

THE INSTITUTIONS OF THE ENLARGED EU UNDER THE REGIME OF THE CONSTITUTIONAL TREATY

ALAN DASHWOOD* and ANGUS JOHNSTON**

1. Introduction¹

In this paper, we review the changes the Draft Treaty Establishing a Constitution for Europe (hereafter: DTC) will bring about in the institutional framework of the European Union, focusing mainly, though not exclusively, on the most controversial issues, which were only resolved by the IGC at its final meeting in June 2004.² Our aim is to identify and explain those changes, and to evaluate them in the light of the objectives of the Laeken Declaration of December 2001. Under the heading, “More democracy, transparency and efficiency in the European Union”, three main questions were put by the authors of the Declaration: how can the legitimacy and transparency of the Union’s institutions be enhanced; what should be the role of national parliaments; and how can the efficiency of decision-making, and the workings of the institutions in a Union of some 30 Member States, be improved? We of-

* Professor of European Law and Fellow of Sidney Sussex College, University of Cambridge.

** University Lecturer in Law and Fellow of Trinity Hall, University of Cambridge.

1. The version of the Draft Constitutional Treaty from which this paper draws the numbering and English text is to be found in Document CIG 87/04 of 6 Aug. 2004 and its addenda on the Protocols and Annexes (Document CIG 87/04 Add 1) and Declarations (Document CIG 87/04 Add. 2) of the same date. All of these documents are available on the Council’s website on the IGC, at: ue.eu.int/cms3_applications/Applications/igc/doc_register.asp?lang=EN&cmsid=576 (last visited, 13 Sept. 2004). Note that this numbering does differ in certain respects from earlier drafts (e.g. the previous complete draft bundle, to be found in Documents CIG 86/04 and 86/04 Add 2 (25 June 2004), 86/04 Add 1 (28 June 2004), Add 2 Cor 1 (15 July 2004) and Add 2 Cor 2 (30 July 2004): again, these are all available via the website cited above). All references are to the Draft Treaty Establishing a Constitution for Europe unless otherwise indicated.

2. The original version of this paper was prepared for a Workshop, which was held in the Cambridge Law Faculty on 20 Sept. 2004, under the auspices of the Centre for European Legal Studies (CELS) and the Swedish Network for European Legal Studies (SNELS). We profited greatly from comments and suggestions made by those taking part in the Workshop. Defects that remain are all our own.

fer a view as to whether the DTC provides satisfactory answers to those questions.³ Two other special concerns of ours are the accessibility of the text to those citizens of the Union willing to make an effort to understand it, and whether the integrity of the institutional framework has been preserved.

We deal successively with changes affecting the European Parliament and national parliaments, the European Council and its President, the Council of Ministers (as it is called in the DTC), the new office of Union Minister for Foreign Affairs, the Commission and the European Court of Justice. In our conclusion, we attempt an overall assessment of the institutional provisions under the new dispensation which the DTC will usher in, assuming (which we expect) that the Treaty is ratified by a sufficient number of Member States to ensure that it comes into force.⁴

2. The European Parliament and national Parliaments

In a constitutional order like that of the European Union, which is composed of sovereign States, it is futile to suppose that democratic legitimacy can be provided exclusively by way of the link of political accountability between individual citizens and a directly elected European Parliament. For the foreseeable future, any political process at the level of the Union is bound to be a pale reflection of the fiercely fought national political game, which remains the source of the glittering prizes of public life.⁵ In such an order, there has to be a dual system of legitimation – to be sure, through the responsibility of MEPs to their electors, but also through the responsibility of Heads of State or Government in the European Council, and of ministers in the Council, to

3. We have benefited from the insights in the survey of similar issues by Kokott and R  th, relating to the text of the DTC produced by the Convention on the Future of Europe (“the Convention text”): see “The European Convention and its Draft Treaty establishing a Constitution for Europe: Appropriate answers to the Laeken questions?” 40 *CML Rev.* (2003), 1315. We do not, however, entirely share those authors’ evaluations. See, also, the Editorial in the August issue of this Review, which touches on some of the matters that we discuss: 41 *CML Rev.* (2004), 899.

4. We are aware, of course, that the existing Treaties can only be amended in accordance with the procedure laid down by Art. 48 TEU, which requires any new Treaty to be ratified by all of the Member States. If more than, say, three or four of the Member States were unable to ratify the DTC, especially if a large Member State were included in this group, that would probably spell the end of the new Constitution. However, we consider it highly unlikely that the non-ratifiers (if any) will be so numerous. Should only one or two Member States fail to ratify, there would surely be irresistible political pressure from the others to find a solution permitting the DTC to enter into force, even if that involved withdrawals from the Union.

5. Including, of course, prizes in the form of membership of Union institutions.

their national parliaments and electorates. The imperative need for dual legitimization has finally received explicit recognition in the primary law of the Union, by the inclusion in Article I-46 (2) of the DTC of a definition of “the principle of representative democracy” in these terms:

“Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments or to their citizens”.⁶

That explains why we have decided to deal with relevant changes affecting the European Parliament and national parliaments in the same section of this article.

2.1. *The European Parliament*

If the DTC amendments relating to the European Parliament do not appear momentous, the reason is that the progressive enhancement of the Parliament’s legislative role had already brought it the status of the Council’s equal partner in the policy areas where co-decision is the law-making procedure prescribed by the EC Treaty. That process is completed by the DTC, through the generalization of co-decision as the “ordinary legislative procedure” of the Union. There is also an amendment to the procedure laid down for the appointment of the President of the Commission, though we consider this to be of less significance than might appear at first sight. The sole issue directly concerning the Parliament that was only resolved at the last minute in the IGC was that of the allocation of seats, which evidently formed part of the political deal struck between the large and small Member States.

2.1.1. *Generalization of the co-decision procedure as the ordinary legislative procedure*

The first step in the enhancement of the role of the European Parliament in EC law-making was the introduction by the Single European Act of what was then officially (and is still unofficially) called “the cooperation procedure”.⁷ That procedure – a forerunner of co-decision, under which the Coun-

6. The odd-sounding “either ... or” of the second subparagraph, *in fine*, is, presumably, to cater for the fact that the French President is directly elected.

7. Officially, “the procedure referred to in Article 252”. The co-operation procedure is discussed in *Wyatt and Dashwood’s European Union Law*, 4th ed. (London, 2000), pp. 47–48.

cil retains power to override the will of the Parliament, if it is able to act unanimously – survives in the EC Treaty, in certain of the legal bases provided for in the Title on Economic and Monetary Policy,⁸ but is given its quietus by the DTC. The TEU brought in the co-decision procedure, which initially was applicable mainly for the enactment of internal market measures.⁹ The procedure was amended by the Treaty of Amsterdam, so as to place the Parliament on an equal footing with the Council, by replacing its negative power of veto with a requirement of positive approval by both Institutions in order for a measure to become law. The Amsterdam Treaty also extended the range of the matters for which recourse to co-decision was prescribed, and a further such extension was made by the Treaty of Nice.¹⁰

The generalization of co-decision by the DTC is linked to the establishment of a hierarchy of the legal instruments available to the European Union. For the first time in the law of the Union, a formal distinction is drawn between “legislative acts” and “non-legislative acts”. The former comprise “European laws” and “European framework laws”, as defined by Article I-33(1), second and third subparagraphs. The definitions of these new forms of instrument correspond, respectively, to the definitions of regulations and directives in the second and third paragraphs of Article 249 EC; however, unlike the Community instruments, European laws and European framework laws can only be used for the adoption of measures under primary powers conferred by the DTC itself. The term “regulation” has been re-assigned, to designate “a non-legislative act of general application for the implementation of legislative acts and of certain specific provisions of the Constitution”, and – confusingly, at least for old Community hands – applies to such measures, whether they are intended to have legal effects corresponding to those of EC regulations or of EC directives.¹¹

Article I-34 identifies co-decision as “the ordinary legislative procedure”, to be used for the adoption of all legislative acts, except in the specific cases where some other procedure is prescribed by the Constitution. This is a thoroughly welcome development, reinforcing the system of dual legitimation in the law-making process of the Union.

8. Arts. 99(5), 102(2), 103(2) and 106(2) EC.

9. Officially designated in the present EC Treaty as “the procedure referred to in Article 251”.

10. On these developments, see Dashwood, “European Community legislative procedures after Amsterdam”, 1 CYELS (1998), 25; and id., “The constitution of the European Union after Nice: Law-making procedures”, 26 EL Rev. (2001), 215.

11. This is not the place to analyse the system of non-legislative acts, as provided for by Arts. I-36 and I-37 DTC, which appears to us both complex and far from clear.

The matters falling outside the scope of the ordinary legislative procedure have been significantly reduced. Those that remain are ones that are seen, at least by some of the Member States, as touching especially nearly on their sovereignty, such as taxation¹² or the creation of new forms of own resources for the Union.¹³

2.1.2. *The involvement of the European Parliament in the appointment of the President and Members of the Commission*

This has been another evolving process. The present arrangements for the appointment of the President and the other Members of the Commission are found in Article 215(2) EC. The Council, meeting in the composition of Heads of State or Government, and acting by a qualified majority, nominates the person it intends to appoint as Commission President. The nomination must obtain the approval of the European Parliament. The list of other persons to be appointed as Commissioners is then adopted by the Council (in its ordinary ministerial composition), acting again by a qualified majority, and with the common accord of the nominee for President. The nominations, including that of the President, are then subjected to a vote of approval by the Parliament, after which the formal appointments are made by the Council, acting by a qualified majority.

The main changes that the DTC will make in the appointment procedure relate to the nomination of the candidate for the Presidency. Article I-27 provides:

“Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, deciding by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its members. If he or she does not obtain the required majority, the European Council, acting by a qualified majority shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure”.

The drafting of the new provision was evidently intended to create the impression that the political link between the Commission and the European Parliament was being strengthened. The language describing the role of the European Council in the process is more tentative than hitherto (“propose” rather than “nominate”), that describing the role of the Parliament more assertive (the proposed candidate “shall be elected” rather than simply “ap-

12. Art. III-171 DTC.

13. Art. I-54 DTC.

proved"). Also, it is spelt out in terms that, if the candidate proposed by the European Council fails to obtain the requisite majority in the Parliament, a new name must be put forward; the European Council is legally barred from repeatedly proposing the same candidate (though, in practice, it is surely inconceivable that it would attempt to bully the Parliament in this way).

The amended appointment procedure leaves the initiative in the hands of the Heads of State or Government of the Member States. That is as it should be, since a Commission President must be a person who commands the confidence of Member State Governments, if he/she is to do an effective job. However, it is democratically proper to require that, in choosing a candidate, the European Council take account of the outcome of European Parliamentary elections: the Commission, as the body responsible for putting forward legislative proposals, should be led by a person whose place on the left/right political spectrum corresponds broadly to the position which the Union's electorate has most recently taken. That is not the same as saying that the Commission President should be designated by the political majority in the European Parliament and bound by the programme on which the majority was elected. The authors remain firmly of the view, which has previously been expressed by one of them, that such politicization would impair the independence of the Commission, rendering it less capable of performing its unique (and, in a constitutional order of sovereign States, indispensable) function – that of formulating and promoting a conception of the general interest of the Union as a whole. The nicely balanced provisions of Article I-27 avoid that pitfall.¹⁴

Although the Article is not yet in force, the appointment of Mr Barroso as the next Commission President illustrates the way in which the new procedure is likely to operate. It was seen by the European Council as essential to find a centre-right candidate, reflecting the composition of the European Parliament, but one who was also acceptable to the Governments of the Member States.

14. The DTC preserves the power of the European Parliament to force the resignation of the Commission by adopting a motion of censure (Art. III-243 TC, corresponding to Art. 201 EC). However, this must not be confused with the power of a national Parliament to adopt a motion of no confidence, indicating that the government no longer commands the political support of a majority of MPs. The censure motion is an extreme remedy, to deal with allegations of serious misconduct, such as those which led to the collective resignation of the Santer Commission in 1999. See the report of the Committee of Independent Experts (often known as the "Wise Men"), First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission (15 March 1999) and, e.g., Craig, "The fall and renewal of the Commission: Accountability, contract and administrative organization", 6 *ELJ* (2000), 98.

2.1.3. *The composition of the European Parliament*

As part of the bargain struck between the large and small Member States in the final phase of the IGC,¹⁵ it was agreed that the maximum number of MEPs should be fixed at 750, with a minimum threshold of six per Member State, and no Member State being allocated more than 96 seats.¹⁶ Seat allocation thus continues to be made with more attention being given to finding an acceptable balance between the Member States than to the proportional representation of the Union's citizens. From that point of view, even the European Parliament remains an Institution which is essentially confederal, rather than federal, in character.

2.2. *National parliaments*

For national parliaments to be able to play their part in the system of dual legitimisation, they have to be kept informed of the progress of legislation through the Council's decision-making process. Machinery was created for this purpose by a Protocol, which was annexed to the EC Treaty by the Treaty of Amsterdam. A Protocol on the application of the principles of subsidiarity and proportionality was annexed by the same Treaty to the EC Treaty. The DTC will significantly strengthen the two Protocols.

2.2.1. *The Protocol on the role of Member States' national parliaments in the European Union*¹⁷

The new version of the Protocol makes it a legal requirement that draft legislative acts originating from the Commission be "forwarded to national Parliaments directly by the Commission, *at the same time as* to the European Parliament and the Council".¹⁸ Article 2 of the present Protocol provides only that "Commission proposals ... shall be made available *in good time* so that the government of each Member State may ensure that its own national Parliament receives them as appropriate".¹⁹ It is further provided that "[t]he agendas for and the outcome of meetings of the Council, including the minutes of meetings where the Council is deliberating on draft European legislative acts, shall be forwarded directly to national Parliaments, at the same time as to Member States' governments".²⁰ If these and the other procedural

15. See Doc. No. CIG 85/04.

16. Art. I-20 DTC.

17. Protocol No. 1 attached to the DTC.

18. Protocol, Art. 2, third para (emphasis added).

19. Emphasis added.

20. Protocol, Art. 5.

requirements laid down by the Protocol are adhered to, it will be harder in future for Ministers returning from meetings in Brussels to present national parliamentarians with *faits accomplis*.

2.2.2. *The Protocol on the application of the principles of subsidiarity and proportionality*²¹

The main change to this Protocol is the establishment of a procedure giving national parliaments a formal role in helping to ensure compliance with the subsidiarity principle. According to Article 5 of the Protocol, any national Parliament, or any chamber of a national Parliament which is bi-cameral, will have six weeks from the date of transmission of a draft European legislative act in which to send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers the draft does not comply with the principle of subsidiarity. According to Article 6, second paragraph, for the purposes of this procedure, national parliaments are to have two votes, one of which must go to each chamber of a bi-cameral parliament, like that of the United Kingdom. If reasoned opinions challenging a measure's compatibility with the subsidiarity principle represent at least a third of all the votes allocated to the national parliaments (currently, one third of 50, i.e. 17), the Institution which originated the draft – normally, but not invariably, the Commission – is required to review it. Following such a review, the Institution concerned may decide to maintain, to amend or to withdraw the draft, and it must give reasons for its decision. If it opts to maintain the draft, and the measure is one that requires the approval of the Council (as legislative acts normally will), voting for its adoption would clearly entail a substantial political risk for any Minister from a Member State whose parliament had sent in a negative written opinion on the issue of subsidiarity.

There is also an intriguing rider added by Article 7 of the Protocol to the jurisdiction of the Court of Justice under Article III-365 of the DTC, which is the provision equivalent to the present Article 230 EC. Judicial review is to be available, on grounds of infringement of the principle of subsidiarity by a European legislative act, not only in proceedings actually *brought* by Member States, but also in proceedings “notified by them in accordance with their legal order *on behalf of their national Parliament or a chamber of it*”.²² In other words, an action will be admissible in which the effective protago-

21. Protocol No. 2 annexed to the DTC.

22. Emphasis added.

nist is not the government of the Member States concerned, but its parliament or one of the chambers of the national parliament (in which, perhaps, the government may not, for the time being, command a majority). The wording appears to have been carefully chosen, so as to avoid appearing to confer on national parliaments a legal right under the DTC, which might conflict with constitutional arrangements in the Member States. However, governments will surely find it hard to deny their parliaments the possibility of taking advantage of this facility, which the DTC will offer them.²³

2.2.3. *National scrutiny procedures*

Those changes to the Protocols will only make a practical difference, if appropriate procedures for the scrutiny of EU legislative proposals are in place at the national level, and if parliamentarians are willing to invest the time and political energy necessary, in order to hold ministers more effectively to account for Council decisions in which they have taken part. Experience to date of parliamentary scrutiny, in most of the Member States of long standing, gives scant cause for optimism;²⁴ and concern may be felt about the additional strain that coping with EU legislation will place on the young democratic institutions of some of the Union's recent Members. Nevertheless, it may be hoped that members of national parliaments will be spurred on to greater efforts by the enhanced role they are called upon to play under the DTC, more particularly with respect to the subsidiarity principle: they, after all, have the most immediate interest in ensuring that compliance with the principle is strictly enforced. It has even been argued that participation in the legislative process of the Union may reinvigorate a culture of government accountability at the national level.²⁵

It is not only the "vertical" relationship between national parliaments and the decision-making Institutions of the EU that is likely to prove increasingly

23. See the earlier, but fuller, discussion of the reinforcement of the subsidiarity principle in Dashwood, "The Draft EU Constitution – First Impressions", 5 CYELS (2002), 395, 405 to 407.

24. In general, see Harlow, *Accountability in the European Union* (OUP, 2002), Ch. 4; Cygan, *The United Kingdom Parliament and European Union legislation* (Aspen, 1998); Smith (Ed.), *National Parliaments as Cornerstones of Integration* (Aspen, 1996); Bogdanor, "Britain and the European Community" in Jowell and Oliver, *The Changing Constitution*, 3rd ed. (OUP, 1994). See, for a relatively optimistic assessment of the prospects for reinforced scrutiny, Raunio, "Towards Tighter Scrutiny? National Legislatures in the EU Constitution", Federal Trust Online Paper No. 16/04.

25. See Mather, *The European Union and British Democracy: Towards Convergence* (Macmillan, 2000), who (*inter alia*) argues that the benefit may be felt not only *vis-à-vis* European policy issues but also in the overall conduct of policy-making, debate and government in the United Kingdom.

important, but also the “horizontal” relationship of national parliaments *inter se*. A measure of mutual constitutional trust will be necessary, if the best use is to be made of the possibilities which have been created by strengthening the two Protocols, especially the introduction of the subsidiarity mechanism. The loose framework for inter-parliamentary cooperation, which is provided by Title 2 of the Protocol on the role of Member States’ national parliaments in the EU, may be found to require further articulation.

3. The European Council and its President

The European Council fills a gap in the institutional system of the Union, as it was originally conceived. The democratic leaders of the Member States acting collectively are, in our view, the right body to set the political agenda of the Union, while leaving it to the Union’s other institutions to implement the programme in accordance with their respective powers.

A symbolically important development in the DTC is the recognition of the European Council as forming part of the “institutional framework” of the Union.²⁶ Hitherto, although having a Treaty basis in Article 4 TEU, the European Council has not enjoyed the formal status of an “Institution” of the Union, since it does not figure on the list in Article 7 EC. This is not a revolutionary change, but rather the culmination of a process, which was set in train by the TEU. There has been an increasing tendency for the European Council to be given a formal role, either at the definitive stage, or some intermediate stage, of decision-making: for instance, pursuant to Article 13(2) TEU, the European Council decides on common strategies, which are instruments of the CFSP capable of being given binding legal force; and it is required, under the procedure laid down by Article 99 EC for the adoption of broad economic policy guidelines for the Member States and the Community, to “discuss a conclusion” on the draft guidelines, preparatory to their incorporation into a Council recommendation.²⁷ Even in the absence of a legal basis, the European Council has developed a practice of adopting positions, which are treated by the Article 7 Institutions effectively as binding decisions. Examples would be the so-called “Copenhagen criteria” which were laid down for the applicant countries from central and eastern Europe to fulfil,²⁸ and the series of Reports annexed to the Presidency Conclusions,

26. Art. I-19(2) DTC.

27. For a full discussion, see Dashwood, “Decision-making at the Summit”, 3 CYELS (2000), 79.

28. See Presidency Conclusions, European Council of Copenhagen, December 1993.

which contain the detailed arrangements of the Union's security and defence policy.²⁹

Under the present Treaties, meetings of the European Council continue to be organized in an informal way, which may be appropriate for holding political discussions, but is highly unsatisfactory for decision-making. There are no rules of procedure – including no voting rule, which means the European Council can only act by common accord – and no minutes are kept. The DTC retains consensus as the default mode of decision-making for the European Council, but there is provision for it to act by unanimity or by a qualified majority in specified circumstances.³⁰ (We have seen an example of this in the procedure for the appointment of the President and Members of the Commission; the inability of the European Council to adopt majority decisions under the existing Treaties explains why the nomination of the President is made, pursuant to Art. 214(2), by the Council meeting in the composition of Heads of State or Government.) The European Council will also be empowered to adopt rules of procedure by a simple majority.³¹ These are changes that will enable it to perform more effectively the range of tasks which experience has increasingly brought within its purview. Acts of the European Council that are intended to produce legal effects towards third parties will be reviewable by the Court of Justice under the procedure of Article III-365 DTC, corresponding to the action for annulment under Article 230 EC.

The introduction of the post of European Council President appears to us to be a necessary consequence of the enlargement of the Union. The more Member States there are, the harder the President's task of facilitating cohesion and consensus is bound to be. To take a concrete example: the preparation for a European Council customarily entails a visit by the President to the capitals of all the Member States in the fortnight or so before a meeting. Under the existing arrangements, that round of visits – which are not courtesy calls, but often involve substantive discussions – has to be combined with all the other responsibilities that fall on the shoulders of a person holding the office of Prime Minister. The job has become one, to which a person, who

29. The series began with the "Presidency Report on strengthening the Common European Policy on Security and Defence", which was approved by the European Council of Cologne in June 1999. See Dashwood, "Issues of Decision-making in the European Union after Nice" in Arnall and Wincott (Eds.), *Accountability and Legitimacy in the European Union* (OUP, 2002) 13, at 35 to 36.

30. Art. I-21(4) DTC. The QMV system is the same for the European Council as for the Council: see Art. I-25 DTC and the analysis in section 4.1., *infra*.

31. Art. III-341(3) DTC.

also has to act as his/her country's Head of Government, cannot be expected to give all the attention it requires.

Also, under the existing system of six-monthly rotation, the approach of successive Presidencies has inevitably been coloured by particular national concerns. A new-style President will be better placed to contribute to the development of coherent Union policies.

According to Article I-22 of the TDC, the role of the President of the European Council will be: to "chair it and drive forward its work"; to "ensure proper preparation and continuity" (this in cooperation with the Commission President, and on the basis of the work of the General Affairs Council); and to "endeavour to facilitate cohesion and consensus within the European Council". The European Council President would have been better able to fulfil that role if the office had been combined with the Presidency of the General Affairs Council; as things are, formal provision will have to be made under the Council's rules of procedure to enable him/her to attend meetings of the General Affairs Council, and perhaps those of all Council formations, *ex officio*. In addition, a senior member of the President's staff should be involved in the work of COREPER, as the preparatory body with a general oversight of Council business.

Early drafts of the Convention's text included a prohibition against the holding of any other mandate by the European Council President, at EU as well as at national level.³² However, in the final version of the text, found in Article I-22(3) DTC, there is only a reference to the holding of national office. This change may be seen as opening up a possibility for the positions of President of the European Council and President of the Commission to be held by the same person.³³ In our view, the drafting of other provisions of the DTC presupposes that *different* people will fill the two posts, notably Article I-21 (2), which says: "The European Council shall consist of the Heads of State or Government of the Member States, *together with its President and*

32. Discussed by Stuart, *The Making of Europe's Constitution* (Fabian Society, 2003) and McCormick, *A Union of its Own Kind* (2004) (available at euro.snp.org/getfile.php?blobId=21 (last visited, 13 Sept. 2004)), pp. 4–5.

33. Stuart *op. cit. supra* note 32, records this amendment and stated that this was due to Giscard d'Estaing's view that explicitly to rule out an EU mandate was an "unnecessary statement, as both jobs were so demanding, that one person simply could not combine them". McCormick *op. cit. supra* note 32, however, has written (p. 5) that the change was made as a result of concerns expressed about the dangers of "a two-headed Europe with a Commission President and a Council President potentially pulling in opposite directions". By removing the restriction, he argued, it would be possible for the Council to choose to appoint the Commission President as its chair, if experience suggested that the separation of the two posts had caused serious difficulties.

the President of the Commission".³⁴ This differentiation of roles is a feature here as an element in the definition of a key Union Institution. Pluralization, it seems to us, would be liable to impair the integrity of the Union's institutional structure, which has creative tension between the Council and the Commission built into it. Some might see the combining of the two offices as a step on the road to transforming the Commission into a "European Government", which we regard as a chimera. At all events, there is very little practical likelihood that the European Council would be attracted by such a solution in the foreseeable future.

4. The Council of Ministers

The Council is to be rechristened "Council of Ministers", presumably in order to make it easier to avoid confusion with the European Council. It is well known that the most strongly contested issue at the IGC, and the one that caused the breakdown of the meeting in December 2003, was the reform of the system of qualified majority voting ("QMV"). In the discussion that follows, we focus on that issue. For the sake of clarity, we begin by attempting an exposition of the fiercely complicated voting arrangements that will apply under the DTC, and go on to offer a critique of those arrangements. Other matters affecting the Council – the transparency of its legislative process and the different configurations in which it meets – are examined more briefly, not because they are less important, but because the relevant Treaty provisions are less rebarbative. (For a summary, see the table in Appendix 1, *infra*.)

4.1. *The new rules on QMV: Exposition*

The provisions of the DTC relating to QMV are to be found in three different places: in Article I-25 of the Treaty itself, in Articles 2 to 4 of Protocol No. 34 (on the Transitional Provisions Relating to the Institutions and Bodies of the Union) and in Declaration No. 5 (on Art. I-25). Further, these provisions create two basic regimes: one that is to apply before 1 November 2009, and the other to apply after that date. The draft European Decision that is set out in the Declaration adds a further layer of complexity to the system that will apply, with no fixed term, as from 1 November 2009.

The same rules apply in decision-making by the European Council, in the rare instances where it may act by QMV.

34. Emphasis added.

4.1.1. *The regime that will apply from 1 November 2004 to 31 October 2009*

This regime is set out in Articles 2, 3 and 4 of Protocol No. 34 to the Final Act of the IGC. Essentially, it represents a continuation of the arrangements put in place by the Treaty of Nice,³⁵ but with the weighting of votes amended (as compared with that laid down in Declaration No. 5 annexed to the Final Act of the Nice IGC) in order to take into account the fact that neither Bulgaria nor Romania have yet acceded to the EU. In the normal situation, where the Council acts on a proposal from the Commission, the QMV threshold is 232 votes in favour, which must represent a majority of the members of the Council; in other cases, the same number of votes is required, but these must represent at least two thirds of the members. In addition, any Council member may request that a check be made that the Member States comprising the qualified majority represent at least 62 per cent of the total population of the Union; and if they do not, the act will not be adopted.

4.1.2. *The basic regime of Article I-25 DTC*

The Convention text³⁶ would have replaced the complex arithmetic of the Nice system of QMV by a much more straightforward voting rule consisting of a double threshold: 50 per cent of the Member States, representing at least three fifths (60%) of the Union's total population. That solution met with bitter opposition, more particularly from the two Member States which came off best (in terms of their comparative population size) under the allocation of the Nice Treaty, namely Poland and Spain. It seemed at one moment that the whole constitutional project might founder on this rock.³⁷ However, a few short months after the debacle of December 2003, a compromise was worked out that brought all Member States to the final negotiating table.

Article I-25 retains the familiar distinction between measures to be adopted on a proposal by the Commission (or by the Union Minister for Foreign Affairs), and those that the Council may adopt without any such proposal.

Paragraph (1) of the Article deals with the first situation, which, we have seen, is the normal one. For such proposals, the qualified majority is defined

35. For a table illustrating the effects of Art. 2(4) of Protocol No. 34 and the specific areas in which provisions have their entry into force delayed, see Appendix 4, *infra*.

36. The final text produced by the Convention on the Future of Europe CONV 820/03 (20 June 2003): see its Art. I-24 on this point.

37. See e.g. the reports in the UK press on 15 Dec. 2003: *Financial Times* pp. 4, 5, 20 and 21, *The Times* p. 16, *The Daily Telegraph* p. 16 and *The Guardian* pp. 13, 15 and 17.

as at least 55 per cent of the members of the Council, comprising *at least 15* of them, *and* representing Member States which account for at least 65 per cent of the Union's total population. A further element – defining the QMV threshold in the opposite perspective, of the composition of a blocking minority – is that the relevant minority must include at least *four* Council members.³⁸

The significance of the “at least 15 Council members” requirement is that, in the current EU25 (assuming no further accessions prior to 1 November 2009), it is this threshold that must be satisfied, rather than the 55 per cent figure, which roughly corresponds to 14 members. In terms of this first criterion, therefore, the blocking minority would be 11 Member States.

On the population criterion, the blocking minority would be anything over 35 per cent of the Union's total population, which, according to the table in Appendix 2,³⁹ would mean just short of 160 million persons. The requirement of four Council members to constitute a blocking minority ensures that three of the four largest Member States (Germany, France, Italy and the UK) could not alone prevent the adoption of a proposal, which in terms of the population threshold they could comfortably do: for instance, the table in Appendix 2 shows that Germany, France and the UK together currently account for approximately 44.24 per cent of the Union's population.

Using this information, a number of potential minimum blocking coalitions can be constructed in theory. See the table in Appendix 3 for a set of examples, based upon a steady Franco-German alliance, and the search for two further partners to form a blocking minority under the new QMV rules. The figures indicate that, e.g., a combination of Germany and France, together with Belgium and the Netherlands, would be amply sufficient.

Paragraph (2) of Article I-25 provides, “[b]y derogation from paragraph 1”, for the situation where the Council is empowered to act in the absence of a Commission or UMFA proposal. Here, the Council membership threshold is raised to 72 per cent (or 18 members), the population threshold remaining at 65 per cent. It is not expressly stated in the text of Article I-25 (2) that the minimum requirement of four Council members to constitute a blocking minority applies also in this situation; however, it is submitted, the requirement must be intended to apply, since the derogation in paragraph (2) should be understood as affecting only those elements of paragraph (1) with which it is inconsistent.

38. Art. I-25(1), second sub-para.

39. See *infra*.

4.1.3. *The impact of the draft European Decision of the Council in Declaration No. 5*

It appears from the first recital of the draft Decision that its purpose is to lay down provisions “allowing for a smooth transition” from the QMV system of the Nice Treaty to the system of Article I-25 DTC. The provisions are modelled on those of the Ioannina Compromise of 1994, which paved the way for the signing of the Treaty of Accession relating to Austria, Finland and Sweden.⁴⁰

Article 1 of the draft Decision provides that, where opposition to the adoption of a measure by QMV is indicated by members of the Council representing at least three quarters of the level of population, or three quarters of the number of Member States, necessary to constitute a blocking minority, the issue must be discussed further by the Council. This applies to any Council act, whether or not proposed by the Commission or the UMFA.

The consequences of triggering such a discussion are that the Council must “do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council” which set the process in motion.⁴¹ To that end, the President of the Council, with the assistance of the Commission, and respecting the Rules of Procedure of the Council, must undertake “any initiative necessary to facilitate a wider basis of agreement in the Council”, and the other members of the Council must assist him/her in this task.⁴²

Finally, Article 4 of the draft Decision provides that it will enter into force on the same day as the new QMV regime of Article I-25, *viz.* 1 November 2009. No specific termination date is fixed. The Council is simply given power to adopt a European decision repealing the Decision, should it so choose.

4.2. *The new rules on QMV: Analysis and critique*

A number of criticisms can be levelled at these arrangements.

4.2.1. *The legal status of the draft European Decision*

40. Council Decision of 29 March 1994 concerning the taking of Decisions by qualified majority by the Council O.J. 1994, C 105/1 (as amended by Council Decision of 1 Jan. 1995 (O.J. 1995, C 1/1)), known as the “Ioannina Compromise” after the Greek city where the deal was brokered at an informal meeting of EU Foreign Ministers. The later amendment was required after the Norwegian decision not to join the EU. It should be noted that the 1994 Decision had no expiry date.

41. Draft Dec., Art. 2.

42. Draft Dec., Art. 3.

The legal basis of the draft Decision set out in Declaration No.5 is by no means clear, which is contrary to what would normally be required by the principle of conferral. The preamble to the Decision contains no reference to a legal basis; nor is there any provision of the DTC itself, or of Protocol No. 34, specifically authorizing the Council to adopt a transitional measure of the kind which is envisaged in the Declaration. The silence of the DTC on this matter contrasts with other cases where provision has been made specifically for the implementation of basic provisions of the Constitution. Thus, for example, Article I-20(2) DTC, second sentence, empowers the European Council to adopt a European Decision on the composition of the European Parliament (on this see, further, Art. 1 of Protocol No. 34); similarly, Article I-24(4) DTC provides for the adoption by the European Council of a European Decision establishing the list of Council configurations other than the General Affairs Council and the Foreign Affairs Council.

It is tempting to find a parallel to the draft Decision in the Decision that was taken at the Edinburgh European Council of December 1992, to provide a solution for the difficulties Denmark was experiencing in ratifying the Maastricht Treaty.⁴³ However, that instrument was formally described, not as a Council Decision, but as a “Decision of the Heads of State and Government, Meeting within the European Council”. As has been noted elsewhere,⁴⁴ this recalled – surely intentionally – the familiar category of decisions of the representatives of the Governments of the Member States meeting within the Council. Such decisions constitute international agreements in simplified form, and that is probably how the Decision on Denmark should be characterized.

The instrument establishing the Ioannina Compromise was designated a “Council Decision”, similarly to the draft Decision in Declaration No. 5, but again this may not be a helpful precedent. The only type of act recognized as constituting a “decision” under the present Article 249 EC is one having a specific addressee.⁴⁵ Nevertheless, the Council has found it expedient, in a variety of situations, to adopt “decisions” lacking an addressee,⁴⁶ which have been described by commentators as “innominate decisions” or “decisions *sui generis*”;⁴⁷ and this has sometimes been done with respect to matters, like the provisions on QMV in the Ioannina Compromise, for which no expressly

43. O.J. 1992, C 348/1.

44. See Dashwood, “States in the European Union”, 23 EL Rev. (1998), 201 (reprinted in Rider (Ed.), *Law at the Centre* (Kluwer, 1999), 235 et seq.).

45. In German legal usage, an *Entscheidung*.

46. In German legal usage, *Beschlüsse*.

47. The most authoritative analysis of the phenomenon of decisions *sui generis* is still that

conferred competence can be found in the Treaties. Because of the *sui generis* character of such decisions, it has been possible to argue, in the absence of a legal basis, that they are consensual acts, binding on the Member States and institutions, which took part in the adoption process. Under the DTC, however, the definition of "European Decisions" will be extended, so as to include acts not having a specific addressee. As formally recognized instruments available to the Institutions, it is hard to see how these could have any effect in law, unless they have been adopted under a competence conferred by the Member States pursuant to the Constitution. Lacking a legal basis in the DTC, such an act could only be regarded, at most, as binding in good faith those who have adopted it by common accord.

A final possibility would be that it is intended to base the draft Decision on the Council's general power under Article III-344(3) DTC to "act by a simple majority regarding procedural matters and for the adoption of its Rules of Procedure". If so, it seems odd that the preamble does not refer to that provision. More seriously, the content of the draft Decision appears to us to go beyond what can fairly be regarded as "procedural matters", since it represents an indefinite modification of the QMV system laid down by the Constitution.

4.2.2. *The operation of the basic system and the possible impact of the draft Decision*

In practice, the original Ioannina Compromise has long been effectively dead; and, because it operates with respect to the distribution of Council votes under the pre-Nice system, it will cease, in principle, to be applicable, once that system comes into force on 1 January 2005.⁴⁸ If validly resorted to,⁴⁹ the Compromise would put an obligation on the Council to "do all in its power" to reach an acceptable resolution of the issue in question "within a reasonable time".

The draft Decision will have essentially the same function of requiring the Council to refrain, for the time being, from adopting a measure by QMV, while an attempt is made, through further discussion, to accommodate the concerns of Member States in the minority. It belongs to the genus of una-

of Lauwaars, *Lawfulness and Legal Force of Community Decisions* (Aspen, 1973).

48. See the answer to Bode MEP's Written Question E-1109/01 of 9 April 2001, O.J. 2001, C 364/48; this also confirmed that the so-called "Luxembourg Compromise" (drawn from the Conclusions of the extraordinary session of the Council in Luxembourg on 17, 18, 27 and 28 Jan. 1966) remained in operation post-Nice.

49. If a Member of the Council representing 23 to 25 votes indicated their intention to oppose the adoption by the Council of a decision by QMV (Art. 1 of the Decision (as amended), note 40, *supra*).

nimity substitutes – procedural devices, such as the Luxembourg Compromise of 1966, and the so-called “emergency break”, also known as “the Luxembourg Compromise Mark II”,⁵⁰ which are designed to sweeten the pill of extending QMV – though its effect can only be to postpone, not to prevent, the taking of a majority decision.⁵¹

Since the formula is not dependent on the weighted votes allocated to each of the Member States, it can apply, whatever the number of Council members at any given time in the future. Although the Preamble to the draft Decision refers to the need to ensure a “smooth transition” to the new voting system that will apply from 1 November 2009, Article 4 of the draft Decision states:

“It shall remain in force until at least 2014. Thereafter the Council may adopt a European decision repealing it”.

So, it appears, in the absence of a repealing European Decision – which the absence of a legal basis suggests would have to be taken by common accord of the members of the Council – the draft Decision is liable to remain in force indefinitely.

It is true, of course, that Council decision-making has in the past been characterized by a search for the widest possible consensus, including in cases where QMV applies. However, given that Member States’ interests are bound to diverge more frequently, as their number, and the disparities between them, grow ever larger, any mechanism that inhibits the operation of the QMV system must be seen as problematic.

4.2.3. *The complexity of the QMV system: Achieving the goals of Laeken*

The QMV system that finally emerged from the IGC process seems to us to run counter to basic concerns of the Laeken Declaration, namely: “how we can increase the democratic legitimacy and transparency of the present institutions ... [and] improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States”.⁵² A voting regime that requires recourse to calculators and multiple sources of rules is in

50. Dashwood, *op. cit.* note 39 *supra*, at p. 215; *id.*, “The Council of the European Union in the Era of the Amsterdam Treaty” in Heukels, Blokker and Brus (Eds.), *The European Union after Amsterdam* (Kluwer Law International, 1998), pp. 123–124; and *id.*, *op. cit. supra* note 27, at 89–91.

51. See Dashwood, *op. cit. supra* note 10 (2001), 236–237, for discussion of the mitigation of the potential impact of the Amsterdam provisions in Arts. 11(2) EC and 40a(2) TEU.

52. Laeken Declaration, SN 273/01 (15 December 2001). See, further, Vibert, “Developing a Constitution for the Union”, ch. 10 in Arnall and Wincott *op. cit. supra* note 29.

danger of rendering the Council process even less intelligible than it is at present. As teachers of law, we do not look forward to explaining the new system to undergraduates. More seriously, the elements of the regime laid down by the DTC and related texts, which have been deliberately designed to facilitate the formation of blocking minorities, and to cater for the concerns of those in the minority on a given issue, will inevitably make it harder for the Council to reach decisions by QMV – thereby undermining, in some degree, the gains in efficiency which the extension of QMV is intended to bring about.

Political scientists,⁵³ economists⁵⁴ and mathematicians⁵⁵ alike have been trenchant in their criticism of the new QMV regime. It is hard to resist the conclusion that political horse-trading has succeeded in trumping the good intentions that were given expression in the Laeken Declaration.

4.3. *Transparency of legislative proceedings*

Article I-24 (6) DTC provides:

“The Council shall meet in public when it deliberates and votes on a draft

53. See e.g. Tsebelis and Yatağan, “Veto Players and Decision-making in the EU After Nice: Policy Stability and Bureaucratic/Judicial Discretion”, 40 JCMS (2002) 283; Plechanová, “The Treaty of Nice and Distribution of Votes in the Council – Voting Power Consequences for the EU after the Oncoming [*sic.*] Enlargement”, 7 E.I.o.P. (2003), No. 6; and Hosli and Machover, “The Nice Treaty and Voting Rules in the Council: a Reply to Moberg”, 42 JCMS (2004), 497 (although cf. Moberg, “The Nice Treaty and Voting Rules in the Council”, 40 JCMS (2002), 259).

54. See the two publications by Baldwin, Berglöf, Giavazzi and Widgren, where the authors develop a game theoretic system for analysing first (in “EU Reforms for Tomorrow’s Europe” (CEPR Discussion Paper No. 2623, November 2000)) the various options being canvassed prior to the Nice IGC and then (in “Nice Try: Should the Treaty of Nice Be Ratified? Monitoring European Integration 11” (CEPR, June 2001)) the outcome of the Nice IGC on QMV. These two reports are summarized in *The Economist* (25 Nov. 2000, p. 150 and 9 June 2001, p. 116 respectively). See, further, the subsequent paper by Baldwin and Widgren, “Winners and Losers Under Various Dual Majority Rules for the EU Council of Ministers” (CEPR Discussion Paper No. 4450, June 2004) and Kandogan, “Power Analysis of the Nice Treaty On the Future of European Integration” (William Davidson Institute Working Paper No. 576, June 2003).

55. E.g. Życzkowski and Slomeczyński, “Voting in the European Union: The Square Root System of Penrose and a Critical Point” (available on the internet at the following web address: arxiv.org/ftp/cond-mat/papers/0405/0405396.pdf) suggest that game theory shows that the QMV system with criteria for both a number of States and a percentage of the population gives greater weight to the influence of each citizen in the larger and the smaller Member States, at the expense of those in the middle.

legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities”.

Thus, more general discussions and policy-making may still take place behind closed doors, but the proceedings of the Council must be public when proposals for the adoption of legislative acts are being debated or voted on. In principle, this is an extremely welcome development, fully in accordance with the goals of the Laeken Declaration.⁵⁶ Any gains in terms of efficiency in compromise building that may come from striking bargains in secret, are outweighed by the cost to the legitimacy of the constitutional order. The UK tabloid myth of “Brussels”, the sinister tyrant, is sustained by the public’s ignorance of the part played by representatives of the Member States in ensuring that divergent national interests are as fully accommodated as possible. Opening up the Council’s process may also help to meet the accountability deficit by improving the flow of information to national Parliaments.

We are not privy to the discussions which, presumably, must be taking place within the Council, as to how the envisaged split between law-making activity and policy-making activity will be organized. The distinction is less than perfectly clear in principle, and will doubtless provide opportunities for disagreement in practice. However, experience suggests the division of business is likely to be along the following lines.

When the Commission first submits a legislative proposal, there will be a public Council debate, in which the competent Commissioner introduces the measure and Ministers give their initial reactions. It is obviously desirable that such reactions be coordinated as far as possible. Detailed negotiations will take place, as under present arrangements, within the competent Council working parties and COREPER. It will then, as now, be a matter for the political judgement of the Presidency and of COREPER as to whether, at a given moment, a further debate by Ministers would move matters forward; the DTC seems to require that such debates be public. To be consistent with the spirit of Article I-24(5) DTC, it is thought that the meeting at which the Presidency compromise in its final form is debated and agreed in substance must take place at Council, not COREPER, level; in the co-decision procedure, that would seem to apply at both first and second readings, and following any conciliation. However, we can see no objection to maintaining the A-point procedure for the purpose of formally adopting a text, the substance

56. See the recommendation to this effect in, e.g., Dashwood, “The Elements of a Constitutional Settlement for the European Union”, 4 CYELS (2001), 1, 10–11.

of which has been agreed in an open Council meeting, after it has been tidied up by the lawyer-linguists.

The Council agenda could, for instance, be divided into three parts: Part A for the public adoption, without debate, of the A-point list; Part B for public debates on legislative acts; and Part C for policy discussions, where the Council would effectively be behaving like a Cabinet. Some Councils, notably External Relations, would normally have only a Part C agenda.

4.4. Council “configurations”

The Council is, as ever, a unitary body, but one that meets in different configurations, as provided for by Article I-24 DTC. Paragraph (2) of the Article places the responsibility for ensuring “consistency in the work of the different Council configurations” upon the General Affairs Council (GAC), which is also to “prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission”. The definition of the GAC’s tasks corresponds with the arrangements that apply under the existing Treaties.⁵⁷

As we have noted *supra*, it is unfortunate that the European Council President is not to have the task of chairing the GAC. Article I-24(7) provides:

“The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established by a European decision of the European Council. The European Council shall act by a qualified majority.”

According to Declaration No. 4, the European Council must begin preparing the decision there referred to as soon as the DTC is signed, and this must be given political approval within six months. A draft of the required decision is already included in the Declaration. Article 1 of the draft Decision would create 18-month Presidencies, to be held by pre-established groups of three Member States. Each Member State would in turn chair, for a six-month period, all Council configurations (apart from the Foreign Affairs Council: see *infra*). The groups are to be determined by equal rotation among all the Member States, taking into account their diversity and geographical balance within the Union.⁵⁸

57. It could be questioned whether or not such a provision needed to be included in the “constitutional” articles, rather than being left to be covered in the more detailed institutional provisions.

58. On the need to change the existing system of six-monthly rotation, see Dashwood, “The

There is power under Article I-24(4) DTC for other configurations of the Council to be established by a European Council Decision, taken by QMV. In the period before the entry into force of that Decision, Article 3 of Protocol No. 34 provides that the GAC may, by simple majority, take a European Decision establishing a list of the other Council configurations.

5. The Union Minister for Foreign Affairs

The creation of the post of Union Minister for Foreign Affairs (hereinafter, “UMFA”) and the issue as to how it could be rendered operational, were the subject of intense debate throughout the IGC process. However, only small (though significant) changes were made by the IGC to the relevant provisions of the Convention draft, so it would seem that the UMFA is here to stay.

He/she is to be appointed by the European Council, acting by QMV, and with the agreement of the President of the Commission.⁵⁹ The UMFA’s role is to conduct the foreign and security policy of the Union, as mandated by the Council,⁶⁰ yet he/she is also to be a Commission Vice-President, “responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action”.⁶¹

Serious criticisms of this “double-hatting” of the UMFA have been expressed by one of the authors,⁶² since it seemed that it would be very hard for one and the same person loyally to prepare and execute Council policies on external relations, while remaining true to his/her role as a Commission Vice-President bound by the discipline of collegiality. It is not the case that there is one sphere of external relations for which the Commission has exclusive responsibility (trade, development aid, etc.) and another sphere for which responsibility is vested exclusively in the Council (the CFSP). Decision-making on trade, aid and the other external relations matters currently governed by the EC Treaty are powers of the Council, while the Commission has its customary role of initiating and implementing Council decisions. International agreements relating to such matters are negotiated by the Com-

Impact of Enlargement on the Union’s Institutions”, ch. 3 in Hillion (Ed.), *EU Enlargement: A Legal Approach* (Hart, 2004), 49–50.

59. Art. I-28(1) DTC.

60. *Ibid.*, para (2).

61. *Ibid.*, para (4).

62. Dashwood, note 23 *supra*, pp. 414–415.

mission, but it must first obtain authorization from the Council, and it is bound by the negotiating directives the Council issues.⁶³ Moreover, power to conclude international agreements under the EC Treaty belongs to the Council in almost all cases.⁶⁴ Which side would the Foreign Minister take in disputes of the kind that have frequently arisen between the Council and the Commission, over issues such as whether the Community is exclusively competent in the matters to which a given agreement relates, or what is the correct legal basis in the Treaty for concluding an agreement?

We are more confident now, than at the time when that criticism was articulated as a first impression of the Convention text, that “double-hatting” will be workable. This is thanks to an amendment to Article I-28, which was agreed at the final meeting of the IGC. The UMFA’s duty of collegiality as a Commission Vice-President, pursuant to paragraph (3) of the Article, has been qualified by the phrase, “to the extent that this is consistent with paragraphs 2 and 3”. Paragraph (2) of Article I-28 relates to the conduct by the UMFA of the CFSP, as mandated by the Council, and paragraph (3) to his/her chairing of the Foreign Affairs Council. We infer from the phrase which has been added to paragraph (3) that, when presiding over the Foreign Affairs Council, the UMFA will not be bound by the Commission’s view on issues such as the exclusivity or non-exclusivity of Union competence, or the choice of legal basis for an envisaged agreement. In other words, at the definitive stage of the decision-making process on both CFSP matters and the other aspects of external relations, the UMFA will be wearing his/her Council hat.

Of course, it is one thing to state this conclusion in principle, quite another to see how the rest of the College of Commissioners will view the conduct of their Vice-President when he/she is operating under the control of the Council. Will the tensions that appear inevitable render the successful achievement of a coherent external relations policy for the Union even more difficult than at present? Or will the Union, in its customary manner, find a pragmatic way of muddling through? Much will probably depend on the personalities involved on all sides, and on the timing of the issues that they will have to face. The Union’s history of living with paradox may perhaps give grounds for optimism.

63. Art. 300(1) EC. See Convention text, Art. III-222.

64. Art. 300(2) EC. See Convention text Art. III-222. The primary role of the Council in concluding Treaties on behalf of the EC was confirmed in Case C-327/91, *France v. Commission*, [1994] ECR I-3641.

6. The Commission

The changes the DTC will bring to the method of appointing the President and Members of the Commission have been considered in the section of this paper relating to the European Parliament. The only other significant issue affecting the Commission is that of its composition, which was among the matters decided at the final meeting of the IGC.

The rules governing the composition of the Commission are laid down by paragraphs (5) and (6) of Article I-26 DTC. Paragraph (5) of the Article provides for the first Commission appointed pursuant to the Constitution to consist of one national of each Member State, including its President and the UMFA. Assuming that the DTC is ratified over a period of some two years, it follows that Commission which takes office in 2010 will be composed on that basis.

Thereafter (in practice, as from 2015), according to Article I-26(6), the number of Commissioners will be fixed at two thirds of the number of Member States. There is to be strict equality between the Member States, "as regards determination of the sequence of, and the time spent by, their nationals as Members of the Commission"; and each successive Commission must be so composed "as to reflect satisfactorily the demographic and geographical range of all the Member States of the Union.

The objections which have been raised by one of the authors to the reduction in the size of the Commission may still be thought to hold good.⁶⁵ A first objection is that, rightly or wrongly, there is comfort for the Member States, especially the small ones, in having one of their nationals as a Commissioner. The envisaged reduction would, therefore, be liable to damage the legitimacy of the institution, and hence of the Union. A second objection is that it would be harder for the Commission to take firm action, for instance to obtain the suppression of a system of State aid, against a large Member State from which, at the time, there happens to be no national within the College.

7. The European Court of Justice

The authors have written in the past⁶⁶ about the need to pay greater attention to the growing pressures upon the European courts in the discharge of their

65. See Dashwood, note 44, *supra*.

66. See Dashwood and Johnston (Eds.), *The Future of the Judicial System of the European*

functions under the EC Treaty. It is clear that, with enlargement and the new regime of the DTC, the role and resources of the courts will become even more crucial and, crucially, increasingly stretched.^{67,68} Here, however, we will focus upon the substantive amendments wrought by the DTC to the current EC Treaty provisions on the European courts.

7.1. *Article III-365 DTC on actions for annulment*

The multitude of case law and academic commentary (and criticism) on the operation of the current Article 230 EC needs little introduction.⁶⁹ Recent case law has highlighted the particular difficulties of the formulation of the test for “individual concern” under Article 230(4) EC, focusing on two main key points. First, actions for annulment brought by individuals are restricted to challenges to the validity of decisions (in form or substance). Second, the restrictive interpretation of what amounts to individual concern in such cases denies standing to the vast majority of prospective applicants. It must be shown that the applicant belonged to a “closed class” *and* (it seems)⁷⁰ that

Union (Hart, 2001), esp. pp. 65–83 (“Synthesis of the Debate”) and 219–268 (“The Outcome at Nice” – an overview and annotated texts) and Johnston, “Judicial Reform and the Treaty of Nice”, 38 CML Rev. (2001), 499.

67. In an enlarged European Union, the increased number of EU citizens is highly likely to lead to an increase in the number of cases finding their way to be heard before the European courts. This will occur due to direct actions: e.g. the growth in EU-level IP rights has already created a significant body of appeals from the determinations of Trade marks and Design rights by OHIM and, with an increasing number of potential applicants for (and challengers to) such IP rights, the numbers look set to increase. Hence the proposals to create specialized judicial panels: clearly, the treatment of staff cases was the main driver behind this development, but there are strong hints that IP cases could be next in line (see, e.g., Johnston, *op. cit. supra* note 66, 513–514). Also, references from national courts for preliminary rulings under Art. III-369 DTC are predicted to increase, particularly as the national judiciaries in the newly acceded Member States get acclimatized to the nature of the application of EU law in their courts.

68. While the accession of the new Member States has brought with it new judges to the courts (Art. I-29(2) (one judge per Member State on the ECJ and at least one per Member State on the “General Court” (ex-CFI)), it has also brought a wider range of languages into which the work of the courts must be translated. A quick visit to the ECJ’s website reveals the familiar story of judgments and opinions only being immediately available in certain languages, but also that the total number of languages into which such documents must now be translated has reached 20.

69. See e.g. Harlow, “Toward a Theory of Access for the European Court of Justice”, 12 YEL (1992), 213 and Arnall, “Private applicants and the action for annulment under Article 173 of the EC Treaty”, 32 CML Rev. (1995), 7 and “Private applicants and the action for annulment since *Codorniu*”, 38 CML Rev. (2001), 7 for good general discussion of the field.

70. See Case T-489/93, *Unifruit Hellas v. Commission*, [1994] ECR I-615, Case C-209/94,

there was some duty owed (akin to a legitimate expectation) to take the applicant's situation into account when adopting the measure under review.

Some of the difficulties surrounding these restrictions have been removed by the courts' willingness to allow challenges of even "true" Regulations provided that direct and individual concern could be shown.⁷¹ However, the Court's reliance upon the mantra that the "national route" should be tried in such cases (by bringing a challenge in a national court against a measure that itself raised the issue of the validity of the EC Regulation, then requesting a reference for a preliminary ruling under Art. 234 EC)⁷² continued to fail to convince.⁷³ This was particularly so in the light of the judgment of the CFI in *Jégo-Quéré*⁷⁴ and the Opinion of Advocate General Jacobs in *UPA*: the main arguments stemming from these two contributions relate to the advantages of a direct action that are denied to a party forced to go down the national route⁷⁵ and the problem that a national action is not always possible.⁷⁶

Buralux SA v. Council, [1996] ECR I-615 and Case C-451/98, *Antillean Rice Mills v. Council*, [2001] ECR I-8949.

71. See Case C-308/89, *Codorniu v. Council*, [1994] ECR I-1853 (esp. para 19) and the consistent subsequent case law of both the Court of First Instance (e.g. Case T-484/93, *Exporteurs in Levende Varkens v. Commission*, [1995] ECR II-2941) and the Court of Justice (in Case C-451/98, *Antillean Rice Mills v. Council*, [2001] ECR I-8949). See the recent reasoned order of the ECJ in Case C-258/02, *Bactria Industriehygiene-Service Verwaltungs GmbH v. Commission*, Order of 12 Dec. 2003, nyr, paras. 57–59.

72. See, e.g. Case 123/77, *UNICME v. Council*, [1978] ECR 845, para 12 and Case C-321/95 P, *Greenpeace v. Commission*, [1998] ECR I-1561, para 33.

73. Case C-50/00 P, *Union de Pequeños Agricultores v. Council*, [2002] ECR I-667, paras. 40–45.

74. Case T-177/01, *Jégo-Quéré v. Commission*, [2002] ECR II-2365 (overturned on appeal by the ECJ in Case C-263/02 P, judgment of 1 April 2004, nyr, where the Court applied its *UPA* ruling).

75. A direct action involves a full exchange of pleadings and secures legal certainty due to its shorter time limits. By comparison, the Art. 234 EC procedure is not available to private individuals as of right but only at the national court's discretion whether or not to refer (and on what terms – interpretation of the measure or questioning its validity). Further, Art. 234 proceedings are usually lengthier and more costly: after all, a national court cannot give a ruling on the validity of the EC measure (see Albors-Llorens, "The standing of private parties to challenge Community measures: Has the European court missed the boat?" (2003) CLJ, 72, esp. 81–86, and cf. Usher, "Direct and individual concern – an effective remedy or a conventional solution", 28 EL Rev. (2003), 575, 586–592). This last point concerning the time taken to get a decision from the European courts illustrates clearly the significance of more *systemic* issues of organization and resources for the day-to-day provision of effective judicial protection in the EU.

76. E.g. where an EC Regulation requires no national implementation measures that can form the basis of a claim before the national court or where national law provides no appropriate procedure for bringing such an action (see Albors-Llorens, note 75, *supra*, at 82). This

This rationalization of the position now finds expression in Article III-365(4) DTC, which provides:

“Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, *and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.*”⁷⁷

This is a welcome recognition of the possibility that even a genuine Regulation can nevertheless have an impact upon the position of individuals such that it can be challenged in an action for annulment, even if the measure is one of “general application” and without the need to satisfy the test of individual concern. However, issues remain that could give rise to difficulties: the italicized passage clearly needs to be read in conjunction with the provisions of the DTC that define and explain the effects of various EU measures. Article I-33(1), 4th sub-para DTC⁷⁸ provides that:

“A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

Alongside this type of measure, there exist:

– legislative measures: “European laws” (sub-para 2, equivalent to current

absence of national implementation measures remains a problem, even after the change in wording of Art. III-365 DTC, due to the extremely strict test for individual concern. Although cf. Temple Lang, “Actions for declarations that Community Regulations are invalid: The duties of national courts under Article 10 EC”, 28 EL Rev. (2003), 102, who argues (at 108) that “[m]ost if not all of the difficulties envisaged by Advocate General Jacobs could be resolved by appropriate orders of the national courts”: he bases this argument upon an interpretation of the duties of national courts under Art. 10 EC. Arguably, the force of this point is bolstered by the inclusion in Art. I-29(1), 2nd sub-para DTC of the requirement that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. See also Usher, note 75, *supra*, at 598, who argues that this goes further than the *UPA* requirement that national courts interpret and apply national procedural rules to this end “so far as possible”: in his view, (what is now) Art. I-29(1), 2nd sub-para DTC imposes a positive obligation upon Member States to secure effective legal protection.

77. Emphasis added. This wording remains unchanged from that of the Convention Draft: see Usher, note 75 *supra*, at 598.

78. Emphasis added. See also Arts. I-35(2) (on the adoption of European regulations by the Council, Commission and (in certain cases) the ECB) and I-36 (on delegated European regulations, where the Commission has been empowered by a European law or framework law – see Art. I-33, 2nd and 3rd sub-paras., respectively, and Art. I-34).

EC Regulations) and “European framework laws” (sub-para 3, equivalent to current EC Directives); and

– “European decisions” (5th sub-para).

Thus, the key question for assessing the impact of the new wording in Article III-365 DTC is what scope will be given to the category of measures that correspond to the term “regulatory acts” (which presumably can only include European regulations under Art. I-33(1), 4th sub-para). This formulation clearly excludes the possibility of individual challenges to European laws and European framework laws (apart from on those rare occasions that individual concern can be shown – e.g. *Codorníu*). This would seem to lead to the result that *Jégo-Quéré* might well be a case where standing would be granted under Article III-365(4) DTC, while *UPA* would not.⁷⁹ This shows that the new Article III-365(4) wording does make some changes, but does not go nearly as far as the proposals of many critics.⁸⁰ The extent of the impact of the new wording is dependent upon the assessment of the nature of the European measure at issue (assuming that the courts continue to approach the classification of such measures on the basis of a “substance-over-form” analysis).⁸¹

Nevertheless, it continues to be tolerably clear that no such restrictions exist upon the types of measure that may be the subject of a reference for a preliminary ruling under Article III-369 DTC. This possibility, allied with the new provision of Article I-29(1), 2nd sub-para DTC that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”, suggest that the safety valve for measures falling outside Article III-360(4) DTC will remain the reference for a preliminary ruling.

7.2. Article III-369, 4th para DTC on preliminary rulings

It should also briefly be noted that a fourth paragraph has been added to the Article of the DTC corresponding to the present Article 234 EC. This provides:

79. See Usher, note 75 *supra*, at 599.

80. See e.g. A.G. Jacobs in *UPA* (note 73 *supra*, para 60), who proposed that individual concern be held to exist where, “by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on [the] interests [of the individual]”. The CFI in *Jégo-Quéré* proposed that the relevant Community measure of general application would be of individual concern if it “affects his legal position, in a manner which is both definite and immediate, by restricting his rights or imposing obligations on him” (note 74 *supra*, para 51). The latter seems narrower in most respects than the former, but both are broader than Art. I-360(4) DTC.

81. See e.g. Cases 789 & 790/79, *Calpak SpA v. Commission*, [1980] ECR 1949, para 7 et seq.

“If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay.”

This addition was thought to be necessary because of the enhanced law-making competence of the Union in the fields of criminal law and of criminal evidence and procedure.

8. Conclusions

At this early stage, with the DTC only just signed on 29 October 2004, and when its ratification and implementation are a distant and uncertain prospect, any assessment of the institutional provisions of the new Constitution is bound to be tentative. To us, the provisions paint a mixed picture, with elements that may be seen as good, bad and indifferent, in the light of the criteria identified in our introduction – though with the positive having a very distinct edge over the negative.

To get the worst out of the way: it is a shame that *realpolitik* at the IGC should have sent the admirably simple QMV rule of the Convention text flying out of the window. The set of rules with which we are faced in Article 24 of the DTC, read together with Protocol No. 34 and the draft Decision in Declaration No. 5, is lacking in internal logic and hopelessly complicated. It fails all of the Laeken tests. There will, if anything, be a diminution of legitimacy and transparency, since the rules are harder to explain than those of the Nice system; and efficacy has been sacrificed by the concessions tending to facilitate the formation of blocking minorities.

On the UMFA, we shall have to see whether the juggling with hats proves workable in practice. The words that were added by the IGC to Article I-28(4), if they are given their full value, seem to resolve any conflict of loyalties the Minister is liable to experience, in favour of his role as an high officer of the Council. However, we believe it would have been a better solution to have avoided the ambiguity of double-hatting, by limiting the UMFA's involvement with the Commission to the status of an observer, with a right to speak but not to vote at meetings of the College where external relations were on the agenda. Other Commissioners will surely find it hard to stomach that, when issues of external relations reach the stage of decision-making, their responsible Vice-President will no longer be subject to collegiate discipline. It is in this aspect of the new constitutional order, more than any other, that the risk of compromising the Union's institutional integrity seems palpable to us.

We fear that the reduction in the size of the Commission will result in a loss of legitimacy, for the sake of an increase in effectiveness which could be achieved in other ways, e.g. by allocating the busier portfolios to groups of Commissioners, working under a Vice-President. Our main concern, however, is that a leaner Commission, far from being meaner, would suffer a loss of authority, owing to the absence of nationals from one or more of the big Member States, through the operation of the principle of strict rotation. That would be especially serious in policy areas where the Commission enjoys a measure of executive power, e.g. the rules on competition applicable to undertakings, the control of State aid and the anti-dumping regime. It is also unsatisfactory, if this change is really seen as necessary, that we should have to wait so long for it to happen – until 2015, assuming our calculations are correct.

The provisions on the appointment of the President and Members of the Commission we would place in our “indifferent” category – not meaning to be derogatory, but simply because it seems to us that nothing much of substance will change. And a good thing too. We have explained why we consider that tying the Commission any more closely to the majority in the European Parliament would upset the institutional balance of the Union.

Turning, finally, to the elements among the institutional provisions of the DTC that we welcome unreservedly, mention may first be made of the reorganization of the European Council, in particular the establishment of the post of European Council President. We see the effectiveness of the European Council as indispensable to a Union structure within which decisions on matters of high politics can be taken. The more visible involvement of democratically responsible national leaders in the governance of the Union should also be a factor in addressing the legitimacy deficit. We do not share the concern of some commentators that the functioning of the Institutions may be adversely affected by rivalry between the new-style President of the European Council and the President of the Commission. A certain degree of creative tension between the Council and the Commission is a permanent and healthy feature of the constitutional order. The position of the Commission President – who is, after all, a member of the European Council – need not be weakened, provided that a person of sufficient political weight is chosen to fill that post.

Our greatest enthusiasm, however, is reserved for the changes that will occur in the legislative process. These are of three kinds: the generalization of co-decision as the ordinary procedure for adopting legislative acts; the opening up of the Council’s proceedings when legislation is being deliberated and voted upon; and the greater involvement of national parliaments in Union law-making, more particularly through the new subsidiarity mechanism. The

reforms are well designed to enhance legitimacy and transparency; and they do so in a way which is true to the nature of the Union, by strengthening dual accountability. The resulting system has a clear logic, which can be understood with relative ease.

Legislating is the most characteristic activity of the European Union. And it is with respect to the law-making process that the democratic deficit has been felt most acutely in the past. The DTC will do about as much towards reforming the process, and thus towards supplying the deficit, as can be achieved through constitutional amendment. Making sure that it really works will then be up to the politicians – ministers, national MPs, MEPs and Commissioners.

**Appendix 1: Table on QMV provisions
(assuming EU25 and all MSs eligible to vote)**

Provision	Percentage of Council Members	No. of Council Members	Number of weighted votes	Percentage of population represented	Outcome
<i>To 31 Oct. 2009</i>					
Prot. No. 34, Article 2 (2), 2nd sub-para., 1st sentence DTC	>50%	(= 13)	≥232**	≥62%***	Measure passed
Prot. No. 34, Article 2 (2), 2nd sub-para., 2nd sentence DTC	≥66.67% (i.e. ² / ₃)	(= 17)	≥232**	≥62%***	Measure passed
<i>From 1 Nov. 2009</i>					
Article I-25 (1), 1st sub-para. DTC	≥55%	≥15	—	≥65%	Measure passed
Article I-25 (1), 2nd sub-para. DTC		≥4	—	>35%	(Measure blocked)
Article I-25 (2) DTC	≥72%	(= 18)	—	≥65%	Measure passed
Draft Council Decision (Article 1 of Decl. No. 5, annexed to DTC)	Re Article I-25 (1), 1st sub-para: > ³ / ₄ of 45% =>33.75%	(= 9)	—	Re Article 25(1), 1st sub-para: > ³ / ₄ of 35% =>26.25%	
	Re Article I-25 (2): > ³ / ₄ of 28% =>21%	(= 6)	—	Re Article (I-25(2): > ³ / ₄ of 35% =>26.25%	

** On this threshold, note also Prot. 34, Art. 2(3) DTC: “For subsequent accessions, the threshold referred to in paragraph 2 shall be calculated to ensure that the qualified majority threshold expressed in votes does not exceed that resulting from the table in the Declaration on the enlargement of the European Union in the Final Act of the Conference which adopted the Treaty of Nice.” This Declaration (No. 20) can be found at O.J. 2001, C 80/82 et seq. and provides for at least 258 votes in favour and a majority of members where the vote is on a proposal from the Commission (and the same but with two-thirds of members for other decisions). The Nice Declaration also allows a check (at a member’s request) that the Member States constituting that qualified majority represent at least 62% of the total population of the Union (failing which, the measure will not be adopted). The table in Prot. 34, Art. 2(2), 1st sub-para. essentially reproduces the table in the Nice Declaration but without the entries for Romania (14 weighted votes) and Bulgaria (10 weighted votes).

*** Prot. 34, Art. 2(2), 3rd sub-para.: “A member of the European Council or the Council may request that, where an act is adopted by the European Council or the Council by a qualified majority, a check is made to ensure that the Member States comprising the qualified majority represent at least 62% of the total population of the Union. If that proves not to be the case, the act shall not be adopted.”

Appendix 2: Population figures for Europe in 2003 (figures in 1000 inhabitants)*

Country/ Region	Population at 1.1.2003	Total increase	Population at 1.1.2004	% of Total EU Population at 1.1.2004	~% of Total EU Population of "EU29" (using 1.1.2004 as a base)
European Union	454 559.9^e	1 888.7^e	456 448.5^e	100	(561 657.3) 100
Eurozone	306 705.8^p	1 712.3^e	308 418.1^e	67.57	?
Belgium	10 355.8	40.2 ^p	10 396.0 ^p	2.28	1.85
Czech Rep.	10 203.3	8.2	10 211.5	2.24	1.82
Denmark	5 383.5	14.1	5 397.6	1.18	0.96
Germany	82 536.7	1.9 ⁿ	82 538.6 ⁿ	18.08	14.70
Estonia	1 356.0	-5.4 ^p	1 350.6 ^p	0.30	0.24
Greece	11 006.4	34.7 ^p	11 041.1 ^p	2.42	1.97
Spain	41 550.6 ^p	647.3 ^p	42 197.9 ^p	9.24	7.51
France	59 635.0 ^p	265.7 ^p	59 900.7 ^p	13.12	10.66
Ireland	3 963.6	61.0	4 024.6 ^e	0.88	0.72
Italy	57 321.1	483.0 ⁿ	57 804.1 ⁿ	12.66	10.29
Cyprus [†]	715.1	15.5 ^p	730.7 ^p	0.16	0.13
Latvia	2 331.5	-12.3	2 319.2	0.51	0.41
Lithuania	3 462.6	-16.7 ^p	3 445.9 ^p	0.75	0.61
Luxembourg	448.3	3.3	451.6	0.10	0.08
Hungary	10 142.4	-25.6 ^p	10 116.7 ^p	2.22	1.80
Malta	397.3	2.6	399.9	0.09	0.07
Netherlands	16 192.6	62.4 ^p	16 254.9 ^p	3.56	2.89
Austria	8 082.0	32.0 ^p	8 114.0 ^p	1.78	1.44
Poland	38 218.5	-27.9	38 190.6	8.37	6.93
Portugal	10 407.5	67.4	10 474.9	2.29	1.86
Slovenia	1 995.0	1.4	1 996.4	0.44	0.36
Slovakia	5 379.2	0.9	5 380.1	1.18	0.96
Finland	5 206.3	13.4	5 219.7	1.14	0.93
Sweden	8 940.8	34.9	8 975.7	1.97	1.60
United Kingdom	59 328.9 ⁿ	186.8 ⁿ	59 515.7 ⁿ	13.04	10.60
<i>Selected others:</i>					
Bulgaria	7 845.8	-44.6	7 801.3	—	1.39
Croatia	4 442.2 ⁿ	-1.9 [#]	:	—	0.79
Romania	21 772.8	-61.5	21 711.3	—	3.87
Turkey	70 173.0 ⁿ	1 081.0 ⁿ	71 254.0 ⁿ	—	12.69

N.B. On these figures, as of 1.1.2004, under Art. I-25(1) DTC a blocking minority requires 159,756,975 total population in four or more Member States.

* Taken from Eurostat news release 'European demography in 2003' (STAT/04/105, 31 August 2004), itself drawn from Eurostat and the Council of Europe, *Statistics in Focus, Population and Social Conditions, No 13/2004*, "First results of the demographic data collection for 2003 in Europe". See, also, "Population Statistics", 2004 Edition, 171 pp including a CD-Rom: available on the Eurostat website at europa.eu.int/comm/eurostat/Public/datashop/print-catalogue/EN?catalogue=Eurostat (last visited 13 Sept. 2004). Reproduced here with kind permission of Eurostat and the Council of Europe.

^e Eurostat estimate; ^p Provisional data; ⁿ National estimate; [†] Government controlled area only; [#] 2002 figure.

Appendix 3: Examples of possible coalitions of Four Member States to form a blocking minority (based upon a steady Franco-German alliance, using population figures as of 1.1.2004 from Appendix 2)

	MS1	MS2	MS3	MS4
1	Germany	France	UK	Any
2	Germany	France	Italy	Any
3	Germany	France	Spain*	Any
4	Germany	France	Poland	Any
5	Germany	France	Netherlands	Any but Cyprus, Luxembourg or Malta
6	Germany	France	Greece	Any but Denmark, Slovakia, Finland, Ireland, Lithuania, Latvia, Slovenia, Estonia, Cyprus, Luxembourg or Malta
7	Germany	France	Portugal	Any but Denmark, Slovakia, Finland, Ireland, Lithuania, Latvia, Slovenia, Estonia, Cyprus, Luxembourg or Malta
8	Germany	France	Belgium	Any but Denmark, Slovakia, Finland, Ireland, Lithuania, Latvia, Slovenia, Estonia, Cyprus, Luxembourg or Malta
9	Germany	France	Czech Republic	Any but Denmark, Slovakia, Finland, Ireland, Lithuania, Latvia, Slovenia, Estonia, Cyprus, Luxembourg or Malta
10	Germany	France	Hungary	Any but Denmark, Slovakia, Finland, Ireland, Lithuania, Latvia, Slovenia, Estonia, Cyprus, Luxembourg, or Malta
11	Germany	France	Sweden	Any but Austria, Denmark, Slovakia, Finland, Ireland, Lithuania, Latvia, Slovenia, Estonia, Cyprus, Luxembourg, or Malta
12	Germany	France	Austria	Any but Sweden, Denmark, Slovakia, Finland, Ireland, Lithuania, Latvia, Slovenia, Estonia, Cyprus, Luxembourg or Malta
13	Germany	France	Denmark	Any but Sweden, Austria, Slovakia, Finland, Ireland, Lithuania, Latvia, Slovenia, Estonia, Cyprus, Luxembourg or Malta
14	Germany	France	Slovakia	Only the UK, Italy, Spain, Poland or the Netherlands
15	Germany	France	Finland	Only the UK, Italy, Spain, Poland or the Netherlands
16	Germany	France	Ireland	Only the UK, Italy, Spain, Poland or the Netherlands
17	Germany	France	Lithuania	Only the UK, Italy, Spain, Poland or the Netherlands

18	Germany	France	Latvia	Only the UK, Italy, Spain, Poland or the Netherlands
19	Germany	France	Slovenia	Only the UK, Italy, Spain, Poland or the Netherlands
20	Germany	France	Estonia	Only the UK, Italy, Spain, Poland or the Netherlands
21	Germany	France	Cyprus	Only the UK, Italy, Spain or Poland
22	Germany	France	Luxembourg	Only the UK, Italy, Spain or Poland
23	Germany	France	Malta	Only the UK, Italy, Spain or Poland

* Perhaps an intriguing configuration, given the newspaper report in *The Times* on 14 Sept. 2004 that “old Europe” was alive and kicking, after a meeting of the leaders of Germany, France and Spain (see also Reuters’ report, available on the internet at the following web address: www.reuters.fr/locales/c_newsArticle.jsp?type=topNews&localeKey=fr_FR&storyID=6212464).

Appendix 4: Table on Article 2(4) of Protocol No. 34

DTC Provision	Issues	Consequences (N.B. Entry into force only as of 1 November 2009)
Article I-44(3), 3rd sub-para. Article I-44(3), 4th sub-para. Article I-44(3), 5th sub-para.	QMV in Enhanced Co-operation	Only MSs involved in the proposed enhanced co-operation can vote
Article I-59(5), 2nd sub-para. Article I-59(5), 3rd sub-para.	QMV re suspension of rights resulting from EU membership	QMV thresholds etc. calculated minus the MS about which the decision is to be taken
Article I-60(4), 2nd sub-para.	QMV re voluntary withdrawal from EU	QMV thresholds etc. calculated minus the MS about which the decision is to be taken
Article III-179(4), 3rd sub-para. Article III-179(4), 4th sub-para.	QMV re MS economic policies out of line with guidelines or jeopardizing EMU	QMV thresholds etc. calculated minus the MS about which the decision is to be taken
Article III-184(6), 3rd sub-para. Article III-184(6), 4th sub-para.	QMV re first Council recommendation on MS excessive budget deficit	QMV thresholds etc. calculated minus the MS about which the decision is to be taken
Article III-184(7), 3rd sub-para. Article III-184(7), 4th sub-para.	QMV re subsequent Council actions re MS excessive budget deficit	QMV thresholds etc. calculated minus the MS about which the decision is to be taken
Article III-196(3), 2nd sub-para. Article III-196(3), 3rd sub-para.	QMV on Council decisions re EMU and related matters in international financial institutions and conferences	QMV thresholds etc. calculated on the basis of those MSs that participate in the Euro
Article III-197(4), 2nd sub-para. Article III-197(4), 3rd sub-para.	QMV re “MSs with a derogation” from adopting the Euro	QMV thresholds etc. calculated on the basis of those MSs that participate in the Euro (i.e. those without a “derogation”)
Article III-198(2), 3rd sub-para.	QMV on abrogating such “derogations” from the Euro for MSs	QMV thresholds etc. calculated on the basis of those MSs that participate in the Euro
Article III-312(3), 3rd sub-para. Article III-312(3), 4th sub-para.	QMV on later MS entry into “permanent structured co-operation” under CSDP (see Article I-41(6) DTC)	QMV thresholds etc. calculated on the basis only of those MSs already participating in the “permanent structured co-operation”
Prot. No. 19* Article 1, 2nd para.	QMV under UK & Eire opt-	QMV thresholds etc. calculated

Prot. No. 19 Article 1, 3rd para. Prot. No. 19 Article 1, 4th para.	outs from Border Checks, Asylum & Immigration (Part III, Title III, Chapter IV, Section 2 DTC) and Judicial Co-operation in Civil Matters (<i>ibid.</i> , Section 3)	on the basis only of those MSs already participating in this field
Prot. No. 19 Article 3(1), 2nd sub-para. Prot. No. 19 Article 3(1), 3rd sub-para. Prot. No. 19 Article 3(1), 4th sub-para.	QMV on application of UK and/or Eire to take part in such opt-out matters referred to under Article 1 of Prot. No. 19	QMV thresholds etc calculated on the basis only of those MSs already participating in this field
Prot. No. 20** Article 1, 2nd para. Prot. No. 20 Article 1, 3rd para. Prot. No. 20 Article 1, 4th para.	QMV operation under the Danish opt-out from the Area of Freedom, Security and Justice provisions (Part III, Title III, Chapter IV DTC)	QMV thresholds etc. calculated on the basis only of those MSs already participating in this field
Prot. No. 20 Article 5, 3rd para. Prot. No. 20 Article 5, 4th para. Prot. No. 20 Article 5, 5th para.	QMV operation under the Danish opt-out from EU decisions with defence implications (Arts. I-41, III-295 (1) and III-309 to III-313 DTC).	QMV thresholds etc. calculated on the basis only of those MSs already participating in this field

N.B. Article 2(4), 2nd sub-para of Protocol No. 34:

“Until 31 October 2009, the qualified majority shall, in cases where not all the members of the Council participate in voting, namely in the cases referred to in the articles mentioned in the first subparagraph, be defined as the same proportion of the weighted votes and the same proportion of the number of the Council members and, if appropriate, the same percentage of the population of the Member States concerned as laid down in paragraph 2.”

* Protocol on the position of the UK and Ireland on policies in respect of border controls, asylum and immigration, judicial cooperation in civil matters and on police cooperation.

** Protocol on the position of Denmark.