

CONV 528/03

NOTE

from : Praesidium

to : Convention

Subject : Draft of Articles 1 to 16 of the Constitutional Treaty

Members of the Convention will find in Annex I a draft of Articles 1 to 16 (Titles I, II and III) as proposed by the Praesidium, and in Annex 2 an explanatory note.

These Articles generally correspond to the description given in the document containing the draft structure for the Constitutional Treaty (CONV 369/02). A few minor changes have been made to the numbering to take account of the debate in the Convention. The draft texts given here reflect the reports of the Working Groups on Legal Personality, the Charter, Economic Governance, Complementary Competencies, the Principle of Subsidiarity and External Action, as well as the guidelines that emerged on the basis of their recommendations during the plenary debate.

DRAFT TEXT
OF THE ARTICLES OF THE TREATY
ESTABLISHING A CONSTITUTION FOR EUROPE

TITLE I: Definition and objectives of the Union

Article 1: Establishment of the Union

1. Reflecting the will of the peoples and the States of Europe to build a common future, this Constitution establishes a Union [entitled ...], within which the policies of the Member States shall be coordinated, and which shall administer certain common competences on a federal basis.
2. The Union shall respect the national identities of its Member States.
3. The Union shall be open to all European States whose peoples share the same values, respect them and are committed to promoting them together.

Article 2: The Union's values

The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity.

Article 3: The Union's objectives

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall work for a Europe of sustainable development based on balanced economic growth and social justice, with a free single market, and economic and monetary union, aiming at full employment and generating high levels of competitiveness and living standards. It shall promote economic and social cohesion, equality between women and men, and environmental

and social protection, and shall develop scientific and technological advance including the discovery of space. It shall encourage solidarity between generations and between States, and equal opportunities for all.

3. The Union shall constitute an area of freedom, security and justice, in which its shared values are developed and the richness of its cultural diversity is respected.
4. In defending Europe's independence and interests, the Union shall seek to advance its values in the wider world. It shall contribute to the sustainable development of the earth, solidarity and mutual respect among peoples, eradication of poverty and protection of children's rights, strict observance of internationally accepted legal commitments, and peace between States.
5. These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competences are attributed to the Union by this Constitution.

Article 4: Legal personality

The Union shall have legal personality.

TITLE II: Fundamental rights and citizenship of the Union

Article 5: Fundamental rights

1. The Charter of Fundamental Rights shall be an integral part of the Constitution. The Charter is set out [in the second part of/in a Protocol annexed to] this Constitution.¹
2. The Union may accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession to that Convention shall not affect the Union's competences as defined by this Constitution.

¹ [The full text of the Charter, with all the drafting adjustments given in Working Group II's final report (CONV 354/02) will be set out either in a second part of the Constitution or in a Protocol annexed thereto, as the Convention decides.]

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Article 6: Non-discrimination on grounds of nationality

In the field of application of this Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 7: Citizenship of the Union

1. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it. All citizens of the Union, women and men, shall be equal before the law.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in this Constitution. They shall have:
 - the right to move and reside freely within the territory of the Member States;
 - the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections in their Member State of residence under the same conditions as nationals of that State;
 - the right to enjoy, in the territory of a third country in which the Member State of which they are a national is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
 - the right to petition the European Parliament, to apply to the Ombudsman, and to write to the institutions and advisory bodies of the Union in any of the Union's languages and to obtain a reply in the same language.
3. These rights shall be exercised in accordance with the conditions and limits defined by this Constitution and by the measures adopted to give it effect.

TITLE III: The Union's competences

Article 8: Fundamental principles

1. The limits and use of Union competences are governed by the principles of conferral, subsidiarity, proportionality and loyal cooperation.
2. In accordance with the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Constitution to attain the objectives the Constitution sets out. Competences not conferred upon the Union by the Constitution remain with the Member States.
3. In accordance with 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, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
4. In accordance with the principle of proportionality, the scope and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.
5. In accordance with the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other to carry out tasks which flow from the Constitution.

Article 9: Application of fundamental principles

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

2. In exercising the Union's non-exclusive competences, the 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. The procedure set out in the Protocol shall enable national parliaments to ensure compliance with the principle of subsidiarity.¹
3. In exercising the Union's competences, the Institutions shall apply the principle of proportionality as laid down in the same Protocol.
4. Member States shall take all appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from actions taken by the Union Institutions.
5. In accordance with the principle of loyal cooperation, Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution. The Union shall act loyally towards the Member States.
6. The Union shall respect the national identities of its Member States, inherent in their fundamental structures and essential State functions, especially their political and constitutional structure, including the organisation of public administration at national, regional and local level.

Article 10: Categories of competence

1. When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union.

¹ A new version of the Protocol will be circulated shortly.

2. When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States shall have the power to legislate and adopt legally binding acts in this area. The Member States shall exercise their competence only if and to the extent that the Union has not exercised its.
3. The Union shall have competence to coordinate the economic policies of the Member States.
4. The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
5. In certain areas and in the conditions laid down in the Constitution, the Union shall have competence to carry out actions to coordinate, supplement or support the actions of the Member States, without thereby superseding their competence in these areas.
6. The Union shall exercise its competences to implement the policies defined in Part Two of the Constitution in accordance with the provisions specific to each area which are there set out.

Article 11: Exclusive competences

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

2. The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act.

Article 12: Shared competences

1. The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles 11 and 15 .
2. The scope of shared competences is determined by the provisions of Part Two.
3. Where the Union has not exercised or ceases to exercise its competence in an area of shared competence, the Member States may exercise theirs.
4. Shared competence applies in the following principal areas:
 - internal market
 - area of freedom, security and justice
 - agriculture and fisheries
 - transport
 - trans-European networks
 - energy
 - social policy
 - economic and social cohesion
 - environment
 - public health, and
 - consumer protection.

5. In the areas of research, technological development and space, the Union shall have competence to carry out actions, in particular to implement programmes; however, the exercise of that competence may not result in Member States being prevented from exercising their competence.
6. In the areas of development cooperation and humanitarian aid, the Union shall have competence to take action and conduct a common policy; however, the exercise of that competence may not result in Member States being prevented from exercising their competence.

Article 13: The coordination of economic policies

1. The Union shall coordinate the economic policies of the Member States, in particular by establishing broad guidelines for these policies.
2. The Member States shall conduct their economic policies, taking account of the common interest, so as to contribute to the achievement of the objectives of the Union.
3. Specific provisions shall apply to those Member States which have adopted the euro.

Article 14: The common foreign and security policy

1. Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity. They shall refrain from action contrary to the Union's interests or likely to undermine its effectiveness.

Article 15: Areas for supporting action

1. The Union may take coordinating, complementary or supporting action. The scope of this competence is determined by the provisions of Part Two.

2. The areas for supporting action are:
 - employment
 - industry
 - education, vocational training and youth
 - culture
 - sport
 - protection against disasters.
3. The Member States shall coordinate their national employment policies within the Union.
4. Legally binding acts adopted by the Union on the basis of the provisions specific to these areas in Part Two cannot entail harmonisation of Member States' laws or regulations.

Article 16: Flexibility clause

1. If action by the Union should prove necessary within the framework of the policies defined in Part Two to attain one of the objectives set by this Constitution, and the Constitution has not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament, shall take the appropriate measures.
2. Using the procedure for monitoring the subsidiarity principle referred to in Article 9, the Commission shall draw Member States' national parliaments' attention to proposals based on this Article.
3. Provisions adopted on the basis of this Article may not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation.

EXPLANATORY NOTE**TITLES I and II**Article 1:

This Article establishes the Union and describes its fundamental characteristics. In response to requests made at the plenary, the wording proposed is designed to adequately express the dual dimension of a Union of States and of peoples of Europe in terms appropriate to a Constitutional Treaty.

Because of its fundamental political importance, it was deemed advisable to emphasise in Article 1 the Union's respect for the national identity of its Member States; Article 9(6) then lists certain features of national identity which more specifically require respect in the legal sense when the Union is exercising its competences.

It also seems appropriate already to list the conditions for membership of the Union in Article 1, although the procedures for accession of new Member States, suspension of rights and withdrawal from the Union would be dealt with in more detail in Title X.

Article 2

This Article concentrates on the essentials – a short list of fundamental European values. Further justification for this is that a manifest risk of serious breach of one of those values by a Member State would be sufficient to initiate the procedure for alerting and sanctioning the Member State (see Article 45 of the preliminary draft Treaty which would incorporate the mechanism set out in Article 7 TEU), even if the breach took place in the field of the Member State's autonomous action (not affected by Union law). This Article can thus only contain a hard core of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society practising tolerance, justice and solidarity; on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are subject to sanction.

That does not, of course, prevent the Constitution from mentioning additional, more detailed elements which are part of the Union's "ethic" in other places, such as, for instance, in the Preamble, in Article 3 on the general objectives of the Union, in the Charter of Fundamental Rights (which, unlike this Article, does not, however, apply to autonomous action by the Member States), in Title VI on "The democratic life of the Union" and in the provisions enshrining the specific objectives of the various policies.

Article 3

The philosophy of this Article is to set out the *general* objectives justifying the very existence of the Union and its action for its citizens in a more cross-sectoral fashion and not to list the specific objectives pursued by the various policies of the Union which are to be found in Part Two of the Treaty.

The fundamental difference between this Article and Article 2 therefore needs to be emphasised: while Article 2 enshrines the basic values which make the peoples of Europe feel part of the same "union", Article 3 sets out the main aims justifying the creation of the Union for the exercise of certain powers in common at European level.

Article 4

In accordance with the recommendation from Working Group III (CONV 305/02), this Article confers legal personality on the Union.

An Article on the Union's legal capacity (see Article 282 TEC), given its highly technical nature, should appear in Part Two of the Constitutional Treaty.

Article 5:

The text proposed reflects two central recommendations by Working Group II (CONV 354/02), on the one hand to incorporate in the Constitution the Charter of Fundamental Rights so that it has constitutional status and is legally binding and, on the other hand, to enable the Union to accede to the European Convention on Human Rights.

As to the technique for incorporating the Charter, the fact that the complete text (with all the drafting adjustments mentioned in the Working Group's final report) will appear either in a separate second part of the Constitution or as a Protocol annexed to it will safeguard its fully binding legal nature and allow the general rules concerning future amendments of the Constitution to be applied to the Charter. Moreover, that technique will also keep the structure of the Charter intact and avoid making the first part of the Constitution more lengthy. At the same time, the reference to the Charter in the first few articles of the Constitution will underline its constitutional status.

The legal basis in paragraph 2 enabling the Union to accede to the ECHR also expressly provides that accession must not affect the division of competences between the Union and the Member States, in line with a recommendation from Working Group II. Only the European Convention on Human Rights is mentioned in this paragraph because of the fact that a Court of Justice opinion in 1996 had rejected Community competence to accede to that Convention on the basis of considerations specific to it. This paragraph is not therefore intended to rule out the possibility of Union accession to other international conventions relating to human rights on the basis of the competences conferred in Part Two of the Treaty.

Paragraph 3 draws on Article 6(2) TEU as it now stands and is intended to indicate clearly that, in addition to the Charter, Union law recognises additional fundamental rights as general principles resulting from two sources – the European Convention on Human Rights on the one hand and the constitutional traditions common to the Member States on the other. As stressed by various members of the Convention in Working Group II (see pages 9 and 10 of the final report, CONV 354/02) and at the plenary, the usefulness of this provision is to make clear that incorporation of the Charter does not prevent the Court of Justice from drawing on those two sources to recognise additional fundamental rights which might emerge from any future developments in the ECHR and common constitutional traditions. That is in line with classic constitutional doctrine which never interprets the catalogues of fundamental rights in constitutions as being exhaustive, thus permitting the development, through case-law, of additional rights as society changes.

Article 6

This Article takes over unchanged the prohibition on all discrimination on grounds of nationality, which is currently enshrined in Article 12 TEC. In line with the structure of the current EC Treaty and of the Charter, this prohibition is here placed in a separate Article rather than forming part of the provision on citizenship of the Union. Because of its fundamental importance for the development of Union law, this provision must be placed in Part One of the Constitution. The legal basis for rules prohibiting discrimination on grounds of nationality (see second paragraph of Article 12 of the current TEC) would be placed in Part Two of the Treaty, as would the current Article 13 TEC, which creates a legal basis for combating certain other forms of discrimination.

Article 7

The definition of citizenship of the Union in paragraph 1 follows that given in the current EC Treaty. This paragraph also establishes the principle of equality between all European citizens.

The citizens' rights listed in paragraph 2 include all those currently appearing in the "citizenship" part of the EC Treaty. The right of access to documents of the institutions, at present established in Article 255 of the TEC, would be placed in the Titles on "the democratic life of the Union" or "Union institutions" of the Constitutional Treaty. This could also be the case for the right to good administration established by the Charter (Article 41), since the Charter grants that right to "every person".

More detailed provisions and the legal bases relating to the definition of the conditions for and limits on the exercise of those rights (see Article 18(2); the second sentences of Article 19(1) and (2); the second sentence of Article 20; Article 194 and Article 195 TEC) would appear in Part Two of the Treaty. The same would apply to the provision of the current Article 22 TEC concerning the possible subsequent development of citizens' rights.

TITLE III

1. The Nice European Council called on the Convention to consider **"how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity"**. More specifically, the Laeken European Council called on the Convention to consider **"how the division of competence can be made more transparent"**, **"whether there needs to be any reorganisation of competence"** and **"how to ensure that a redefined division of competence"** is maintained and **"ensure at the same time that the European dynamic does not come to a halt"**.
2. These questions have been discussed in plenary sessions and in Working Groups. On the basis of those discussions, the Praesidium has drawn up a draft text of articles the aim of which is, inter alia, to:
 - (a) Define clearly the fundamental principles governing the limits of the competences between the Union and the Member States and the way in which the Union's competences are to be used (as well as the rules for applying those principles).
 - (b) Determine the different categories of the Union's competences. The key factor in establishing those categories is the extent of the legislative competence conferred on the Union in relation to that of the Member States, according to whether such competence is conferred on the Union alone (exclusive competence) or shared between the Union and the Member States (shared competence), or whether it continues to lie with the Member States (areas for supporting action).
 - (c) Indicate the areas covered by each category of competences. The lists of areas of shared competence are not exhaustive, which takes account of the the Convention's wish not to establish a fixed catalogue of competences. The reference in Article 12 to "principal areas" avoids having to define in detail each area of shared competence. The exact definition, and the extent of each area, are determined by the relevant provisions of Part Two.

(d) In line with the wish of a large number of members of the Convention, include a provision introducing a measure of flexibility in order to enable the Union to react in unforeseen circumstances. But that flexibility is restricted to the areas already specified in Part Two. The provision requires that the Member States' national parliaments be informed explicitly whenever the Commission proposes to use the flexibility clause.

3. In addition to these general remarks, the Praesidium wishes to draw the Convention's attention to the following points:

1. **Definition and application of the fundamental principles (Articles 8 and 9)**

- Article 8 lists and defines, clearly and explicitly, the fundamental principles governing the limits and exercise of competences.
- Article 9 contains certain rules for the application of those principles. The inclusion of a reference to the role of the national parliaments is intended to highlight their importance in monitoring the principle of subsidiarity, in accordance with the conclusions of the Working Group chaired by Mr Méndez de Vigo. The Praesidium's conclusions further to the plenary debate on the Working Group's recommendations will be incorporated in the Protocol on the application of the principles of subsidiarity and proportionality.
- The existing principle according to which Member States implement European Union law is also incorporated in this Article.
- Paragraph 6 on the Union's respect for national identities develops a principle set out in Article 1 of the Constitution.

2. **Categories of competence (Article 10)**

- This Article lists and describes the different categories of the Union's competences, stating for each category what the consequences of the Union's exercise of its competences are for the competences of the Member States.
- The common foreign and security policy and coordination of the Member States' economic policies are given separate paragraphs, in order to reflect the specific nature of the Union's competences in those areas.

3. **Exclusive competences (Article 11)**

- The list in paragraph 1 of the areas of the Constitution in which the Union has exclusive competence goes beyond the present situation, as it includes the entire common commercial policy. This reflects the conclusion of Mr Dehaene's Group that Article 133(6) of the Nice Treaty should be deleted.
- Paragraph 2 of this Article reflects the case law of the Court of Justice on the Union's exclusive competence to conclude international agreements.

4. **Shared competences (Article 12)**

- Areas in which there are shared competences are identified by their exclusion from the areas of exclusive competence and the areas for supporting action. The reference in paragraph 2 to Part Two of the Constitution is a link to the specific provisions of that Part determining the extent and intensity of Union competence in each area.
- The inclusion of energy in the list of areas of shared competence requires the creation of a specific legal basis for that area in Part Two of the Constitution as no such legal basis exists in the current Treaties (thus far acts relating to this area have been adopted on the basis of Article 308).
- The areas of development cooperation and research and technological development (and space) appear in separate paragraphs to indicate that even though the Union exercises its competence in these areas exhaustively, Member States still retain their competences. Despite the importance and scale of Union programmes for development aid and research the Constitution does not envisage the abolition of national programmes.

5. **The coordination of economic policies (Article 13)**

While, for those Member States which have adopted the euro, monetary policy falls within the exclusive competence of the Union, the economic policies of the Member States remain within the competence of the latter, in accordance with the conclusions of Mr Haensch's Working Group.

In this area Union competence consists in coordinating national policies. In view of the importance of such coordination the Praesidium considered that it merited a separate Article.

6. **The common foreign and security policy (Article 14)**

This Article seeks to identify Member States' specific obligations in exercising their competences in this area.

7. **Areas for supporting action (Article 15)**

- As in the case of shared competences, the reference to Part Two is to indicate that the extent and intensity of Union competence in each area are determined by the specific provisions of that Part and to ensure that there are no changes as compared with the current situation other than those expressly decided on by the Convention.
- The inclusion of "sport" and "protection against disasters" in the list of areas for supporting action follows on from the conclusions of Mr Christophersen's Group and involves the creation of a specific legal basis for those two areas in Part Two, given that there is no such basis in the current Treaties (thus far acts in the area of civil protection have been adopted on the basis of Article 308).

8. **Flexibility clause (Article 16)**

- In view of the Convention's desire to ensure that the implementation of this provision respects the limits of the competences conferred on the Union by the Constitution, paragraph 1 states that this provision may be used only "within the framework of the policies defined in Part Two".
- The procedure involving European Parliament assent is proposed (by way of derogation from the conclusions of Mr Amato's Group, which decided that codecision should be the general rule for the adoption of legislative acts and that assent should be reserved for the conclusion of international agreements) and also unanimity for the Council vote. The possibility of a qualified majority could be examined during the Convention's general debate on the question. This procedure is being proposed in order to restrict the use of this provision, while at the same time expediting matters when it is necessary to have recourse to it.
- Paragraph 2 follows up the proposals by Mr Mendez de Vigo's Group.

- Paragraph 3 seeks to introduce into the Constitution a limitation on the scope of the flexibility clause which reflects current Court of Justice case law.

