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# **What Does Business Think of the EU Constitution?**

By  
**Arthur Forbes**

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A previous version of this paper was presented at the 2004 Maastricht Forum on "European Integration: Making the Constitution Work" which was held at EIPA on 19 November 2004

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# **What Does Business Think of the EU Constitution?**

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# Introduction

The purpose of this paper is to discuss the ‘Future of Europe’ process and critically evaluate the ‘Treaty establishing a Constitution for Europe’, the final product that emerged from the Convention on the Future of Europe and the Intergovernmental Conference. The paper in particular focuses on the views and positions promoted by both the Irish and combined European business community during the process.<sup>1</sup> The main areas examined are social policy issues stemming from the incorporation of the Charter of Fundamental Rights into the Constitution, the Constitution’s provisions on economic and social policy in Parts I and III, and finally the new role for National Parliaments within the Union’s governance structures.

Clearly, business also has views on the range of changes introduced in the other policy-related fields in Part III of the Constitution. However, a comprehensive evaluation of all of these goes beyond the scope of this paper. Nevertheless, it is worth at least mentioning that welcome progress, strengthening the Union’s capacity to act, has been made in the areas of research and development, common commercial policy, and intellectual property. The attribution of new competences or modifications of existing arrangements in the field of services of general interest, energy, public health and transport have also been noted.

More generally, it should be recalled that the business community, as a partner in European integration from the very beginning of the Coal and Steel Community, has been closely involved in the various endeavours that have been undertaken from the 1980s onwards to reform and deepen the Community, and latterly the European Union. It is not surprising therefore that companies and their representatives should have been closely involved in the process leading to the adoption of the Treaty establishing a Constitution for Europe.

Within the context of the civil society pillar of the Convention on the Future of Europe, the Social Partners at European level<sup>2</sup> were invited to participate in the Convention as ‘Observer Members’. In reality, given the absence of voting arrangements in the Convention, the status of the social partners was in fact equivalent to that of any of the 105 full members, in particular in the various working groups, within which the social partners played an important role.

Likewise, at the Intergovernmental Conference stage of recent Treaty revision process, UNICE and its 36 national member Federations had a not inconsiderable role to play in the process, both at European level with the relevant Presidencies managing the IGC, and at Member State level through channels, both formal and informal, between the national business federations and their respective governments. Indeed, as by its nature treaty revision is explicitly and intergovernmental as opposed to Council activity, the significance and relevance of such national level contacts in the national capitals should not be discounted.

Arguably of more importance still will be the role played by representative business organisations in the next and final phase of this process: the ratification stage. With the decision by up to ten Member States to put the Constitution to its citizens via a referendum, experience both in Ireland and elsewhere in recent years has amply shown that the role played by business in these referenda – whether that be

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1. IBEC, the Irish Business and Employers Confederation, and UNICE, the Union of Industrial and Employers Confederations in Europe, of which IBEC is the Irish member. UNICE has 36 member federations, coming from 30 European countries.  
2. UNICE, CEEP (the Centre of European Enterprises with Public Participation and ETUC (the European Trade Union Confederation).

*Arthur Forbes*

actively campaigning in favour or otherwise – will undoubtedly inform and condition debates at national level.

## Objectives of Business Going into the Process

Though engaged in constant bilateral contacts with Convention members from February 2002, IBEC held back on publishing its official position paper on its priorities for the Future of Europe debate until early 2003.<sup>3</sup> This was primarily linked to the ongoing situation in Ireland concerning the ratification of the Nice Treaty, which to a certain extent overshadowed, in the public mind at least, the early months of the proceedings of the Convention. Interestingly, the successful outcome to the 2<sup>nd</sup> Nice referendum in Ireland on 19 October 2002 gave a noticeable shot in the arm to the various Irish members on the Convention. Their influence would be considerably strengthened from that point onward, in particular with members from the accession states.

In the context of Nice, IBEC's paper not unsurprisingly stressed that, above all, the Union should learn from national debates on European integration and take heed of the disconnection felt by many citizens. The paper asserted that the EU project would struggle to gain 'true legitimacy' until its communication with its citizens became very much more user-friendly. The paper also urged the Union to focus on delivering 'the key competitiveness-related goals of the Lisbon Strategy'. More specifically, the business federation called for legislation at Community level, 'when it is demonstrated to be necessary', to be 'proportional and market-led'. On qualified majority voting, the paper supported extending the use of QMV in general, but insisted that the principle of unanimity voting 'be enshrined in the Constitutional Treaty' for all taxation related issues and for certain sensitive social policy issues. Finally, it called for Ireland to become a driver within the Union, 'promoting at all levels best practice on the success factors that have worked in Ireland over the past ten years'.

At the European level, very early in the life of the Convention, UNICE adopted and published its position paper.<sup>4</sup> This drew attention to the overall need to strengthen Europe's competitiveness, increase its adaptability in the face of structural change and improve its employment prospects. A fundamental part of this would be ensuring the long-term success of the internal market and economic and monetary union. Specific proposals that were advanced included:

- Well-functioning EU Institutions;
- Maintenance of the recognition in the Treaties of the specificities of the social dialogue;
- Generalisation of qualified majority voting, with very clear exception of the sensitive areas of social policy and taxation measures;
- Improvement in Europe's capacity to defend and promote its interests in the field of trade at international level;
- Better application of the principle of subsidiarity and proportionality;
- Better impact assessment of draft Union laws; and
- Increased use of co-regulation and self-regulation.

Above all, IBEC and all its partner federations in UNICE were agreed that the Charter of Fundamental Rights should not be introduced into the Treaty, and it is this tricky subject which the reader's attention is drawn to first.

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3. Adopted by the National Executive Council of IBEC on 23 March 2003. See [www.ibec.ie/ibb](http://www.ibec.ie/ibb).

4. Position Paper of 17 June 2002. See [www.unice.org](http://www.unice.org).



# The Charter of Fundamental Rights

One of the most significant implications, if not the single most important issue for business resulting from the EU Constitution is the legal recognition it gives to the Charter of Fundamental Rights. From companies' perspective, the category into which the Charter has fallen until has been that of a somewhat all-embracing wishlist, with no real binding power. While the Charter and its fifty-four articles cover more than just social policy matters, it is addressed here as it is the social policy elements of the Charter that have caused most concern in the business community. In this context, the debate about the Charter and its provisions, as amended by the Convention and IGC, is considered in detail below, and preliminary conclusions are drawn concerning the attitude business organisations are taking to the Charter's incorporation, in the context of the national ratification procedures that are about to begin on the Constitution.

The origins of the Charter can be found in a 1996 ECJ judgement,<sup>5</sup> concerning the proposed accession by the European Community to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The ruling stated that the Treaties did not empower the Community to formally accede to the Convention. However, given that all the EU Member States themselves are individual signatories to the Convention and thus subscribe to its principles, the solution devised was that an internal EU Charter of Rights would act as an appropriate substitute to accession to the Council of Europe Convention.

At another level, voices calling for further deepening of European integration argued that the creation of such an EU Charter of Fundamental Rights would better reflect the new more profoundly political phase into which the European Union had now entered. The symbolic importance of this Charter was seen as a very important milestone on the road towards this political or federal Europe, notwithstanding that in itself the Charter is not meant to create any new rights. This is in fact quite similar to the reasoning behind the drive to create a European Constitution – which again adds very little to the substance of EU powers. Instead, it is all about building on the symbolism of 'ever closer union'.

The preparation of the Charter of Fundamental Rights was undertaken by all the relevant political actors within the EU, rather than just national governments. The Cologne European Council in June 1999 decided to use a special procedure, not previously employed in the EU, to do this work. The promulgation of the Charter was thus entrusted to a special 'Convention' of Government representatives, national Parliamentarians, the Commission and MEPs. This Convention would of course be the model on which the structure and working methods to the subsequent but altogether separate 'Convention on the Future of Europe' would be based. The Charter Convention met between December 1999 and October 2000, and following approval by the Council, Parliament and Commission, the Charter was signed and 'proclaimed' on 7 December 2000, where it was signed by the then Presidents of the Council, European Parliament and European Commission. Even though the Charter did not have full legal force after it was 'proclaimed', and thus it was more declaratory and aspirational in character, the Institutions and courts nevertheless showed from early on that they were prepared to draw inspiration from the non-binding Charter. Indeed, outgoing Commission President Prodi would declare that compliance with the Charter's provisions should be 'the touchstone' of future actions and initiatives of the Commission itself. In the context of the Commission right to initiate legislative proposals within the EU, this means it now examines every new proposal for a European law to make sure it falls in line with what the Charter says. What

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5. Opinion 2/94 of 28 March 1996.

is perhaps even more revealing, in terms of the political objectives associated with the Charter, is that this declaration by Romano Prodi was made in 2001, long before there was any consensus on making the Charter a binding part of EU law.

The question of the Charter's legal status was initially raised as early as 1999. Indeed, the Convention drew up the draft Charter as if it were going to be legally binding, and a European Parliament Resolution explicitly called for its incorporation. However, the Nice Summit in 2000, at the strong urging of the UK and Irish Governments, decided to 'proclaim' the Charter as a merely non-binding instrument, not as part of the Nice Treaty. This meant that the Charter would not therefore constitute a document open to interpretative rulings by the European Court of Justice. Nevertheless, under strong pressure from many sides, the Heads of State or Government decided in 2000 that the Charter's ultimate legal status would be considered during the general debate on the future of the European Union, with a final decision to be taken at the next IGC in 2004.

The main reason put forward for incorporating the Charter was to make these various rights more 'visible' for citizens. In particular, rights stemming from judgements of the European Court of Justice or of the European Court of Human Rights were viewed as too removed from ordinary citizens. For example, the right in the Charter to 'good administration' reflects a series of decisions of the Court of Justice in this field. As well as making certain rights more explicit, where the Charter really broke new ground is by considering the various economic and social rights it articulates to be 'fundamental rights'. Such a step had not previously been taken. These come alongside the more traditional fundamental civil and political rights and citizens' rights derived largely from Community treaties. That being said, the stated intention of the Charter was that no transfer of powers to the European level was envisaged. Rather, the objective was to establish an instrument with which to control the way the institutions of the European Union and Member States implement fundamental rights measures in areas in which EU level powers exist. However, employers have argued that this mixing up of different types of rights will inevitably give rise to confusion, as a close reading of the Charter shows that, logically, certain rights are more 'fundamental' than others. Indeed, the range of qualifications and limitations put on the various economic and social rights clarify that it is misleading to put them alongside genuinely fundamental rights such as the right to life or human dignity. In March 2003, IBEC stated that it had:

... significant concerns about the implications for Ireland of explicit recognition of the Charter of Fundamental Rights in the Treaty. Business shares the view that any incorporation of the Charter into the Treaty must neither have the unintended consequence of altering current rights enjoyed by Irish citizens in the economic and social fields, nor have the effect of extending EU competence in either of these areas.<sup>6</sup>

As already mentioned, these concerns were shared by all the national business and employer Federations within the European level body UNICE, which stated that the Charter was 'not fit to become legally binding'.<sup>7</sup> Similarly, the Irish and UK governments initially were strongly opposed to recognising the Charter, a position that was maintained until changes were introduced to the text during the Convention; further refinements would also be introduced in the IGC at the insistence of the British delegation.

The Charter articles of most concern were those which set out individuals' rights or freedoms, and which in principle were taken from one of the 'precursor' texts mentioned above. Within the field of social rights, the articles of most concern to employers in the Charter were Articles 12, 27 and 28. These cover:

- Freedom of assembly and of association: 'Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests' (Article 12);
- Workers' right to information and consultation within an undertaking: 'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices' (Article 27); and
- Right of collective bargaining and action: 'Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and con-

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6. IBEC position paper, *op. cit.*, p. 5.

7. UNICE position paper, *op. cit.*, p. 2.

clude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action' (Article 28).

The subsequently adoption in March 2002 of Directive 2002/14/EC on information and consultation of employees, although not welcomed in itself, would nevertheless diminish concerns over Article 27 of the Charter. However, Articles 12 and 28 (II-72 and II-88 respectively in the new Constitution), touching as they do on the critical areas of the right of trade union recognition and right to strike, remain of crucial importance to Irish employers, given that the EU has never before attempted to introduce harmonised rules in these industrial relations fields.

The incorporation of the Charter into the Constitutional Treaty of course gives to the Charter legal value and makes it subject to interpretation by the Court of Justice. In terms therefore of process, if citizens believe that a decision taken by the Union's Institutions, or by Member States when implementing EU law, is at variance with any of the rights articulated within the Charter, they can bring the matter before a court in a Member State. The presiding judge may then refer the case to EU level for a final, definitive and binding judgement from the European Court of Justice. A number of lawsuits grounded in the Charter can be expected once it legally enters into force.

As regards the possibility of judgements in the above-mentioned areas of concern to employers, in the first instance, it is important to be clear what the Treaties say in the field of the key aspects of industrial relations. Article 137.5 of the EC Treaty classifies 'pay, the right of association, the right to strike and the right to impose lock-outs' as 'excluded competences', in other words areas in which the Community cannot adopt measures under its social policy powers. It should be noted that this excluded competences provision is reproduced verbatim in the Constitution Article III-210.6 – meaning that there has been no move towards introducing EU powers in these fields using the powers conferred on the Union in Part III of the Constitution. Furthermore, within the Charter itself, it is important to recognise that the possible effects of articles II-72 and II-88 are now severely limited by a range of conditions:

Firstly, a number of the original Charter's articles, including II-88 on collective bargaining/action, qualify themselves such that they must be 'in accordance with national laws and practices'. Secondly, the crucial closing articles of the Charter specifically state that it only applies in the context of implementation of Union law (II-111.1). Furthermore, the Charter 'does not extend the field of application of Union law' and does not 'establish any new power or task or the Union, or modify powers and tasks' already defined at European level (II-111.2). Thirdly, the text of the Charter stipulates that with regard to the scope and interpretation of the various rights enumerated, 'full account shall be taken of national laws and practices' (II-112.6). Finally, a separate text, entitled 'Explanation relating to the text of the Charter' brings full clarity to just what is meant in each Article of the Charter, leaving little scope for the ECJ or national courts to give expansive judgements. At the insistence of the UK government, these Explanations are now explicitly referred to in both the Preamble and in the closing section of the Charter (II-112.7). The ECJ and national courts are formally instructed to give 'due regard' to these Explanations in its future interpretative rulings on the Charter. This goes a long way to assuaging the fears of Irish employers any potential expansion of the scope of the rights included by the Charter under future case law.

However, the task of balancing the contents of the Charter with the 'Explanations' of national circumstances will at the end of the day still be left to the courts, above all the ECJ in Luxembourg. A body of ECJ case law in this field seems inevitable over the years ahead and, judging by the court's historical record as a motor for European integration, it would be surprising if it did not come up with ways and means to promote and support one way or another all the values of the Charter.

Is it therefore possible to give a final answer to the question as to whether the prohibition on Union action in the excluded fields of trade union recognition and right to strike (Part III-210.6) is in any way qualified or compromised by the Charter's affirmation that rights for workers in these areas can be claimed and exercised at the European level (Part II-72 and II-88)? At this stage, it is probably not possible to give a definitive answer. However, in the light of all the conditions spelt out above to actually effecting all the 'rights' articulated in the Charter, the grounds for employers to fear ECJ rulings on national industrial relations system as a result of the Charter's incorporation into the Constitution can ultimately be considered relatively weak. Nevertheless, some legal uncertainty is bound to remain on these issues until such time as the European Court of Justice eventually begins to interpret all the relevant, and

ostensibly conflicting, provisions of the Constitution. Notwithstanding this, Irish and European business have indicated they are prepared to accept the assurances that have been given on the Charter, and thus give the final text the benefit of the doubt.<sup>8</sup>

As an epilogue to this issue, we are left with the question of what the real added value of the Charter will be: on the one hand, citizens' rights will be given more visibility in the Constitution; on the other, there is now a significant mixing up of fundamental rights along with values and objectives in the same Charter. Furthermore, in some articles the Union would not even seem to have the competence to provide and ensure some of the rights that the Charter articulates. Does this mean that the whole Charter episode in the Constitution was just about optics after all?

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8. At the time of writing, the Confederation of British Industry is still consulting its membership on the position that the CBI should adopt on the issue.

## The Provisions on Social Policy

Leaving the Charter of Fundamental Rights to one side, the Constitutional Treaty has introduced a certain number of changes in respect of employment and social policies. In late 2002, following repeated demands by a large number of members of the Convention, a Working Group on 'Social Europe' was set up reasonably late in the Convention's deliberations. The overall outcome of this root and branch review of the Treaty's social provisions would be considered reasonably satisfactory from a business perspective, particularly when compared with the extent of the ambitions of some of the MEP *Conventionnels* involved in that Working Group.

The Constitution does not give the Union any new defined competences to legislate in further areas of social policy. In other words, the old Treaty articles on precisely what laws can be adopted in the social field remain exactly the same. Furthermore, the 'excluded competences' where the Union cannot legislate remain as at present.<sup>9</sup> This is an area in which a substantive change would have undoubtedly constituted a 'deal breaker' for Irish employers – as is also implicit from the section above on the Charter of Fundamental Rights.

In addition, the decision-making arrangements for most social issues were left as agreed at Nice, where a mixture of unanimity and qualified majority voting was decided.<sup>10</sup> The key unanimity provisions concern legislation on social security, the social protection of workers, the representation and collective defence of workers' interests, and the employment conditions of third-country nationals. One change that was agreed this time however is the transition from unanimity voting to QMV for the aggregation and payment of benefits to migrant workers and their dependents,<sup>11</sup> and even this change was qualified in the end by the IGC with the creation of a new procedure involving an 'emergency break', whereby Member State can delay a legislative proposal by appealing to the European Council if 'fundamental aspects of its social security system' would be affected. Prime Ministers can then, within four months, refer the measure back to the Council, either requesting or requiring a new and reworked draft of the measure from the Commission.

With regard to the annual employment guidelines process, significant pressure in the Social Europe Working Group to amend the treaty provision which stated that these guidelines 'shall be consistent' with the broad economic policy guidelines was resisted, thus reaffirming the current hierarchy and inter-relationship between the two processes.<sup>12</sup>

Both trade unions and employers would express significant satisfaction with the decision to incorporate into the Constitution a new article, in Part I, on the role of the social partners at European level.<sup>13</sup> I-48 recognises the role, the particularity and the autonomy of the social dialogue, thereby giving constitutional status to the process introduced into the Community at the behest of Jacques Delors at Maastricht. The text of this article was jointly submitted to the Convention Plenary on 14 January 2003 by the representatives of UNICE, CEEP and ETUC. Subsequently, the Irish EU Presidency would insert during the IGC an additional indent to this article, which reads: 'the Tripartite Social Summit for Growth and Employment shall contribute to social dialogue'.<sup>14</sup> This formal recognition in the Constitution of the Tri-

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9. III-210.6, covering 'pay, right of association, the right to strike and the right to impose lockouts'; ex EC Treaty Art. 137.5.

10. III-210.2 and III-210.3.

11. III-136; ex EC Treaty Art. 42.

12. III-206.2, 2<sup>nd</sup> indent. See also I-15, where the hierarchy between the two sets of guidelines is not explicitly mentioned, although silently implied, by the order of paragraphs in the article.

13. I-48.

partite Social Summit can be seen as another important enhancement of the social partners' status within the Union's governance system. In a practical sense, the precise modalities through which the TSS will contribute to the social dialogue, and the implications of that contribution, will need to be fleshed out further once the Constitution enters into force.

In parallel with all of the above, the 'social agenda' achieved a number of gains in the Convention and IGC: the Union's objectives (I-3) will be extended to include all of the following: the 'aim' of 'full employment',<sup>15</sup> a 'social market economy' protecting the rights of the child, combating social exclusion and discrimination, promoting social justice, and solidarity between generations. Likewise, advances were made with the introduction of 'values' of the Union (I-2), building on the earlier formulation of 'principles' in the EU Treaty. These will include 'equality between women and men', 'solidarity', and 'non-discrimination' in addition to human dignity, the rights of minorities as well as various other values.

Furthermore, a new horizontal 'social' clause has been introduced, at the beginning of Part III,<sup>16</sup> according to which the Union shall take account of social policy goals in the definition and implementation of all other policies. These goals are listed as a high level of employment, adequate social protection, the fight against social exclusion, a high level of education and training, and protection of human health. Business leaders have expressed surprise and disappointment that horizontal clauses such as this have also been introduced on anti-discrimination, environment, consumer policy and services of general interest in Part III, but yet no room could be found for a horizontal clause on competitiveness,<sup>17</sup> a not illogical assumption one would have thought in the Europe of the Lisbon Strategy. The High Contracting Parties on the other hand did manage to find space for a horizontal clause on the necessity for the Union to take account of the requirements of animals, as 'sentient beings' in the formulation and implementation of Union policies.<sup>18</sup>

Finally, the Union may in future formally promote 'co-ordinating measures' (in other words, the Lisbon Strategy's 'open method of co-ordination') in the fields of employment, labour law, working conditions, vocational training, social security, the prevention of occupational accidents and diseases, occupational hygiene, and the right of association and collective bargaining.<sup>19</sup> However, a Declaration (No. 18) attached to the Constitution clarifies the conditions under which such co-ordination will be possible, namely that all of these 'fall essentially within the competence of the Member States', and any EU measures can only be of a complementary nature, strengthening co-operation between the Member States and not harmonising national systems.

In general, weighing up the pluses and minuses of this round of Treaty reform, the social provisions of the Constitutional Treaty can generally be considered acceptable to business and employers; ultimately, they neither significantly increase the competences of the EU in social matters nor greatly extend the use of QMV.

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14. I-48, 2<sup>nd</sup> indent. The Tripartite Social Summit, formally established by a Council Decision in 2003, provides for a meeting on the eve of the Spring European Council between the Prime Ministers of the Troika Presidencies, the President of the Commission, the Presidents of the European Social Partners and the head of the national Social Partners of the three relevant Member States. In practice, each EU Presidency has convoked a meeting of the TSS, most recently on 4 November 2004 to discuss the Kok report.

15. Note however the continued use of the old formulation of the promotion/objective of 'a high level of employment' in III-117 and III-205.2.

16. III-117.

17. See interview with Jérôme Chauvin, Director of Company Affairs, UNICE, in *European Voice*, 16-22 September 2004, p. 23. The horizontal clauses are III-117 to 122. It should nevertheless be noted that III-122 on services of general economic interest was watered down in the IGC, with the role and competences of Member States clearly confirmed.

18. III-121.

19. III-213.

## The Provisions on Economic Policy

Perhaps even more than was the case in the debates on social policy questions, the future economic governance system of the Union constituted the scenario for the most visceral clash of ideologies within this treaty revision exercise. In these debates, both those in public and behind closed doors, the diametrically opposed visions and ambitions of the various actors met head on. It is therefore not surprising that the outcome of these battles, who won, who lost, continues to inform, in a not inconsiderable way, the various debates currently being conducted in Member States in advance of their respective decisions on ratification of the Constitution.

A fundamental issue for business in the Convention/IGC concerned the Union's decision-making procedures in the field of taxation. IBEC and UNICE's position throughout the Convention and IGC was to oppose any changes to existing decision-making arrangements for direct, indirect or environmental tax matters.<sup>20</sup> The business view tends to be that while certain tax issues need to be resolved at EU level, when the political will really does exist, agreement can and will be reached on this most sensitive of areas using the principle of unanimity.

It is worth recalling that from the beginning of the proceedings of Working Group VI on Economic Governance in the Convention in June 2002, it quickly became clear that there would be a highly concerted agenda to move all Council decision making in this field to QMV. However, a considerable coalition of members, from around eight old and new Member States (UK, Spain, Ireland, Sweden, Poland, Slovakia, Estonia and Slovenia), insisted on maintaining the principle of unanimity. The majority view as expressed in the October 2002 Economic Governance WG report, supported by the Commission, was to call for an introduction of qualified majority voting on company, indirect and environmental taxes. Later on, the general view in the Convention (bearing in mind that the Convention Plenary never provided for votes) was considered to broadly reflect that of the relevant working group; notwithstanding this, the Convention proposal, when it finally came after Easter, provided for the possibility of a very limited use of QMV, on a case-by-case basis, within the tax field. This was the result of very considerable debate in the 12-member Praesidium, where John Bruton, the former Irish Prime Minister, took a leading and forceful role on the issue. In reaction to the Praesidium text, a significant rearguard action was fought on the margins of the Convention, right up to the last minute, by majorities in the so-called 'constituent bodies' (i.e. National Parliaments, European Parliament, and Governments), who pushed hard, but in vain, for a genuine introduction of QMV to taxation matters.

In any event, when the matter was considered by the IGC, it soon became clear that the UK Government would not accept the compromise anyway. In its inputs to the Italian Presidency, UNICE likewise called for unanimity to apply to tax measures.<sup>21</sup> The final decision in June 2004 was to keep the principle of unanimity voting for all tax related matters, therefore maintaining the wording of the former Articles 93, 94 and 175.2.<sup>22</sup> This apparent maintenance of the status quo must nevertheless be seen in the context

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20. At an extraordinary meeting of the Presidents of the member Federations of UNICE's in Brussels on 3 October 2002, this position was unanimously reconfirmed. The relevant wording in the June 2002 position paper, *op. cit.*, p. 5, was: '... qualified majority voting should be the rule, with only a very small number of exceptions for which unanimity would be required. Unanimity should in particular be reserved for... new policy initiatives in the field of taxation (e.g. harmonisation of systems of taxation, as well as environmental fiscal measures).'

21. Letters of UNICE President Jürgen Strube to the Prime Minister of Italy, Silvio Berlusconi, on 1 October 2003 and 18 November 2003.

22. Annex II of this paper constitutes a list of all Constitution articles where unanimity voting will apply. For the sake of clarity, a second list (Annex I) list all articles where the use of QMV has been extended.

of the decision by the IGC to retain a separate Convention proposal, envisaging the possibility for QMV to be introduced within an enhanced co-operation initiative (III-422), the so-called *passerelle* concept. Indeed, people involved in the IGC process acknowledge that this was very clearly a trade-off between the two issues. However, from the Irish perspective, the potential implications and risks associated with enhanced co-operation, and ultimately use of this bridging procedure, in the field of taxation will need to be carefully evaluated.

Meanwhile, on other economic governance questions, the Commission's powers in the Broad Economic Policy Guidelines (BEPG) process have been very marginally enhanced. The Commission will in future have the right to 'address a warning' to a Member State, once it has already been established by Council that a Member State's economic policies are not consistent with the Guidelines.<sup>23</sup> Previously, this right to address a warning was reserved to the Council. Many hours were also spent in laborious battles to make the text of Part I<sup>24</sup> – which the Convention Praesidium drafted – consistent with the relevant implementing provisions of Part III in this field,<sup>25</sup> which essentially reflected Article 99 of the EC Treaty, and which were more acceptable to business. In general, business had been cautious of any major changes in the procedures of the annual BEPGs, as any 'normalisation' (i.e. Commission 'proposal', from which Council can only deviate by unanimity) of the adoption of the Guidelines would have constituted a significant incursion into the powers of the Member States in setting their annual budgets.

By contrast with its stance on taxation and annual economic guidelines provisions, business did support the attribution of a much stronger role to the Commission in the Stability and Growth Pact. This is because the question of further transfers of competence was not so central; rather, the issue was about achieving proper implementation of the existing Pact. Increased powers for the Commission within the Stability and Growth Pact – albeit eventually somewhat paired back in the IGC – were thus considered welcome, and supported by UNICE's Secretary General Philippe de Buck in the Convention Working Group on Economic Governance. In the first instance, the Commission will now have the right to address an opinion to a Member State where there is a risk of an excessive deficit or where the Commission believes an excessive deficit actually exists.<sup>26</sup> This contrasts with the previous situation where its powers were limited to making a 'recommendation' to Council that such a risk or such a deficit existed. Secondly, the Commission will have the right of 'proposal' (rather than just a 'recommendation') to the Council in the process leading to the formal decision by Council that an excessive deficit exists.<sup>27</sup> The importance of this is that Council can only modify the text of the decision by unanimity (minus the affected Member State of course). Previously, it could do so by QMV.<sup>28</sup>

Another area on which business has been broadly supportive, although cautiously so, is on the new provisions for the eurozone.<sup>29</sup> In general, there was no great controversy on these either in the Convention (where the Economic Governance Working Group report produced consensus recommendations) or in the IGC. A new chapter, entitled 'Provisions specific to Member States whose currency is the euro', was added in the Constitution. This outlines enhanced economic coordination arrangements, including extra 'economic policy guidelines' for eurozone Member States.<sup>30</sup> Furthermore, a 'Protocol on the Euro Group' formalises the currently informal meetings of eurozone Finance Ministers, and foresees 'ever-closer coordination of economic policies within the euro area'.<sup>31</sup> This goes well beyond the current treaty provisions, which state that economic policies are only 'a matter of common concern'.<sup>32</sup> The ultimate possibility opened up by all this is more 'variable geometry' in the economic field, which would effec-

23. III-179.4.

24. I-12.3 and I-15.1.

25. III-179.

26. III-184.5.

27. III-184.6.

28. On the specific judge and jury role that Council plays in the S&G Pact, the experiences of November 2003 (albeit at a different stage of the excessive deficit procedure on this occasion) showed how QMV in Council, with no automatic switch to unanimity when Council wishes to deviate from a Commission initiative, can be a dangerous thing. In that particular case, France and Germany would lean heavily on a number of smaller Member States to achieve the required blocking minorities letting them off the hook as regards comprehensive sanctions for their excessive deficits.

29. Strube to Berlusconi, 1 October 2003, *op. cit.*, p. 2, where UNICE restricts itself obliquely to supporting the 'full realisation of EMU's potential'.

30. III-194.1.

31. Protocol 12, 1<sup>st</sup> Preamble.

32. EC Treaty, Article 99.1.



tively mark a further extension of the 'ins' and 'outs' situation that currently exists for the euro. This Protocol also determines that a Minister for Finance from a eurozone member shall be elected by his eurozone peers to chair the group – incidentally a measure that has already been implemented in September 2004.

Much of the debate of the Convention Working Groups and Plenary sessions centred on the question of what should be the stated Objectives of the Union. This was more than a technical debate about drafting niceties. In addition to the specific legal base that justifies EU action in each individual policy area, the Union's objectives provide an essential set of policy goals and instructions to the Commission when it is putting together draft EU legislation. For example, if 'competitiveness' had been deleted from these objectives, there would in future have been no formal obligation on the Commission to justify new proposals in terms of their impact on the competitiveness of industry. In the pre-final drafts of the Convention text circulated by the Praesidium in mid-May 2003, this is however precisely what happened: the objective of competitiveness, first inserted into the Treaties at Maastricht, was deleted. This created a genuine uproar in the wider business community, with representations made at all levels at national and European level to re-insert this objective. UNICE, in its capacity as an Observer Member of the Convention, along with nine other Convention members, tabled an amendment to the text, reinserting the objective of 'a high level of competitiveness' into I-3. In addition, UNICE wrote to President Valéry Giscard d'Estaing on 28 May 2003 expressing its 'extreme concern' about the removal of competitiveness from the objectives of the Union. The clear implication of this was that, whether by simple oversight or by design, the Praesidium was risking the very support of business for the draft Constitutional Treaty. In the end, Article I-3 was redrafted in early June, and the words 'highly competitive' were added to the text submitted to the Plenary session of the Convention which met on 5-6 June, bringing an end to this particular mini-crisis in the Convention, and allowing UNICE's Council of Presidents, which met near Athens on 6 June, to reconfirm its support for the overall text. During the IGC, at the formal request of the ECB, the objectives article would be refined further, bringing back in the principle of price stability.<sup>33</sup> This has naturally been welcomed as an important and positive outcome by business. Overall, business has taken the view that, in the context of the range of competing interests that clamoured to be recognised, the balance struck in the Union's objectives is acceptable. That being said, the Union's social objectives were undoubtedly strengthened more than any other area.

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33. Article 4.2, EC Treaty, already included this principle.

## Subsidiarity and National Parliaments

... the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States... National Parliaments shall ensure compliance with that principle. (I-9)

The reasons for concluding that a Union objective can be better achieved at Union level must be substantiated by qualitative and, wherever possible, quantitative indicators. (Protocol on the principle of subsidiarity and proportionality, Article 4)

Subsidiarity as a theoretical concept dates from the Maastricht Treaty.<sup>34</sup> However, up to now, there have arguably been weaknesses in its application in the formulation of Community law, not least on the part the ECJ when interpreting that law. The questions therefore is frequently asked as to who should be the champions and defenders of this much-vaunted principle. The answer provided by the Convention, and retained by the IGC, is to provide for individual National Parliaments to be the ones to blow the subsidiarity whistle from now on regarding new Commission proposals. This can be considered the major innovation in the draft Constitution.<sup>35</sup>

In practical terms, if any Parliament, within a period of six weeks, considers a draft proposal does not comply with subsidiarity, all Union Institutions must take account of that view in adopting their positions. More importantly, if one third or more National Parliaments express such a view, the Commission is obliged to critically review its proposal, which may include abandoning a proposal altogether. As a last resort, National Parliaments have the power to refer subsidiarity-related matters to the ECJ. In addition to these scrutiny arrangements, the new insistence on qualitative and quantitative indicators, as spelt out in the citation above (in other words, adequate cost-benefit and impact assessment, as constantly called for by business), marks a significant articulation of how subsidiarity will be translated into practice. These indicators are also a nod in the direction of the better regulation agenda, upon which all business interests insisted so strongly in inputs to the Future of Europe process. When combined with the existing Treaty provision that Union action 'shall not exceed what is necessary to achieve the objectives of the Constitution',<sup>36</sup> it is clear that there is now the potential to give further meaning to the subsidiarity and proportionality principles, and by corollary the capacity for debate and action on European issues to be taken at a level which is as close as possible to the citizen. The spotlight will in future be very firmly fixed on the Commission every time it attempts to push through new legislation at Union level.

One of the important outcomes thrown up by all this is that National Parliaments, and in particular their European Affairs Committees, can in future be considered as key advocacy targets by those wishing to influence draft EU legislation.<sup>37</sup> For lobbying organisations whose networks stretch to every capital, and to take the case of UNICE, whose real strength and representativeness stems from its base in the 25 capitals, the new rules hold out the possibility of exciting co-ordinated pan-European advocacy cam-

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34. EC Treaty, Article 5.

35. Protocol on the role of national Parliaments in the European Union and Protocol on the application of the principles of subsidiarity and proportionality.

36. The proportionality principle, I-11.1.

37. To take a relevant current example, were the Constitution already in force, the current Commission proposal on EU chemicals policy, considered controversial in the business community, could already be challenged in National Parliaments, even before Ministers and MEPs began to consider the proposals.

paigns. By contrast, organisations with no real roots or strength in the Member States will find themselves exposed in this new environment.

## Conclusions

Business has expressed its satisfaction that its core priorities were in general addressed in this treaty revision process. Bottom lines, such as maintaining unanimity in tax policy and key areas of social policy, reaffirming the goal of competitiveness, stability and growth, and introducing the need for greater proportionality in Union legislation, were all properly taken into account.

Secondly, all social partners are very pleased that a new article on the social partners has been introduced in Part I of the Constitution, clearly recognising their role as well as the particularity and autonomy of the social dialogue at European level. Also on social issues, the decision to neither increase the competences of the EU in the social chapter of the Treaty nor to dramatically extend the use of QMV has been positively received. As for the Charter of Fundamental Rights, which contained extremely problematic articles were it to be made legally binding, a number of conditions were introduced to assuage the fears of employers; thus while business is not happy about the incorporation, it is not seen as enormously problematic either.

Meanwhile, excellent progress was made on the simplification agenda, and the Union's founding text is also now more readable and the procedures more understandable. The old joke that it is very easy to prove that something was in the Treaties, but much more difficult to prove that something wasn't there will hold much less sway once the Constitution enters into force. This is in large part due to the Herculean work of Convention Vice-President Giuliano Amato, and something for which Europe's corporate and private citizens can be very grateful.

In terms of giving more definition to the Lisbon Strategy, the Constitution contains a welcome acknowledgement of the tools used for the 'open method of co-ordination'. These consist of 'guidelines, indicators, benchmarking, best practice, evaluation, and peer review'. This 'open method' will be used for some aspects of social policy, research and development, public health and industry policy. Importantly, the new text is drafted in such a way however as to avoid covert slippage of competence to the Union level.

On the negative side, business is disappointed that formal recognition has not been given in the draft Constitution to the non-legislative approaches such as co-regulation and self-regulation. These were presented by UNICE in the Convention Plenary and supported by the Convention Chair, but did not ultimately feature in the final text. In addition, the horizontal clauses introduced on social policy, environmental and consumer protection requirements, and the absence of an equivalent clause on competitiveness or impact assessment is a source of frustration. In the area of common commercial policy, business would have liked a greater extension of QMV, in particular for trade in services and the commercial aspects of intellectual property, but this was not to be on this occasion.

In terms of institutional changes, not addressed in this paper, the Constitution gives significant food for thought. Once the Commission ceases to be a College of one Commissioner per Member State, from 2014, the 'national' route into the EU executive will no longer exist in the same way, with all the implications that implies. In the 2004-9 College, larger Member States will of course already experience a variation on this, with the abolition of their second Commissioner. Furthermore, the consolidation of Council Presidencies, and the creation of the concept of 'team Presidencies' spanning 18 months will also change the EU's way of doing business. Since the Seville European Council in June 2002, the principle of annual programming is however already a reality in Council, and the business community has already adjusted its advocacy to take account of this development.<sup>38</sup>

What then is the final business verdict on the Constitution? Irish and European business have indicated that they welcome the successful outcome of the negotiations in Brussels.<sup>39</sup> IBEC has also stated that it will strongly support the adoption of the Constitution in the subsequent referendum in Ireland in either 2005 or 2006. This was notwithstanding the organisation's concerns that legal confusion might arise from the decision to incorporate the Charter of Fundamental Rights into the Constitution. More recently, on the day of the signature of the Constitution in Rome on 29 October, UNICE issued a press release calling for 'swift ratification' in all Member States.

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38. See for example 'A Growth Agenda for Europe: Position paper on priorities of the EU Presidencies of Ireland and the Netherlands in 2004', jointly submitted to the Governments of Ireland and the Netherlands by IBEC and VNO-NCW, September 2003. Also of relevance is 'Growth and prosperity in Europe: Action plan of business for the 2004-2005 EU Presidencies', prepared by VNO-NCW with FEDIL (Luxembourg) CBI and IBEC, July 2004. Both documents are available at [www.ibec.ie/ibb](http://www.ibec.ie/ibb).

39. IBEC stated on 18 June 2004 agreement that 'this landmark achievement is the highlight not only of the 2004 Irish Presidency, but of all six Irish EU Presidencies since 1975'. Likewise, UNICE 'applauded' the adoption of the Constitutional Treaty, calling it 'a very important step in the ongoing construction of the EU'.

## **ANNEX I**

### **27 Articles Where Use of QMV Extended**

- Social security measures for migrant workers (III-136; ex Art. 42)\*
- Judicial cooperation in criminal matters (III-270 to 273; ex Art. 31 EU Treaty)\*
- Police co-operation (III-275 and 276; ex Art. 30 EU Treaty)
- Border controls procedures (III-265; ex Art. 62)
- Asylum procedures (III-266; ex Art. 63)
- Immigration procedures (III-267; ex Art. 63)
- Appointment of ECB President and members of the Executive Board; however, only eurozone members will vote (III-382; ex Art. 112.2.b)
- Mutual recognition of diplomas for self-employed persons (III-141; ex Art. 47)
- Intellectual property rights protection (III-176, 1<sup>st</sup> indent; ex Art. 308)
- Energy policy (III-256.2; ex Art. 308)
- Powers given to the Commission to manage implementation of Union legislation (I-37; ex Art. 202)
- Trade in cultural and audiovisual services, where proposed agreements do not ‘risk prejudicing the Union’s cultural and linguistic diversity’ (III-315.4; ex Art. 133.6)
- Trade in social, education and health services, where proposed agreements do not ‘risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them’ (III-315.4; ex Art. 133.6, 2<sup>nd</sup> indent)
- Economic and technical assistance agreements with non-EU countries (III-319; ex Art. 181a)
- Urgent humanitarian aid to non-EU countries (III-321.3; ex Art. 308)
- Culture policy (III-280.5; ex Art. 151.5)
- Adopting CFSP decisions when proposed by the Union Minister for Foreign Affairs (III-300.2.b)
- Amendment of certain parts of ECB Statutes (III-187; ex Art. 107)
- Setting up of a ‘specialised court’ attached to the former Court of 1<sup>st</sup> Instance, now called the General Court (III-359; ex Art. 225a)
- Union Patent Court (III-364; ex Art. 229a)
- Revision of the ECJ Statute (III-381; ex Art. 245)
- Civil protection, against natural or man-made disasters (III-284; ex EC Art. 308)
- Implementation measures for own resources system (I-54.4; ex Art. 269)
- From 1/1/2007, decisions on rules for implementing the budget (III-412.1; ex Art. 279.1) and on procedures relating to revenue under own resources (III-412.2; ex Art. 279.2)

\* An asterisk indicates that a Member State may refer a draft measure upward to the European Council for further consideration before an act is adopted by Council

## ANNEX II

### 65 Articles Subject to Unanimity Voting

#### Policy Fields

- ‘Horizontal’ bridging clause for the Constitution, where policies in Part III subject to unanimity (e.g. taxation) would be moved to QMV, if no national Parliament objects (IV-444.1)
- Direct tax measures (III-173)
- Indirect tax measures (III-171)
- In an enhanced cooperation initiative, a bridging clause to introduce QMV to the field in question: military and defence fields are specifically excluded, and only participating Member States vote (III-422)
- Environmental taxes, town/country planning, quantitative management of water, and land use (III-234)
- Fiscal measures in the field of energy policy (III-256.3)
- Bridging clause to apply QMV to measures on environmental taxes, town/country planning, quantitative management of water, and land use (III-234.2.c)
- Measures on social security/social protection of workers, protection where employment is terminated, collective defence/co-determination, employment condition of non-EU workers (III-210.3)
- ‘Bridging clause’ to apply QMV to measures on protection where employment is terminated, collective defence/co-determination, employment condition of non-EU workers (III-210.3, 2<sup>nd</sup> indent)
- Ratification of a formal Social Partner agreement if it falls in an area subject by unanimity (III-212.2)
- General rule for anti-discrimination rules (III-124.1)
- Adding to the rights of citizens of the Union (III-129)\*
- International agreements on trade in services, on the commercial aspects of intellectual property, on foreign direct investment, where unanimity applies for internal rules (III-315.4, 2<sup>nd</sup> indent)
- Under certain conditions, international agreements for trade in cultural and audiovisual services, trade in social, educational and health services (III-315.4, 3<sup>rd</sup> indent)
- The so-called ‘residual competences’ or flexibility article, where there is no specific legal base for actions necessary to meet one of the Union’s objectives (I-18.1)
- Approval of a state aid in a Member State, in derogation from the general treaty rules (III-168.2)
- International agreements in a field where unanimity is required internally, association agreements, and cooperation agreements with candidate countries (III-325.8 2<sup>nd</sup> indent)
- International exchange-rate agreements for the euro (III-326.1)
- Revision of the Excessive Deficit Protocol (III-184.13 2<sup>nd</sup> indent)
- Any measure that constitutes a ‘step backward’ on free movement of capital with non-EU countries (III-157.3)
- Approval of a restrictive tax measure introduced by a Member State against a non-EU country (III-158.4)
- Language arrangements for European intellectual property rights, e.g. the Community patent (III-176, 2<sup>nd</sup> indent)
- Conferral of prudential supervision tasks on the ECB (III-185.6)
- Fixing the exchange rate of an incoming eurozone member – only eurozone countries vote (III-198.3)
- Any ‘step backward’ regarding access by transport operators to a Member State (III-237)

#### Institutional Matters

- Ratification procedure for this Constitution in all Member States (IV-447.1)\*
- Full revision procedure for the Constitution, in the framework of a future IGC (IV-443.3)\*
- Simplified revision procedure for the Constitution, where content of policies in Part III could be amended (IV-445.2)\*
- Entry of a new Member State to the Union (I-58.2)\*
- Existence of a breach by a Member State of the ‘values’ of the Union (I-59.2)

- Voluntary withdrawal from the Union – if any EU rules are to apply more than two years after the Member State notifies its intention to leave (I-60.3)
- Amendment by Council of any legislative proposal of the Commission in the process leading to the adoption of an act of the Union (III-395.1 and III-396.9)
- Rules for relations with the Union for overseas territories of individual Member States (III-291)
- Application of the Constitution to the overseas territories of certain Member States (IV-440.7)
- Establishment of a European Public Prosecutor's Office (III-274.1)
- Extension of the powers of the future Public Prosecutor (III-274.4)
- Size of the European Parliament (I-20.2 2<sup>nd</sup> indent)
- Rules for a uniform procedure for elections to the European Parliament (III-330.1)\*
- Tax rules for MEPs' salaries (III-330.2)
- Size of the Commission (I-26.6)
- Rotation between Member States in the Commission (I-26.6 2<sup>nd</sup> indent)
- Decision not to fill a vacancy in the European Commission (III-348.2 2<sup>nd</sup> indent)
- Appointment of judges to the Court of Justice (I-29.2 and III-355 1<sup>st</sup> indent)
- Appointment of judges the former Court of First Instance, now renamed the 'General Court' (I-29.2 and III-356 2<sup>nd</sup> indent)
- Number of Advocates-General in the Court of Justice (III-354 1<sup>st</sup> indent)
- Appointment of members of 'specialised courts' of the Court of Justice (III-359.4)
- Amendment of the Statute of the EIB (III-393)
- Determination of location of the seat of the Union's institutions (III-432)
- Rules governing the language regime of the Institutions (III-433)
- Measures concerning the right to vote or stand in European or local elections in another Member State (III-126 1<sup>st</sup> indent)
- Size of the Committee of the Regions (III-386 1<sup>st</sup> indent)
- Size of the Economic and Social Committee (III-389 1<sup>st</sup> indent)

### **Budgetary Matters**

- Changes to EU's 'own resources' system of financing (I-54.3)\*
- Multi-annual financial framework (I-55.2)
- Bridging clause to apply QMV to multi-annual financial framework (I-55.4)
- Decision that the costs of an enhanced cooperation initiative be borne by the EU budget (III-421)

### **Freedom, Security and Justice**

- Family law related judicial cooperation measures (III-269.3), and bridging clause to apply QMV to measures in this field (III-269.3)
- Measures concerning passports, identity cards, residence permits or social security/social protection documents (III-125)
- Certain aspects of criminal procedure in the police and judicial cooperation field (III-270.2.d)
- Identification of 'other areas of crime', in addition to those mentioned in this Article, on which action could be undertaken (III-271.1, 3<sup>rd</sup> indent)
- Operational cooperation between police services (III-275.3)
- Rules for operation of police services in the territory of another Member State (III-277)

### **Common Foreign and Security Policy**

- General rule for decisions in Common Foreign and Security Policy (I-40 and III-300)
- Identification by the European Council of 'strategic interests and objectives' of the EU, in particular CFSP (III-293)
- Any future decision to introduce a Common Security and Defence Policy (I-41.2)\*
- General rule for implementation of any future CSDP (I-41.4)
- Final decision at European Council level on one of the CFSP issues subject to QMV which a Member State has opposed 'for vital and stated reasons of national policy' (III-300.2)



- Bridging clause to apply QMV to measures on CFSP areas not already subject to QMV (III-300.3)
  - Decisions on ‘permanent structured cooperation’ on CSDP for participating Member States (III-312)
  - Authorisation to a group of countries to proceed with ‘enhanced cooperation’ in CFSP (III-419)
  - Admission into an existing CFSP ‘enhanced cooperation’ arrangement of a Member State, and only ‘in’ states vote (III-420)
- Amendments to the 1958 arms list (III-436)

\* An asterisk indicates that, in addition to unanimity being applicable, for a decision to become effective, it must also be ratified at national level by Parliament or in a referendum