

# **EU draft Constitution - Provisions governing intellectual property**

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# ***I) GENERAL PRINCIPLES OF EU LAW***

## ***1. FUNDAMENTAL PRINCIPLES***

### **Article I-9**

*Principles governing EU Competence:*

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

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

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

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

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

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

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Constitution. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.

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

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

## ***2. PRIMACY OF EU LAW***

### **Article I-10**

*All EU law prevails over national laws and national constitutions*

*Require fulfilment of EU obligations by Member States*

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

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

### 3. JURISDICTION ON QUESTIONS OF COMPETENCE

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

#### Article III- 270

*EU-Court reviews:*

*- legality of legal acts*

*- lack of competence and infringement of:*

*- procedural requirements*

*- the Constitution*

*- rule of law*

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

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

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

#### Article III-281

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

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

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

#### Article III-284

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

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

## **II) INTELLECTUAL PROPERTY**

### **1. INTELLECTUAL PROPERTY ACCORDING TO THE PRESENT PROVISIONS OF THE TEC:**

#### **1.1. Introduction**

*The term 'intellectual property' refers to a design, an idea, or an invention which belongs to the person who invented it. The law prohibits others from copying it. It hence covers the following issues:*

- patents*
- copyrights*
- trade marks*
- designs*

*Until the entry into force of the Treaty of Amsterdam, no legal basis in the TEC specifically referred to intellectual property. The Treaty of Amsterdam and the following Treaty of Nice only mentioned the intellectual property in the frame of a common commercial policy. Hence, measures taken in this area were either based on Article 133, the respective articles designed to the functioning and the completion of the internal market, or on the so-called flexibility clause (Article 308 TEC). The new draft Constitution hence proposes a new Article III-68 which would serve as a proper legal basis for measures aiming at the protection of intellectual property.*

*Although little attention has been paid to intellectual property at Community level so far, its protection has been governed by many international conventions. The World Intellectual Property Organisation (WIPO) and, more recently, the World Trade Organisation (WTO) are responsible for implementing numerous international conventions and treaties. The first convention, the Paris Convention for the Protection of Industrial Property, dates back to 1883, and since then several conventions and treaties have been signed which cover various aspects of the protection of intellectual property, such as the protection of literary and artistic works (the Berne Convention from 1886), and the protection of performers, producers of phonograms and broadcasting organisations (the Rome Convention from 1928).*

*The conclusion of the Agreement on trade-related aspects of intellectual property rights (the TRIPS Agreement) by the members of the WTO in 1996 emphasises the importance of the protection of intellectual property in the field of trade. The Agreement covers several aspects of trade, particularly the granting of patents for, amongst other things, pharmaceutical products. The WTO therefore plays an important role in the protection of intellectual property and has established close relations with the WIPO. The corresponding commitments made by some or all of the Member States are leading to some standardisation of national laws in specific fields.*

*At European level, the following offices play an important role in the sphere of intellectual property law:*

*a. The European Patent Office in Munich grants European patents for the 20 states, which signed the European Patent Convention (EPC). Since 2003, it covers all EU countries. In 2003, the Council agreed to introduce a genuine uniform European Patent and a European Patent Court by 2010. The European Patent Office is not a Community agency.*

*b. The European Office for Harmonisation of the Internal Market was established in 1993 carries out registration procedures for Community trade marks and in the near future, for Community designs. It is a Community agency.*

## **1.2 Present legal bases**

*Several articles can serve as legal bases when the Community acts in the sphere of intellectual property. Those are:*

- Article 95 TEC for the approximation of national laws to improve the functioning of the internal market*
- Article 308 TEC (flexibility clause) for uniform intellectual property rights*
- Article 133 TEC for commercial agreements with third countries related to intellectual property*

### **1.2.1 Article 95 TEC:**

*Article 95 TEC - General legal base for measures taken in the area of intellectual property when the aim is to approximate the member states provisions on intellectual property (e.g. directive harmonising the conditions for registration of a national trade mark, directive approximating national laws to bring them into line with the Community designs etc):*

#### **ARTICLE 95 (ex Article 100a) TEC**

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

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

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

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

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

**Keep better rules**

- environment
- working environment

**Introduce better rules**

- environment
- working environment
- specific problem for a State

*The Commission decides:*

- excluding:
- discriminatory treatment
- hidden trade restrictions
- obstruct the functioning of the Internal Market

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

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

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

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

### **1.2.2 Article 308 Flexibility clause:**

***However, Article 308 TEC, the so-called flexibility clause applies when provisions in the sphere of intellectual property set up a new European legal order, which means uniform intellectual property rights (e.g. regulation on the Community trade mark, regulation for a Community design, future regulation on a Community patent).***

**The "Flexibility Clause"**

*Unanimity in the Council,  
Parliament to be consulted*

**ARTICLE 308 (ex Article 235) TEC**

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

### **1.2.3 Article 133 - Agreements with third countries related to intellectual property:**

*The common commercial policy does not cover those international negotiations and agreements relating to services and intellectual property which are subject to the GATS and TRIPS agreements. This is insofar relevant as, until now, the Member states have to (co-)sign agreements related to the trade in services and intellectual property. If these areas were to be considered as belonging to the common commercial policy, the Community would have the exclusive competence to negotiate and to sign these agreements (although the current Article 133 paragraph 5, subparagraph 4 stipulates that the Member states rights shall not be affected).*

*Since Amsterdam, the Council can nevertheless extend the scope of Article 133 to include the negotiation and agreements on services and intellectual property by unanimous agreement following consultation of the European Parliament (former Article 133.5 TEC).*

*The Treaty of Nice also amended Article 133 to allow such agreements (of trade in services and the commercial aspects of intellectual property) to be concluded by qualified majority voting (current Article 133 paragraph 5, 1st subparagraph, and paragraph 4 TEC). The Treaty of Nice also allows the Council to extend the scope of Article 133 to include the negotiation and agreements on the whole reach of intellectual property by unanimous agreement following consultation of the European Parliament (current Article 133.7 TEC).*

**International trade agreements**

*Common commercial policy built on uniform principles*

*The Council, acting by qualified majority, authorises the Commission to negotiate*

*§133 Committee to be regularly informed*

*The Council concludes agreements by qualified majority*

*Services and intellectual property rights - introduced under the*

**ARTICLE 133 (ex Article 113) TEC**

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations. The relevant provisions of Article 300 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, insofar as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

## *Treaty of Nice*

*Unanimity required for agreements related to:  
- trade in services and intellectual property  
- which include provisions for which unanimity is required for the adoption of internal rules*

*Agreements shall not exceed the Community's internal powers*

*Cultural, audio-visual, educational, social, health services require common accord = unanimity*

## *Transport*

*The Council can extend the scope of this article by unanimity*

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements.

6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.

7. Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property insofar as they are not covered by paragraphs 5.

## **2. INTELLECTUAL PROPERTY ACCORDING TO THE DRAFT CONSTITUTION**

### **2.1 Article III-65 and the new Article III-68**

***The provisions regarding the internal market remain fundamentally unchanged. However, a new Article III-68 is being proposed as a new legal basis for providing uniform intellectual property rights protection. At present, measures in this area are either taken by unanimity on the basis of the flexibility clause, Article 308 TEC, which requires unanimity with a mere consultation of the European Parliament, or (if aiming at the approximation of laws in the***

*frame of the internal market) on the basis of Article 95 TEC by qualified majority, with the European Parliament co-deciding.*

*Article III-68.1 provides for the ordinary legislative procedure: qualified majority voting in the Council with the European Parliament co-deciding.*

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

***Special new Article for intellectual property  
= No need for the use of the general internal market clause (Article III-65) or the flexibility clause (I-17)***

*- Centralisation of intellectual-property rights under Union  
- Measure can be taken by qualified majority with EP co-deciding*

*Rules establishing the language arrangements require unanimity, EP consulted*

## **Article III-68**

In establishing an internal market, measures for the introduction of European instruments to provide uniform intellectual-property rights protection throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements shall be established in European laws or framework laws.

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

## **2.2 Article III-217**

*Already now, the Community can conclude international agreements regarding the commercial aspects of intellectual property according to Article 133 TEC. Although Article 133 TEC provides in general for qualified majority voting for the conclusion of such agreements (Article 133, paragraph 5, 1st alternative, and paragraph 4 TEC), unanimity is required for agreements that include provisions for which unanimity is required for the adoption of internal rules (Article 95, paragraph 5, 2nd subparagraph TEC).*

*Therefore, either unanimity (Article 308 TEC is the legal base for the adoption of internal rules when setting up uniform rules for intellectual property rights) or qualified majority (Article 95 is the legal base for measures aiming at the approximation of the national provisions on intellectual property) would be required for the conclusion of such agreements*

*The draft Constitution also proposes in its Article 217 qualified majority as a general rule for the conclusion of trade agreements, and also states that unanimity is required if the agreement*

*includes provisions for which unanimity is required for the adoption of internal rules. However, since the newly proposed Article III-68 provides for the ordinary legislative procedure, international agreements could be concluded by qualified majority voting as to both the setting up of uniform rules for intellectual property (e.g. a possible agreement with the Members of the Munich Convention to apply the future uniform Community patent) and the approximation of the national provisions on intellectual property.*

**Common Commercial policy**

**Article III-217**

*Uniform principles*

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

*Legislative procedure*

2. European laws shall establish the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more States or international organisations need to be negotiated, the relevant provisions of Article I-227 shall apply subject to the special provisions of this Article.

*Council mandates  
Commission to negotiate*

The Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

*General rule: qualified majority*

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by qualified majority.

*Trade agreements concerning intellectual property need unanimity when unanimity is required for the adoption of internal rules*

For the negotiation and conclusion of agreements in the fields of trade in services involving the movement of persons and the commercial aspects of intellectual property, **the Council of Ministers shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules**.

*Unanimity when culture and audiovisual services are involved*

The Council shall also act unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity.

*Transport*

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to the provisions of Section 7 of Chapter III of this Title and Article III-227.

*This article cannot  
undermine delimitation of  
competence between the  
Union and Member States*

6. The exercise of the competences conferred by this Article in the field of commercial policy shall not affect the delimitation of internal competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of Member States insofar as the Constitution excludes such harmonisation.

### **III) THE INSTITUTIONS OF THE UNION**

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

#### **1) EUROPEAN PARLIAMENT**

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

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

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

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

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

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

#### **Article I-19**

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

*Direct elections every 5*

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

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

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

The remainder will be divided by degressive proportionality.

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

EP President

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

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

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

### ***1.1) COMPOSITION OF THE EUROPEAN PARLIAMENT AT PRESENT:***

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

***Absolute Majority of Members = 314votes***

### ***1.2 COMPOSITION OF THE EUROPEAN PARLIAMENT 2004-2009***

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

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

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

### **1.3 COMPOSITION OF THE EUROPEAN PARLIAMENT FROM 2009 ONWARDS**

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

#### **Article I-19**

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

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

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

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



## 2) EUROPEAN COUNCIL

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

### Article I-20

#### *European Council*

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

*Meets quarterly*

*President may convene  
additional meetings*

*Decisions by consensus*

1. The European Council shall provide the Union with the necessary impetus for its development, and shall define its general political directions and priorities. It does not exercise legislative function.

2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The Union Minister for Foreign Affairs shall take part in its work.

3. The European Council shall meet quarterly, convened by its President. When the agenda so requires, its members may decide to be assisted by a minister, and, in the case of the President of the Commission, a European Commissioner. When the situation so requires, the President shall convene an special meeting of the European Council.

4. Except where the Constitution provides otherwise, decisions of the European Council shall be taken by consensus.

## THE EUROPEAN COUNCIL CHAIR

### Article I-21

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

*Tasks of the President*

*Represents the EU  
in the wider world on*

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

2. The President of the European Council:

- shall chair it and drive forward its work,
- shall ensure proper preparation and continuity in cooperation with the President of the Commission, and on the basis of the work of the General Council,
- shall endeavour to facilitate cohesion and consensus within the European Council,

*CFSP issues*

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

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

*President cannot have a national mandate*

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

### 3) COUNCIL OF MINISTERS

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

#### Article I-22

**Council of Ministers:**

- legislates with EP
- carries out policy making
- coordinates

*Only ministers may commit their Member States and vote*

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

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

#### 3.1 WEIGHTING OF VOTES IN THE COUNCIL AT PRESENT:

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

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

### **3.2 WEIGHTING OF VOTES IN THE COUNCIL 2004-2009**

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

#### ***Qualified majority:***

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

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

### **3.3 VOTING IN THE COUNCIL FROM 2009 ON**

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

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

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

## Article I-24

### ***1. Majority of Member States***

#### ***2. 60 % of the EU population***

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

### ***Enlarged qualified majority***

- 1. 2/3 of Member States*
- 2. 60% of the EU population*

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

### ***NB: New deepening clause***

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

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

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

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

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

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

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

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

## 4) EUROPEAN COMMISSION

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

### Article I-25

#### **EU-Commission**

##### **Role:**

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

**Monopoly of initiative:**  
*Only it can propose new laws*

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

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

*Non-voting Commissioners from the other states*

*Effective from 2009*

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

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

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

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

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

These arrangements will take effect on 1 November 2009.

### ***Independence***

*May not take instructions from government or other body*

### ***Censure***

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

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

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

## **COMMISSION PRESIDENT**

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

### ***Commission President***

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

### ***Commission members***

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

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

### **Article I-26**

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

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

3. The President of the Commission shall:

- lay down guidelines within which the Commission is to work;
- decide its internal organisation, ensuring that it acts consistently, efficiently and on a collegiate basis;

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

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

## 5) EU FOREIGN MINISTER

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

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

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

### Article I-27

#### *EU Foreign Minister*

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

#### *Tasks of Foreign Minister*

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

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

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

*External service*  
*established in part III*

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

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