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The Treaty establishing a Constitution for Europe: Part IV and Protocols

Part IV of the *Treaty establishing a Constitution for Europe* (the “European Constitution”) contains the “General and Final Provisions.” These cover the legal succession of the new European Union to the old, the arrangements for carrying over the *acquis communautaire*, ways to amend the Treaty, and ways to change the voting method on European laws from unanimity to Qualified Majority Voting.

This Paper looks at these General and Final Provisions. Where relevant it compares them to their predecessors in the draft constitution prepared by the Convention on the Future of Europe.

It also considers the Protocols annexed to the Constitution on the role of national parliaments, subsidiarity and proportionality, and transitional institutional provisions.

This is one of a series of Library Research Papers on the European Constitution. Paper 04/66 covers Part I, Paper 04/75 covers Part III and a Paper on Part II will be forthcoming.

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Summary of main points

- The outstanding elements of the *Treaty Establishing a Constitution for Europe* (the “European Constitution”) were agreed on 18 June and a consolidated provisional text was published on 25 June 2004.
- The final edited text was published on 6 August 2004 as CIG 87/04 with Addendums 1 and 2 containing Protocols and Declarations respectively.
- The Treaty is divided into four parts, comprising in Part I general principles; Part II, the Charter of Fundamental Rights; Part III, detailed provisions on policies and procedures relating to Articles in Part I; and Part IV, General and Final Provisions. Protocols and Declarations are annexed to the Constitution.
- Part IV of the Constitution contains technical provisions governing the operation of the Constitution itself.
- It repeals the existing EC Treaties and provides for the succession of the new European Union to the rights and responsibilities of the existing European Union and European Community.
- It carries over the *acquis communautaire* and entrenches the case law of the ECJ as the source of interpretation for this and for the Constitution.
- It sets out the procedures for changing the Constitution:
 - amendment of the Treaty will be effected by new treaties, as at present. However, rather than negotiating these directly between governments in an intergovernmental conference, a Convention will be set up, for amendments of sufficient weight, to make recommendations to a meeting of government representatives.
 - the voting method on policy matters, other than defence, may be changed from unanimity to QMV without amending the Treaty. A separate procedure is established for this.
 - there is also a procedure for making changes to main policy areas without amending the Treaty. These changes cannot expand the competences of the Union. That would require a new treaty.
- The Constitution must be ratified by all the Member States before it can come into force. If they all ratify in time, it will come into force on 1 November 2006. If not, it will come into force at the beginning of the second month after the final ratification.
- The Protocols on the Role of National Parliaments, Subsidiarity and Proportionality provide mechanisms for a greater involvement and better oversight of the Union’s legislative activities by national parliaments.
- Other Protocols maintain the UK opt-ins and opt-outs with regard to certain EU policies. The Protocols are integral parts of the Constitution and legally binding.

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I Introduction

The Convention on the Future of Europe (the Convention) drew up a draft constitutional text, which was agreed on 18 July 2003. This was the basis for discussion at the Intergovernmental Conference (IGC), which opened in October 2003. The IGC reached agreement on the outstanding issues on 18 June 2004.¹

A provisional consolidated version of the final text was published as IGC document CIG 86/04 on 25 June 2004.² The British Government published this as Command Paper 6289 on 19 July 2004.

The text was edited by the Council of Ministers' legal and linguistic experts in the 20 official languages of the EU, in order to make it authentic within the meaning of Article IV-448 of the text itself. The edited text of the Treaty was published on 6 August 2004 as CIG 87/04³ with Addendums 1 and 2⁴ containing Protocols, Annexes and Declarations.

The formal title of the text is the *Treaty Establishing a Constitution for Europe* but it is referred to here as “the European Constitution” or “the Constitution”. It repeals and replaces the current EC Treaties (the *Treaty Establishing the European Community* or TEC and the *Treaty on European Union* or TEU), merging the main EC Treaty, the TEC, with the intergovernmental elements contained in the TEU.

The Constitution is to be signed in Rome on 29 October 2004 and will then be subject to ratification by all 25 Member States in accordance with their constitutional requirements. The final text of the Constitution will be re-published as a Command Paper in the UK following signature, and if it is ratified, it will be published as a Command Paper in the European Treaty Series.⁵

¹ For information on the IGC negotiations on the Constitution, see Standard Notes SN/IA/2803, 2838, 2469, 3091 and 3128 on the Library publications page.

² CIG 86/04 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00086.en04.pdf>. This was based on the provisional consolidated version (CIG 50/03, 25 November 2003 at <http://ue.eu.int/igcpdf/en/03/cg00/cg00050.en03.pdf>), together with its corrigenda at http://ue.eu.int/cms3_applications/applications/igc/doc_register.asp?cmsid=576&num_page=3&lang=EN&content=DOC and http://ue.eu.int/cms3_applications/applications/igc/doc_register.asp?cmsid=576&num_page=4&lang=EN&content=DOC and Presidency documents CIG 81/04, 16 June 2004 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00081.en04.pdf> and CIG 85/04, 18 June 2004, at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81109.pdf. The Protocols were published in CIG 86/04 Addendum 1, at <http://ue.eu.int/igcpdf/en/04/cg00/cg00086-ad01.en04.pdf>, and the Declarations in CIG 86/04 Addendum 2, at <http://ue.eu.int/igcpdf/en/04/cg00/cg00086-ad02.en04.pdf>.

³ CIG 87/04, 6 August 2004 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf>

⁴ CIG 87/04 ADD 1, 6 August 2004 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf> and CIG 87/04 ADD 2, 6 August 2004 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf>

⁵ See HC Deb 20 July 2004 c26WS at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040720/wmstext/40720m05.htm#40720m05.html_sbhd2

The Constitution is structured in four parts. Part I contains articles of general principle. Part II contains the Charter of Fundamental Rights, Part III the detailed provisions for Articles in Part I, and Part IV general and final provisions. One of the main technical adjustments agreed by the IGC and carried out by the Council experts was to renumber the four parts of the Constitution in a continuous numbering system, rather than numbering each part separately, as in the provisional final text. The Constitution contains 448 articles and is 349 pages long.⁶ The British Foreign Secretary, Jack Straw, who wanted a text that would fit into his pocket,⁷ now concedes that a “poacher’s pocket” will be needed.⁸

The European Treaties are unusual in many ways. They create arrangements of complexity between states and they give birth to institutions with an extensive independent life. This represents a delegation of sovereignty and is one of the grounds for interest in, and controversy over, the EC Treaties. Nevertheless, they are not entirely open-ended. They are still treaties, legal agreements in written form, hedged around with procedures and definitions which limit the scope for institutional play. As legal documents, the treaties need technical provisions to govern their own operation. These provisions may seem banal at first glance, but they underpin the functioning of the treaties, and thus feed in to the functioning of the institutions and policies

These technical provisions are contained in Part IV, **Articles IV-437 to IV-448**. They cover matters such as the relationship with the existing treaties, the succession of the new European Union to the old, amendment of the new Treaty, and ratification and entry into force. They effect the repeal and replacement of a major body of international law, the preceding EC Treaties and acts. They ensure the survival, with modifications, of the institutions created under those Treaties and of the laws created by those institutions. They bind into the Constitution the jurisprudence of the European Court of Justice (ECJ) and they make use of a “*passerelle*” device allowing for a change from voting by unanimity to voting by qualified majority.

Annexed to the Constitution are a number of legally binding Protocols and non-binding, but politically influential, Declarations. The Protocols on the Role of National Parliaments and Subsidiarity and Proportionality aim to involve national parliaments to a greater extent in the Union’s legislative processes. They will also affect the way that Westminster examines and scrutinises draft legislation and other Union activities.

⁶ Together with the Protocols, Annexes and Declarations, the IGC version of the text has 852 pages

⁷ “A Constitution for Europe” *The Economist* 11 October 2002, at:
<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1034270166922>

⁸ *The Economist* 10 July 2004; see also British Embassy Berlin website, at
<http://www.britischesbotschaft.de/en/news/items/040710.htm>

II Succession and legal continuity between the existing and future Unions

The first major work of Part IV is to remove from legal effect the existing European Treaties, and to establish the new European Union, created under the present Treaty (the Constitution) as the legal successor to the existing European Union. This is necessary in order to ensure a smooth transition, and it fits the aim of avoiding any form of dual or alternative membership.

Articles IV-437 to IV-439 effect these changes. The Constitution makes slight shifts of emphasis in these matters, compared to the Convention draft articles IV-2 and IV-3. Previously there was detail on the succession of the new Union to the old, specifying the rights and obligations to which the new Union would succeed. The laws, on the other hand, were carried over in relatively simple language. In the new text these positions are reversed. Succession is effected in short language, while legal continuity is spelled out in some detail.

A more significant change is that the case law of the European Court of Justice (ECJ) is now “the source” for interpretation of Union law and of the Constitution, whereas in the Convention draft it was “a source” for interpretation of Union law.

A. Succession

Article IV-437 repeals the existing EC Treaties and the acts and treaties which have amended them. It also repeals the accession treaties for states which were not original parties to the Treaty of Rome, except for certain provisions which remain relevant. These are listed in Protocols to the Constitution. Those in respect of the UK mostly concern Gibraltar, the Channel Islands and the Isle of Man, and nuclear energy.⁹

Article IV-438 provides that the European Union established by the Constitution is the successor to the existing European Union and European Community. It provides for legal continuity between the existing and the new arrangements, including the continuing *acquis communautaire*,¹⁰ and it expands the role of ECJ case law as the basis for legal interpretation.

As to succession, Article IV-438 (1) states simply that

the European Union established by this Treaty shall be the successor to the European Union established by the Treaty on European Union and to the European Community.

⁹ Protocol 8, Title II, starting at p137: <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf>

¹⁰ The *acquis communautaire* is the entire body of European law, including the Treaties, regulations and directives adopted by the European institutions, as well as judgments of the European Court of Justice.

This means, among other things, that the new European Union will not have to renegotiate agreements made by the existing European Union. Whereas the Convention draft spelled out that the succession included legal rights and obligations, assets and liabilities, and archives, the Constitution is laconic on this.

There are transitional provisions for the institutions and other bodies. These are set out in Articles **IV-438(2)** and **IV-439**. When the new European Union comes into being, the composition of the European Parliament and the Commission will be governed by a Protocol on transitional provisions.¹¹ A Council Decision will be adopted once the Constitution comes into force, providing for a smooth transition from the QMV provisions set out in the Protocol on transitional provisions, which will apply until 31 October 2009, and the QMV system under Article I-25 of the Constitution.¹²

Other existing institutions will function under the Constitution, retaining their composition at the time of its entry into force until new arrangements are introduced under the Constitution or until the end of their term of office.

B. Continuity

Article IV-438 (3) states that the laws adopted under the existing Treaties will remain in force and that their legal effects will be preserved, unless and until they are repealed, annulled or amended in implementation of the Constitution. The same goes for agreements between Member States under the existing Treaties. All other components of the *acquis communautaire* (i.e. the non-legislative parts) are preserved until they have been deleted or amended. The Convention draft merely stated that the legislative acts would remain in force.

Under **Article IV-438 (4)** the case law of the ECJ and the Court of First Instance on the interpretation and application of the Treaties and laws

shall remain, *mutatis mutandis*, the source of interpretation of Union law and in particular of the comparable provisions of the Constitution.

There is a significant shift here from the Convention draft, which stated that

the case-law of the Court of Justice of the European Communities shall be maintained as a source of interpretation of Union law.¹³

¹¹ Protocol 34, starting at p351: <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf>.

¹² The draft Decision is set out in Declaration No. 5 on Article I-25 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf>

¹³ Article IV-3.

Continuity of administrative and legal procedures is required under **Article IV-438(5)**, and it is devolved to the components of the Union to achieve this.

III Changing the Constitution

The Constitution introduces mechanisms by which it may be amended. It also introduces mechanisms by which various of its provisions may be modified, without the necessity of amending the Constitution itself.

A. Amendment

Article IV-443 sets out the “ordinary revision procedure,” which allows the Constitution to be amended. Proposals for amendment may come from a Member State, the EP or the Commission. They are submitted to the Council, which then passes them to the European Council. National parliaments are informed. The European Council then has to decide whether to submit the proposals for further examination, which it does by means of a decision by simple majority, after consulting the EP and Commission.

If a decision is adopted to consider the proposals further, the President of the European Council calls a Convention. The Convention includes representatives of the national parliaments, the Heads of State or Government, the EP and the Commission. If the proposals concern institutional changes in the monetary area, the European Central Bank (ECB) will also be consulted (**Article IV-443(2)**). The Convention then makes a recommendation, adopted by consensus, to a conference of government representatives. This conference is convened “for the purpose of determining by common accord the amendments to be made to this Treaty” (**Article IV-443(3)**).

There is an alternative procedure available under the same Article. If the European Council feels that the “extent” of the proposed amendments is not such as to justify consideration by a Convention, it may make a decision to this effect, by simple majority and after obtaining the EP’s consent (**Article IV-443(2)**). The European Council then defines the terms of reference for a conference of government representatives and there is no Convention. The amendments take the form of a treaty, which must be ratified by all Member States before it can enter into force.

There is a procedure in case of difficulty in gaining universal ratification. The matter is referred to the European Council if, two years after signature of an amendment treaty, four-fifths of the Member States have ratified it, but one or more have “encountered difficulties in proceeding with ratification” (**Article IV-443 (4)**).

B. *Passerelles*

Passerelle is a French word meaning “footbridge” and has been called a “bridging” or “escalator” clause in the present context. A *passerelle* clause allows the parties to move from the position set out in the Constitution to a different position by means of a provision in the text itself, rather than by means of a new treaty to amend the original one.

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

The Constitution has a number of *passerelle* clauses, which allow changes to be made to Part III articles, the main substantive policy and procedure provisions. The present EC Treaty also contains a *passerelle* provision in Article 67 (Title IV on “Visas, Asylum, Immigration and other Policies related to the Free Movement of Persons”). The Constitution **Article IV-444** broadens the range of matters which may be transferred from unanimity to QMV, without amending the Treaty.

To the extent that these clauses are used, some would argue that they will have the effect of altering the arrangements set out in Part III, such that the Treaty will not be a wholly accurate guide to its own provisions. On the other hand, they will not be amendments to the Constitution, but an exercise of its provisions. Whereas in the past such treaty changes were made largely by means of an amendment treaty, in the future they may be made without amending the text of the Constitution. The *passerelles* do not create a free-for-all, however, since they specify procedures that must be satisfied in order for changes to be made.

Gisela Stuart, one of the UK’s parliamentary representatives on the Convention, voiced her objections to the key *passerelle* clause in **Article IV-444** (then Article I-24(4)) to the Standing Committee on the Convention:

As a parliamentarian, I find it extremely difficult to accept that Parliament's right to have a say in the matter should be waived in such a cavalier fashion, particularly given that part III of the constitution is a precise list for which unanimity remains.¹⁴

The British Government was also opposed to the *passerelle* clause in the Convention draft, in which the changes from unanimity to QMV were to be sent to national parliaments four months before a decision was taken, while the changes from special to ordinary legislative procedures were to be made after consulting the EP and informing national parliaments. The Prime Minister said in December 2003 that it was “necessary to improve the original Convention text, on which we have been negotiating for the past few months”, and also claimed that the Government had “got rid of it”.¹⁵ The clause remains, but with a stronger role for national parliaments.

¹⁴ Standing Committee on the Convention 16 June 2003 c 003 at <http://www.publications.parliament.uk/pa/cm200203/cmstand/conven/st030616/30616s01.htm>

¹⁵ HC Deb 15 December 2003, c 1528

1. Voting method

Article IV-444 concerns the use of unanimity or QMV in a “simplified revision procedure”. It allows the Member States to move from the use of unanimity, where this is stipulated in the Constitution, to the use of QMV, without amending the Constitution under Article IV-443.

There has been a significant change in this clause from the Convention draft. A new provision has been added to allow national parliaments to block these changes.

Article IV-444(1) states:

Where Part III provides for the Council to act by unanimity in a given area or case, the European Council may adopt a European decision authorising the Council to act by a qualified majority in that area or in that case.

This paragraph shall not apply to decisions with military implications or those in the area of defence.

Article IV-444(2) effects an equivalent provision for those laws adopted under the special legislative procedure:

Where Part III provides for European laws and framework laws to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a European decision allowing for the adoption of such European laws or framework laws in accordance with the ordinary legislative procedure.

Article IV-444(3) states:

Any initiative taken by the European Council on the basis of paragraphs 1 or 2 shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the European decision referred to in paragraphs 1 or 2 shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

Following this, if a decision is to be adopted, the European Council acts by unanimity after obtaining the EP’s consent by a majority of its component members.

In the debate on the European Constitution on 9 September 2004 Gisela Stuart raised with the Foreign Secretary a lack of precision in the wording in respect of national parliaments:

What if, in a bicameral Parliament like this, the two Chambers do not agree?
There is no mechanism for defining what “Parliament” means in that context.¹⁶

Mr Straw replied that it would be for the Commons to decide.¹⁷ Later in the same debate Ms Stuart made the more general point that “we must be much more precise about the mechanism that this House will use to form an opinion.”¹⁸ Mr Straw agreed with Ms Stuart’s point and said that he would try to address it in the Bill concerning ratification of the Constitution.¹⁹ Some Members suggested that scrutiny procedures at Westminster should be improved to take account of this important new role.²⁰

2. Policy matters

Article IV-445 is another *passerelle* clause. Like Article IV-444 it allows significant changes to be made without the necessity of a new treaty with universal ratification under Article IV-443. However, some of the features of a treaty amendment are preserved.

The Article provides a “simplified revision procedure concerning internal Union policies and action.” This is a way of changing the Constitution’s provisions in the main areas of Union policy set out in Part III, Title III, covering Articles III-130 to III-285.

Under **Article IV-445(1)** Member State governments, the EP or the Commission may submit to the European Council proposals for changes to these policies. For the proposals to be adopted the European Council must first consult the EP and the Commission (plus the European Central Bank if the proposals are for institutional changes in the monetary area) and then it must act by unanimity. The European decision thus adopted must be “approved by the Member States in accordance with their respective constitutional requirements.” This is not the same thing as treaty ratification, but it creates a possibility for national input and for national veto.

Under **III-445(3)** “the European decision referred to in **III-445(2)** shall not increase the competences conferred on the Union in this Treaty.” That would require an amendment treaty, using Article IV-443.

The British Government supports the simplified revision process. The Foreign Secretary told the Foreign Affairs Committee in December 2003:

I may say there that that is actually in our interests because some of these policies are ages old, they are not appropriate, they need to be amended. You do not have to have the whole panoply of an IGC to have them amended and because this is

¹⁶ HC Deb 9 September 2004, cc884-5.

¹⁷ Ibid, c885.

¹⁸ Ibid c903.

¹⁹ Ibid

²⁰ Ibid c930.

an intergovernmental treaty there is much more detail on these policies than ever there would be, say, on agricultural policy applying to any one Member State. It then says in (2) that the European Council may adopt a European decision amending all or part of their provisions of Title III of Part 3 and the Council shall act by unanimity, and then it says that such a decision shall not come into force until it has been approved by the Member States in accordance with their respective constitutional requirements, so that is again a complete block for the national parliaments.²¹

C. Implications

The broad intention behind **Articles IV-443 - IV-445** is to clarify, and to some extent to simplify, the amendment procedures, and thus to move away from the sometimes cumbersome IGCs. The use of the Convention process, already rehearsed in drawing up the Charter of Fundamental Rights and the draft constitution, is aimed at widening input to the process and making it more transparent.

Under general treaty law, where a treaty provides for its own amendment, those procedures should be followed.²² This means that Article IV-443 would become the method for amendment. The IGCs of the past would be replaced by intergovernmental meetings working (in those cases deemed sufficiently weighty) on the basis of a recommendation made by a Convention.

It is debateable whether this system will be simpler or more efficient than the existing one under Article 48 TEU. It has more stages and more actors, which may lead to greater scope for disagreement. On the other hand, it may also allow wider input and enhanced credibility. It also remains to be seen how often the *passerelles* will be crossed and whether those who regard the crossing as vertiginous will be satisfied with the available mechanisms for refusal.

The new arrangements in Articles IV-444 and IV-445 do not preclude the prospect of future changes in policy by means of amendment treaties concluded according to Article IV-443. Likewise, that Article would apply to changes in the areas excluded from Articles IV-444 and IV-445, such as defence or the extent of Union competences.

IV Other Articles

Article IV-440 (Article 299 TEC) sets out the territorial scope of the Treaty, including the various arrangements for overseas territories.

²¹ Foreign Affairs Committee Minutes of Evidence, 11 December 2003, at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmfaaff/1233/3102814.htm>

²² *Vienna Convention on the Law of International Treaties 1969*, Article 40.

Article IV-441 (Article 306 TEC) allows for regional unions between Belgium and Luxembourg, or between those two states and the Netherlands, to the extent that their objectives cannot be attained under the Treaty.

Article IV-442 (Article 311 TEC) provides that the Protocols and Annexes to the Constitution are integral parts of it.

Article IV-446 (Article 312 TEC) provides that the Treaty is concluded for an unlimited period.

Article IV-447 concerns ratification. As in Article 48 TEU, the Constitution must be ratified by all the Member States. It will enter into force on 1 November 2006 if universal ratification has been achieved by then. If not, it will enter into force at the beginning of the second month after the final ratification.

Universal ratification, combined with the repeal of the existing treaties and the replacement of the existing European Union, serves to avoid anomalies. Many multilateral treaties come into force after a certain proportion of the signatories have ratified them. Also, it is possible for some states to adopt amendments as between themselves, while others remain party to the unamended treaty. In the case of the EU, neither the existing Treaties, nor the Constitution, allow this. The Constitution, which is effectively a grand amendment of the existing ones, cannot come into force for some Member States but not for others. In many areas this is a political move, to prevent the growth of alternative sets of rules and relationships. It is a rejection of notions such as variable geometry or a multi-speed Europe. However, there are parts of the Constitution for which it is also necessary in a logical sense, for instance in respect of the functioning of the institutions. The Member States cannot work under differing rules of voting arithmetic or institutional composition. Universal ratification ensures that this uniformity is preserved, since the Constitution will replace the existing Treaties for all Member States at the same time.

In Declaration No. 30 on ratification the IGC notes that

if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.

The difficulties would presumably be discussed by the European Council with a view to agreeing on a way to proceed. The French President, Jacques Chirac, said at a press conference on 28 April 2004 that he was in favour of exerting “friendly pressure” on Member States that failed to ratify the Constitution within two years of its signature.²³ He

thought that such States could be forced to leave the EU and wanted a “ratify or leave” clause to be written into the Constitution. The Declaration is clearly not of this order, but it does for the first time suggest a framework for tackling ratification problems.

Article IV-448 provides that the texts of the Constitution in all the official languages of the Union shall be equally authentic and that it may be translated into any other languages with official status in particular Member States, although those will not be authentic texts, merely authorised translations. The British Government has said that it will consider which languages it will translate the Treaty into nearer the time of the publication of an official version of the Treaty.²⁴

This Article is supplemented by a Declaration underlining the importance the Union attaches to cultural and linguistic diversity, which is illustrated by the provision on translation.²⁵

V Protocols Annexed to the Constitution

There are 36 Protocols annexed to the Constitution, some new ones, and others carried over from the existing Treaties. The Protocols on the role of national parliaments and the application of subsidiarity and proportionality²⁶ are crucial to the Government’s argument that the Constitution places greater emphasis on the importance of national parliaments and that it grants more powers to Member State governments and parliaments than under the current Treaties.

The Protocols will also have significant implications for the ways in which national parliaments seek to enhance their role and influence in the European process. The means by which this is achieved lie as much with the methods used by national parliaments to scrutinise the EU and to influence their governments as with the mechanisms provided at the European level.

This section also looks at the Protocol on transitional measures relating to the institutions, which includes the Council voting arrangements for the immediate post-implementation period and for the following term starting in November 2009.

²⁴ HC Deb 13 July 2004 c1378-9W

²⁵ <http://ue.eu.int/jgcpdf/en/04/cg00/cg00087-ad02.en04.pdf>

²⁶ Other Protocols have been considered alongside the Constitution Articles to which they refer in Research Papers on Parts I and III in this series (04/66 at <http://hcl1.hclibrary.parliament.uk/rp2004/rp04-066.pdf> and 04/75 at <http://hcl1.hclibrary.parliament.uk/rp2004/rp04-075.pdf> respectively)

A. Protocol 1 on the Role of National Parliaments in the European Union

1. Introduction

Successive Treaty amendments have tried to tackle the problems raised by national parliamentarians dissatisfied with the failure of the EC legislative process to take their views into account. The problem lies to some extent in the way that national governments inform their own parliaments about EU matters, while the lack of national parliamentary representation at EU level has led to a feeling of alienation, and the criticism of a lack of democratic legitimacy in the EU. On the former point, the Government has adopted a policy of keeping Parliament better informed about EU business.²⁷

The British Prime Minister had put forward ideas for a new second EU chamber composed of national parliamentarians in his Warsaw speech in October 2000,²⁸ but this was not popular elsewhere in Europe. The EU Committees in the Commons and the Lords²⁹ were also critical. In a Report in November 2001 the ESC had called instead for “joint meetings of national parliamentarians and MEPs to be placed on a more formal basis with a small secretariat and joint organisation by national parliaments and the EP”.³⁰

Declaration No 13, annexed to the *Treaty on European Union* (Maastricht Treaty), and Protocol 13, annexed to the *Treaty of Amsterdam*, both attempted to involve national parliaments to a greater extent in EU matters. Declaration 23, annexed to the *Treaty of Nice*, invited national parliaments to participate in the debate on the future of the Union and the Laeken Declaration of 15 December 2001 proposed specific questions about the role of national parliaments that the Convention should tackle.³¹

2. Convention on the Future of Europe

The Convention Working Group (WG) IV, which was chaired by Gisela Stuart, considered the role of national parliaments. It looked at three strands:

- the role of national parliaments in scrutinising governments;
- the role of national parliaments in monitoring the application of subsidiarity;

²⁷ See HC Deb 13 September 2004 c1451W and references to Modernisation Committee below

²⁸ Text of speech at FCO website, <http://www.fco.gov.uk/news/speechtext.asp?4215>

²⁹ ESC Report, 152-xxxiii-II and see also the Lords Select Committee on the European Union, *A Second Parliamentary Chamber for Europe: an unreal solution to some real problems*, HL Paper 48, 2001-02, 27 November 2001

³⁰ ESC Report, 152-xxxiii-II, Para 143 at:

<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15209.htm#n263>

³¹ <http://ue.eu.int/en/Info/eurocouncil/index.htm>

- the role and function of multilateral networks or mechanisms involving national parliaments at the European level.

The Group's Final Report of 22 October 2002³² emphasised the need for reform of the Council's working methods to make it more open and transparent, in order to bring about greater awareness in national parliaments. The Seville European Council in June 2002 had already contributed to this process by requiring open meetings when the Council was acting under the co-decision procedure, but the Group also considered that records of proceedings should be sent within 10 days to the EP and national parliaments, parallel with the transmission to governments. The WG recommended that the future constitutional treaty:

should specifically acknowledge the importance of the active involvement of national parliaments in the activities of the European Union, in particular by ensuring the scrutiny of governments' action in the Council, including the monitoring of the respect of the principles of subsidiarity and proportionality.³³

The WG's consideration of national scrutiny systems led it to conclude, not surprisingly, that effective scrutiny of governments' action at EU level depended on the scrutiny arrangements in the Member States. It noted that many national scrutiny measures could also apply to sub-state level, subject to the national constitutional arrangements in the Member States. The WG identified some basic factors influencing the effectiveness of scrutiny, including:

- the timeliness, scope and quality of information covering all activities of the Union;
- the opportunities for a national parliament to formulate its position with regard to an EU legislative proposal;
- regular contacts and hearings with Ministers before and after Council of Ministers meetings, as well as European Council meetings;
- active involvement of sectoral/standing committees in the scrutiny process;
- regular contacts between national parliamentarians and MEPs;
- availability of support staff, including the possibility of a representative office in Brussels.

The Group acknowledged that national parliaments did not always make use of the powers they had to scrutinise their governments, a matter that COSAC, the group of parliamentary EU committees, might consider in the on-going debate on its reform process.³⁴

³² CONV 353/02

³³ Ibid

³⁴ The acronym is from the French "Conférence des organes spécialisés dans les affaires communautaires".

Turning to the Commission, the WG thought that national parliaments perhaps did not exploit early opportunities to react to proposals at the pre-legislative stage, when the Commission operated a wide consultation process on its drafts. The Group suggested that consultative documents could be sent directly to national parliaments at the same time as to the Council.

The six-week period stipulated by the Amsterdam Protocol between transmission of a proposal and its inclusion on the Council agenda for adoption (or the adoption of a common position) was “sufficient as a general rule” for national parliaments, provided that they received information rapidly. However, there was concern about the possibility of “preliminary agreements” being reached in Council Working Groups within this six-week period, before national parliaments had been able to make their views known to their governments. Therefore, the Group concluded that no preliminary agreements should be acknowledged in the Council, including Working Groups and the Committee of Permanent Representatives (COREPER, comprising national government representatives), during the six-week period. However, the Commission should still be able to present the proposal, and a preliminary exchange of views in the Working Groups should be allowed. The need to maintain an urgency provision should remain, but the reasons for exceptions must be clearly stated (i.e. in line with existing Protocol provisions).

The WG wanted the Commission to transmit its Annual Policy Strategy and annual legislative and work programme, and the Court of Auditors its annual report, to national parliaments at the same time as documents were transmitted to the EP and Council.

The Group recommended a strict observation of existing Treaty provisions on national parliaments but with a clearer status within the Council’s Rules of Procedure for parliamentary scrutiny reserves, and a specified time limit for reserves, so as not to block the decision process unnecessarily. It suggested other procedural amendments that would ensure that observance of the Rules was kept in a public record.

The Group also looked at a possible role for national parliaments in controlling the application of subsidiarity and held one joint meeting with the Subsidiarity WG. National parliaments, it thought, should be involved early in the legislative process and in possession of all the relevant information. The Group largely rejected the creation of a new body to monitor subsidiarity, preferring a new, simple mechanism that would not delay the legislative process unnecessarily. National parliaments could, as part of a two-stage monitoring process, consider a draft from the perspective of subsidiarity at the start of the process, but also throughout the process in cases where the text had been considerably amended, possibly with the opportunity to intervene at any stage.

Regular exchanges of information between national parliaments and the EP were welcomed as a useful way of discussing best practice and benchmarking in national scrutiny, but the WG thought existing arrangements had not been fully exploited at national or at sub-state level. COSAC’s mandate as an inter-parliamentary consultative body should be clarified. It might also provide a platform for contacts between sectoral

standing committees in national parliaments and the EP and MEPs could be invited to participate in meetings. The Group looked at various forms of contacts (specific issues on an ad hoc basis, more systematic cooperation between national and EP committees, ad hoc inter-parliamentary conferences on sectoral issues such as CAP reform etc).

In view of the expanded role COSAC received under Amsterdam in relation to the EU institutions, the Group suggested that the institutions should also respond to COSAC's contributions, via a Commissioner or an institutional representative, for example, or in writing from the institution concerned. The WG also proposed an annual "European Week", during which national parliaments, the EP, governments and possibly the Commission would try to raise awareness of EU activities.

The European Scrutiny Committee was disappointed in the Working Group Report for not being "radical" enough. This was conveyed in a Committee Press Notice in October 2002³⁵ and clarified by the Chairman, Jimmy Hood, at the Standing Committee on the Convention in October 2002:

We were disappointed, partly because there seemed to be consensus that increasing national Parliaments' role in the European Union was a way of helping to bridge the gap between citizens and EU institutions. The treaty of Nice listed the role of national Parliaments as one of four subjects to be discussed at the next intergovernmental conference. The Laeken declaration asked questions about increasing the role of national Parliaments, and the United Kingdom Government said that developing the role of national Parliaments in the EU was one of their priorities for the Convention. Even the European Parliament's Committee on Constitutional Affairs accepted:

"the solidity of national democratic frameworks and their closeness to the citizens are an essential asset which can in no way be ignored in pursuing the parliamentarisation of the Union."

In view of all that, it was not unreasonable to expect that the Convention would bring forward proposals that would make a significant difference to national Parliaments' ability to exert influence in the EU, but without creating a new institution, such as a second chamber, and without giving a formal role in the legislative process to national Parliaments. The Select Committee on European Scrutiny, of which I am Chairman, put forward its own ideas in its report entitled "Democracy and Accountability in the EU and the Role of National Parliaments." Most of the discussion about a new role addressed enforcement of the principles of subsidiarity and proportionality, and my Committee made a proposal. However, we are less worried about the specific mechanism used than about ensuring that objections made by national Parliaments on grounds of subsidiarity have an impact rather than being brushed aside. That is where much of our disappointment arises.

³⁵ ESC Press Notice No.24, 2001-02, 16 October 2002, at: http://www.parliament.uk/parliamentary_committees/european_scrutiny/escpn161002.cfm

The working group's report, in line with that of the working group on subsidiarity, provides for national Parliaments to object at an early stage. However, there would be no requirement for anyone to take the slightest notice of that objection or to respond to it. The emphasis in the report is entirely on ensuring that the new procedure does not cause any delay in the legislative process. The working group on subsidiarity is right to emphasise that it would be the first time that national Parliaments would be involved in the EU's legislative process, but it seems that such involvement would be without influence. If there is no possibility of delay, the involvement of national Parliaments can be no more than a formality. As I said in a press release:

"a real watchdog does not just convey views; it barks, and occasionally bites."

The second disappointment relates to matters that affect the scrutiny that we may carry out in Westminster and other national Parliaments. I am pleased that the draft report recognises that the way in which the EU operates can affect national Parliaments' ability to hold their Governments to account. [...] I am also pleased that the draft report stresses the need for greater openness in the Council. However, it ignores such important issues as the need for time for scrutiny before a radically revised text is put to the Council for agreement. It says nothing about the conciliation process, which, with its secrecy and back-room deals, is as much an affront to democratic principles as the Council of Ministers meeting in private. I cite an example of that: the European Parliament agreed not to breach financial ceilings in return for getting an early retirement scheme for the temporary staff of its political groups. Our two alternate members are on the working group on simplifying legal instruments, and I hope that they will oppose any extension of the co-decision and conciliation process, unless it is made much more transparent. The report adopts our suggestion that parliamentary scrutiny reserves should be given formal status in the Council's rules of procedure, but when the decision is by qualified majority voting, it explicitly encourages the Council to go ahead without waiting. Apparently, pressing on regardless is more important than allowing the small amount of time needed for scrutiny.

There are some good things in the report, such as encouraging the Conference of Community and European Affairs Committees to draw up minimum standards of parliamentary scrutiny, and exploring the possibility of introducing new ways of bringing MPs and MEPs together for discussion. However, it is not clear to me whether anything in the report will significantly increase the role and influence of national Parliaments.³⁶

Draft Protocols on the application of the principles of subsidiarity and proportionality and the role of national parliaments were published by the Praesidium on 27 February 2003 and presented to the Convention plenary on 28 February.³⁷ The draft on national parliaments omitted several WG recommendations that had been broadly endorsed in the Plenary, including provisions to ensure that the Council fully respected the six-week

³⁶ Standing Committee on the Convention 23 October 2002 cc 025-6 at: <http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm>

³⁷ These Protocols are contained in CONV Doc 579/03, 27 February 2003.

period following publication of a Commission legislative proposal and a possible role for COSAC in promoting inter-parliamentary co-operation.

An amended draft protocol on the role of national parliaments, co-sponsored by the two UK Parliamentary Representatives, Gisela Stuart and David Heathcoat-Amory, included WG recommendations that were not in the Praesidium draft. It emphasised the importance of national parliaments being able to express their views before decisions were made. It expressly ruled out “preliminary agreements” becoming the basis for the adoption of legislation in Council, and insisted on adequate time specifications at the various legislative stages to allow for national scrutiny of proposals. It gave the Council the duty to justify action in the face of a national scrutiny reserve and added to Praesidium draft paragraph 5 (on the submission of information on Council meetings) the transmission of a record of the debate at open Council meetings. Building on the Commission’s White Paper on European Governance,³⁸ which advocated a “reinforced culture of consultation and dialogue” between national parliaments and EU committees, the proposal gave the Commission a duty to respond promptly to requests and questions from national parliaments and to transmit all information to national parliaments at the same time as to governments. Finally, in paragraphs 11-14, the amendment set out the role and remit of COSAC in scrutinising EU legislative proposals for compliance with subsidiarity and proportionality, and required the Union institutions to respond to any COSAC contribution.³⁹

3. Constitution Protocol

The final text of the Protocol takes on board several WG suggestions, but is not as ambitious as the Stuart/Heathcoat-Amory proposal. The Preamble to the Constitution Protocol states that the aim is to

encourage greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft European legislative acts as well as on other matters which may be of particular interest to them ...⁴⁰

Under **Article 1** all Commission consultation documents (green and white papers and communications) will be forwarded directly by the Commission to national Parliaments upon publication. The Commission will also forward to national parliaments the annual legislative programme and “any other instrument of legislative planning or policy”, at the same time as to the European Parliament and the Council.

³⁸ *European Governance: A White Paper*, COM(2001) 428 final, 25 July 2001

³⁹ <http://european-convention.eu.int/docs/treaty/pdf/30000/ParStuart.pdf>

⁴⁰ CIG 87/04 Add 1 at

Whereas the Amsterdam protocol only mentions Commission proposals for legislation and Commission consultation documents, the Constitution increases the range of documents that will have to be submitted to national parliaments.

Under **Article 2** draft European legislation from the Commission, Member States and the EP, Court of Justice requests and European Central Bank or European Investment Bank recommendations, will be sent to national parliaments directly by the Commission, EP or Council.

In the Convention draft only Commission consultation documents and legislative proposals were to be included, but now “draft European legislative acts” will include proposals, initiatives and requests from several EU institutions.

The Protocol also clarifies the matter of who sends the documents to national parliaments. The Amsterdam Protocol provides that Commission consultation documents should be “promptly forwarded” to national parliaments, but does not stipulate that the Commission should do this. It is left up to Member State governments. The Constitution Protocol clearly attributes this responsibility, with certain exceptions, to the Commission.

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

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

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

Under **Article 6**, when the European Council intends to make use of Article IV-444(1) or (2) of the Constitution (allowing the move from unanimous voting to QMV, without amending the Treaty under Article IV-443), national parliaments will be informed of the initiative of the European Council at least six months before any European decision is adopted.

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

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

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

Article 10 provides that a conference of parliamentary committees dealing with EU affairs “may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission”.

Furthermore, this conference will promote the exchange of information and best practice between national parliaments and the EP, including their special committees, and may also organise inter-parliamentary conferences on specific topics, in particular the common foreign and security policy (CFSP, including defence policy). The conference contributions will not be binding on national parliaments, nor “prejudge their positions”.

B. Protocol 2 on Subsidiarity and Proportionality

1. Introduction

The principle of subsidiarity was introduced in old Article 3b TEU (now Article 5), which states that:

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 action, be better achieved by the Community.

The then Conservative British Government hailed this as a triumph for the nation states, as it presumed action at national level, unless there were good reasons not to. However, the principle is vague and its enforceability uncertain. Successive British Governments have headed calls for a strengthening of the principle and mechanisms to enforce it at EU level.

2. Convention Working Group

Working Group 1 on subsidiarity recalled in its Final Report⁴¹ that subsidiarity was already considered by the institutions participating in the legislative process under current Treaty requirements and the “Protocol on the principles of subsidiarity and proportionality”; also that it was already subject to *ex post* (i.e. after implementation) judicial review by the ECJ. However, the Group wanted an improvement in both the application and monitoring of subsidiarity, without making decision-making lengthier or more cumbersome, and without creating an ad hoc body to monitor its application.

Improvements should be effective, independent of the institutional architecture of each Member State, and had to avoid interference with any national institutional debates. As subsidiarity was essentially a political principle and its implementation involved a considerable margin of discretion for the institutions (in considering whether shared objectives could “better” be achieved at EU level or not), the monitoring of compliance with that principle should also be of an essentially political nature and take place *before* the entry into force of the act in question.

The Group also thought *ex ante* political monitoring of subsidiarity (i.e. before implementation) should primarily involve national parliaments. Their monitoring of their own governments should be strengthened with regard to the determination of government positions on Community questions.⁴² The Group agreed that *ex post* monitoring of subsidiarity should be of a judicial nature and the conditions for referral to the ECJ broadened. The Group submitted a proposal on three lines:

(a) Reinforcing the “taking into account” and the application of subsidiarity by the institutions participating in the legislative process during the drafting (the earlier the better) and examination phases of the proposed legislative act, with a speedy consultation of all the relevant players.

(b) Setting up an “early warning system” of a political nature, intended to reinforce the monitoring of compliance with the principle of subsidiarity by national parliaments. This *ex ante* monitoring mechanism would for the first time involve national parliaments in the European legislative process, enabling them to ensure correct application of the subsidiarity principle through a direct relationship with the law-making institutions. The Group thought the Treaty should stipulate that the Commission should address its legislative proposals directly to each chamber of each national parliament at the same time as to the Community institutions (at present national governments forward proposals to their parliaments).

⁴¹ CONV 286/02, 23 September 2002.

⁴² This view was broadly shared by the Working Group on the role of national parliaments.

Within six weeks from the date of transmission, and before the legislative procedure was initiated, any national parliament would be able to issue a reasoned opinion to the Presidents of the EP, Council and Commission on the proposal's compliance with subsidiarity, or draw attention to a possible breach of the principle by the legislating body/bodies. The WG proposal outlined different procedures, depending on the amount of reaction to a draft from national parliaments, including a re-examination of the proposal by the Commission if a "significant number of opinions from one third of national parliaments" were received. This might result in maintaining, amending or even withdrawing the proposal.

(c) Broadening the possibility of referral to the ECJ for non-compliance with subsidiarity. *Ex post* judicial review carried out by the ECJ on compliance could be reinforced, and should be linked to the early warning system. Recourse to judicial proceedings would occur only in limited or exceptional cases, when the political phase had been exhausted without any satisfactory solution being found by the national parliament(s) involved.

The Group proposed that a national parliament (or one chamber thereof) which had delivered a reasoned opinion under the early warning system (either at the beginning of the procedure, or in Conciliation Committee proceedings) should be able to refer the matter to the ECJ. The Group also proposed allowing the Committee of the Regions (CoR) to refer a subsidiarity objection to the ECJ.⁴³

The British Prime Minister expressed support for an early warning system involving national parliaments in a speech in Cardiff in November 2002: "I welcome this as a practical response to the call I made two years ago in Warsaw for better involvement by national parliaments in European decision-making".⁴⁴ In the final analysis, the Government viewed subsidiarity decisions as a matter for politicians and not judges. The then Foreign Office Minister, Peter Hain, told the Commons European Scrutiny Committee (ESC) that he did not want judges to make rulings on this issue. For the Government, this "was a basic principle: elected politicians should be the arbiters on this matter, not judges".⁴⁵

In the December 2002 debate on the Convention the Shadow Foreign Secretary, Michael Ancram, welcomed the WG's proposals on subsidiarity, but said they did "not go nearly far enough".⁴⁶ He agreed that subsidiarity decisions needed to be made by a political watchdog, not the ECJ, and also suggested that "National parliamentarians should be able

⁴³ However, a majority of the Group considered that the degree of, and arrangements for, the involvement of regional and local authorities in the drafting of EC legislation should be determined solely within the national framework.

⁴⁴ Tony Blair, "A clear course for Europe", 28 November 2002, FCO website at: <http://www.pm.gov.uk/output/page6709.asp>

⁴⁵ Peter Hain, Evidence to ESC, 20 November 2002, at: <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/uc103/uc10302.htm>

⁴⁶ HC Deb 2 December 2002 c 687

to intervene on subsidiarity at the level of national Parliaments and through a subsidiarity panel or watchdog”.⁴⁷ He proposed that subsidiarity reservations “expressed by, say, five national parliaments should be enough to halt a piece of legislation”.⁴⁸ Michael Moore, for the Liberal Democrats, supported the early warning system proposal⁴⁹ and, in support of an earlier call by Gisela Stuart for better parliamentary scrutiny mechanisms, he emphasised that national parliamentarians “should not shirk [their] responsibilities in Parliament”.⁵⁰

In the Standing Committee on the Convention Mr Heathcoat-Amory expressed doubts about the subsidiarity proposals:

Subsidiarity, even if observed, would not cure the democratic deficit. There would still be a blizzard of regulations, often connected in some way with the single market, which engulfed national Parliaments and the people we represent. Therefore, we must get national Parliaments in right at the start of the legislative chain, and the right of initiative must be removed from the Commission. It is scary that 20 unelected people in Europe have the sole right to initiate legislation in Europe. Until that changes, the cynicism and despair felt about democracy in the European Union will persist.⁵¹

The ESC thought new procedures to enforce subsidiarity were needed and was also concerned about the stage in the legislative process at which proposals should be checked for compliance with subsidiarity.⁵² As to whether enforcement should be by judicial means through the ECJ or by political means through a second Chamber, the Committee thought:

Since the principle of subsidiarity is incorporated in the Treaties, it must be capable of being interpreted by the ECJ. However, **we believe enforcement of the principle of subsidiarity should be a political matter**, for two reasons. The first is the practical one that political enforcement is likely to be faster. The second is that decisions on whether the objectives of a policy would be better achieved at a particular level of government are fundamentally political ones.⁵³

The Committee supported a role for national parliaments in the enforcement process for three reasons:

⁴⁷ HC Deb 2 December 2002 c 688

⁴⁸ Ibid

⁴⁹ Ibid c 696

⁵⁰ Ibid

⁵¹ Standing Committee on the Convention 23 October 2002 c 011 at:

<http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm>

⁵² Select Committee on European Scrutiny, *Democracy and Accountability in the EU and the Role of National Parliaments*, 21 June 2002, HC 152-xxxiii-II, 2001-02, para 108, at:

<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15201.htm>

⁵³ ESC, *Democracy and Accountability in the EU and the Role of National Parliaments*, 21 June 2002, HC 152-xxxiii-II, 2001-02, para 112

- Because the EU institutions are not in practice keen on applying the principle;
- Many national parliaments do not have an inherent institutional interest in transferring powers to the EU level and could therefore counterbalance the EU institutions;
- National parliaments are more likely to reflect the views of citizens.⁵⁴

The Committee concluded:

We believe national parliamentarians should have a role in determining questions of subsidiarity. [...] If cases are referred for decision by another body, we would favour that body being a political or quasi-judicial arbiter or watchdog ...⁵⁵

It was not persuaded by the EP's view that examination at a later stage in the process would be better because it would "encourage the Council and EP to adopt a cautious approach".⁵⁶ An early alert to non-compliance "would prevent much wasted effort, but it could also be possible to scrutinise for subsidiarity problems at the end of the legislative process any changes made to a proposal".⁵⁷ The Committee also noted the Commission's commitment to withdrawing proposals "where inter-institutional bargaining undermines the Treaty principles of subsidiarity and proportionality or the proposal's objectives".⁵⁸

The ESC also supported greater input by national parliamentarians in examining annual programmes and agendas:

Whatever the method, we favour a system in which national parliamentarians could refer items of legislation to a 'subsidiarity watchdog' or other body for examination of compliance with the principles of subsidiarity and proportionality. Meetings of national parliamentarians to scrutinise the Commission's annual work programme from a subsidiarity point of view could also be of value.⁵⁹

It called for:

joint meetings of national parliamentarians and MEPs to scrutinise the Commission's annual policy strategy and work programme, question

⁵⁴ ESC, *Democracy and Accountability in the EU and the Role of National Parliaments*, 21 June 2002, HC 152-xxxiii-II, 2001-02, para 113

⁵⁵ Ibid paras 113-4

⁵⁶ EP, A5-0133/2002, Lamassoure report, p. 25

⁵⁷ ESC Report HC 152-xxxiii-II, 2001-02, para 15, at:

<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15201.htm>

⁵⁸ *European governance: a White Paper*, COM(2001) 428 final, 25 July 2001, p 22 at:

http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf

⁵⁹ ESC Report HC 152-xxxiii-II, 2001-02, para 134

Commissioners on it, and debate it, and would support a similar procedure for the European Council's annual agenda.⁶⁰

3. Praesidium Draft Protocol

The Praesidium draft Protocol of 27 February 2003⁶¹ did not appear to reflect the conclusions of Working Groups I and IV and the Plenary debate on the Working Groups' final reports. Many Convention members thought the compromise text on the early warning system, in particular, lacked teeth. The draft conferred the power to activate the early warning system on each national parliament, and not on each chamber, as recommended by WG I (and endorsed by WG IV). It left to national parliaments the internal arrangements for the consultation of each chamber (in bicameral parliaments) and/or regional parliaments with legislative powers. It recommended that the threshold for activating the second stage of the mechanism, objection to a proposal, should be set at one third of national parliaments, as recommended by WG I.

Once the early warning system had been activated, the text provided a weak basis for the Commission to take into account the arguments put forward by national parliaments, stating: "The Commission shall take account of the reasoned opinions of the national parliaments". Following this, the Commission may decide to "maintain, amend or withdraw its proposal". Even if a majority of national parliaments activated the early-warning system, the Commission would not be obliged to withdraw its proposal. The draft did not adopt an idea submitted by Gisela Stuart⁶² to introduce a "red-card" procedure, requiring the Commission to withdraw its proposal, if reasoned opinions were received by two-thirds of national parliaments. Article 8 of the Praesidium draft effectively removed the right of national parliaments to independent recourse to the ECJ, as parliaments would have to request their governments to act as their conduit. On the other hand, the draft allowed the Committee of the Regions to bring cases directly before the ECJ.

The principle of proportionality (that the EU may act only to the extent needed to achieve the objectives set out in the Constitution) was barely mentioned in the draft. The WG on national parliaments had recommended that "the link between subsidiarity and proportionality should be further emphasised"⁶³ and at the subsequent Plenary debate, the Government representative to the Convention had pressed for greater linkage between the two.

Peter Hain, the British Government's representative, submitted to the Convention a detailed amendment to the draft protocol, which added substantially to paragraph 1 on

⁶⁰ ESC Report HC 152-xxxiii-II, 2001-02, para 140

⁶¹ CONV 579/03 27 February 2003

⁶² CONV 540/03 "The Early Warning Mechanism – putting it into practice" 6 February 2003 at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00540en03.pdf>

⁶³ CONV 353/02 22 October 2002

institutional respect for subsidiarity, in order to clarify some of the hitherto vague provisions understood to be guaranteed by that principle:

1 bis. For Union action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Union. The following guidelines should be used in examining whether the above mentioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Union action would conflict with the requirements of the Constitution or would otherwise significantly damage Member States' interests;
- action at Union level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

1 ter. The form of Union action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Union shall legislate only to the extent necessary. Other things being equal, framework laws should be preferred to laws.

1 qua. Regarding the nature and the extent of Union action, Union measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Constitution. While respecting Union law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Union measures should provide Member States with alternative ways to achieve the objectives of the measures.⁶⁴

Mr Hain inserted "proportionality" in all paragraphs where the Praesidium text had omitted any reference to it, and stressed the regional dimension. In paragraph 2 he proposed that Commission consultation should always include taking account of "any regional and local dimension of the action envisaged" (deleting "where appropriate") and included in paragraph 3 the Committee of the Regions as a recipient of all Commission legislative and amended proposals, and all Council and EP legislative resolutions and common positions. The CoR would also be able to send a reasoned opinion on subsidiarity/proportionality to the EU institutions. Mr Hain deleted paragraph 7 on the submission of a reasoned opinion prior to a Conciliation Committee meeting, on the grounds that this would over-complicate the mechanism.

A Stuart/Heathcoat-Amory co-sponsored amendment to the draft Protocol⁶⁵ also included reference to proportionality, where the Praesidium draft omitted it, and in paragraph 5 it reinstated the WG proposal that any chamber of a national parliament could send a

⁶⁴ <http://european-convention.eu.int/docs/treaty/pdf/20000/SubHain.pdf>

⁶⁵ <http://european-convention.eu.int/docs/treaty/pdf/20000/SubStuart.pdf>

reasoned opinion on non-compliance with subsidiarity and proportionality. In article 6 they proposed that, where at least one third of the chambers of national parliaments issued a reasoned opinion,⁶⁶ the Commission should review its proposal, “taking the utmost account of the reasons given by national parliaments”. The amendment placed a much greater onus on the Commission to justify its subsequent action. It further strengthened paragraph 6, stating that a proposal should not be proceeded with if two-thirds of national parliament chambers issued reasoned opinions for non-compliance. If the Commission subsequently introduced a new proposal on the same subject, it would have to justify this decision, taking into account the previous reasoned opinions.⁶⁷ The proposal provided for a reconsideration of a common position or amendments, and subsequent justification for action by the Council or the EP. It also removed the need for Member State governments to be “commissioned” by national parliaments to bring an action to the ECJ. Finally, it added national parliaments to the list of recipients of the Commission report on the application of subsidiarity.

The European Scrutiny Committee was not happy with the draft Protocol. In its 24th Report, published in June 2003, the Committee concluded:

30. The Protocol is important in that for the first time national parliaments would have a formal role in the EU's legislative process. However, we regard the proposal as inadequate because objections by the specified proportion of national parliaments could simply be overridden by the Commission.⁶⁸

4. Constitution Protocol

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

Article 2 requires the Commission, except in cases of “exceptional urgency”, to “consult widely”, taking account, where appropriate, of regional and local dimension of the proposed action.

Article 3 defines “draft European legislative act” as:

- Commission proposals
- initiatives of groups of Member States
- initiatives of the European Parliament

⁶⁶ For this and related purposes, a unicameral parliament would count as two chambers.

⁶⁷ Draft article 6 bis

⁶⁸ European Scrutiny Committee 24th Report, *The Convention on the Future of Europe and the Role of National Parliaments*, HC 63-xxiv, 16 June 2003 at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxiv/6306.htm#n24>

- requests from the Court of Justice
- recommendations from the European Central Bank
- and requests from the European Investment Bank

for the adoption of a European legislative act.

Article 4 sets out the procedure as follows:

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

The European Parliament shall forward its draft European legislative acts and its amended drafts to national Parliaments.

The Council shall forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.

Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.

Article 5 requires that draft legislative acts must be “justified with regard to the principles of subsidiarity and proportionality” and should contain “a detailed statement making it possible to appraise compliance with” these principles.

The statement should include an assessment of the proposal’s financial impact and, for a draft European framework law, of “its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation”.

Reasons for concluding that a Union objective can be better achieved at Union, rather than national, level, must be substantiated by qualitative and, if possible, quantitative indicators.

Draft legislative acts must take account of the need for any financial or administrative burden on the Union, national, regional or local government, economic operators and citizens, to be minimised, and “commensurate with the objective to be achieved” (proportionality).

Article 6 states that:

Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

National parliaments will be responsible for consulting regional parliaments. The devolved legislatures have been particularly interested in developments in the application of subsidiarity. However, successive IGCs, including this one, have ruled out a Treaty base for its application at sub-State level.⁶⁹

If the draft legislative act originates from a group of Member States, the Council President will forward the opinion to those Member State governments. If it originates from the ECJ, the ECB or the EIB, the Council President will forward the opinion to the institution or body concerned.

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

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

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

5. UK views on the Protocol and its Implementation

In September 2004 the Government published its *White Paper on the Treaty establishing a Constitution for Europe*.⁷⁰ It claimed credit for the final agreement on the subsidiarity mechanism approved by the IGC and set out in the Protocol and described its “twofold” importance:

⁶⁹ The Scottish First Minister, then Jack McConnell, set out the Scottish Executive’s views on subsidiarity in a speech in June 2002 on “The Future of Europe Debate: a Scottish perspective” at <http://www.scotland.gov.uk/about/FCSD/ExtRel1/00014768/page1239857280.aspx>

⁷⁰ Cm 6309 at http://www.fco.gov.uk/Files/kfile/White%20Paper_Treaty%20establishing%20a%20Constitution%20for%20Europe.pdf

21. [...] First, it will be very difficult to ignore the strongly-held views of one-third of the national parliaments. In practice any proposal meeting such opposition would be very unlikely to prosper, not least because, if a third of national parliaments were against any proposal, so too would their Governments be, and it would be hard to put together the qualified majority needed to pass the law in question. So the protocol gives real teeth to subsidiarity.

22. Secondly, it gives the national parliaments a direct say in the EU's lawmaking procedures for the first time. At present, there is no obligation on Member States or the Commission even to inform national parliaments about draft EU laws, still less to let them have any power. Under the new mechanism, all national parliaments must be notified independently, and given six weeks to respond.

23. It is obviously for national parliaments, including the UK Parliament, to decide how they wish to make use of this new power. The Government hopes that it will give parliaments an incentive to work together even more closely than now, to maximise their effectiveness at EU level, and thus make the EU more attuned to the views of the EU's electorates. The Government welcomes the progress already made by Parliament's Scrutiny Committees in giving thought to how this mechanism can be made to work effectively, and how the devolved parliaments and assemblies can be consulted on its use.⁷¹

In the debate on the European Constitution on 9 September 2004 Mr Straw welcomed the subsidiarity mechanism and confirmed that it would be for Parliament, not the Government, to decide how it will make use of the new power.⁷² The Liberal Democrat European Affairs Spokesman, Menzies Campbell, voiced his concerns about the subsidiarity early warning mechanism:

On subsidiarity, I am one of those who is supportive of the so-called yellow card—the early warning mechanism. Here the Foreign Secretary and I may part company. I am not convinced that five countries is necessarily the basis upon which to have a red card, but I do think that that principle would have been worth exploring a little further. Indeed, on a previous occasion I may have put forward the suggestion that two thirds of the Parliaments, if they took the view that what was being proposed was unacceptable, ought to have the ability not just to hold up their hand and issue a warning but to say, "This is legislation emanating from the European Union, which should be stopped in its tracks".⁷³

Mr Straw conceded that this was an important point, on which he had "thought long and hard":

There is a point where the formula for the intervention of national Parliaments collides with the arrangements for qualified majority voting or indeed for the

⁷¹ Cm 6309 p 19

⁷² HC Deb 9 September 2004 c882

⁷³ Ibid c 909 at <http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040909/debtext/40909-18.htm>

veto, and if there were a formula by which two thirds of national Parliaments could prevent a move, that would actually change the nature of majority voting.⁷⁴

Mr Heathcoat-Amory was unenthusiastic:

The Government tried to give additional powers, including a kind of veto power, to the national Parliament over measures that breach the subsidiarity principle, but they comprehensively failed in that, as they did in most of the rest of their amendments. We can do no more than raise the issue; the final decision will, as always, be with the European Commission and the European institutions.⁷⁵

The *Economist* commented on the subsidiarity provisions in June 2004:

Protections for "subsidiarity"-ensuring that issues are dealt with at the most appropriate level-are weak at best, non-existent at worst: national parliaments are invited to speak up if they think subsidiarity has been flouted, but the European Commission is merely obliged to take note.⁷⁶

The Foreign Secretary, replying to this comment, stated in the *Economist* two weeks later:

In its leader of June 26th, The Economist dismissed the procedure for subsidiarity; but it was wrong to do so. At present, there is no obligation on member states or the European Commission even to inform national parliaments about draft EU laws, still less to let them have any power. But under the new provisions all national parliaments must be notified independently of all draft laws, and given six weeks to respond. If a third of them object, the commission must "review" the draft. Yes, in theory, the commission could then re-submit the original proposals unamended, but in practice they would be unlikely to do so, not least because, if a third of national parliaments are against a proposal, so will be their governments, and the commission would be close to losing the qualified majority needed to pass laws.⁷⁷

The two Constitution Protocols concerning national parliaments could have a significant effect on the way the UK Parliament deals with future EU legislation, for which the present European scrutiny system is not prepared. The ESC and the Commons Modernisation Committee are now considering how parliamentary scrutiny of the EU might be improved and how relations between Westminster MPs and their European counterparts might be enhanced. In March 2004 the Leader of the House, Peter Hain, published a Memorandum to the Modernisation Committee on improving the scrutiny of

⁷⁴ HC Deb 9 September 2004 c 909

⁷⁵ Ibid c 925

⁷⁶ *Economist* 26 June 2004

⁷⁷ Jack Straw *The Economist* 10 July 2004; also at <http://www.britishebotschaft.de/en/news/items/040710.htm>

the EU. Amongst many other things, this considered the need to take account of the subsidiarity Protocol in any reform of EU scrutiny procedures:

31. The draft Constitutional Treaty provides that, if a national parliament believes that an EU legislative proposal breaches the principle of subsidiarity, it could put forward a reasoned opinion on it, and if a third of chambers submitted such opinions within six weeks, the Commission would have to reconsider. While the future of the Treaty is at present uncertain, it would be helpful if the **Modernisation Committee, in consultation with the Procedure Committee, could give consideration to how the House might implement this proposal, taking into account the suggestions of the European Scrutiny Committee.** The Scrutiny Committee has proposed that, if this situation were to arise, it might alert the House by tabling a motion on the Remaining Orders providing for objection to be made. The Government would decide, within a given timeframe, when to put the motion to the House; and it would then be decided on without debate and, if necessary, by deferred division. The devolved assemblies might wish to submit their views. This seems to the Government to be a reasonable suggestion; though it would be premature to make any decision until the outcome of the negotiations on the Treaty is known.⁷⁸

C. Protocol on Transitional Provisions relating to the Institutions

1. Introduction

The size of the Commission, the allocation of EP seats and the weighted votes for a qualified majority were the main unresolved issues at the 2003 IGC, which collapsed in December 2003.⁷⁹ Following a series of bilateral discussions led by the Irish Presidency, the IGC was relaunched at ministerial level on 4 May 2004.

In the Convention draft the large countries (Germany, France, Italy and the UK) each had 29 votes in the Council of Ministers, with 27 votes each for Spain and Poland. The Nice Treaty established a complicated “triple majority” system, under which a measure can only be adopted if it has met three separate thresholds, but the Convention feared this might slow down the EU’s decision-making capacity, and proposed a “double majority” system. The IGC also supported a double majority system and came up with various equations. Spain and Poland did not want to lose the advantage they gained under Nice, and, along with Lithuania, Latvia and Hungary, maintained their opposition to the proposed double majority. They were opposed by several States, notably Germany,

⁷⁸ Government Memorandum 5 from the Leader of the House *The Subsidiarity Early-Warning Mechanism* <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmmodern/508/508m07.htm>

⁷⁹ The various positions are discussed in Standard Note SN/IA/2838, *IGC 2003: the outcome of the Brussels summit*, 29 December 2003 at <http://hcl1.hclibrary.parliament.uk/notes/iads/sn-02838.pdf>

which wanted to change the Nice system because they felt that their population size and contribution to the EU were not properly reflected in Nice.⁸⁰

The Convention proposed a double majority system, consisting of the majority of Member States, representing at least 60% of the EU population. This would mean that three large EU countries (Germany, France and the UK) would be able to block a decision, even though 22 of the 25 EU Member States supported it. Among the advocates of the double majority, there were proponents of a 50% of Member States/50% of population solution, or a 60%/60% solution. There was also a proposal for a “rendezvous clause”⁸¹ on this subject, which was supported by the British Government.

On 19 November 2003 it was reported that the UK had joined Poland and Spain in opposing reform of the Nice voting system.⁸² This, in turn, angered France and Germany, which had lobbied hard to replace the Nice system with one based more on population. The change of government in both Poland and Spain helped to bring about agreement on the QMV formula.

The composition of the Commission was also problematic. Several small Member States and accession states were opposed to a reduction in the number of voting Commissioners. The draft constitution proposed that 15 commissioners (including the president and the new ‘foreign minister’) would constitute the voting college and there would be 10 non-voting Commissioners. The voting Commissioners would be appointed on a strict five-yearly rotation. While France, Germany and others believed it was important to ensure that the Commission could function effectively after enlargement, the accession states and some of the small Member States were concerned that they could lose influence within the Commission soon after joining. Gaps narrowed on the composition of the Commission, however, and a compromise was finally agreed, whereby the Commission will initially comprise one Commissioner per Member State, but from 2014 would be reduced to two-thirds of the total number of Member States in the Union.⁸³

2. The Constitution Protocol

Protocol 34 on transitional provisions for the institutions gives a detailed breakdown of the allocation of votes in the Council of Ministers, the weighting of votes for a qualified majority and the size of the Commission and EP.⁸⁴ The Protocol provisions are transitional, because they will apply before all the provisions of the Constitution and the

⁸⁰ Jack Straw, Foreign Affairs Committee Minutes of Evidence December 2003, 2003-04, at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/1233/3102813.htm>

⁸¹ i.e. postponing for several years the decision whether to amend the voting system envisaged in the Nice Treaty.

⁸² See the *Independent* 19 November 2003

⁸³ See Research Paper 04/66 *The Treaty Establishing a Constitution for Europe* 6 September 2004 pp 48-49

⁸⁴ <http://ue.eu.int/jgcpdf/en/04/cg00/cg00087-ad01.en04.pdf>

instruments necessary for their implementation take full effect. This will cover the period between implementation of the Constitution (expected in around 2007) and the implementation of future institutional arrangements provided by the Constitution (which generally take effect from 2009).

Article 1(1) provides for a European decision (mentioned in Article I-20(2)) to determine the composition of the EP before EP elections in 2009.

Article 1(2) sets out the number of EP seats for the Parliamentary term 2004 – 2009, which will remain the same as on the date of entry into force of the Constitution. The Member State allocations are as follows:

Belgium	24	Luxembourg	6
Czech Republic	24	Hungary	24
Denmark	14	Malta	5
Germany	99	Netherlands	27
Estonia	6	Austria	18
Greece	24	Poland	54
Spain	54	Portugal	24
France	78	Slovenia	7
Ireland	13	Slovakia	14
Italy	78	Finland	14
Cyprus	6	Sweden	19
Latvia	9	United Kingdom	78
Lithuania	13	Total	732

Article 2 states that the QMV definition provided for in Part I will take effect on 1 November 2009 after the EP elections that year, and the following votes will apply until 31 October 2009:

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

This Article requires that, for the adoption of an act, the Council will need at least 232 votes in favour, representing a majority of the members, on a proposal from the Commission. In other cases decisions shall be adopted if there are at least 232 votes in favour, representing at least two-thirds of the members. In addition, a Member State may request that, where QMV is required for the adoption of an act, a check is made to ensure

that the qualified majority of States represents at least 62% of the EU's total population. If it does not, the act will not be adopted. This is currently contained in the Treaty of Nice "Declaration on the Enlargement of the European Union".⁸⁵

The Constitution provides a qualified majority system to operate from 1 November 2009. This is set out in **Article I-25**. The adoption of a proposal from the Commission will need the support of 55% of Member States (i.e. 15 out of a predicted 27 Members, including Bulgaria and Romania), representing 65% of the EU's population. A blocking minority must include at least four Council members. If not, the qualified majority will be deemed attained. When the Council is not acting on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority will be 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union.

If a number of Member States representing at least three-quarters of either of the above figures indicate that they oppose a proposal, the Council will delay adoption of the proposal and continue discussion in an effort to reach a satisfactory solution (this succeeds the "Ioannina Compromise").⁸⁶ This mechanism, currently contained in the Declaration on Article I-25, is to be set out in a Council Decision that will be adopted as and when the Constitution comes into force. It will be valid until 2014 and will then be removable by QMV. This Decision will be effective from 1 November 2009 at least until 2014, after which the Council may repeal it.

In the White Paper published in September 2004 the Government stated that it was "happy with the new mechanism" which "provides a reasonable balance between passing and blocking legislation, and ensures that the rights of small groups of Member States can be asserted when they need to be".⁸⁷

Article 2(3) provides that for subsequent accessions (in the short term Bulgaria and Romania) the threshold in paragraph 2 will be calculated to ensure that the number of votes needed for a qualified majority does not exceed that in the table in the Nice Declaration on enlargement (258 votes). Furthermore, a Declaration annexed to the Constitution contains transitional institutional provisions for Bulgaria and Romania, in the event of their accession before the entry into force of the Council Decision on the allocation of EP seats for 2004-9. Bulgaria would have 18 and Romania 35 MEPs.

Article 2(4) lists the Constitution Articles that will come into force from 1 November 2009. These are Article sub-paragraphs which set out a majority voting procedure in a range of contexts (e.g. enhanced cooperation, the suspension of Union rights, voluntary

⁸⁵ Cm 5879 p.74

⁸⁶ The Ioannina Compromise was secured by the UK at the enlargement negotiations in 1994 to allow further discussion of an issue of significant national concern to a Member State with a view to securing agreement in a QMV issue.

⁸⁷ Cm 6309, *White Paper on the Treaty Establishing a Constitution for Europe* p.23

withdrawal from the Union and Council action on the economic policies of a Member State).

Article 3 stipulates that until the Council Decision on Article I-24 (on Council formations other than the Foreign Affairs Council) comes into force, the Council may meet in the configurations laid down in that Part I Article and in the other configurations on the list established by the General Affairs Council.

Article 4 concerns the Commission and the Union Minister for Foreign Affairs. Commissioners in office when the Constitution comes into force will remain in office until the end of their term of office. However, when the Minister for Foreign Affairs assumes office, the term of the member having the same nationality as him/her will end.

Under **Article 5** the terms of office of the Secretary-General of the Council, High Representative for the CFSP and the Deputy Secretary-General of the Council will end when the Constitution comes into force and the Council will appoint a Secretary-General under Article III-344(2) of the Constitution.

Article 6 sets out the membership for the advisory bodies, the Committee of the Regions and the Economic and Social Committee, until the entry into force of the European decision referred to in Articles III-386 and III- 389 respectively.

An IGC Declaration annexed to the Final Act concerning Article I-26 states that when the Commission no longer includes nationals from all Member States, the Commission should ensure full transparency in relations with all Member States, by liaising closely with them, whether or not they have a national Commissioner. The Commission should also share information and consult with all Member States and “ensure that political, social and economic realities in all Member States, including those which have no national serving as member of the Commission, are fully taken into account”.⁸⁸

⁸⁸ <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf>