



Statewatch Analysis

EU Reform Treaty Analysis no. 3.3:

Revised text of Part Three, Titles I to VI of the Treaty establishing the European Community (TEC): Internal Market and competition

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Introduction

The following text sets out what will be the text of the internal market and competition provisions of the revised Part Three of the Treaty establishing the European Community (TEC) following the amendments to be agreed by the planned Reform Treaty. This text is based on the draft Reform Treaty released on 23 July 2007, and incorporates the amendments which are proposed by this draft Treaty to the current TEC into the current TEC text. It is updated to include the text as revised in October 2007 by legal experts and by EU leaders when they agreed on the draft Treaty on 18 October 2007.

I have indicated by ~~strikeout~~ which provisions of the current TEC would be deleted, and by **bold** and underline which provisions would be added to the TEC. The provisions in *italics* are amendments following from the Reform Treaty mandate for an intergovernmental conference (IGC) as agreed at the EU leaders' summit on 23 June 2007, which amend what was agreed as part of the Constitutional Treaty.

It should be recalled that the TEC will be renamed the 'Treaty on the Functioning of the European Union' (TFEU) by the Reform Treaty.

The commentary on the Articles gives more detail on which Treaty provisions would be amended, and compares the text in detail to the text of the Constitutional Treaty (OJ 2004 C 310). The changes which stem from the Reform Treaty mandate are also discussed further in the commentary.

Some further changes to the text are possible before the final signature of the Treaty - which is planned for 13 December 2007. This analysis will be updated in the event of changes to the text.

The draft Reform Treaty confirms that the Treaty Articles will be renumbered, but does not yet include the new numbering. I have inserted the likely new numbering of the Treaty provisions in square brackets throughout.

The Reform Treaty will make a number of standardized changes to the TEC/TFEU, such as the following:

- the word 'Community' will be replaced with 'Union' throughout;
- references to the 'common market' will be replaced by references to the 'internal market';
- references to 'this Treaty' will be replaced by references to 'the Treaties', ie including the Treaty on European Union (TEU) together with the TEC/TFEU;
- references to the Council voting by qualified majority (QMV) will be deleted, since this will be the default method by which the Council votes;
- the references to the co-decision procedure (currently variants of, 'The Council, acting in accordance with the procedure referred to in Article 251') will be replaced by references to the 'ordinary legislative procedure';
- the adoption of legislation other than by means of the co-decision procedure will be referred to as a 'special legislative procedure';

I have amended the current Treaty to reflect all of these changes, but since they do not amount to changes to the substance of the existing text, I have not commented on them. I have, however, pointed out all cases where QMV and/or the co-decision procedure would be extended, or where the decision-making procedure would otherwise be altered, or where the competence of the EU would be changed in some way.

General comments

This part of the Treaty is the core of the original European Economic Community. It is amended less by the draft Reform Treaty than any other part of the Treaties.

The substantive amendments which the draft Reform Treaty would make to these provisions of the Treaty are as follows:

- a) co-decision is introduced for the basic rules governing agriculture and fisheries (Article 37);
- b) qualified majority voting (QMV), with an 'emergency brake', will apply to social security for migrant workers, and for self-employed migrants (Article 42);
- c) co-decision will apply to the adoption of legislation on exceptions from the right of establishment (Article 45);
- d) QMV will apply to all aspects of decision-making regarding free movement of self-employed persons (Article 47);
- e) co-decision will apply to legislation on the provision of services by resident third-country nationals resident in the Community (Article 49);
- f) co-decision will apply to legislation on the provision of services (Article 52);
- g) co-decision will apply to legislation on the free movement of capital to and from third countries, while consultation will apply to legislation making such free movement more restrictive (Article 57);
- h) there is a new procedure permitting the authorization of national restrictions on the movement of capital to and from third countries (new Article 58(4));
- i) the current Article 60, concerning financial sanctions on third countries, has amended (but also moved into the new Part Five of the Treaty, on external relations);

- j) an exception providing for unanimity in exceptional cases as regards the common transport policy has been deleted (Article 71);
- k) the potential repeal of exceptions to the transport and state aids rules which concern the historic division of Germany (Articles 78 and 87);
- l) there is a clarification of the relationship between Articles 94 and 95 of the Treaty (the general internal market powers);
- m) co-decision is extended to the adoption of legislation governing distortion of competition (Article 96); and
- n) there is a new 'legal base' for the adoption of legislation concerning EU-wide intellectual property rights (QMV and co-decision, except languages aspects are subject to unanimity and consultation).

All of these changes are the same as those provided for in the Constitutional Treaty, except for two. First of all, the application of the 'emergency brake' which applies to the extension of QMV to social security for migrant workers and self-employed has been clarified as part of the deal to negotiate the Reform Treaty.

Secondly, a new Article introduced by the Constitutional Treaty has been moved from the free movement of capital section to Title IV of Part Three (the JHA Title). This Article gives the EU new competence to adopt financial sanctions on domestic 'terrorists' (ie groups or individuals based within the EU who are designated as 'terrorist' by the EU or, perhaps by the United Nations). Placing this Article in the JHA Title means that the British, Irish and Danish opt-outs from JHA measures will now apply to this legislation.

Also, although this is not a substantive point, the Constitutional Treaty aimed to restructure most of the internal market provisions of the Treaty, and to move the agriculture, transport and JHA Titles to other Parts of the Treaty. However, this idea has been dropped in the draft Reform Treaty.

Of the new changes listed above, although there are several extensions of qualified majority voting and co-decision, most of them concern 'legal bases' which are rarely, if ever, used. There is no extension of qualified majority voting on tax matters. The most significant changes are: the extension of QMV to social security for migrant workers and self-employed, although this is subject to an 'emergency brake' which has been clarified in the draft Reform Treaty (as noted above); the extension of co-decision to the basic rules on agriculture and fisheries; and the new legal base for EU-wide intellectual property measures, although the impact of this is limited because the most controversial aspect of such measures (the language regime) remains subject to unanimous voting.

PART THREE

COMMUNITY UNION POLICIES AND INTERNAL ACTIONS

TITLE I

FREE MOVEMENT OF GOODS

THE INTERNAL MARKET

Article 22a (ex-14) [26]

(III-130)

~~1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.~~

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of ~~this Treaty~~ **the Treaties**.

3. The Council, ~~acting by a qualified majority~~ on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

These amendments update Article 14 to take account of the expiry of the 1992 deadline for completing the internal market. Unlike the Constitutional Treaty, the draft Reform Treaty would not merge Articles 14 and 15 TEC.

Article **22b** (ex-15) [27]
(III-131)

When drawing up its proposals with a view to achieving the objectives set out in Article 14, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain ~~during the period of establishment~~ **for the establishment** of the internal market and it may propose appropriate provisions.

If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the ~~common~~ **internal** market.

The amendments do not change the substance.

The Constitutional Treaty would have moved the current Articles 297 and 298 TEC (national security exceptions) from the final provisions of the Treaty to this part of the Treaty. The draft Reform Treaty would not. This means that these provisions will not be subject to the possibility of a simplified revision pursuant to the new Article 33(2) TEU.

TITLE I **la**

FREE MOVEMENT OF GOODS

Article 23 [28]
(III-151(1) and (2))

1. The ~~Community~~ **Union** ~~shall be based upon~~ **shall comprise** a customs union which shall cover all trade in goods and which shall involve the prohibition between

Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. The provisions of Article 25 and of Chapter 2 of this title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

Article 24 [29]
(III-151(3))

Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

This is the first Article of the TEC not subject to any amendments whatsoever.

CHAPTER 1

THE CUSTOMS UNION

Article 25 [30]
(III-151(4))

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

Article 26 [31]
(III-151(5))

Common Customs Tariff duties shall be fixed by the Council ~~acting by a qualified majority~~ on a proposal from the Commission.

Article 27 [32]
(III-151(6))

In carrying out the tasks entrusted to it under this chapter the Commission shall be guided by:

- (a) the need to promote trade between Member States and third countries;
- (b) developments in conditions of competition within the Union Community in so far as they lead to an improvement in the competitive capacity of undertakings;
- (c) the requirements of the ~~Community~~ Union as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods;
- (d) the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production and an expansion of consumption within the ~~Community~~ Union.

The Constitutional Treaty would have merged Articles 23-27 TEC; the draft Reform Treaty would not.

Chapter 1a

CUSTOMS COOPERATION

Article 27a (ex-135) [33]
(III-152)

Within the scope of application of this Treaty the Treaties, ~~the Council, acting in accordance with the procedure referred to in Article 254~~ the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission. ~~These measures shall not concern the application of national criminal law or the national administration of justice.~~

This Article has been moved, with amendments, to become Article 27a, and the criminal law limitation has been removed. This will allow criminal law measures relating to customs to be adopted, in accordance with the clause on this issue in the JHA Title. It should be noted that the UK, Denmark and Ireland will therefore have an opt-out from any criminal law measures concerning EU customs law.

CHAPTER 2

PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 28 [34]
(III-153)

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 29 [35]
(III-153)

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

The Constitutional Treaty would (foolishly) have merged Articles 28 and 29 TEC. The draft Reform Treaty would not.

Article 30 [36]
(III-154)

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

It is striking that, if the projected new numbering of the Treaty is correct, this well-known Treaty Article will revert to the same number it had before the Treaty of Amsterdam.

Article 31 [37]
(III-155)

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

TITLE II

AGRICULTURE AND FISHERIES

The name of the Title is amended. However, the unwise idea (in the Constitutional Treaty) of moving this Title away from the internal market provisions and placing it much further into the Treaty (which would perhaps have altered the character of this Title) is not included within the draft Reform Treaty.

Article 32 [38]
(III-225 and III-226)

1. **The Union shall define and implement a common agriculture and fisheries policy.**

The ~~common~~ **internal** market shall extend to agriculture, **fisheries** and trade in agricultural products. "Agricultural products" means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. **References to the common agricultural policy or to agriculture, and the use of the term 'agricultural', shall be understood as also referring to fisheries, having regard to the special characteristics of this sector.**

2. Save as otherwise provided in Articles 33 to 38, the rules laid down for the establishment **and functioning** of the ~~common~~ **internal** market shall apply to agricultural products.

3. The products subject to the provisions of Articles 33 to 38 are listed in Annex I to ~~this Treaty~~ the Treaties.

4. The operation and development of the ~~common~~ internal market for agricultural products must be accompanied by the establishment of a common agricultural policy.

The amended paragraph 1 clearly applies the Common Agricultural Policy to fisheries. In practice, the EU already has a common fisheries policy.

Article 33 [39]
(III-227)

1. The objectives of the common agricultural policy shall be:
 - (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
 - (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
 - (c) to stabilise markets;
 - (d) to assure the availability of supplies;
 - (e) to ensure that supplies reach consumers at reasonable prices.
2. In working out the common agricultural policy and the special methods for its application, account shall be taken of:
 - (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;
 - (b) the need to effect the appropriate adjustments by degrees;
 - (c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

Article 34 [40]
(III-228)

1. In order to attain the objectives set out in Article 33, a common organisation of agricultural markets shall be established.

This organisation shall take one of the following forms, depending on the product concerned:

- (a) common rules on competition;
 - (b) compulsory coordination of the various national market organisations;
 - (c) a European market organisation.
2. The common organisation established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 33, in particular regulation of prices, aids for the production and marketing of the various

products, storage and carryover arrangements and common machinery for stabilising imports or exports.

The common organisation shall be limited to pursuit of the objectives set out in Article 33 and shall exclude any discrimination between producers or consumers within the ~~Community~~ Union.

Any common price policy shall be based on common criteria and uniform methods of calculation.

3. In order to enable the common organisation referred to in paragraph 1 to attain its objectives, one or more agricultural guidance and guarantee funds may be set up.

Article 35 [41]
(III-229)

To enable the objectives set out in Article 33 to be attained, provision may be made within the framework of the common agricultural policy for measures such as:

- (a) an effective coordination of efforts in the spheres of vocational training, of research and of the dissemination of agricultural knowledge; this may include joint financing of projects or institutions;
- (b) joint measures to promote consumption of certain products.

Article 36 [42]
(III-230)

The provisions of the chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 37(2) ~~and (3)~~ and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 33.

~~The Council may, in particular, authorise the granting of aid~~ The Council, on a proposal from the Commission, may authorise the granting of aid:

- (a) for the protection of enterprises handicapped by structural or natural conditions;
- (b) within the framework of economic development programmes.

Article 37 [43]
(III-231)

~~1. In order to evolve the broad lines of a common agricultural policy, the Commission shall, immediately this Treaty enters into force, convene a conference of the Member States with a view to making a comparison of their agricultural policies, in particular by producing a statement of their resources and needs.~~

2. ~~1.~~ Having taken into account the work of the Conference provided for in paragraph 1, after consulting the Economic and Social Committee and within two years of the entry into force of this Treaty, the The Commission shall submit proposals for working out and implementing the common agricultural policy,

including the replacement of the national organisations by one of the forms of common organisation provided for in Article 34(1), and for implementing the measures specified in this title.

These proposals shall take account of the interdependence of the agricultural matters mentioned in this title.

~~The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make.~~

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consultation of the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 34(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.

2a. The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.

~~3. The Council may, acting by a qualified majority and in~~ **in** accordance with paragraph 2, ~~replace the national market organisations~~ **may be replaced** by the common organisation provided for in Article 34(1) if:

- (a) the common organisation offers Member States which are opposed to this measure and which have an organisation of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialisation that will be needed with the passage of time;
- (b) such an organisation ensures conditions for trade within the **Community Union** similar to those existing in a national market.

4. If a common organisation for certain raw materials is established before a common organisation exists for the corresponding processed products, such raw materials as are used for processed products intended for export to third countries may be imported from outside the **Community Union**.

The co-decision procedure is applied to the basic aspects of agricultural and fisheries law, with other aspects reserved for the Council without EP participation. This is another well-known Treaty Article which would revert to its pre-Amsterdam numbering, if the projected new numbering of Treaty articles is correct.

Article 38 [44]
(III-232)

Where in a Member State a product is subject to a national market organisation or to internal rules having equivalent effect which affect the competitive position of similar production in another Member State, a countervailing charge shall be

applied by Member States to imports of this product coming from the Member State where such organisation or rules exist, unless that State applies a countervailing charge on export.

The Commission shall fix the amount of these charges at the level required to redress the balance; it may also authorise other measures, the conditions and details of which it shall determine.

TITLE III

FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1

WORKERS

Article 39 [45] (III-133)

1. Freedom of movement for workers shall be secured within the Community Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in ~~implementing~~ regulations to be drawn up by the Commission.
4. The provisions of this article shall not apply to employment in the public service.

Article 40 [46] (III-134)

~~The Council shall, acting in accordance with the procedure referred to in Article 251~~ **The European Parliament and the Council, acting in accordance with the ordinary legislative procedure,** and after consulting the Economic and Social Committee, **shall** issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 39, in particular:

- (a) by ensuring close cooperation between national employment services;
- (b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether

resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

- (c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;
- (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 41 [47]
(III-135)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

Article 42 [48]
(III-136)

~~The Council shall, acting in accordance with the procedure referred to in Article 251, **The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall** adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for ~~migrant workers~~ **employed and self-employed workers** and their dependants:~~

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- (b) payment of benefits to persons resident in the territories of Member States.

~~The Council shall act unanimously throughout the procedure referred to in Article 251.~~

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure, or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

Unanimity is dropped in this area, but an ‘emergency brake’ is provided for. This provision has been clarified in accordance with the Reform Treaty mandate. A Declaration, agreed as part of the Reform Treaty mandate, will point out that the

European Council will act by consensus. The scope of this Article is also extended to migrant self-employed workers. Since the 1970s, this group of persons has been covered by the legislation in this area pursuant to Article 308 TEC (the general clause granting 'residual' powers to the Community if there is no more specific legal base).

CHAPTER 2

RIGHT OF ESTABLISHMENT

Article 43 [49] (III-137)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

Article 44 [50] (III-138)

1. In order to attain freedom of establishment as regards a particular activity, ~~the Council, acting in accordance with the procedure referred to in Article 251~~ **the European Parliament and the Council, acting in accordance with the ordinary legislative procedure**, and after consulting the Economic and Social Committee, shall act by means of directives.

2. The **European Parliament, the** Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

- (a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;
- (b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the ~~Community~~ **Union** of the various activities concerned;
- (c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;
- (d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that

- State at the time when they intended to take up such activities;
- (e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 33(2);
 - (f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;
 - (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and other, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 with a view to making such safeguards equivalent throughout the **Community Union**;
 - (h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

Article 45 [51]
(III-139)

The provisions of this chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

~~The Council may, acting by a qualified majority on a proposal from the Commission,~~ **The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may** rule that the provisions of this chapter shall not apply to certain activities.

The co-decision procedure has been extended to this Article.

Article 46 [52]
(III-140)

1. The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

~~2. The Council shall, acting in accordance with the procedure referred to in Article 251,~~ **The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall** issue directives for the coordination of the abovementioned provisions.

Article 47 [53]
(III-141)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, ~~the Council shall, acting in accordance with the procedure referred to in Article 251,~~ **the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall** issue directives for the mutual recognition of diplomas, certificates and other evidence of formal

qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

~~2. For the same purpose, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. The Council, acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. In other cases the Council shall act by qualified majority.~~

~~3. 2.~~ In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions is dependent upon coordination of the conditions for their exercise in the various Member States.

The exception to this Article providing for unanimous voting has been deleted.

Article 48 [54]
(III-142)

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the ~~Community~~ **Union** shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Article ~~48~~**a** (ex-294) [55]
(III-143)

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 48, without prejudice to the application of the other provisions of ~~this Treaty~~ **the Treaties**.

This Article has been moved here from the final provisions.

CHAPTER 3

SERVICES

Article 49 [56]
(III-144)

Within the framework of the provisions set out below, restrictions on freedom to provide services within the ~~Community~~ **Union** shall be prohibited in respect of nationals of Member States who are established in a ~~State of the Community~~ **Member State** other than that of the person for whom the services are intended.

~~The Council may, acting by a qualified majority on a proposal from the Commission,~~ **The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may** extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the ~~Community~~ **Union**.

The co-decision procedure is extended to this Article.

Article 50 [57]
(III-145)

Services shall be considered to be "services" within the meaning of ~~this Treaty~~ **the Treaties** where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

Without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the **Member** State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Article 51 [58]
(III-146)

1. Freedom to provide services in the field of transport shall be governed by the provisions of the title relating to transport.
2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

Article 52 [59]
(III-147)

1. In order to achieve the liberalisation of a specific service, ~~the Council shall, on a proposal from the Commission~~ **the European Parliament and the Council, acting in accordance with the ordinary legislative procedure,** and after consulting the Economic and Social Committee and the European Parliament, issue directives acting by a qualified majority.
2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

The co-decision procedure is extended to this Article. In practice, Article 47 (which is extended to services by Article 55) is currently normally used for

adoption of legislation on services, so the co-decision procedure applies to services legislation already.

Article 53 [60]
(III-148)

The Member States ~~declare their readiness to~~ **shall endeavour to** undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 52(1), if their general economic situation and the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

Article 54 [61]
(III-149)

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 49.

Article 55 [62]
(III-150)

The provisions of Articles 45 to 48 shall apply to the matters covered by this chapter.

CHAPTER 4

CAPITAL AND PAYMENTS

Article 56 [63]
(III-156)

1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
2. Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Article 57 [64]
(III-157)

1. The provisions of Article 56 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or ~~Community~~ **Union** law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other chapters of ~~this Treaty~~ the Treaties, ~~the Council may, acting by a qualified majority on a proposal from the Commission~~ the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, adopt measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets. ~~Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries.~~

3. Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step back in Union law as regards the liberalisation of the movement of capital to or from third countries.

Co-decision has been extended to part of this Article. The EP gains consultation rights over use of the exception.

Article 58 [65]
(III-158)

1. The provisions of Article 56 shall be without prejudice to the right of Member States:

- (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
- (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with ~~this Treaty~~ the Treaties.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.

4. In the absence of measures pursuant to Article 57(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties insofar as they are justified by one of the objectives of the Union and compatible with the

proper functioning of the internal market. The Council shall act unanimously on application by a Member State.

Paragraph 4 is entirely new.

Article 59 [66]
(III-159)

Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, ~~acting by a qualified majority on a proposal from the Commission and after consulting the~~ **ECB European Central Bank**, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

Article 60

~~1. If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.~~

~~2. Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.~~

~~The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council.~~

This Article has been moved to the external relations Part of the Treaty, and merged (as amended) into the Article on economic sanctions.

The Constitutional Treaty also introduced a new Article III-260 at this point. In accordance with the Reform Treaty mandate, it has been moved into the JHA Title (Article 67a), where it will be subject to the UK, Irish and Danish opt-outs. It read as follows:

Where necessary to achieve the objectives set out in Article III-257, as regards preventing and combating terrorism and related activities, European laws shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt European regulations or European decisions in order to implement the European laws referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Title IV of the TEC/TFEU, concerning Justice and Home Affairs, appears next. It has already been the subject of a Statewatch analysis, and so is not reproduced here. It contains 22 Articles, which will likely be numbered Articles 67-89 of the Treaty.

It should be noted that the JHA provisions, as amended, will remain in Title IV of Part Three of the TEC/TFEU. The Constitutional Treaty would have moved these provisions.

TITLE V

TRANSPORT

Some press commentary on the Constitutional Treaty suggested that the EU would have a 'new' common transport policy. It should be noted that the EC already has a common transport policy, and indeed has done since the original Treaty of Rome in 1958. It can be seen from the text below that the Treaty provisions would largely be left intact by the draft Reform Treaty (ditto the Constitutional Treaty) In fact, the Treaty provisions on transport have barely been amended since the original Treaty of Rome, except to remove the requirement for unanimous voting on shipping and air transport measures back in 1987, when the Single European Act entered into force.

It should also be noted that the transport provisions, as amended, will remain in Title V of Part Three of the TEC/TFEU. The Constitutional Treaty would have moved these provisions.

Article 70 [90]
(III-236(1))

The objectives of ~~this Treaty~~ **the Treaties** shall, in matters governed by this title, be pursued ~~by Member States~~ within the framework of a common transport policy.

Article 71 [91]
(III-236(2) and (3))

1. For the purpose of implementing Article 70, and taking into account the distinctive features of transport, ~~the Council shall, acting in accordance with the procedure referred to in Article 251~~ **the European Parliament and the Council, acting in accordance with the ordinary legislative procedure**, and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

- (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;
- (b) the conditions under which non-resident carriers may operate transport services within a Member State;
- (c) measures to improve transport safety;
- (d) any other appropriate provisions.

~~2. By way of derogation from the procedure provided for in paragraph 1, where the application of provisions concerning the principles of the regulatory system for transport would be liable to have a serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities, they shall be laid down by the Council acting unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee. In so doing, the Council shall take into account the need for adaptation to the economic development which will result from establishing the common market.~~

2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.

The unanimity exception would be deleted. This also entails an extension of the co-decision procedure.

Article 72 [92]
(III-237)

Until the provisions referred to in Article 71(1) have been laid down, no Member State may, ~~without the unanimous approval of the Council~~ **unless the Council has unanimously adopted a measure granting a derogation,** to make the various provisions governing the subject on 1 January 1958 or, for acceding States, the date of their accession less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State.

The technical error in the July draft of the Reform Treaty (which referred to such acts as legislative) has been corrected.

Article 73 [93]
(III-238)

Aids shall be compatible with ~~this Treaty~~ **the Treaties** if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Article 74 [94]
(III-239)

Any measures taken within the framework of ~~this Treaty~~ **the Treaties** in respect of transport rates and conditions shall take account of the economic circumstances of carriers.

Article 75 [95]
(III-240)

1. In the case of transport within the ~~Community~~ **Union**, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on

grounds of the country of origin or of destination of the goods in question shall be ~~abolished~~ prohibited.

2. Paragraph 1 shall not prevent the European Parliament and the Council from adopting other measures pursuant to Article 71(1).

3. The Council shall, ~~acting by a qualified majority~~ on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, lay down rules for implementing the provisions of paragraph 1.

The Council may in particular lay down the provisions needed to enable the institutions of the ~~Community~~ Union to secure compliance with the rule laid down in paragraph 1 and to ensure that users benefit from it to the full.

4. The Commission shall, acting on its own initiative or on application by a Member State, investigate any cases of discrimination falling within paragraph 1 and, after consulting any Member State concerned, shall take the necessary decisions within the framework of the rules laid down in accordance with the provisions of paragraph 3.

Article 76 [96]
(III-241)

1. The imposition by a Member State, in respect of transport operations carried out within the ~~Community~~ Union, of rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries shall be prohibited, unless authorised by the Commission.

2. The Commission shall, acting on its own initiative or on application by a Member State, examine the rates and conditions referred to in paragraph 1, taking account in particular of the requirements of an appropriate regional economic policy, the needs of underdeveloped areas and the problems of areas seriously affected by political circumstances on the one hand, and of the effects of such rates and conditions on competition between the different modes of transport on the other.

After consulting each Member State concerned, the Commission shall take the necessary decisions.

3. The prohibition provided for in paragraph 1 shall not apply to tariffs fixed to meet competition.

Article 77 [97]
(III-242)

Charges or dues in respect of the crossing of frontiers which are charged by a carrier in addition to the transport rates shall not exceed a reasonable level after taking the costs actually incurred thereby into account.

Member States shall endeavour to reduce these costs progressively.

The Commission may make recommendations to Member States for the application of this article.

Article 78 [98]
(III-243)

The provisions of this title shall not form an obstacle to the application of measures taken in the Federal Republic of Germany to the extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division. Five years after the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, the Council, acting on a proposal from the Commission, may adopt a decision repealing this Article.

The amendment is entirely new. It permits this Treaty Article to be amended (repealed) by QMV.

Article 79 [99]
(III-244)

An Advisory Committee consisting of experts designated by the governments of Member States shall be attached to the Commission. The Commission, whenever it considers it desirable, shall consult the Committee on transport matters ~~without prejudice to the powers of the Economic and Social Committee.~~

Article 80 [100]
(III-245)

1. The provisions of this title shall apply to transport by rail, road and inland waterway.

~~2. The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.~~

~~The procedural provisions of Article 71 shall apply.~~

2. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate measures for sea and air transport. They shall act after consulting the Committee of the Regions and the Economic and Social Committee.*

In practice, legislation on sea and air transport is already adopted by the co-decision procedure.

TITLE VI

COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 1

RULES ON COMPETITION

SECTION 1

RULES APPLYING TO UNDERTAKINGS

Article 81 [101]
(III-161)

1. The following shall be prohibited as incompatible with the ~~common~~ internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the ~~common~~ internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82 [102]
(III-162)

Any abuse by one or more undertakings of a dominant position within the ~~common~~ internal market or in a substantial part of it shall be prohibited as incompatible with the ~~common~~ internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 83 [103]
(III-163)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, ~~acting by a qualified majority~~ on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

- (a) to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments;
- (b) to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
- (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82;
- (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;
- (e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article.

Article 84 [104]
(III-164)

Until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the ~~common~~ internal market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82.

Article 85 [105]
(III-165)

1. Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that

there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or directive pursuant to Article 83(2)(b).

The amendment reflects existing practice.

Article 86 [106]
(III-166)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in ~~this Treaty~~ **the Treaties**, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in ~~this Treaty~~ **the Treaties**, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the ~~Community~~ **Union**.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

SECTION 2

AIDS GRANTED BY STATES

Article 87 [107]
(III-167)

1. Save as otherwise provided in ~~this Treaty~~ **the Treaties**, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the ~~common~~ **internal** market.

2. The following shall be compatible with the ~~common~~ **internal** market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the ~~common~~-internal market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment and of the regions referred to in Article 299, in view of their structural, economic and social situation;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the ~~Community~~ Union to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council ~~acting by a qualified majority on a proposal from the Commission.~~

The first amendment allows for repeal of a part of the Treaty by QMV. The second amendment was added in the October draft of the Reform Treaty.

Article 88 [108]
(III-168)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the ~~common~~-internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the ~~common~~ internal market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the ~~common~~-internal market, in derogation from the provisions of

Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the ~~common~~ **internal** market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid in respect of which the Council has, pursuant to Article 89, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

The amendment reflects existing practice.

Article 89 [109]
(III-169)

The Council, ~~acting by a qualified majority~~ on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 87 and 88 and may in particular determine the conditions in which Article 88(3) shall apply and the categories of aid exempted from this procedure.

CHAPTER 2

TAX PROVISIONS

Article 90 [110]
(III-170(1))

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Article 91 [111]
(III-170(2))

Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.

Article 92 [112]
(III-170(3))

In the case of charges other than turnover taxes, excise duties and other forms of indirect taxation, remissions and repayments in respect of exports to other Member States may not be granted and countervailing charges in respect of imports from Member States may not be imposed unless the measures contemplated have been previously approved for a limited period by the Council ~~acting by a qualified majority~~ on a proposal from the Commission.

Article 93 [113]
(III-171)

The Council shall, acting **in accordance with a special legislative procedure** ~~unanimously on a proposal from the Commission~~ and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market ~~within the time limit laid down in Article 14~~ **and to avoid distortion of competition.**

CHAPTER 3

APPROXIMATION OF LAWS

Article **94** (ex-95) [114]
(III-172)

1. ~~By way of derogation from Article 94 and~~ Save where otherwise provided in ~~this Treaty~~ **the Treaties**, the following provisions shall apply for the achievement of the objectives set out in Article 14 **Articles 22a and 22b**. ~~The Council shall, acting in accordance with the procedure referred to in Article 251~~ **The European Parliament and the Council, acting in accordance with the ordinary legislative procedure** 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.

4. ~~If, after the adoption by the Council or by the Commission of a harmonisation measure~~ **If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission,** 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 European Parliament and the Council**, 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.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a **Community Union** control procedure.

*Article **95** (ex-94) [115]
(III-173)*

Without prejudice to Article 94, the Council shall, acting ***in accordance with a special legislative procedure*** ~~unanimously on a proposal from the Commission and~~

after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the ~~common~~ internal market.

The draft Reform Treaty attempts to clarify the relationship between Articles 94 and 95.

Article 96 [116]
(III-174)

Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the ~~common~~ internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, ~~the Council shall, on a proposal from the Commission, acting by a qualified majority,~~ the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. ~~The Commission and the Council may take any other appropriate measures provided for in this Treaty.~~ Any other measures provided for in the Treaties may be taken.

The co-decision procedure has been extended to this Article.

Article 97 [117]
(III-175)

1. Where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 96, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question.

2. If a State desiring to introduce or amend its own provisions does not comply with the recommendation addressed to it by the Commission, other Member States shall not be required, pursuant to Article 96, to amend their own provisions in order to eliminate such distortion. If the Member State which has ignored the recommendation of the Commission causes distortion detrimental only to itself, the provisions of Article 96 shall not apply.

Article 97a [118]
(III-176)

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform intellectual property rights protection throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.

This is a new legal base providing for the adoption of legislation concerning EU-wide intellectual property rights. This legal base would largely be subject to QMV and co-decision, with an exception for language arrangements (consultation of the EP and unanimity in the Council). At present, such legislation (in particular concerning the Community trademark and Community design right) is adopted by using the 'residual powers' clause of Article 308 TEC (consultation of the EP and unanimity in the Council).

*It should be noted that EC legislation harmonising **national** laws relating to intellectual property, as distinct from legislation establishing EC-wide intellectual property rights, is currently adopted using the 'legal base' of Article 95 TEC (QMV and co-decision). This would not change. Such legislation has already harmonised, in particular, significant aspects of trademark law, copyright and related rights and design rights, along with limited aspects of patent law as well as procedural aspects of IP law.*