of conferred powers is also reflected in Article 7(1) TEC, last sentence.

<sup>2</sup> CONV 375/1/02.

action, be better achieved by the Community”. It is/may be significant that Article 8(3) refers to “Union” and not “Community”. There may not in future be a distinction between them, thus making the principle more widely applicable to Union activity.

42. Article 8(3) makes clear that the principle of subsidiarity only applies “in areas which do not fall within its [the Union’s] exclusive competence”. The division of competences (exclusive/shared/supporting) is addressed in Article 10. The identification of the Union’s exclusive competence is the subject of Article 11 and, as we explain below, may be controversial, especially for the relationship between the Union and the Member States, but also for the involvement of national parliaments in the control of Union legislation.

43. The principle of proportionality (Article 8(4)) is a well-established principle in Community law. The Court of Justice has ruled on proportionality both in challenges to Community action<sup>1</sup> and in challenges to Member State action within the scope of the Treaties.<sup>2</sup> The principle currently finds legislative expression in Article 5(3) TEC (inserted by the Maastricht Treaty): “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”. The wording of Article 8(4) is slightly expanded and provides that the principle applies to “the scope and form of Union action” (rather than “any action by the Community”). There is no explicit reference to the “content” of any action, but this would seem not to be necessary. Any application of the principle and appraisal of the “scope and form” of a measure would necessarily have to involve consideration of its “content”. Finally, the reference to “the objectives of the Constitution” should be to “the objectives of the Union” (see Article 3).

44. Article 8(5) defines the principle of loyal cooperation. Some commentators have suggested that this is new. Although the term does not appear as such in the current Treaties the principle is well-established and can be seen in both the TEC and the TEU. Article 10 TEC encompasses the principle, stating that: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.” The principle, and indeed the word “loyalty”, can be found in Article 11(2) TEU: “The Member State shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity”. The implications of “loyalty” in the context of the Common Foreign and Security Policy are considered in paragraph 75 below.

45. But Article 8(5) appears at first sight to change the focus significantly. It is not just about Member States fulfilling Treaty obligations, but emphasises that the principle involves two-way cooperation between the Union on the one hand and Member States on the other. Again this is not new. The Court of Justice has long recognised that the duty of cooperation is a mutual one.<sup>3</sup> The Article might nonetheless be seen as reinforcing the position of Member States, in view of the now explicit reference to cooperation and assistance “in full mutual respect”.

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<sup>1</sup> For example, on proportionality and human rights, see Case 44/79 *Hauer v Land Rheinland-Pfalz* [1970] ECR 3727.

<sup>2</sup> Case 36/75 *Rutili v Ministre d’Interieur* [1975] ECR 1219.

<sup>3</sup> Case 230/81 *Luxembourg v European Parliament* [1983] ECR 255, Case C-2/88 *Zwartfeld and Others* [1990] ECR I-3365.



### Article 9: Application of fundamental principles

1. The Constitution, and law adopted by the Union Institutions in exercising competences conferred on it by the Constitution, shall have primacy over the law of the Member States.
2. In exercising the Union's non-exclusive competences, the Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Constitution. The procedure set out in the Protocol shall enable national parliaments to ensure compliance with the principle of subsidiarity.<sup>1</sup>
3. In exercising the Union's competences, the Institutions shall apply the principle of proportionality as laid down in the same Protocol.
4. Member States shall take all appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from actions taken by the Union Institutions.
5. In accordance with the principle of loyal cooperation, Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution. The Union shall act loyally towards the Member States.
6. The Union shall respect the national identities of its Member States, inherent in their fundamental structures and essential State functions, especially their political and constitutional structure, including the organisation of public administration at national, regional and local level.

#### Explanatory note

*“Article 9 contains certain rules for the application of those principles. The inclusion of a reference to the role of the national parliaments is intended to highlight their importance in monitoring the principle of subsidiarity, in accordance with the conclusions of the Working Group chaired by Mr Méndez de Vigo. The Praesidium's conclusions further to the plenary debate on the Working Group's recommendations will be incorporated in the Protocol on the application of the principles of subsidiarity and proportionality.*

*The existing principle according to which Member States implement European Union law is also incorporated in this Article.*

*Paragraph 6 on the Union's respect for national identities develops a principle set out in Article 1 of the Constitution.”*

### 4.3. Commentary

46. Article 9(1) consolidates the doctrine of the supremacy or primacy of Community law. It is well established that in the event of a conflict between Community law and national law, Community law is supreme and has primacy over national law, irrespective of the source, status or date of that law.<sup>2</sup> It is also clear from the jurisprudence of the ECJ that the primacy of Community law applies irrespective of the status of the national law or the organ of the Member State involved.<sup>3</sup> In this context Community law includes the Treaty and rules made under it. Article 9(1) refers to the Constitution and the laws adopted under it. The implications for the Common Foreign and Security Policy (CFSP) need further consideration.

47. Articles 9(2) and (3) deal with the *application* of the principles of subsidiarity and proportionality, which are defined in Article 8(3) and (4) (see above). The Union shall apply these principles “as laid down in the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Constitution”. This will replace the existing Protocol on subsidiarity and proportionality and is expected to recognise the role of national parliaments in monitoring the application of subsidiarity. The precise form of action by national parliaments in this context is subject to much debate at present. There have been proposals to create an “early warning mechanism”, in cases where a number of national parliaments have subsidiarity concerns - which they

<sup>1</sup> A new version of the Protocol is expected to be circulated shortly.

<sup>2</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>3</sup> Case 106/77 *Italian Finance Administration v Simmenthal* [1978] ECR 629.

can raise with the Commission (the “yellow card”). What is more controversial is whether national parliaments will have the ability to block a Commission proposal on subsidiarity grounds (the “red card”). It has also been suggested that national parliaments should be able to challenge measures in the Court of Justice for non-compliance with subsidiarity.

48. A separate issue (raised in part by the difference in wording of Article 9(2) and (3)) is the apparent distinction between checks on subsidiarity (which national parliaments can do) and checks on proportionality (which are not for national parliaments but are left to the Community Courts). In practice it may be difficult to draw a clear line between subsidiarity and proportionality issues, as the examination of subsidiarity may involve issues of proportionality. We believe that Article 9 and the Protocol should be amended to require the views of national parliaments on both subsidiarity and proportionality to be sought.

49. The wording of Article 9(4) is similar to the first sentence of Article 10 TEC. The difference is that “Constitution” and “Union institutions” have replaced “Treaty” and “Community institutions”.

50. Article 9(5) is another facet of the principle of loyal cooperation set out in Article 8(5). The wording of the first sentence is similar to the second sentence of Article 10 TEC (again with the words “Union” and “Constitution” replacing “Community” and “Treaty”). This conduct is now expressly labelled as “loyal cooperation”. What is added is the phrase “the Union shall act loyally towards the Member States”. This, as mentioned above, consolidates a “two-way” duty of loyal cooperation.

51. The first part of Article 9(6) repeats Article 1(2) of the draft Treaty, and is the exact wording of Article 6(3) TEU. The novelty is that Article 9(6) goes further to flesh out what national identity in this context entails. Emphasis is placed on political identity, rather than cultural or ethnic identity.

#### **Article 10: Categories of competence**

1. When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union.
2. When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States shall have the power to legislate and adopt legally binding acts in this area. The Member States shall exercise their competence only if and to the extent that the Union has not exercised its.
3. The Union shall have competence to coordinate the economic policies of the Member States.
4. The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
5. In certain areas and in the conditions laid down in the Constitution, the Union shall have competence to carry out actions to coordinate, supplement or support the actions of the Member States, without thereby superseding their competence in these areas.
6. The Union shall exercise its competences to implement the policies defined in Part Two of the Constitution in accordance with the provisions specific to each area which are there set out.

#### **Explanatory note**

*“This Article lists and describes the different categories of the Union's competences, stating for each category what the consequences of the Union's exercise of its competences are for the competences of the Member States.*

*The common foreign and security policy and coordination of the Member States' economic policies are given separate paragraphs, in order to reflect the specific nature of the Union's competences in those areas.”*

#### **4.4. Commentary**

52. This Article defines the three basic categories of competence: exclusive competence; shared competence; and supporting action. It also confirms that the Union has competence to coordinate the economic policies of Member States and to define and implement a common foreign and security policy (CFSP). The Explanatory note

justifies the express reference to economic policy and CFSP as being necessary “to reflect the specific nature of the Union’s competences in those areas”. The “specific nature” is not itself identified. Articles 10(3) and (4) seem out of place in a provision dealing with the categorisation of competences as they are expressed to confer, rather than to classify, competences. It may simply be that these two policies do not fit within the basic threefold classification. The uncertainty is compounded by the way in which Article 12(1) defines “shared competence”, apparently including the Article 10(3) (Article 13) and 10(4) (Article 14) competences. Given these uncertainties it is difficult to see the logical justification for the inclusion of paragraphs (3) and (4) in Article 10. Some reference to them may be needed for political reasons but the way they are expressed in this Article hardly makes the division of competence “more transparent” as requested by the Laeken European Council. The Constitution must be clear on issues of such importance.

#### **Article 11: Exclusive competences**

1. The Union shall have exclusive competence to ensure the free movement of persons, goods, services and capital, and establish competition rules, within the internal market, and in the following areas:
  - customs union,
  - common commercial policy,
  - monetary policy for the Member States who have adopted the euro,
  - the conservation of marine biological resources under the common fisheries policy.<sup>1</sup>
2. The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act.

#### **Explanatory note**

*“The list in paragraph 1 of the areas of the Constitution in which the Union has exclusive competence goes beyond the present situation, as it includes the entire common commercial policy. This reflects the conclusion of Mr Dehaene’s Group that Article 133(6) of the Nice Treaty should be deleted.*

*Paragraph 2 of this Article reflects the case law of the Court of Justice on the Union’s exclusive competence to conclude international agreements.”*

### **4.5. Commentary**

53. Article 11 seeks to describe, and define, those areas where the Union has exclusive competence. It deals with internal (Article 11(1)) and external competence (Article 11(2)), which are two separate but related subjects. As will be explained below, it is possible for the Union to have exclusive *external* competence in an area where the Union and Member States have shared *internal* competence under the Treaty.

54. The syntax of Article 11(1) is problematic. The relationship between the four specific “areas” listed and ensuring free movement within the internal market is unclear. The Article could be read as meaning that the Union only has exclusive competence in the four specific areas to the extent that such competence ensures free movement within the internal market but this would raise the question as to how the conservation of marine biological resources might ensure those freedoms. We read the Article as intending to give the Union exclusive competence (a) to ensure free movement etc within the internal market and, additionally, (b) in the four specified areas.

55. If our interpretation of Article 11(1) is correct, the reference to ensuring free movement within the internal market raises substantial concerns. Free movement has always been a key element of the Community and now the Union. Similarly the competition rules can be traced back to the Treaty of Rome. The Community has both extensive powers to legislate to ensure free movement (for example Article 95 (goods and services)) and competition rules, which we would expect to see restated in Part Two of the new Treaty. But we doubt whether it

<sup>1</sup> This derives from EC Treaty Articles dealing with agriculture, Regulations adopted establishing the common fisheries policy and Article 102 of the Act concerning the conditions of Accession and the Adjustments of the Treaties. See Cases 3, 4 and 6/76 *Kramer and others* [1976] ECR 1279.

is the case that Member States are, by virtue of the Community's competence, prohibited from legislating on any matter which might relate to the free movement of persons, goods, services and capital, or establishing competition, within the internal market. For example, all Member States have company laws. Are they prohibited from amending those laws if the consequence would be to affect the right of establishment in a positive way? Or only if that was intended?

56. What the reference to free movement etc may mean is that the Union is to have exclusive competence to adapt measures specifically designed to permit freedom of movement (*eg* rules on the mutual recognition of qualifications) but not rules which may have an incidental effect on freedom of movement but are designed with another object in mind. It is unclear. Further, the draft Treaty is itself internally inconsistent. While Article 11(1) would suggest the Union has exclusive competence in relation to the internal market, Article 12 (Shared competence) lists "internal market" as one of the "principal areas" of shared competence (Article 12(4)).

57. The reference to the competition rules is similarly confused and confusing. The Treaty already contains substantive competition rules (Articles 81 and 82 TEC) as well as powers to apply and implement them (Article 83). Article 83(2) (e) TEC expressly contemplates the co-existence of Community law and national competition laws and both inevitably will apply "within the internal market". We doubt that it is the draftsman's intention to exclude the application of national competition laws and indeed the latest Community regulation to be agreed on the implementation of Articles 81 and 83 TEC expressly contemplates the application of national laws alongside the Community rules.<sup>1</sup> The intention might be to give the Union exclusive competence to adapt competition rules which apply where trade between Member States is affected (*ie* where Articles 81 and 82 are engaged) but even that would limit Member States' existing powers.

58. If all that the reference in Article 11(1) to free movement within the internal market is trying to say is that there are important rules on the subject in the Treaty and the Union has been given powers to legislate, that does not need saying. Article 11(1) is either a tautology or, on at least one construction, a substantial extension of competence.

59. Article 11(2) seeks to consolidate the law on exclusive external competence. The Community's competence to conclude international agreements arises from two sources: (i) express provisions in the Treaty (for example, Article 133 enables the Community to enter into tariff and trade agreements within the scope of the Common Commercial Policy). Other examples can be found in Article 111 (monetary and foreign exchange agreements), Article 155 (TENs), Article 174 (Environment) and Article 181 (Development Cooperation); and (ii) the jurisprudence of the European Court of Justice (the Court has held that external competence may flow from other provisions of the Treaty and measures adopted within the framework of those provisions).<sup>2</sup> The existence of "internal rules"<sup>3</sup> or of unexercised Treaty powers<sup>4</sup> to adopt such rules confers external competence to the Community.

60. The Community's ability to conduct external relations is restricted, as a matter of law, to those areas where it has competence (exclusive or shared). On the other hand, where and to the extent that the Community has competence, Member States' freedom of action is limited. They may not enter into agreements between themselves or with third States on the same subject matter. This is a consequence of the supremacy/primacy of Community law—Member States cannot prejudice the operation of Community law by entering into external obligations. Where the transfer of competence is partial, because the Treaty expressly preserves Member States' competence (*eg* Article 174(4) TEC) or the internal rules do not occupy the whole field, then the Community and the Member States share competence. Both will be parties to the international agreement, which is commonly referred to as a "mixed agreement". Internal and external competence are therefore directly related.

61. The precise extent of Community competence in relation to a particular subject or agreement is frequently a matter of concern and debate between the Commission and the Member States. The external competence implications of a proposal may therefore influence Member States' decisions on the adoption or extension of internal rules.

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<sup>1</sup> Reg 1/2003 of 16 December 2002. [2003] OJ L1/1.

<sup>2</sup> Opinion 1/94, *WTO* [1994] ECR I-5267.

<sup>3</sup> *AETR*, Case 22/70 *Commission v Council* [1971] ECR 263.

<sup>4</sup> *Rhine navigation*. Opinion 1/76 [1977] ECR I-741.

### Article 12: Shared competences

1. The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles 11 and 15.
2. The scope of shared competences is determined by the provisions of Part Two.
3. Where the Union has not exercised or ceases to exercise its competence in an area of shared competence, the Member States may exercise theirs.
4. Shared competence applies in the following principal areas:
  - internal market
  - area of freedom, security and justice
  - agriculture and fisheries
  - transport
  - trans-European networks
  - energy
  - social policy
  - economic and social cohesion
  - environment
  - public health, and
  - consumer protection.
5. In the areas of research, technological development and space, the Union shall have competence to carry out actions, in particular to implement programmes; however, the exercise of that competence may not result in Member States being prevented from exercising their competence.
6. In the areas of development cooperation and humanitarian aid, the Union shall have competence to take action and conduct a common policy; however, the exercise of that competence may not result in Member States being prevented from exercising their competence.

### Explanatory note

*“Areas in which there are shared competences are identified by their exclusion from the areas of exclusive competence and the areas for supporting action. The reference in paragraph 2 to Part Two of the Constitution is a link to the specific provisions of that Part determining the extent and intensity of Union competence in each area.*

*The inclusion of energy in the list of areas of shared competence requires the creation of a specific legal basis for that area in Part Two of the Constitution as no such legal basis exists in the current Treaties (thus far acts relating to this area have been adopted on the basis of Article 308).*

*The areas of development cooperation and research and technological development (and space) appear in separate paragraphs to indicate that even though the Union exercises its competence in these areas exhaustively, Member States still retain their competences. Despite the importance and scale of Union programmes for development aid and research the Constitution does not envisage the abolition of national programmes.”*

## 4.6. Commentary

62. The list of shared competences is indicative and not exhaustive. And Article 13(2) makes it clear that the details will be set out in Part Two of the new Treaty.

63. Article 12(3) sets out the relationship between the Union and Member States where competence is shared. Member States may exercise their competence where the EU has not exercised or ceases to exercise competence. This statement may require some expansion and qualification. As the commentary to the draft Treaty prepared by

Professor Dashwood indicates,<sup>1</sup> a distinction may need to be drawn between “pre-emptive” EU legislation, where Member States are precluded from exercising any independent competence to derogate from or supplement the harmonised norms and “minimum harmonisation”, where Member States are free to enact more stringent measures. If Article 12(3) does not expressly include or in practice permit such a distinction, Member States could not act in any case of shared competence where the Union has acted (this may also be inferred from 12(5) and 12(6), where Member States’ freedom to act is expressly reserved). This might have significant implications, especially for areas such as the harmonisation of civil and criminal law within the context of the creation of an area of freedom, security and justice.

64. A further question raised by Article 12(3) is: when will the Union have ceased to act? How in practice will that be discerned?

65. Article 12(4) identifies eleven “principal areas” of shared competence. They are not new. The EC Treaty already includes extensive provisions on the internal market (most notably Article 95 TEC), the establishment of which has been a fundamental Community objective, especially since the 1980s and the Single European Act. The concept of the EU as an “area of freedom, security and justice” (AFSJ) was introduced in the Amsterdam Treaty, following the establishment of a Justice and Home Affairs competence for the EU in Maastricht. There are currently provisions on the AFSJ (which is also, according to draft Article 3(3), a Union objective) in both the First (Title IV TEC—Articles 61-69) and the Third Pillar (Title VI TEU—Articles 29-42). Agriculture—including the establishment of a Common Agricultural Policy (CAP)—is covered in Articles 32-38 TEC, transport in Articles 70-80 TEC and trans-European networks in Articles 154-156 TEC. The Treaty also includes provisions on economic and social cohesion (Articles 158-162 TEC), the environment (Articles 174-176 TEC), and consumer protection (Article 153 TEC).

66. The inclusion of energy is noteworthy. There is a reference to energy in the context of trans-European networks, and Article 3(u) TEC lists ‘measures in the field of energy’ as an EC activity. Article 175(2) (in the environment title) also contains a reference to energy. The present Treaty references therefore are not as substantial as in relation to other areas listed in Article 12(4). It remains to be seen whether an energy title will be added at the next Inter-Governmental Conference (there was pressure to include such a title during the Amsterdam IGC). Extension of Union competence in matters of energy policy would have major consequences for domestic policies and therefore needs to be considered carefully.

67. Public health and social policy are also noteworthy, but for a different reason. These are areas where the current Treaty provisions provide for both shared and supporting competence. The Community’s powers relating to public health are currently set out in Article 152 TEC and are a mix of shared and supporting competences. Article 152(1), for example, envisages the Community taking action to complement national policies. Article 152(4) enables the adoption of measures (by co-decision of the Council and the European Parliament) setting standards of quality and safety *inter alia* of blood and blood derivatives. It is presumably the power given by Article 152(4) which has led to the classification of public health as a shared competence.

68. The Treaty contains an extensive list of provisions on social policy (Articles 136-148 TEC). The Treaty grants the EC supporting/complementary competence regarding health and safety at work, working conditions, social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers, conditions for employment for legally resident third-country nationals, the information and consultation of workers, the integration of persons excluded from the labour market and equality between men and women with regard to labour market opportunities and treatment at work (Article 137). There are also provisions enabling coordinating action on employment, labour law and working conditions, vocational training, social security, prevention of occupational accidents and diseases, occupational hygiene and the right of association and collective bargaining (Article 140 TEC). Last, but not least, the Treaty includes the well-established principle of equal pay without discrimination based on sex (Article 141 TEC) which, according to the ECJ, is a fundamental principle of EC law.<sup>2</sup>

69. What is not clear is what effect, if any, the inclusion of public health and social policy in Article 12(4) has. Is it intended to elevate public health and aspects of social policy (Articles 137 and 141 TEC) from areas of supporting/coordinating/complementary EC action to areas of shared competence? The answer is probably not, but careful scrutiny of the relevant Articles in Part Two of the new Treaty will be needed to identify the extent, if any, of any change.

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<sup>1</sup> The text of the draft Dashwood Treaty has now been published in the *European Law Review*: (2003) 28 E.L.Rev. 3.

<sup>2</sup> Case 43/75 *Defrenne v Sabena* [1976] ECR 455.

70. The approach of Articles 12(5) and (6), as mentioned above, differs from that in Articles 12(3) and (4) in that it is expressly provided that in certain policy areas the exercise of Community competence “may not prevent” Member States from exercising their competence. The policy areas in Article 12(5) are research, technological development and space. While the Treaty contains a series of provisions on research and technological development (Articles 163-173), the reference to space is new. Article 12(6) refers to development cooperation and humanitarian aid. The TEC contains a separate Title on development cooperation (Title XX Articles 177-181). Article 180 TEC provides that the Community and Member States shall “consult each other on their aid programmes” and Member States “shall contribute if necessary to the implementation of Community aid programmes”. A new Title on “economic, financial and technical cooperation with third countries” (Title XXI—Article 181a) has been added in the Nice Treaty, presumably also covering aspects of humanitarian aid. However, there is no specific reference to “humanitarian” aid in either of these Titles.

#### **Article 13: The coordination of economic policies**

1. The Union shall coordinate the economic policies of the Member States, in particular by establishing broad guidelines for these policies.
2. The Member States shall conduct their economic policies, taking account of the common interest, so as to contribute to the achievement of the objectives of the Union.
3. Specific provisions shall apply to those Member States which have adopted the euro.

#### **Explanatory note**

*“While, for those Member States which have adopted the euro, monetary policy falls within the exclusive competence of the Union, the economic policies of the Member States remain within the competence of the latter, in accordance with the conclusions of Mr Haensch's Working Group.*

*In this area Union competence consists in coordinating national policies. In view of the importance of such coordination the Praesidium considered that it merited a separate Article.”*

#### **4.7. Commentary**

71. Article 13(1) is not new and can be traced back to Article 99 TEC, which requires Member States to regard their economic policies as a matter of common concern and to “co-ordinate them within the Council”. Article 99(2) TEC empowers the Council to formulate broad guidelines for those policies. The main change is therefore that under the Constitution it would be the Union which would coordinate economic policies rather than the Member States doing so within the Council. Depending on how Part Two of the new Treaty allocates responsibilities between the Institutions, this would not appear to involve any major change.

72. Similarly Article 13(2) appears to derive from Article 98 TEC (“Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Community, as defined in Article 2 [TEC], and in the context of the broad guidelines referred to in Article 99(2) [TEC]”). Whether “taking account of the common interest” under the new Article 13(2) will be distinguishable from regarding economic policies as a matter of common concern as required by Article 99 TEC might be a debating point and at first sight seems unlikely to be of any significance in practice.

73. Article 13 is factually accurate and implies that some States may continue as Members of the Union without adopting the euro. This is a helpful clarification of the *status quo*. It is implicitly reinforced by Article 11(1), which states that the Union shall have exclusive competence in relation to the “monetary policy for the Members States who have adopted the euro”.

#### **Article 14: The common foreign and security policy**

1. Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity. They shall refrain from action contrary to the Union's interests or likely to undermine its effectiveness.

#### **Explanatory note**

*“This Article seeks to identify Member States' specific obligations in exercising their competences in this area.”*

### **4.8. Commentary**

74. Article 14 is similar to Article 11 TEU. The main difference is that now Member States should support the Union's “common foreign and security policy”, rather than the Union's “external and security policy”. It is not clear whether the meaning is identical or whether it signifies a broadening of scope. Article 10(4) makes clear that the term includes a common defence policy. The second sentence has been simplified (current Article 11 reads: “... likely to impair its effectiveness *as a cohesive force in international relations*”). The reference to Member States working together “to enhance and develop their mutual political solidarity” has been dropped. But this wording may appear in the specific CFSP section.

75. Though the new wording is broadly similar to existing Treaty Articles, we are concerned that the new Treaty structure (seemingly collapsing the current three Pillars into one) should not fundamentally change the nature of, and the extent of Member States' obligations in respect of, the CFSP. The new Treaty might give the impression that authority in these matters derives from the Constitution and not from the Member States. We will pursue with the Government the case that CFSP should remain intergovernmental. Further, we will carefully scrutinise the wording of all the new CFSP Articles. The obligation for Member States to “actively and unreservedly support” the CFSP will presumably in practice be qualified by the requirement for unanimity before CFSP measures are taken. However, recent events focus attention on the strength and potential width of the commitment contained in Article 14 as well as the strategic and budgetary implications.



### Article 15: Areas for supporting action

1. The Union may take coordinating, complementary or supporting action. The scope of this competence is determined by the provisions of Part Two.
2. The areas for supporting action are:
  - employment
  - industry
  - education, vocational training and youth
  - culture
  - sport
  - protection against disasters
3. The Member States shall coordinate their national employment policies within the Union.
4. Legally binding acts adopted by the Union on the basis of the provisions specific to these areas in Part Two cannot entail harmonisation of Member States' laws or regulations.

#### Explanatory note

*“As in the case of shared competences, the reference to Part Two is to indicate that the extent and intensity of Union competence in each area are determined by the specific provisions of that Part and to ensure that there are no changes as compared with the current situation other than those expressly decided on by the Convention.*

*The inclusion of “sport” and “protection against disasters” in the list of areas for supporting action follows on from the conclusions of Mr Christophersen's Group and involves the creation of a specific legal basis for those two areas in Part Two, given that there is no such basis in the current Treaties (thus far acts in the area of civil protection have been adopted on the basis of Article 308).”*

#### 4.9. Commentary

76. The EC Treaty already envisages coordinating or supporting action on employment (Articles 125-130), industry (Article 157), education, vocational training and youth (Articles 149 and 150) and culture (Article 151).

77. Employment in this context, it appears, would be given the widest interpretation but be limited to those matters referred to in Article 125-130. “Employment”, in the broad sense, may also be covered by economic policy (where there is a separate obligation to coordinate policies—see Article 13) and the provisions on social policy (currently Articles 136-145 TEC), in particular Article 137 TEC which enables supporting and complementary action in a range of matters affecting workers, the work place and the labour market. It may be difficult to distinguish between, and keep separate, what is an “employment” and what is a “social policy” measure in this context. This distinction is important, as “social policy” is considered as an area of “shared” (and not “supporting”) competence in the draft Treaty (Article 12(4)). This may imply that EU competence for action under Article 137 is now transformed from “supporting” to “shared”.

78. Article 15(2) anticipates “sport” and “protection against disasters” becoming established as new areas of Union competence. On sport, the main EU action thus far consisted of the Declaration on sport of the Amsterdam Treaty and the Declaration “on the specific characteristics of sport and its social function in Europe”, which was annexed to the Conclusions of the Nice Summit. EC action on civil protection, on the other hand, has been thus far only been possible under Article 308 TEC.

79. Article 15(3) would impose an obligation on Member States to coordinate their national employment policies within the Union. Currently “Member States and the Community shall ... work towards developing a coordinated strategy for employment” (Article 125 TEC) with the Community being able to contribute to a high level of employment by encouraging cooperation between Member States (Article 127 TEC) and the Council being able to adopt incentive measure designed to encourage cooperation between Member States (Article 129 TEC).

80. Article 15(4) states, as general rule, that supporting action in the areas listed in Article 15(2) does not permit the harmonisation of Member States' laws or regulations. Specific examples of this rule can currently be found in Article 129 (employment), Article 150(4) (vocational training), and Article 151(5) (culture).

### Article 16: Flexibility clause

1. If action by the Union should prove necessary within the framework of the policies defined in Part Two to attain one of the objectives set by this Constitution, and the Constitution has not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament, shall take the appropriate measures.
2. Using the procedure for monitoring the subsidiarity principle referred to in Article 9, the Commission shall draw Member States' national parliaments' attention to proposals based on this Article.
3. Provisions adopted on the basis of this Article may not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation.

### Explanatory note

*“In view of the Convention's desire to ensure that the implementation of this provision respects the limits of the competences conferred on the Union by the Constitution, paragraph 1 states that this provision may be used only “within the framework of the policies defined in Part Two”.*

*The procedure involving European Parliament assent is proposed (by way of derogation from the conclusions of Mr Amato's Group, which decided that codecision should be the general rule for the adoption of legislative acts and that assent should be reserved for the conclusion of international agreements) and also unanimity for the Council vote. The possibility of a qualified majority could be examined during the Convention's general debate on the question. This procedure is being proposed in order to restrict the use of this provision, while at the same time expediting matters when it is necessary to have recourse to it.*

*Paragraph 2 follows up the proposals by Mr Mendez de Vigo's Group.*

*Paragraph 3 seeks to introduce into the Constitution a limitation on the scope of the flexibility clause which reflects current Court of Justice case law.”*

## 4.10. Commentary

81. As mentioned above (paragraph 38) the title of this Article may be confusing. Flexibility is sometimes used to mean closer cooperation. Article 16 is derived from Article 308 TEC. Article 308 TEC is a major source of the mistrust which many people feel towards the existing Community and Union. The inclusion of a similar provision in Article 16 raises a number of questions, both of principle and of detail.

82. First, the inclusion of a catch-all/fall back clause such as is being proposed casts doubt on the value of drawing up a list of competences. Even if it is accepted that that list cannot be definitive (the list in Article 11 above cannot by definition be exhaustive and that in Article 12 is merely illustrative) the desirability of including a provision which will inevitably affect the respective competences of the Union and the Member States needs the most careful consideration. There is also a danger that any “flexibility” clause could be used as a way of bypassing the need to amend the Constitution and the parliamentary democratic control and national constitutional requirements that would imply. On the other hand the absence of a power for the Union to take action might lead the Court of Justice to construe existing powers more widely and possibly even develop a theory of implied powers.

83. The experience of Article 308 TEC (formerly Article 235 EC and once known as “*la petite révision*”), sometimes linked with other Treaty Articles, has been that the power has been used extensively over a range of matters (including social policy, the environment, consumer protection, external affairs and institutional and financial matters).<sup>1</sup> In addition to filling in gaps<sup>2</sup> in the Treaty, some quite substantial policy and regulatory measures have been developed and adopted where the “Treaty has not provided the necessary powers”. For

<sup>1</sup> See *The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC*. A working document prepared by the Swedish Institute for European Policy Studies and submitted to the Convention Working Group V. Working Document 19.

<sup>2</sup> For example, Council Regulation No 1103/97 [1997] OJ L162/1, relating to the introduction of the euro.

example, the creation of a Community trademark<sup>1</sup> and the European company,<sup>2</sup> establishing a Community action programme in the field of civil protection,<sup>3</sup> and creating a rapid-reaction mechanism (humanitarian aid).<sup>4</sup> The new Article 16 would be wider in scope. It would apply to the Union (not just the Community/First Pillar) and therefore confer power to act in relation to the Common Foreign and Security Policy (CFSP—Second Pillar) and Police and Judicial Cooperation (Third Pillar). The power would be exercisable at the initiative of the Commission, a factor which is politically significant in the context of the CFSP.

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

85. Finally, Article 16(3) prohibits the use of Article 16 to harmonise national laws where that is excluded by the Constitution. Article 16 cannot be used to get round Article 15(4).

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<sup>1</sup> Council Regulation No 40/94 [1994] OJ L349/83.  
<sup>2</sup> Council Regulation No 2157/2001 [2001] OJ L294/1.  
<sup>3</sup> Council Decision of 9 December 1999 [1999] OJ L327/53.  
<sup>4</sup> Council Regulation No 381/2001 [2001] OJ L57/5.

## APPENDIX 1

### *Membership of the European Union Committee and Sub-Committee E (Law and Institutions)*

The members of the European Union Committee are:

Baroness Billingham  
Lord Brennan  
Lord Cavendish of Furness  
Lord Dubs  
Lord Grenfell (Chairman)  
Lord Hannay of Chiswick  
Baroness Harris of Richmond  
Lord Jopling  
Lord Lamont of Lerwick  
Baroness Maddock  
Lord Neill of Bladen  
Baroness Park of Monmouth  
Lord Radice  
Lord Scott of Foscote  
Earl Selborne  
Lord Shutt of Greetland  
Baroness Stern  
Lord Williamson of Horton  
Lord Woolmer of Leeds

The members of Sub-Committee E (Law and Institutions) are:

Lord Brennan  
Lord Fraser of Carmyllie  
Lord Grabiner  
Lord Henley  
Lord Lester of Herne Hill  
Lord Mayhew of Twysden  
Lord Neill of Bladen  
Lord Plant of Highfield  
Lord Scott of Foscote (Chairman)  
Baroness Thomas of Walliswood  
Lord Thomson of Monifieth

## APPENDIX 2

*Preliminary draft Constitutional Treaty, drawn up by the Praesidium, which the President presented at the European Convention's plenary session on 28 October 2002 (CONV) 369/02*

[see text contained in doc. CONV 369/02]

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