

EU draft Constitution - Provisions governing the Internal Market

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I) GENERAL PRINCIPLES OF EU LAW

1. FUNDAMENTAL PRINCIPLES

Article I-9

Principles governing EU Competence:

*- Conferral:
EU laws need legal base in the Constitution or else a Member State competence*

*- Subsidiarity:
EU-action only when "Better achieved at Union level"*

*Principle of subsidiarity defined in attached protocol.
National Parliaments shall ensure compliance*

*- Proportionality:
"Not exceed what is necessary"*

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.

3. Under 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, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The Union 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. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.

The Institutions shall apply the principle of proportionality as laid down in the Protocol referred to in paragraph 3.

2. PRIMACY OF EU LAW

Article I-10

All EU law prevails over national laws and national constitutions

Require fulfilment of EU obligations by Member States

1. The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.

2. Member States shall take all appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from the Union Institutions' acts.

3. JURISDICTION ON QUESTIONS OF COMPETENCE

The EU Court has jurisdiction on questions of competence...

Article III- 270

EU-Court reviews:

- legality of legal acts

- lack of competence and infringement of:

- procedural requirements

- the Constitution

- rule of law

1. The Court of Justice shall review the legality of European laws and European framework laws, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of agencies and bodies of the Union which produce legal effects vis-à-vis third parties.

2. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Constitution or of any rule of law relating to its application, or misuse of powers.

... and although the national courts are not excluded from disputes to which the Union is a party...

Article III-281

Member States' courts are not excluded in cases where the Union is party, unless otherwise specified

Save where jurisdiction is conferred on the Court of Justice by the Constitution, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

... no dispute on the interpretation and application of the Constitution shall be submitted to any other method of settlement.

Article III-284

Member States undertake not to submit a dispute concerning the interpretation or application of the Constitution to any method of settlement other than those provided for therein.

Therefore, only the EU Court, no national high court, has jurisdiction on questions of EU/Member States' competence

II) INTERNAL MARKET

1. INTRODUCTION:

In the TEC, two different market-related terms appear: the "common" and the "internal" market. Whereas the single market has been defined in Articles 3.1c and 14 TEC as an "area without internal frontiers in which the free movement of goods, persons, services and capitals is ensured," an actual definition of the common market is lacking. However, the difference is crucial, since harmonisation measures taken according to Article 94 TEC require unanimity, whereas measures taken according to Article 95 only require qualified majority voting.

The wording of Article 15 TEC, which mentions both the internal and the common market, can be consulted to establish a proper distinction of both terms. Whereas according to its paragraph 1 the Commission shall take into account the efforts of certain economies when establishing the internal market and propose appropriate provisions, those provisions shall not disturb the functioning of the common market. Although Article 95 (internal market) only provides for qualified majority voting in the Council, whereas Article 94 TEC (common market) requires unanimity, the internal market can hence best be defined as a more uniform and thorough-going common market. The Commission itself calls the internal market the "culmination of the common market".

The term "internal market"- allowing decisions by qualified majority - was introduced in 1987 by the Single European Act (SEA) to indicate the removal of all obstacles to the free movement of goods, services, capital and persons. Since the White Book on the completion of the internal market was published in 1985, some say that the term 'internal market' was only inserted as a pretext for introducing qualified majority voting in this area.

Consequently, the new draft Constitution has dropped the use of these different terms and only refers to the "internal market, in both Articles III-64 (currently article 94 TEC) and III-65 (currently Article 95 TEC) (see below).

Although it is difficult to separate subjects which are often closely linked, this subject sheet is concerned solely with the concept of the internal market from the viewpoint of the free movement of goods, persons, services and capital (as defined in 3.1c and 14 TEC), and does not cover accompanying policies. Having an economic connotation, the term 'internal market' does for example not cover the freedom of movement for ALL persons. In relation with the free movement of persons, therefore, the term 'internal market' basically only applies to the free movement of workers. Accordingly, directives which regulate the right of students, pensioners and non economically active persons to reside in any Member State are based on Article 18 TEC (Union citizenship). In this context, the Schengen Agreement and the creation of an "area of freedom, security and justice" without checks on persons on the internal borders of the European Union, cannot be considered as areas belonging to the internal market.

The four freedoms and their principles

The four freedoms are governed by two main principles:

- the principle of non-discrimination laid down in Article 12 TEC and*
- the principle of mutual recognition*

The principle of non-discrimination

Article 12 of the EC Treaty, which prohibits "any discrimination on grounds of nationality" is one of the fundamental principles of the internal market. Discrimination is understood as meaning different treatment, on the basis of nationality, under the same circumstances. Under this provision, it is prohibited to treat workers, persons exercising their freedom of establishment and providing services, as well as imported goods, differently. At first glance, this principle seems abstract, yet it entails many concrete activity areas of the Community (fair competition, no quantitative restrictions, no customs tariffs, etc.)

Mutual recognition

Closely linked to the principle of non-discrimination, the principle of mutual recognition claims that the legislation of another Member State is equivalent in its effects to domestic legislation. This means that, as a general rule, products that have been approved for sale in one Member State have to be approved for sale in all others. This principle was laid down by the Court of Justice in the Cassis de Dijon judgement of 1979 (case 120/78). However, the recognition of products in one state on a low level can lead to the so-called problematic "race to the bottom" in which safety and health standards are being lowered permanently.

2. INTERNAL MARKET ACCORDING TO THE PRESENT PROVISIONS IN THE TEC

2.1 Legal bases:

Covering the four freedoms, measures in the area of the internal market can be based on different legal bases.

2.1.1 Article 95 and 94 TEC:

As mentioned above, harmonisation measures can be taken either on the basis of Article 94 (common market) or 95 TEC (internal market). Since Article 95 contains exceptions as to its application (it does not apply to fiscal provisions, to provisions related to the free movement of persons, and to provisions related to the rights and interests of employed persons), it has to be considered as the more specific rule, hence prevailing over Article 94 if none of the exceptions apply. In practice, therefore, Article 95 TEC mainly applies for the free movement of goods.

Decision making according to Articles 95 and 94 TEC:

Article 95 of the EC Treaty stipulates that the majority of legal transactions relating to the establishment and functioning of the internal market are adopted in accordance with the codecision procedure. This provides for the Council to give a qualified majority ruling by codecision with the European Parliament.

A number of sectors are excluded from this rule and still require the unanimous decision of the Member States within the Council. These include fiscal provisions, certain aspects associated with the free movement of persons, and measures involving the rights and interests of employed persons. For those areas, Article 94 TEC constitutes the proper legal basis unless more specific Articles are to be applied (see below).

2.1.2 Further legal bases:

As mentioned above, the term 'internal market' means an 'area without internal frontiers in which the free movement of goods, persons, services and capitals is ensured.' Thus, when ruling in the area of the internal market, the Community can also base its activities on other articles.

Free movement of goods: e.g. Articles 26, 93 TEC

Free movement of workers: e.g. Articles 40, 42, 46, 137 TEC

Right of establishment : e.g. Articles 44, 47.2, 46, 47 TEC

Freedom to provide services: e.g. Articles 46 (with 55) 49, 52, 80, 93 TEC

Free movement of capitals: e.g. Articles 57 TEC

Furthermore, measures can support the internal market (without belonging to it in the sensus strictus - see above):

- free movement of (all) persons: e.g. Article 18.2 TEC

- judicial cooperation in civil matters: e.g. Articles 65, 67 TEC

- asylum and immigration: e.g. Articles 61,62,63 TEC

- tax provisions: e.g. Article 93 TEC

In all these cases, the more specific Articles prevail over the more general Articles 94, 95 TEC and the latter only serves as a legal basis, if none of the exceptions of its paragraph 2 apply.

Because of its general character, Article 95 is nonetheless to be considered as the main legal basis for measures taken in the area of the internal market.

2.2 The main Articles in the TEC

2.2.1 To promote a common market (Article 2 TEC), the activities of the Community shall include the setting up of an internal market:

| | ARTICLE 3 (ex Article 3) TEC |
|--|---|
| <i>Catalogue of competences</i> | 1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: |
| <i>Internal market</i> <i>Free movement of goods, persons, services and capital = the "four freedoms"</i> | c) an <u>internal market</u> characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; |

2.2.2 Article- 14 TEC- Inserted through the Single European Act, Article 14 stipulates the establishing of the internal market by 31st of December 1992

| | ARTICLE 14 (ex Article 7a) TEC |
|---|--|
| <i>The internal market</i> | 1. The Community shall adopt measures with the aim of progressively establishing the <u>internal market</u> over a period expiring on <u>31 December 1992</u> , in accordance with the provisions of this Article and of Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty. |
| <i>Area without internal frontiers</i> | 2. The internal market shall comprise an <u>area without internal frontiers</u> in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty. |
| <i>Qualified majority decides Conciliation procedure under Article 95</i> | 3. <u>The Council</u> , acting by a <u>qualified majority</u> on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned. |

2.2.3 Article 94 TEC - General legal base for the common market:

| | ARTICLE 94 (ex Article 100) TEC |
|---|--|
| <i>Laws to be harmonised by unanimity, if there is no</i> | The Council shall, acting <u>unanimously</u> on a proposal from the Commission and after <u>consulting</u> the European Parliament and the Economic and Social |

special legal basis

Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

2.2.4 Article 95 TEC - General legal base for the internal market:

ARTICLE 95 (ex Article 100a) TEC

*Laws of the Internal Market
by qualified majority and
conciliation procedure*

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

*excluding
-taxation
-movement of persons
-employees' rights
High level of protection for
health, safety, environment,
consumer protection*

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

Keep better rules
*-environment
-working environment*

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

Introduce better rules
*-environment
-working environment
- specific problem for a
State*

4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

*The Commission decides:
-excluding:
-discriminatory treatment
-hidden trade restrictions
-obstruct the functioning of
the Internal Market*

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

3. INTERNAL MARKET ACCORDING TO THE DRAFT CONSTITUTION

3.1 Competence:

At present, the area of the internal market has to be considered as a shared competence between the Union and its Member States.

The draft Constitution proposes that competition rules within the internal market become an exclusive competence. This would represent a considerable impact on the present national rules since the Member States would totally lose their competence to legislate in the area of competition.

The other areas of the internal market however, remain a shared competence as at present where EU law - when enacted - suppresses national competence to legislate.

3.2 Internal market and Common market

Since the distinction between the "common" and the "internal" market is difficult, the new draft Constitution has sensibly dropped the use of these different terms and only refers to the "internal market, in both Articles III-64 (currently article 94 TEC) and III-65 (currently Article 95 TEC) (see below).

3.3 Structure and legal bases

The present rules governing the internal market are resorted in the draft Constitution. Thus, it assembles them under one chapter in order to achieve more coherence and a better overview. The proposed Articles III-14 until III-17 are currently dispersed throughout the TEC (Articles 14, 15, 297, 298 TEC). The draft Constitution also places the general provision of Article III-14 before the more specific sections and subsections on the free movement of persons (currently Articles 39-48 TEC), services (currently Articles 49-55 TEC), goods (currently Articles 23-38 TEC) and capital (currently Articles 56-60 TEC), as well as customs cooperation (currently Article 135 TEC), competition rules (currently Articles 81-86 TEC), aids granted by the Member States (currently Articles 87-89 TEC), tax provisions (currently Articles 90-93 TEC), and the approximation of laws (currently Articles 94-97 TEC).

This new order is undoubtedly to be considered as sensible, since it allows a much better overview of the present regulations dispersed throughout the TEC. The structure is logical, placing the provisions applicable to all areas in the first place, and the more general legal bases (III-64 and III-65) behind the more specific sections and subsections - thus also underlining that the latter prevail over the more general ones.

Finally, within the Chapter on free movement, it places the most important section - the free movement of persons - ahead.

3.4 Newly proposed legal bases

Although at first glance, the provisions on the internal market seem to remain largely unchanged, some important changes are being proposed by the draft Constitution:

3.4.1- Article III-68

Article III-68 is being proposed as a new legal basis for providing uniform intellectual property rights protection. At present, measures in this area are taken by unanimity on the basis of the flexibility clause, Article 308 TEC, which requires unanimity with a mere consultation of the European Parliament. Article III-68.1 provides for the ordinary legislative procedure: qualified majority voting in the Council with the European Parliament co-deciding.

However, paragraph 2 of Article 68 still provides for unanimity for language arrangements of the protection of intellectual property rights.

Notes:

Already now, the Community can conclude international agreements regarding the commercial aspects of intellectual property according to Article 133 TEC. Although Article 133 provides in general for qualified majority voting for the conclusion of such agreements (Article 133, paragraph 5, 1st alternative, and paragraph 4), unanimity is required for agreements that include provisions for which unanimity is required for the adoption of internal rules. At present, unanimity would be required for the conclusion of such agreements because for the adoption of internal rules in the sphere of intellectual property, Article 308 is the proper legal base.

The draft Constitution also proposes in its Article 217 qualified majority as a general rule for the conclusion of trade agreements, and also states that unanimity is required if the agreement includes provisions for which unanimity is required for the adoption of internal rules. However, since the newly proposed Article III-68 provides for the ordinary legislative procedure, international agreements on that issue could be concluded by qualified majority voting.

3.4.2 - Articles III-62.2 and III-63

The newly proposed Articles III-62.2 and III-63 relate to the possibility to switch from unanimity to qualified majority voting if the Council states by unanimity that measures concerning tax provisions relate either to

- administrative cooperation, or

- to combat fraud and tax evasion.

Currently, any measures related to taxes are subject to unanimity (Article 94 TEC for direct taxation, Article 93 TEC for indirect taxation). Thus, the draft Constitution would allow a passerelle, which means the switching over from unanimity to qualified majority. However, this still provides for the Council to decide unanimously.

Notes:

The wording of Articles III-62.2 and III-63 is confusing, since the Council shall "find" whether or not a measure relates to administrative cooperation, or the fight against fraud and tax evasion. This will lead to much uncertainty and confusion since the fact whether or not a measure relates to those issues will be subject to permanent case-to-case interpretation.

3.4.3 Article III-49

The newly proposed III-49 also represents a new legal base, according to which the Union would be able to take measures with regards to capital movements and payments to fight against organised crime, terrorism and trafficking in human beings. Until now, such measures were based on Article 308 TEC and hence required unanimity in the Council.

Article III-49 provides for the ordinary legislative procedure - qualified majority voting with the European Parliament co-deciding.

Notes:

The fight against crime traditionally belongs to the criminal law, an area of Justice and Home Affairs. Although similar provisions, e.g. the directive on the fight against money laundering (91/308), are also based on provisions related to the internal market (Article 95 TEC), the fight against crime, terrorism and trafficking on human beings, especially the procedures of freezing and seizing of assets, are typical criminal enforcement measures. It is hence confusing that the draft Constitution places Article III-49 under the Section 4 - Freedom of Capital and Payments. This paves the way for a very broad interpretation of the notion of the "internal market" since it would embrace (parts of) criminal legislation.

3.4.4 Areas where decision-making is moved from unanimity to qualified majority voting:

In the sphere of the internal market, the draft Constitution provides for changes, which would allow the Council to decide by qualified majority instead of unanimity:

- Article III-21 - Social security of migrating workers;*
- Article III-26 - The mutual recognition of diplomas and certificates;*
- Articles III-62.2 and III-63: Passerelle clause in the field of taxes in cases of administrative cooperation, and the fight against fraud and tax evasion.*

3.4.5 Areas in which the European Parliament's powers are increased

In the sphere of the internal market, the draft Constitution proposes changes in the following articles, which would increase the European Parliament's powers by providing for the ordinary legislative procedure - qualified majority and the European Parliament co-deciding:

- Article III-24 - Measures exempting certain activities, which are related to the exercise of public authority, from the principle of the freedom of establishment;
- Article III-29 - Measures extending the principle of freedom to provide services to third country nationals;
- Article III-32 - Measures to achieve the liberalisation of a certain specific service;
- Article III-46 - Measures on the movement of capitals to or from third countries.

3.4.6 The main articles in the draft Constitution

Exclusive competence

- competition rules within the internal market
- commercial policy
- customs union
- monetary policy
- marine biological resources

Article I-12: Exclusive competence

1. The Union shall have exclusive competence to establish **competition rules within the internal market**, and in the following areas:
 - monetary policy, for the Member States which have adopted the euro,
 - common commercial policy,
 - customs union,
 - the conservation of marine biological resources under the common fisheries policy.

Shared competence

General rule: when not an exclusive competence or a supportive action then a shared competence

Non-exhaustive list of shared competences (where an EU law suppresses national competence to legislate)

Article I-13: Areas of shared competence

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 I-12 and I-16.
2. Shared competence applies in the following principal areas:
 - internal market**,
 - area of freedom, security and justice,
 - agriculture and fisheries, excluding the conservation of marine biological resources,
 - transport and trans-European networks,
 - energy,
 - social policy, for aspects defined in Part III,
 - economic, social and territorial cohesion,
 - environment,
 - consumer protection,
 - common safety concerns in public health matters.
3. In the areas of research, technological development and space, the Union shall have competence to carry out actions, in particular to define and implement programmes; however, the exercise of that competence may not result in Member States being

Areas where the Union cannot prevent Member States from legislating

Development cooperation and humanitarian aid

prevented from exercising theirs.

4. 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 theirs.

Establishing the internal market

Area without internal frontiers, allowing free movement

Council decides, through regulations and decisions, by qualified majority voting

Article III-14

1. The Union shall adopt measures with the aim of establishing the internal market, in accordance with this Article, Article III-15, Article III-26(1) and Articles III-29, III-39, III-62, III-65 and III-143 and without prejudice to the other provisions of the Constitution.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the Constitution.

3. The Council of Ministers, on a proposal from the Commission, shall adopt European regulations and decisions determining the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Internal market - Unanimity

Laws to be harmonised by unanimity, if there is no specific legal basis like for example Article III-65

Article III-64

Without prejudice to Article III-65, a European framework law of the Council of Ministers shall establish measures for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market. The Council of Ministers shall act unanimously after consulting the European Parliament and the Economic and Social Committee.

Internal market - Qualified majority

Internal market laws and framework laws made by ordinary legislative procedure = qualified majority voting

Article III-65

1. Save where otherwise provided in the Constitution, this Article shall apply for the achievement of the objectives set out in Article III-14. European laws or frameworks law shall establish measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. It shall be adopted after consulting the Economic and Social Committee.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons or to those relating to the rights and interests of employed persons.

Excluding:

-taxation

-movement of persons

-employees' rights

High level of protection for health, safety, environment, consumer protection, but not the "highest" level

3. The Commission, in its proposals submitted under paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the

Maintenance of better national rules or ...

...introduction of better national rules

*The Commission decides whether a measure is:
-excluding
-discriminatory treatment
-a hidden trade restriction
-an obstruction to the functioning of the Internal Market*

Extend period by six months

If a national derogation from harmonisation has been proved being sensible, Commission shall propose adaptation for all

Health not included in the foregoing, so-called, environmental guarantee

Directly to the Court

Safeguard clause under EU control

NEW

Centralisation of intellectual-property rights

Council will also seek to achieve this objective.

4. If, after the adoption of a harmonisation measure by means of European law or framework law or a Commission regulation, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article III-43, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by means of a European law or framework law or a Commission regulation, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions and the reasons for them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, adopt a European decision approving or rejecting the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures.

9. By way of derogation from the procedure laid down in Articles III-265 and III-266, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to in this Article shall, in appropriate cases, include a safeguard clause authorising the Member States to adopt, for one or more of the non-economic reasons referred to in Article III-43, provisional provisions subject to a Union control procedure.

Article III-68

In establishing an internal market, measures for the introduction of European instruments to provide uniform intellectual-property rights protection throughout the

under Union's competence

Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements shall be established in European laws or framework laws.

Rules decided by unanimity,
EP consulted

A European law of the Council of Ministers shall establish language arrangements for the European instruments. The Council of Ministers shall act unanimously after consulting the European Parliament.

III) THE INSTITUTIONS OF THE UNION

- 1. EUROPEAN PARLIAMENT**
- 2. EUROPEAN COUNCIL**
- 3. COUNCIL OF MINISTERS**
- 4. EUROPEAN COMMISSION**
- 5. FOREIGN MINISTER**

1) EUROPEAN PARLIAMENT

The European Parliament would, jointly with the Council of Ministers, enact legislation and exercise the budgetary function, as well as functions of political control and consultation.

"Jointly with the Council" means that under Article III-302.7 the EP can reject legislative proposals or propose amendments to them, but only with the absolute majority of its members at 2nd reading.

The Council cannot adopt laws without the approval of the EP and the latter cannot decide anything without the approval of a qualified majority in the Council.

The EP "elects" the President of the European Commission but it can only elect the candidate proposed by the European Council acting by qualified majority. If the EP rejects a candidate, it will be up to the European Council to propose a new one.

After the President of the Commission has selected other Members of the Commission, the EP has to approve the College as a whole.

The number of MEPs would be limited to 736. The allocation of seats before the elections scheduled for 2009 would be decided by the European Council, on a proposal from Parliament and with its consent, with a minimum threshold of four seats per Member State.

Article I-19

The European Parliament
- co-legislates with the Council
- controls politically
- approves the Commission President proposed by the prime ministers

Direct elections every 5

1. The European Parliament shall, jointly with the Council, enact legislation, and exercise the budgetary function, as well as functions of political control and consultation as laid down in the Constitution. It shall elect the President of the European Commission.

2. The European Parliament shall be elected by directly universal suffrage of European

years, max. 736, min. of 4 members per Member State

The remainder will be divided by degressive proportionality.

According to a proposal from the EP this could mean fewer members from the smaller states than at present

EP President

citizens in free and secret ballot for a term of five years. Its members shall not exceed seven hundred and thirty-six in number. Representation of European citizens shall be degressively proportional, with a minimum threshold of four members per Member State.

Sufficiently in advance of the European Parliamentary elections in 2009, and, as necessary thereafter, for further elections, the European Council shall adopt by unanimity, on the basis of a proposal from the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles set out above.

3. The European Parliament shall elect its President and its officers from among its members.

1.1) COMPOSITION OF THE EUROPEAN PARLIAMENT AT PRESENT:

| | |
|----------------|-----|
| Belgium | 25 |
| Denmark | 16 |
| Germany | 99 |
| Greece | 25 |
| Spain | 64 |
| France | 87 |
| Ireland | 15 |
| Italy | 87 |
| Luxembourg | 6 |
| Netherlands | 31 |
| Austria | 21 |
| Portugal | 25 |
| Finland | 16 |
| Sweden | 22 |
| United Kingdom | 87 |
| TOTAL | 626 |

Absolute Majority of Members = 314votes

1.2 COMPOSITION OF THE EUROPEAN PARLIAMENT 2004-2009

| | |
|----------------|----|
| Belgium | 24 |
| Czech Republic | 24 |
| Denmark | 14 |
| Germany | 99 |
| Estonia | 6 |
| Greece | 24 |
| Spain | 54 |

| | |
|----------------|------------|
| France | 78 |
| Ireland | 13 |
| Italy | 78 |
| Cyprus | 6 |
| Latvia | 9 |
| Lithuania | 13 |
| Luxembourg | 6 |
| Hungary | 24 |
| Malta | 5 |
| Hungary | 27 |
| Austria | 18 |
| Poland | 54 |
| Portugal | 24 |
| Slovenia | 7 |
| Slovakia | 14 |
| Finland | 14 |
| Sweden | 19 |
| United Kingdom | 78 |
| TOTAL | 732 |

*After having joined the EU, Romania will have 33, and Bulgaria 17 seats in EP
From the date of Romania's and Bulgaria's accession and until 2009, the European Parliament will therefore be composed of up to 782 MEPs. From 2009 onwards, the number of MEPs will be limited to 736 (see below).*

1.3 COMPOSITION OF THE EUROPEAN PARLIAMENT FROM 2009 ONWARDS

Before the elections in 2009, the European Council decides by unanimity and with EP's consent on the latter's composition. However, the number of seats shall not exceed 736 and the minimum threshold shall be 4 MEPs per Member State.

Article I-19

Direct elections every 5 years, max. 736, min. 4 members per Member State.

*The remainder will be divided by degressive proportionality
According to a proposal from the EP this could mean fewer members from the smaller states than at present.*

2. The European Parliament shall be elected by directly universal suffrage of European citizens in free and secret ballot for a term of five years. Its members shall not exceed seven hundred and thirty-six in number. Representation of European citizens shall be degressively proportional, with a minimum threshold of four members per Member State.

Sufficiently in advance of the European Parliamentary elections in 2009, and, as necessary thereafter, for further elections, the European Council shall adopt by unanimity, on the basis of a proposal from the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles set out above.

|

2) EUROPEAN COUNCIL

The European Council is formally to become an institution. It would provide impetus and define political priorities but would not exercise legislative functions. The present rotating presidency would be replaced by a permanent presidency, elected by a qualified majority of its members for a renewable term of two and a half years. The general rule regarding the adoption of decisions will be consensus.

Article I-20

European Council

*European Council =
Prime Ministers,
President of European
Council and President of
Commission.
Minister of Foreign
Affairs shall take part*

Meets quarterly

*President may convene
additional meetings*

Decisions by consensus

1. The European Council shall provide the Union with the necessary impetus for its development, and shall define its general political directions and priorities. It does not exercise legislative function.
2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The Union Minister for Foreign Affairs shall take part in its work.
3. The European Council shall meet quarterly, convened by its President. When the agenda so requires, its members may decide to be assisted by a minister, and, in the case of the President of the Commission, a European Commissioner. When the situation so requires, the President shall convene an special meeting of the European Council.
4. Except where the Constitution provides otherwise, decisions of the European Council shall be taken by consensus.

THE EUROPEAN COUNCIL CHAIR

Article I-21

*Prime Ministers will
appoint for 2 ½ years –
may re-elect once*

Tasks of the President

*Represents the EU
in the wider world on*

1. The European Council shall elect its President, by qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end his mandate according to the same procedure.
2. The President of the European Council:

shall chair it and drive forward its work,

shall ensure proper preparation and continuity in cooperation with the President of the Commission, and on the basis of the work of the General Council,

shall endeavour to facilitate cohesion and consensus within the European Council,

CFSP issues

shall present a report to the European Parliament after each of its meetings.

The President of the European Council shall at his or her level and in that capacity ensure, the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the responsibilities of the Union Minister for Foreign Affairs.

President cannot have a national mandate

3. The President of the European Council may not hold a national mandate.

3) COUNCIL OF MINISTERS

The establishment of a Legislative and General Affairs Council has been proposed in order to ensure consistency in the Council's work. The draft Constitution also provides for a Foreign Affairs Council chaired by the EU Minister for Foreign Affairs. A specific legal basis will allow the European Council to set up other formations of the Council, chaired by representatives of Member States on the basis of equal rotation.

Article I-22

Council of Ministers:

- legislates with EP
- carries out policy making
- coordinates

Only ministers may commit their Member States and vote

*Decides by qualified majority
The "Luxembourg compromise" has not been used since the 1980s*

1. The Council of Ministers shall, jointly with the European Parliament, enact legislation, exercise the budgetary function and carry out policy-making and coordinating functions, as laid down in the Constitution.
2. The Council of Ministers shall consist of a representative of each Member State at ministerial level for each of its formations. Only this representative may commit the Member State in question, and cast its vote.
3. Except where the Constitution provides otherwise, decisions of the Council shall be taken by qualified majority.

3.1 WEIGHTING OF VOTES IN THE COUNCIL AT PRESENT:

| | |
|----------------|----|
| Belgium | 5 |
| Denmark | 3 |
| Germany | 10 |
| Greece | 5 |
| Spain | 8 |
| France | 10 |
| Ireland | 3 |
| Italy | 10 |
| Luxembourg | 2 |
| Netherlands | 5 |
| Austria | 4 |
| Portugal | 5 |
| Finland | 3 |
| Sweden | 4 |
| United Kingdom | 10 |
| TOTAL | 87 |

Qualified majority = 62 votes (certain decisions require also the votes of 10 Member States)

3.2 WEIGHTING OF VOTES IN THE COUNCIL 2004-2009

| | |
|----------------|------------|
| Belgium | 12 |
| Czech Republic | 12 |
| Denmark | 7 |
| Germany | 29 |
| Estonia | 4 |
| Greece | 12 |
| Spain | 27 |
| France | 29 |
| Ireland | 7 |
| Italy | 29 |
| Cyprus | 4 |
| Latvia | 4 |
| Lithuania | 7 |
| Luxembourg | 4 |
| Hungary | 12 |
| Malta | 3 |
| Netherlands | 13 |
| Austria | 10 |
| Poland | 27 |
| Portugal | 12 |
| Slovenia | 4 |
| Slovakia | 7 |
| Finland | 7 |
| Sweden | 10 |
| United Kingdom | 29 |
| Total | 321 |

Qualified majority:

- 1. 232 out of 321*
- 2. majority of Member States*
- 3. 62% of the population*

Weighting of votes of Romania: 14, of Bulgaria: 10

3.3 VOTING IN THE COUNCIL FROM 2009 ON

Qualified majority would become the general rule for the adoption of decisions within the Council of Ministers and, from 1 November 2009, would be defined as consisting of a majority of states representing three fifths of the population of the Union. For cases in which the Convention did not achieve consensus on changing over to qualified majority voting, a transitional measure (known in French as a 'passerelle') is planned. This means that

European Council would be able to decide unanimously that the Council will in future act by qualified majority and, as the case may be, by the ordinary legislative procedure, without the need to amend the Constitution, which would in turn require ratification by each Member State.

When a Commission proposal is not required or when a decision is not adopted on the initiative of the Minister for Foreign Affairs, the qualified majority required would be made up of two thirds of Member States representing three fifths of the population of the Union.

Article I-24

1. Majority of Member States

2. 60 % of the EU population

(meaning that the 3 biggest states can block a decision desired by 22 Member States)

Enlarged qualified majority

1. 2/3 of Member States

2. 60% of the EU population

Until 2009: qualified majority is 232 of 321 votes from a majority of states and 62% of the EU-population

NB: New deepening clause

European Council can change legislative procedure regarding a Council decision by unanimity

Can change unanimity to qualified majority on its own without ratification and possible referendums

1. When the European Council or the Council of Ministers take decisions by qualified majority, such a majority shall consist of the majority of Member States, representing at least three fifths of the population of the Union.

2. When the constitution does not require the European Council or the Council of Ministers to act on the basis of a proposal of the Commission, or when the European Council or the Council of Ministers is not acting on the initiative of the Union Minister for Foreign Affairs, the required qualified majority shall consist of two-thirds of the Member State, representing at least three fifths of the population

3. The provisions of paragraphs 1 and 2 will take effect on 1 November 2009, after the European Parliament elections have taken place, according to the provisions of article I-19.

4. Where the Constitution provides in Part III for laws and framework laws to be adopted by the Council of Ministers according to a special legislative procedure, the European Council can adopt, on its own initiative and by unanimity, after a period of consideration of six months, a European decision allowing for the adoption of such European laws or framework laws according to the ordinary legislative procedure. The European Council shall act after consulting the European Parliament and informing the national Parliaments.

Where the Constitution provides in Part III for the Council of Ministers to act unanimously in a given area, the European Council can adopt, on its own initiative and by unanimity, a European decision allowing the Council to act by qualified majority in that area. Any initiative taken by the European Council under this subparagraph shall be sent to national Parliaments no less than four months before any decision is taken on it.

5. Within the European Council, its President and the President of the Commission do not vote.

4) EUROPEAN COMMISSION

The Commission's monopoly of legislative initiative is clearly restated. From 2009, it may be made up of different classes of Commissioners.

Article I-25

EU-Commission

Role:

- promote general interest
- oversee application of Union law
- execute the budget
- implementation
- ensure external representation outside the common foreign and security policy

Monopoly of initiative:
Only it can propose new laws

Composition:
15 members, no longer one from each Member State

Rotate on equal basis
- max one term between having a member
- represent demographic and geographical range of the Union

Non-voting Commissioners from the other states

Effective from 2009

1. The European Commission shall promote the general European interest and take appropriate initiatives to that end. It shall ensure the application of the Constitution, and steps taken by the institutions under the Constitution. It shall oversee the application of Union law under the control of the Court of Justice. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions as laid down in the Constitution. With the exception of the common foreign and security policy, and other cases provided for in the Constitution, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

2. Except where the Constitution provides otherwise, Union legislative acts can be adopted only on the basis of a Commission proposal. Other acts are adopted on the basis of a Commission proposal where the Constitution so provides.

3. The Commission shall consist of a College comprising its President, the Union Minister of Foreign Affairs/Vice-President, and thirteen European Commissioners selected on the basis of a system of equal rotation between the Member States. This system shall be established by a European decision of the European Council on the basis of the following principles:

- Member States shall be treated on a strictly equal footing as regard determination of the sequence of, and the time spent by, their nationals as Members of the College; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one.
- subject to point (a), each successive college shall be so composed as to reflect satisfactorily the demographic and geographical range of all Member States of the Union

The Commission President shall appoint non-voting Commissioners, chosen according to the same criteria as apply for Members of the College and coming from all other Member States.

These arrangements will take effect on 1 November 2009.

Independence

May not take instructions from government or other body

Censure

The EP can only censure Commission as a single body, not as individual members

4. In carrying out its responsibilities, the Commission shall be completely independent. In the discharge of their duties the European Commissioners and Commissioners shall neither seek nor take instructions from any government or other body.

5. The Commission, as a College, shall be responsible to the European Parliament. The Commission President shall be responsible to the European Parliament for the activities of the Commissioners. Under the procedures set out in Article III-243, the European Parliament may pass a censure motion on the Commission. If such a motion is passed, the European Commissioners and Commissioners must all resign. The Commission shall continue to handle everyday business until a new college is nominated.

COMMISSION PRESIDENT

The political power of the President of the Commission would be backed through his/her approval by the European Parliament and would include the appointment of Commissioners, allocation of portfolios and the right to request the resignation of a Commissioner without needing the approval of the College, as at present.

Commission President

- 1. Prime Ministers elect by qualified majority*
- 2. EP approves with majority of Members*
- 3. If rejected a new candidate shall be put forward within 1 month*

Commission members

- 3 candidates from each Member State*
- The Commission President selects 13 members*
- EP approves by simple majority*
- Must have European commitment*
- Term: 5 years*

The Commission President decides guidelines and internal organisation, and appoints vice presidents and dismisses members

Article I-26

1. Taking into account the elections to the European Parliament, and after appropriate consultations, the European Council, deciding by qualified majority, shall put forward to the European Parliament its proposed candidate for the Presidency of the Commission. This candidate shall be elected by the European Parliament by a majority of its members. If this candidate does not receive the required majority support, the European Council shall within one month put forward a new candidate, following the same procedure as before.

2. Each Member State determined by the system of rotation shall establish a list of three persons, in which both genders shall be represented, whom it considers qualified to be a European Commissioner. By choosing one person from each of the proposed lists, the President-elect, shall select the thirteen European Commissioners for their competence, European commitment, and guaranteed independence. The President and the persons so nominated for membership of the College, including the future Union Minister for Foreign Affairs, as well as the persons nominated as non-voting Commissioners, shall be submitted collectively to a vote of approval by the European Parliament. The Commission's term of office shall be five years.

3. The President of the Commission shall:

lay down guidelines within which the Commission is to work;

decide its internal organisation, ensuring that it acts consistently, efficiently and on a collegiate basis;

appoint vice-presidents from among the members of the College.

A European Commission or Commissioner shall resign if the President so requests.

5) EU FOREIGN MINISTER

The Minister for Foreign Affairs would be appointed by the European Council by an extended qualified majority with the agreement of the President of the Commission. He/she would conduct the Union's common foreign and security policy, chair the Foreign Affairs Council and also serve as Vice-President of the Commission. Although he/she is a member of the Commission, it has still to be decided whether his/her nomination should be subject to the EP's approval of the Commission as a whole, and eventually to a vote of censure.

In this 'two-hatted' role (Commission-Council), the Minister would be responsible for carrying out the Union's external policy as a whole. The Minister would have the power of initiative (in the absence of which a decision by qualified majority within the Council would not only require the majority, but two thirds of Member States), would represent the Union alone or with the Commission, and would have authority over the external delegations. Representation of the Union would be limited through the competence of the President of the Union who would represent the Union at "his or her level".

The Foreign Minister's (and the Commission's) opinion would be required for the Council's authorisation to proceed with enhanced cooperation in matters related to Common Foreign and Security Policy.

Article I-27

EU Foreign Minister

*Elected by qualified by
Prime Ministers in
agreement with
Commission President*

Tasks of Foreign Minister

1. The European Council, acting by qualified majority, with the agreement of the President of the Commission, shall appoint the Union Minister for Foreign Minister. He shall conduct the Union's common foreign and security policy. The European Council may end his tenure by the same procedure.

2. The Union Minister for Foreign Affairs shall contribute by his proposals to the development of the common foreign policy, which he shall carry out as mandated by the Council of Ministers. The same shall apply to the common security and defence policy.

Double hat
Foreign Minister also
Vice-President of
Commission for external
relations

External service
established in part III

3. The Union Minister for Foreign Affairs shall be one of the Vice-Presidents of the Commission. He shall be responsible there for handling external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, The Union Minister for Foreign Affairs shall be bound by Commission procedures.

[Footnote 1: The establishment of a Joint European External Action Service, to assist the Minister, will be addressed in a Declaration/Part III.]