



Statewatch

EU Constitution: Decision-making

The attached summary lists the rules on EU legislative and executive decision-making procedures (leaving aside the Commission's executive powers) that would apply under the final version of the proposed EU Constitution (document Conv. 850/03). In order to show how the rules would change, it also indicates how each of the rules compares to the current rules (where they exist) as they apply in July 2003. Where there is no change from the current rules, the second column is left blank. The list uses the Article numbers as they appear in the proposed Constitution.

Where the 'legal base' for EU action would be new or substantially revised in scope under the Constitution, this is indicated (although the details of changes in scope are not set out). In several cases, the Constitution would create new 'legal bases' for powers that the EC is in practice exercising already under the 'residual powers' clause of Article 308 EC (which at present entails a unanimous vote in Council, sole initiative of the Commission and consultation of the EP). These cases are also indicated (as are the current uses of Article 308 where the Constitution would *not* create a new legal base).

It should be noted that under the current Treaty, some of these rules are scheduled to change automatically or at the discretion of the Council in May 2004 (immigration, visas, borders and civil law), when the basic rules are laid down (asylum) or from 2007 (cohesion spending and financial regulations). These already-scheduled changes are noted in detail in the summary.

Normal legislative procedure

First of all, the list of cases where the **normal legislative procedure** would apply is summarized. This is the current 'co-decision' procedure as set out in Article 251 EC; this will appear in Article III-302 of the new Constitution, but will essentially be unchanged. But the number of cases where the procedure applies will be roughly doubled, as can be seen from the list. All references in the Constitution to laws or framework laws entail use of this procedure, except where otherwise noted.

'Special legislative procedures'

Next the summary lists the cases of **'special legislative procedures'** where the Council or the EP adopt legislation by themselves, but with some participation of the other 'legislative chamber'. It can be seen that there will still be some cases of legislation adopted with the assent of the EP, although there will no longer be any cases of co-decision combined with unanimous voting.

Council 'executive' actions

Then the summary lists cases of **Council 'executive' actions**. Executive action is distinguished from legislation in the draft treaty because the latter involves the use of laws and framework laws, and the former involves the use of regulations and decisions.

European Council executive actions

Next, the summary lists cases of **European Council executive actions**. This is a much-expanded list compared to the present, as the European Council will be given the powers currently given to the Council acting at the level of Heads of State or Government (this body is legally distinct from the European Council because the latter includes the President of the Commission and is not subject to judicial review). It will also be given a number of other Council powers over key institutional decisions, plus some new institutional powers which would be created by the draft Constitution.

The draft Constitution would not provide expressly for judicial review of the European Council except for the case of Article III-276, where the European Council would take decisions on suspension of Member States now taken by the Council. However, the European Council would be implicitly covered by Article III-274, since it would be given the status of an institution, and all acts of 'institutions' could be referred to the Court of Justice by national courts. It would also be able to act as a plaintiff under Article III-272. But it should also be recalled that the Court of Justice has been willing to subject EU bodies to judicial review where necessary in the interests of the law, even where the current Treaty did not provide for it. As an institution, the European Council would also be covered by the access to documents rules in Article I-49 and III-305, as well as the jurisdiction of the Ombudsman in Article I-48 and III-237.

Member States and national parliaments

Finally, the summary lists the situation, including changes, to cases where **Member States** take decisions, or where **Member States' national parliaments** must ratify EU acts or Member States' decisions.

The distinction between legislative and executive acts

It should be recalled that the **distinction between legislative and executive acts** will have consequences for the following (besides the use of normal or special legislative procedures for legislation):

- the role of the Legislative Council (I-23(1))
- the European Council's different powers to amend decision-making rules (I-24(4))
- the Commission's right of initiative (I-25(2))
- the ability to confer upon the Commission delegated powers, as distinct from implementing powers (I-35(1))
- the rules on publication of acts (I-38)
- the rules on public meetings (I-49(2))
- publication of 'the relevant documents' (III-305(2))
- the protocol on national parliaments (points 2, 3, 4, 6)
- the protocol on subsidiarity and proportionality (in its entirety)

Other distinctions could emerge in practice.

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Legislative Acts

Ordinary legislative procedure

Part III:

Constitutional proposal	change from current rules (as of July 2003)
6 public services	- new clause
7 non-disc nationality	
8(2) incentive measures non-disc	
9(1) citizens' movement	
19 free movement workers	
21 social security migrant workers	- unanimity in Council
23 establishment	
24 establishment exceptions	- no EP role
25 establishment & public policy, etc.	
26 mutual recognition	- unanimity in Council [partly]
29 free movement services third-c nats	- no EP role
32 free movement services	- no EP role
41 customs cooperation	- <i>text revised</i>
46(2) capital	- no EP role
49 capital/JHA	- new clause
65 internal market	
66 harmonisation of law	- no EP role
68 EC IP rights	- new clause [Art 308 EC used]
71(6) surveillance procedure	- cooperation
77(6) bank supervision	- unanimity Council/EP assent
79(5) ECB statute*	- EP assent*
83 monetary legislation	- no EP role; <i>text revised</i>
101 employment	
104(2) social law	
108 sex equality in employment	
115 social fund	
117 funding outside cohesion funds	
119 structural funds	- assent
120 implementing measures re funds	
127(2) agriculture/fisheries	- consultation
130(1) environment	
132(3) consumers	
134 transport	
143 air/sea transport	
145 trans-european networks	
149 research programmes	
150 research participation	

151	supplementary research programmes	
152	participation in research programmes	
155	space	- new clause
157	energy	- new clause [art 308 EC used]
166	visas/borders	- consultation/unanimity*; <i>text revised</i>
167	asylum	- consultation/unanimity*; <i>text revised</i>
168(2)	migration	- consultation/unanimity*; <i>text revised</i>
168(4)	integration of migrants	- new clause
170(2)	civil law (except family law)	- <i>text revised</i>
171	criminal cooperation/procedure*	- consultation/unanimity; <i>text revised</i> *
172	substantive criminal law*	- consultation/unanimity; <i>text revised</i> *
173	crime prevention*	- new clause [prior measures adopted]*
174	Eurojust*	- consultation/unanimity; <i>text revised</i> *
176(2)	police cooperation*	- consultation/unanimity; <i>text revised</i> *
177	Europol*	- consultation/unanimity; <i>text revised</i> *
179	public health	
180	industry	
181	culture	- unanimity in Council
177	education	- <i>text revised</i> [sport added]
183	vocational training	
184	civil protection	- new clause [art 308 EC used]
185	administrative cooperation	- new clause
217	common commercial policy	- no EP role; <i>text revised</i>
219	development policy	
221	funding non-developing states	- EP consultation
223	humanitarian aid	- new clause; but treated as dev't policy
233	European political parties	
264	specialised courts*	- consultation/unanimity*
269	IP courts	- consultation/unanimity/MS ratification
289	statute of ECJ*	- consultation/unanimity*
299	EIB statute*	- consultation/unanimity*
304	EU administrative law	- new clause
318(1)	financial regulations	- consultation
321	EC fraud	- <i>text revised</i>
333	staff regulations	- consultation
335	statistics	

Part I:

Constitutional proposal

change from current rules

46(4)	citizens' initiatives	- new clause
49(4)	access to documents	- <i>text revised</i>
50(2)	data protection	- <i>text revised</i>

- 36 extensions of co-decision (including new clauses)

- * indicates Commission shares initiative in this case (current initiative for a single MS to propose criminal/police law would become an initiative for a quarter of MS)
- under current rules, Commission will have sole right of initiative over all visas, borders, asylum, immigration, family law from 1.5.2004
- not clear from Art. I-33 whether shared initiative cases are to be considered normal or special legislative procedure; but apparently normal procedure, as Art. III-302 (setting out details of the normal legislative procedure) makes provision for MS initiatives in police/criminal law and for initiatives of EU institutions and bodies besides Commission (ECB, EIB, ECJ)
- Arts. III-119 and III-318(1) would be subject to unanimity until 1.1.2007
- co-decision currently provided for on part of visa law from 1.5.2004; on most asylum law when certain conditions met; on external borders (subject to conditions), illegal immigration and freedom to travel from 1.5.2004 according to Nice treaty declaration
- QMV in Council currently used for part of visa policy (visa list, visa format)

Special legislative procedures

Council acts: Part III

Constitutional proposal

change from current rules

8(1)	non-discrimination [consent EP]	- EP consultation
9(2)	citizens' passports, etc.	- existence of power unclear
10	citizens' electoral rights	
11	citizens' consular protection [QMV]	- MS to reach agreement; no role EP
13	new citizens' rights [consent EP]	- consultation EP
46(3)	capital exceptions	- no EP role
62(1)	indirect tax	
62(2)	indirect tax exceptions [QMV]	- unanimity in Council
63	company tax fraud, coop [QMV]	- new clause
64	harmonisation of law	
68	languages, EU IP system	- new clause [Art 308 EC used]
76(13)	exc. deficit protocol	
99(3)	social policy (4 exceptions)	
130(2)	environmental policy (3 exceptions)	
170(3)	family law	- shared initiative to 1.5.2004*
175	Euro. pub. prosecutor [EP approval]*	- new clause
177(3)	police operational cooperation*	- revised text*
178	cross-border police action*	*
232(1)	EP elections [EP initiative, EP consent]	

- Commission initiative/unanimity Council/consultation EP unless otherwise indicated
- * indicates Commission shares initiative in this case
- according to Art. I-24(4), the European Council could decide to switch any or all of the above clauses to the normal legislative procedure

Council acts: Part I

17	flexibility [Comm init, EP consent]	- text revised; EP consultation
53(3)	own resources [MS ratify]	- text revised
53(4)	details own resources [EP consent]	- new clause
54(2)	multi-annual fin. f'work [EP consent]	- text revised

- only Art. I-53(3) requires unanimous voting; others are QMV (except first multi-annual financial framework under constitution requires unanimous voting: Art. I-54(4))
- Art I-17 refers to 'measures', so could also include executive acts
- recent uses of the current flexibility clause (Article 308 EC) that would not be covered by express powers are the adoption of the EC company statute and comparable measures, and the extension of monetary legislation to non-eurozone MS

EP acts (all in Part III)

Constitutional proposal

change from current rules

232(2) MEP statute

235 Committee of inquiry [approval Comm]

237(4) Ombudsman

- EP initiative/opinion Commission/QMV Council unless otherwise indicated

- Art 232(2) requires unanimity in Council for taxation rules and QMV for other rules

Sui generis rule (Part III)

310 budget

- revised text

Executive Acts of Council

Part III: qualified majority vote

Constitutional proposal

change from current rules

14	internal market	
39	common external tariff	
48	emergency capital restrictions	
49	capital/JHA implementation	- new clause
42	competition [EP consult]	
56(3)	specific state aid rules	
58	general state aid rules [EP consult]	
72(1)	support measures	
72(2)	support measures	
74(2)	overdrafts, etc. [EP consult]	- cooperation
75(2)	EU assumption of debt [EP consult]	- cooperation
76(6)	ex deficit decision	
76(7)	ex deficit application	
76(13)	ex deficit rules [EP consult]	
78(2)	coins [EP consult]	- cooperation
79(6)	ECB acts* [EP consult]	
82(3)	ECB powers* [EP consult]	
86(3)	Ecofin committee	
88(1)	Eurozone measures	- new clause
90	Eurozone policy, representation	
92(2)	extension EMU [EP consult]	
95(2)	mutual assistance [initiative unclear]	
96(3)	MS derogations [initiative unclear]	
106	social agreements	
126(2)	agriculture/fisheries (aid)	- consultation
127(3)	agriculture/fisheries (technical)	- consultation
138(3)	transport discrimination [EP consult]	- no EP consultation
149(4)	research programmes [EP consult]	
154	joint undertakings [EP consult]	
161	JHA evaluation	- new clause [prior powers used]*
164	JHA admin coop* [EP consult]	- revised text; unanimity to 1.5.2004*
167(3)	emergency asylum [EP consult]	- revised text; no EP consult
168(3)	readmission treaties [EP consent]	- implied power; unanimity
201(2)	CFSP exception [init FM/MS]	- revised text
212(2)	arms agency [init unclear]	- new clause
222	balance of payments	- new clause [art 308 used]
224	sanctions	- text revised
227(9)	treaties [EP various]	- text revised
228(1)	exchange rate	
228(2)	exchange rate policy	

- 228(3) monetary treaty negotiations
- 231 anti-terrorist measures - new clause
- 262 judicial screening panel [init ECJ] - new clause
- 290(4) Ct of Auditors rules [init CoA]
- 291(2) Ct of Auditors [EP consult; init Council]
- 292 CoR appointment [init MS]
- 296 ESC appointment [init MS]
- 303 inter-inst agreements [all 3 insts] - new clause
- 306 salaries [init unclear]
- 311(2) budget 1/12s [sui generis]
- 318(2) financial regulations - unanimity
- 325(1) flexibility [EP consent] - *text revised*
- 325(2) CFSP flexibility [init unclear] - *text revised*; possible ‘emergency brake’
- 326 MS joining flexibility - *text revised*

- Commission initiative and no role EP unless otherwise indicated
- * indicates Commission shares initiative
- some provisions call for informing EP after act has been taken
- it is not expressly stated that Art. III-76(6) requires executive acts, as the type of instrument to be used is not stated, but the use of executive acts can be assumed because of the reference to Commission initiative (such a reference is not necessary where acts are legislative: see Art. I-25(2))
- current power over aspects of JHA administrative cooperation (Art. 66 EC) moves to QMV and Commission right of initiative from 1.5.2004
- current rules call for possible change to QMV in voting on readmission agreements from 1.5.2004 (Declaration to Nice Treaty)
- move to QMV for Art. 318(2) would not take place until 1.1.2007

Part III: simple majority vote [initiative unclear, no role for the EP]

- 102 employment committee [EP consult]
- 111 social protection committee [EP consult]
- 247 General Secretariat, Sec-Gen, procedure, rules of procedure
- 248 request to Commission
- 249 committees
- 334 Commission collection info

Part I: qualified majority vote

Constitutional proposal

change from current rules

- 58(1) ‘yellow card’ to MS [various init; 4/5 vote]
- 58(3) implementation suspension MS
- 59(2) withdrawal agreement [EP consent] - new clause

- the right of initiative is not indicated unless otherwise stated

Part III: unanimous vote

Constitutional proposal

change from current rules

- 57(2) state aid approval [MS init]
- 92(3) exchange rates
- 104(3) social policy decision-making [EP consult]
- 106(2) labour agreements
- 130(2) env dec-making [init unclear] - Comm initiative
- 135 transport exceptions
- 170(2) family dec-making [EP consult] - shared initiative
- 171(2) crim proc powers [EP assent]* - new clause
- 172 subst crim law powers [EP assent]* - new clause
- 191 O'seas countries/terrs [init unclear]
- 201(1) CFSP general rule [init MS/For Min] - init MS/Commission
- 210(2) defence [init unclear] - init MS/Commission
- 211(2) defence [init unclear] - init MS/Commission
- 215 CFSP funding [init unclear; EP consult] – no role EP
- 217(4) commercial policy exception - *revised text*
- 227(9) international agreements [EP various]- *revised text*
- 228(1) exchange rate agreements
- 259 more Adv-Generals [init ECJ]
- 264(4) lower court appointments [init unclear]
- 292 MS #s on committee [init unclear] - new clause
- 295 MS #s on committee [init unclear] - new clause
- 301 voting to amend Comm. proposal
- 302(9) voting to amend Comm. Proposal
- 327 flex budget [init unclear; EP consult]
- 328 flex decision-making [own init] - new clause
- 328 flex leg proc [EP consult; own init] - new clause
- 339 languages [init unclear]
- 342 arms exception

- Commission initiative and no role EP unless otherwise stated; * is shared initiative
- the current Arts. 71(2), 133(7) EC and 42 EU would be repealed, along with current Art. 215, para 2, line 2 (unan. Council vote not to appoint a replacement for a Commissioner)
- according to Art. I-24(4), the European Council could decide to switch any or all of the above clauses to QMV (although the power to change the defence voting rule is unclear)
- since CFSP acts are binding 'decisions', a category of 'legal acts', it would be clear that current Joint Actions/Common Positions are legally (rather than politically) binding

Part I: unanimous vote

- 39(7) foreign policy decisions - *text revised*
- 40(4) defence decisions
- 57(2) accession

European Council

Constitutional proposal

change from current rules

Part I

- | | | |
|-------|---|---|
| 19(2) | EP new rules [EP init, consent]* | - Council power [no role EP]; <i>text revised</i> |
| 21(1) | chair appointment** | - new clause |
| 23(3) | Council formations | - Council rules of procedure (simple maj'ty) |
| 23(4) | Council rotation | - Council power; <i>text revised</i> |
| 24(4) | extend leg. procedure [EP consult]* | - new clause |
| 24(4) | extend QMV in part III* | - new clause |
| 25(3) | Commission numbers | - Council power; <i>text revised</i> |
| 26(1) | nominate Comm Pres** [EP assent] | - HSG Council power; <i>text revised</i> |
| 27(1) | app't For Min [Comm Pres assent]** | - Council appoints HRep CFSP; <i>text revised</i> |
| 39(7) | foreign policy decisions* | - common strategies; <i>text revised</i> |
| 39(8) | CFSP decision-making* | - new clause |
| 40(2) | common defence* [MS ratify] | - currently 'might' be established, not 'will' |
| 58(2) | suspension MS* [various init, EP consent] | - HSG Council power |
| 59(3) | extension negs with w'drawing MS | - new clause |

* - indicates unanimous voting

** - indicates voting by QMV

- voting rule is consensus (Art. I-20(4)) and initiative is unclear, unless stated otherwise

Part III [unanimous voting, except simple majority for 244(3)]

- | | | |
|--------|------------------------------|--|
| 194 | CFSP strategy [init Council] | - common strategies; <i>text revised</i> |
| 201(3) | CFSP decision-making rules | - new clause |
| 244(3) | rules of procedure | - new clause |
| 245 | Council rotation | - Council power |

Part IV [simple majority]

- | | | |
|---|------------------------|-----------------|
| 7 | convene IGC/Convention | - Council power |
|---|------------------------|-----------------|

- as an 'institution', the European Council would fall partly within ECJ jurisdiction (even though the only express reference to it in the Court provisions is in III-267; see III-269 and 271), and general rules applying to the EU institutions would also apply to it (for example, access to documents rules)

- the references to the Council acting at Head of State/government (HSG) level would all be replaced by references to the European Council (Art. 7 TEU, Arts. 122, 128, 214(2) EC) or repealed (current Art. 121 EC)

- Art III-196(3) repeats Art. I-39(8) and Art. III-240 repeats Art. I-23

- renaming common strategies as binding 'decisions', a category of 'legal acts', settles the current dispute as to whether they are binding or not

Other institutional issues

Member State decision-making (always unanimous/common accord)

Part I

57(2) accession treaties

Part III

84 Appointment of ECB executive
260 appointment ECJ judges, AGs
261 appointment CFI judges
338 seat of institutions

- current MS agreements on freedom of movement for workers to/from overseas countries and territories (current Art. 186 EC) would become subsumed into power to adopt EU legislation (proposed Art. III-185)
- current MS power to adopt conventions in certain areas (Art. 293 EC, Art. 34 EU) would be abolished, as would the power to negotiate between themselves on consular protection (Art. 20 EU)
- current shared competence over certain commercial policy measures (Art. 133 EC), requiring conclusion of treaties jointly between EC/MS, would be abolished (proposed Art. III-212)

Part IV

7 Constitutional amendment
8 Constitutional treaty

Member State ratification of EU institutions' acts

Part I

40(2) common defence
53(3) Own resources - extent of power reduced

Part III:

13 new citizens' rights
232(1) EP elections

- dropped in Art. III-269 (current Art. 229a EC): becomes normal legislative procedure
- current Art. 42 TEU (transfer of third pillar) repealed entirely