EUROPEAN COMMISSION
SECRETARIAT-GENERAL

Task Force Future of the Union and institutional questions

Brussels, 30 January 2004

NOTE TO THE IRISH PRESIDENCY

1. The Commission would like to give its full support to the efforts of the Irish Presidency to pave the way at the Spring European Council for an agreement in the Intergovernmental Conference under its Presidency. Not only would it be extremely desirable to sign the Constitutional Treaty before the European elections; any further postponement could only make it harder to reach an overall agreement.

However, the Commission considers that, even if the Irish Presidency were to conclude on the basis of its consultations that the prospect for progress is as yet too limited to call a new meeting of the Intergovernmental Conference, it would nevertheless be important to consolidate the results of the IGC so far. The IGC meeting at the level of Heads of State or Government in December last year ended with no substantial conclusion. It would therefore be important to ensure that, when the opportunity to "relaunch" the IGC arises, there would be no difference of opinion between delegations as to what had been agreed so far, nor as to the points on which the IGC would still need to take a final decision.

2. Over the last months, no delegation has contested the Thessaloniki European Council conclusions; in other words, the draft Constitutional Treaty presented by the European Convention remains the basis for the work of the Intergovernmental Conference.

All delegations have accepted that the reference document for the work of the IGC is the draft Constitutional Treaty as reviewed by the group of legal experts ("Piris Group"), contained in document CIG 50/03 (and its addendum on Protocols). This document will hopefully be completed in the course of February by a further document of the Piris Group on the Accession treaties. In this way, the IGC would have at its disposal a legally and technically correct and complete text, on which only the remaining political issues need to be addressed by the IGC.

Apart from the most sensitive political problems, the Italian Presidency succeeded in distilling the large number of proposed amendments to the Convention draft into a series of concrete proposals. These were presented to the "Naples conclave" (CIG 52/03) and, with some modifications, to the Brussels IGC meeting at the level of Heads of State and Government (CIG 60/03).

The Commission is convinced that a large number of the proposals in the document presented in Naples were acceptable to all delegations, and that most of the other proposals were acceptable to most delegations, at least in the framework of an overall compromise. The Commission therefore considers that this document (CIG

52/03) should be the basis for further work in the IGC on unresolved issues. Indeed, the modified version of the Naples document, presented for the European Council, constituted in our view on too many issues a serious step backwards [1].

3. The course of events at the Brussels European Council, however, has lead to some confusion as to where we stand on the unresolved issues. It is true that, although many delegations had given a positive appraisal of the 'Naples document', all had some comments and observations on the proposals of the Italian Presidency, sometimes of substance, sometimes more technical or even purely drafting in nature. The Commission would suggest that the Irish Presidency, taking into account the comments of delegations, should release a new, enhanced and consolidated version of this document. If it were possible, this document should distinguish between the issues on which all delegations can already in principle agree, and include the texts agreed upon, and those on which work in the IGC needs to continue.

With this approach in mind, the function of this note is to inform the Irish Presidency of the Commission's observations and comments on the proposals of the Italian Presidency. Although the Commission considers that the last version of this document (addendum to CIG 60/03) was not an improvement on the text presented at the Naples conclave, the present comments are based on that text to which, probably, most delegations will refer. The present note follows for reasons of clarity the order of the annexes to that document, but obviously not all comments are of the same nature or importance.

4. In addition, the Commission would like to draw the attention of the Irish Presidency to the fact that a certain number of amendments suggested by the Italian Presidency, which when looked at separately do not necessarily pose a problem, when taken together add up to an unbalanced proposal in respect of decision making in the Union and the scope of qualified majority voting.

It will be no surprise that the Commission strongly regrets that the Italian Presidency proposed to delete Article III-328, which provides for a specific *passerelle* for introducing QMV in an enhanced cooperation (cf. CIG 60/03, Annex 44 (H)), and to render the operation of the 'ordinary' *passerelles* even more difficult (cf. CIG 60/03, Annex 35). These steps backward, as well as other proposed changes to decision making such as the proposals for Articles III-77 (6), III-171 and III-172, III-175, III-21, III-62, (cf. CIG 60/03, Annexes 12, 18, 19, 25 and 26) are not counterbalanced by the proposal to extend QMV in CFSP - particularly given the probability that such a proposal would not be accepted by the IGC, or at least not in the ambitious formulation proposed by the Italian Presidency (cf. CIG 60/03, Annex 23 : Article III-201).

Given the conflicting views of delegations on this matter, it will be important for the Presidency to strike the right balance. This will not be possible by an examination article by article – one delegation or another will always call for unanimity. Decision making procedures must be looked as part of an overall proposal. The Commission

[1] With the exception of Annex 28 on economic, social and territorial cohesion.

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would welcome an exchange of views on this matter in the bilateral meeting of 6 February.

Finally, the Commission would like to confirm its support for the gist of the French proposal for an adaptation of Article III-47 on the movement of capital to or from third countries. On the other hand, it would like to recall its concern about the provisions on economic governance, where there is a compelling case for reinforcement. In any event, any further steps backward on economic and financial provisions, as suggested by the Ecofin Council, would be unacceptable.

5.

With respect to the politically most sensitive issues, the Commission continues to support those delegations which consider the double majority proposed by the Convention as the best voting system for the Council, provided that the population threshold is not raised above 60 %). The Commission has noted with satisfaction that most delegations now share its view that the Constitution should not make a distinction between Commissioners with and without voting rights and that the Commission should be made up of one national of each Member State at least until the new Member States and the acceding countries are fully integrated into the Union.

The attention of the Presidency is drawn to the fact that, were the IGC to follow the majority view that the Commission should be composed -at least for the medium term- of one Commissioner per Member State (with equal rights), the text of the articles concerning the composition and functioning of the Commission would need important modifications (both in Part I and Part III of the Constitution) [2]. The Commission is ready to support the Presidency with concrete textual proposals.

[2] Due attention will also have to be given to the transitional provisions concerning the composition of the Commission and the Union's Foreign Minister, in particular to ensure that the latter can be full member of the Commission from the entry into force of the provisions on the Minister. These provisions have not yet been drafted (see Article 4 of the Protocol on transitional provisions relating to institutions and bodies of the Union, CIG 50/03 ADD 1, Protocols as reviewed by the Legal Experts Group - p. 33).

ANNEX 4 - EXPLANATIONS RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS

Most delegations seem to accept the proposal for a declaration. However, it is questionable whether the "explanations" of the Charter need to be fully reproduced in the Declaration to the Constitution, or whether it would be sufficient to make a reference to those explanations (which would be published beforehand in the "C" series of the Official Journal). The Presidency document proposes both, which is contradictory, or at least superfluous.

It should be noted that those explanations constitute a document of 52 pages (doc. CONV 828/03- REV1). Therefore, the Commission would strongly advise against the full reproduction of those explanations in the Declaration. From a legal point of view, the reference to a certain source (the Official Journal) has the same consequence; there is no need to make the Constitution, together with its protocols, annexes and declarations, even more voluminous.

Drafting suggestion:

Declaration for incorporation in the Final Act
concerning the explanations relating to the Charter of Fundamental Rights

The Conference takes note of the explanations relating to the Charter of Fundamental Rights prepared at the instigation of the Presidium of the Convention which drafted the Charter and updated under the responsibility of the Presidium of the European Convention, ~~as set out below~~ **as published in the Official Journal of the European Union, C [number] of [date]**.

The document *~~(…) [reproduction of the explanations contained in~~ CONV 828/1/03 REV 1 of 31 July 2003~~, which~~ will be published* ***before the signature of the draft Constitutional treaty*** *in the "C" series of the Official Journal of the European Union.~~]~~*

ANNEX 6 - DRAFT DECISION OF THE EUROPEAN COUNCIL ON THE EXERCISE OF THE PRESIDENCY OF THE COUNCIL OF MINISTERS

The Commission would like to encourage the Irish Presidency to use the bilateral contacts with delegations to examine whether the proposals made in Annex 6, on the organisation of the presidency of the different formations of the Council, correspond to what delegations consider the most appropriate solution. The Commission has the impression that, if the European Council were indeed to opt for a system with 'team-presidencies', the Luxembourg proposal (three Member States, twelve months) received more sympathy - as it combined more or less the same rhythm as now (each Member State would be in the presidency seat every 8/9 years) with a reasonable burden for those Ministers who would be in charge (a period of twelve months).

It considers in any event of major importance that the Council can continue to function on a yearly basis. Periods of 18 months would be at odds with the budget cycle and the annual and multi-annual programming of the work of the Union. Moreover, a presidency of six or twelve months seems more reasonable in terms of workload for ministers (and their services) who continue to be in charge of their national mandate. The Commission considers that the questions raised by the presidency of the GAC should not lead to a system with a negative impact overall on the Council's smooth functioning.

In any event, the text of the draft Decision should be carefully re-examined, both from a political as from a legal-technical point of view.

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Besides, the Commission recalls that it considers Article 2 of the Protocol on the Euro Group an unnecessary complication because it fixes a period for the office of President of the Euro Group, where Article I-23 leaves the period open. The period envisaged (2½ years) is different from all other periods proposed -which would rule out the possibility for the president of Ecofin to preside also over the Eurogroup, if that is what the Member States whose currency is the euro would wish. The easiest way to resolve these contradictions would be to delete Article 2 of the Protocol on the Euro Group. As an informal forum, the Euro Group should be free to organise its presidency as it wishes; there is no need for a provision which limits this freedom.

ANNEX 7 - THE MINISTER FOR FOREIGN AFFAIRS

It is of paramount importance that the Minister of Foreign Affairs is a genuine "double hat". All proposals which pull the Constitution away from that would lead to weakening the Community method, which is today applicable in the trade policy, development aid and external aspects of the regular Union policies. All proposals pulling him away from being a full member of the Commission would also make it impossible for him to do the job the post was created for – to facilitate greater consistency in the Union's external action. Only by having a real say in the Commission as a full Member can he do that.

a) Remarks concerning Article I-27, paragraph 4

1. The amendments proposed to Art. I-27 (4) are unfortunate as to their formulation, as they imply a subordination of all the Union's external action to CFSP and introduce a hierarchy in the roles of the Minister. According to the second sentence, the Minister "shall ensure that the Union's action in external action is consistent with the common foreign and security policy". This is contrary to the approach of the Convention, subscribed to by all Member States, to enhance consistency between all areas of the Union's external action, without a hierarchy between policies. A more balanced text regarding policy consistency of is to be found in Article III-193, last paragraph: "The Union shall ensure consistency between the different areas of its external action and between these and its other policies."

2. The amendments to the last sentence of Article I-27 imply a subordination of the Minister's functions in the Commission to his/her action in the Council. The formulation on the consistency of the Minister's responsibilities in the Commission with those in the Council undermines the essence of the post of Minister for Foreign Affairs as conceived by the Convention, the "double-hatted" approach. The result would be a less effective Minister. It is therefore better to delete the additional words to the last sentence, or at least to introduce a more neutral formula: "without prejudice ..".

It became very clear from ministerial discussions in the IGC that the overwhelming majority of delegations share the approach of the Convention that the Minister for Foreign Affairs, on top of his/her responsibilities towards the Council, must be a "full" Commissioner, with voting rights on all issues, whether related to foreign action of the Union or not. In order to avoid any misunderstanding about this, it would be better not to refer in the last sentence only to the responsibilities in external action (".. these .."), but to all his/her responsibilities.

Drafting suggestion:

Article I-27

4. The Union Minister for Foreign Affairs shall be one of the Vice-Presidents of the Commission. He or she shall **take all appropriate initiatives to ensure consistency between** ~~that~~ the Union's action in external relations ~~is consistent with~~ **and** the common foreign and security policy **and between these and the other policies of the Union.** He shall be responsible within the Commission for responsibilities falling to it in external relations and for coordinating other aspects of the Union's external action. In exercising ~~these~~ **his/her** responsibilities within the Commission, and only for these responsibilities, the Union Minister for Foreign Affairs shall be bound by Commission procedures [~~to the extent that this is consistent with~~ **without prejudice to** the provisions of the above paragraphs 2 and 3 **]**.

b) Other comments

Amendments to Article I-25 paragraph 5 make the text unnecessarily heavy. The text of the Convention should be restored. The Minister is a full Member of the Commission, and it is therefore self-evident that he/she will resign together with the rest of the Commission if the European Parliament adopts a motion of censure. If the amendment contained in document CIG 60/03 is maintained, a parallel provision should also be added to Article I-27 paragraph 1, regarding the consequences of a resignation decided by the European Council. This being said, it would in reality seem politically unrealistic that a Minister who has resigned from his/her functions in the Commission would continue to execute his/her Council mandate for CFSP for any considerable length of time – as it would be equally unrealistic for a Minister deprived of the CFSP mandate to continue with full confidence to exercise his/her responsibilities within the Commission. When one of the "hats" of the Minister falls, the Minister can no longer function as intended.

The order of words of the proposed amendment to Article I-26 paragraph 3 regarding the resignation of the Minister should be inverted, to place "Vice-President" after "Minister for Foreign Affairs", as there could potentially be more than one Vice-President of the Commission.

ANNEX 8 - EUROPEAN EXTERNAL ACTION SERVICE

The amendment to Article III-197 par. 3 contained in document COG 60/03 aims to establish a legal basis for the creation of the European External Action Service. In the view of the Commission, it is not necessary to provide a legal basis for the specific internal organisation of the EU's administration in the Constitution: the draft Declaration established by the Convention [3] provided that the Service should be set up through an (inter-institutional) agreement between the Council and the Commission.

However, if the IGC would prefer to insert a specific legal basis in the Constitution, this is only acceptable on the condition that the procedure allows for the setting up of a genuine joint service. The best way to achieve this is to give the right of initiative to the Union Foreign Minister, since it concerns after all his service; but the final decision should be left to the two interested institutions. In this way, the Constitution would remain as close as possible to the approach proposed by the Convention (an interinstitutional agreement).

Furthermore, the reference to a "central administration" is unfortunate, as it suggests the creation of a distinctly separate body/institution. This would be contrary to the aim of efficiency and greater consistency through better use and pooling of existing resources (and would rather risk duplication). Delegations are part of the Service, and do not need to be mentioned separately either.

Drafting suggestion:

Article III-197(3)

In fulfilling his or her mandate, the Union Minister for Foreign Affairs shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States. **The Council and the Commission shall establish, by a joint European Decision on a proposal from the Minister for Foreign Affairs and after obtaining the opinion of the European Parliament,** the organisation and functioning ~~of the central administration~~ of the European External Action Service~~, and of the Union's delegations, shall be established by a European Decision of the Council. The Council shall decide after obtaining the opinion of the European Parliament and the consent of the Commission.~~

[3] **DECLARATION ON THE CREATION OF A EUROPEAN EXTERNAL ACTION SERVICE**

To assist the future Union Minister for Foreign Affairs, introduced in Article I-27 of the Constitution, to perform his or her duties, the Convention agrees on the need for the Council of Ministers and the Commission to agree, without prejudice to the rights of the European Parliament, to establish under the Minister's authority one joint service (European External Action Service) composed of officials from relevant departments of the General Secretariat of the Council of Ministers and of the Commission and staff seconded from national diplomatic services.

The staff of the Union's delegations, as defined in Article III-230, shall be provided from this joint service.

The Convention is of the view that the necessary arrangements for the establishment of the joint service should be made within the first year after entry into force of the Treaty establishing a Constitution for Europe."

ANNEX 10 - MULTIANNUAL FINANCIAL FRAMEWORK

1. The first subparagraph of Article I-54, paragraph 4 is a misleading translation of the French version of the document [4].

But more fundamentally, the phrase is incorrect, in so far as there will be no "multiannual financial framework" in force when the Constitution enters into force, but only "financial perspectives", which is – legally - not the same (the framework is a law, the perspectives are an interinstitutional agreement).

The Union will have to adopt in any event a financial framework when the Constitution enters into force (even if it consists solely of putting the existing financial perspectives into a new form, and even if only for a short period). This will be the only way to make the financial limits agreed upon a legally binding limit to the (increased) powers of the EP on the annual budget.

The Commission would therefore propose retaining the text proposed by the Convention, which refers to the first multiannual financial framework following the entry into force of the Constitution. In any event, the rationale of the amendment suggested by the Italian presidency is not clear. If this amendment aims to keep unanimity for the adoption of the first "substantially new" multiannual financial framework, the easiest solution would be to fix a future date for the switch from unanimity. This would give the time required to ensure that the current arrangements were maintained for the "transitional" framework, whilst also ensuring that unanimity would not be applicable for too long. It is therefore suggested to take 1 November 2009 as a cut-off date (which is also used in other provisions); by then, the multiannual financial framework for the years after 2007 should have been long adopted, without interfering with the adoption procedure for the next financial framework.

Finally, as suggested by the Group of Legal Experts (cf. doc. CIG 50/03, footnote page 59), this transitional provision should not be introduced into the Constitution itself, but in the Protocol on transitional provisions (doc. CIG 50/03 ADD 1, page 33).

2. The proposed second subparagraph of Article I-54 is meaningless, both from a political and a legal point of view.

Drafting suggestion:

- Delete Article I-54, paragraph 4

- Add to the Protocol on Transitional Provisions a new Article:
" **When adopting a multiannual financial framework in accordance with Article I-54, paragraph 2, the Council shall act unanimously until 31 October 2009**."

[4] " ... lors de l'adoption du premier cadre financier pluriannuel suivant l'échéance de celui en vigueur à la date de la signature de la Constitution .. " : 'suivant' should have been translated by 'following the expiration of the one in force' and not by 'in accordance with the timetable in force'.

ANNEX 11 - BUDGET PROCEDURE

The Commission is not convinced that the proposal to give the Council the right to reject the entire budget will create a sufficient incentive for an agreement between the European Parliament and the Council; it seems to tilt the balance in favour of the Council. However, the Commission can accept this text, if it is acceptable to the Parliament.

However, legal drafting revision will be in any event necessary:

First, the end of paragraph 8 '*in accordance with the joint text*' (which does not exist in the French version) gives the impression that even if the Council does not take a decision after the Parliament confirms its amendments, the joint text adopted in conciliation would become the adopted European law establishing the budget, thus ignoring the second reading by Parliament. This part of the sentence should be deleted.

Secondly, the second sentence of paragraph 9 - which aims to ensure that Parliament does not delay the vote on the joint text established by the Conciliation Committee - should be placed immediately after paragraph 6, in a new paragraph 6a. In order to ensure full equality between the two branches of the budgetary authority, the text should also rule out the possibility that the Council would fail to take a decision, even if this is purely hypothetical.

ANNEX 14 - LAMFALUSSY PROCEDURE

The Commission accepts the draft Declaration.

However, since it is the Commission itself which adopts the delegated regulations, the French text of the declaration should be aligned to the English version, by deleting the words “de ses propositions”, or at least replacing them with the words “de ses projets”.

ANNEXES 18 AND 25 - EMERGENCY BRAKE

As indicated before, the Commission regrets that the Italian presidency has proposed to depart from the outcome of the Convention on qualified majority voting in respect of some legal bases. In some cases, the Italian presidency has proposed to maintain qualified majority voting in principle, but to provide for an "emergency brake", in particular for Articles III-171 and III-172 (Annex 18 : judicial cooperation in criminal matters), and Article III-21 (Annex 25 : social security). The Commission considers that these emergency brakes are unnecessary, in particular in respect to article III-172, taking into account the wording of that article. Nevertheless, the Commission could accept, in the context of a general compromise, these emergency brakes, provided that the wording of the Naples document is maintained.. In the last document, however, the Italian presidency has rendered that mechanism more complicated; although it does not provide for unanimity, it might give equally to any Member State the possibility to paralyse the decision making process. In any event, the Commission would like to point out that the procedures, as they are drawn up in document CIG 60/03, annexes 18 and 25, are 'technically' incorrect.

In the "Naples document" (CIG 52/03) the Presidency proposed a procedure which could work: it provided for the possibility for a Member State to request a discussion of a proposal in the European Council; this discussion only delayed normal decision making in the Council for a given period [5].

However, in doc. CIG 60/03 the Italian presidency presented a "reinforced" version of an emergency brake [6]. This new version is contrary to Article I-20, which provides that the European Council shall not exercise legislative functions. Moreover, the mechanism is not watertight. When a Member State triggers the emergency brake, the matter is referred to the European Council who can, according to the text, do two things: either decide to refer back to the Council or request the Commission to submit a new proposal. However, according to Article I-20 (4), the European Council has to act by consensus, which means that if no consensus can be found on either decision, the matter is deadlocked. This possibility must be ruled out.

It is therefore proposed - if the Irish Presidency would consider necessary to propose an emergency brake according to the lines presented by the Italian Presidency – to draft the last two sentences in the following way, which gives a clear time limit for the emergency brake procedure and avoids stalemate: *"In this case, the procedure referred to in Article III-302 shall be suspended for a period of up to [four] months. After discussion,*

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5 e.g. Art. III-171: " Where a member of the Council considers that a draft European framework law would infringe the fundamental principles of its legal system, it may request that the draft law be referred to the European Council for discussion. In this case, the time limits of three months or six weeks referred to in Article III-302 shall be extended by two months or one month respectively."

6 e.g. Article III-171: "Where a member of the Council considers that a draft European framework law as referred to in this paragraph would infringe the fundamental principles of its legal system, it may request that the draft law be referred to the European Council. In this case, the procedure referred to in Article III-302 shall be suspended. After discussion, the European Council may:
(a) refer the draft back to the Council, which shall terminate the suspension of the procedure referred to in Article III-302, or
(b) request the Commission or the group of Member States from which the draft framework law emanates to submit a new draft; in that case, the act originally proposed shall be deemed not to have been adopted.

the draft is referred back to the Council, which shall terminate the suspension of the procedure, unless the European Council requests the Commission [or the group of Member States from which the draft framework law emanates [7]] to submit a new draft; in that case, the act originally proposed shall be deemed not to have been adopted".

[7] This part of the sentence should obviously not be added to article III-21.

ANNEX 25 – SOCIAL SECURITY

Independently of the outcome of the discussion on the decision making procedure, the Commission remains convinced that the scope of Article III-21 should be brought in conformity with the present scope of Regulation 1408/71, on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (currently based on Articles 42 and 308 EC).

The existing scope of the coordination scheme established by Regulation 1408/71 is not limited to workers and self-employed persons, but covers also other categories of European citizens when they are moving within the Union (e.g. students, workers in the public sector). This evolution should be reflected in the Constitution.

Drafting suggestion:

Article III-21

Add the following paragraph :

" European laws and framework laws referred to in the first paragraph may extend the application of the measures which they establish to other European citizens and to members of their families. "

ANNEX 28 – ECONOMIC, SOCIAL AND TERRITORIAL COHESION

In order to avoid any further discussion on this matter, the reference to the fact that Article III-56 (concerning state aids) is left unchanged should be deleted from the document.

ANNEX 31 – ENERGY

The last sentence of Art. III-157 as agreed by the Convention reads: "...shall not affect a Member State's choice between different energy sources and the general structure of its energy supply...". However, the Italian Presidency proposed to replace this perfectly acceptable assurance by a limitation of the existing competence of the Union: the second subparagraph of Article III-157 would now state that "Such laws or framework laws shall not affect a Member State's right to determine the conditions for exploiting its energy resources ...".

As a consequence, this provision would exclude the possibility - if need be - to approximate the conditions for exploiting energy resources; this is a clear step back compared to the present internal market provisions. The smooth functioning of the internal market may require measures to ensure the right of establishment or free movement of services, or may require measures to ensure fair competition. Since, with the creation of a new legal basis for energy, it would no longer be possible to use the internal market legal bases, any limitation of this new legal basis for energy as proposed by the Presidency would constitute regression with respect to the present treaty and even to the Community *acquis*.

In other words, the Commission would have to insist that Article III-157 be deleted if the IGC were to consider the proposed additions to the text drafted by the Convention.

ANNEX 32 – PUBLIC HEALTH

The Presidency proposes to add to paragraph 1 of Article III-179 on public health that Union action shall comprise: "(b) monitoring, early warning and combating accidental or intentional serious threats to health when they may affect more than one Member State.". The article provides, however, no powers for such action.

As a consequence, the addition proposed to paragraph 1 is meaningless and misleading. Recent threats like SARS or bioterrorism prove that there is a real need for powers for the Union to take appropriate action. It should be noted that paragraph 5 of article III-179 only permits incentive measures. Competence to legislate should be added in paragraph 4.

Moreover, the Commission drafting suggestion is justified in order to rebalance the text of this provision: the amendments proposed by the Italian presidency, especially in paragraph 7, could lead to a reduction of the competences of the Union in this domain.

Drafting suggestion:

Article III-179

Add to Paragraph 4:

" (d) measures concerning monitoring, early warning and combating natural or intentional serious threats to health when they affect more than one Member States. "

ANNEX 33 – SPORT

The Commission considers the addition in paragraph 1 of Article III-182 of language on the "special nature" of sport as unhelpful. Every sector of human activity has its special characteristics. It is to be feared that some would use this mention in the Constitution, which does not add anything useful to Article III-182, in the context of the application of other provisions of the Constitution to sport, such as the internal market or competition policy.

ANNEX 42 - PROVISIONS ON ROMANIA AND BULGARIA

The draft Declaration in Annex 42 needs thorough legal revision, in particular to bring the text in conformity with the Protocol on Transitional Provisions (cf. CIG 50/03 ADD 1, p. 33).

For example, the threshold of QMV after accession of Romania and Bulgaria should not be decided by the Council, as stated in point 3 of the Declaration, but in the Accession Treaty itself. The Declaration should mention, in conformity with the Nice treaty, that the blocking minority in a Union of 27 will be raised to 91 votes (the blocking minority in the Union of 25 will be 90 votes). Point 2 of this declaration is not 'without prejudice to Art. I-24', but concerns the application of Article 2 of the Protocol on Transitional Provisions.

ANNEX 44 – MISCELLANEOUS

POINT F - DETERMINATION OF THE PENALTY PAYMENTS IMPOSED BY THE ECJ

Article III-267 (3)

The amendment proposed by the Italian presidency renders an important innovation introduced by the Convention meaningless: the possibility that a Member State can be fined because of non-compliance with its primary obligation to notify measures transposing a framework law. The proposed text provides for this payment only if the Member State concerned has not complied with a judgement of the Court, a possibility which already exists under the present EC treaty.

Moreover, it is not at all clear why the jurisdiction of the Court of Justice, when deciding on the penalties in this specific case, has been limited in the draft: the text provides that those penalties may not exceed the amount specified by the Commission in its application to the Court. Today, for the similar case of failure of compliance with a previous judgement, the Court has unlimited jurisdiction in this respect (Article 228 (2) subparagraph 3 EC). There is no reason why its jurisdiction should now be limited.

It is therefore suggested to modify the second subparagraph first sentence, as follows:
"If the Court **upholds** the Commission's request, it may impose a lump sum or penalty payment on **the Member State concerned**."

POINT G - IMPLEMENTATION OF THE COMMON COMMERCIAL POLICY

Article III-217 (2)

It is recalled that Article III-217 on the common commercial policy is the result of long and difficult negotiations, which should not be reopened. However, the amendment to paragraph 2 is acceptable as its aim is to render explicit what was meant.

The text should be brought into consistency with document CIG 50/03 (the result of the legal experts' group): the reference to framework laws should thus be deleted ("European laws ~~or framework laws~~ shall establish ... ")

POINT H – ENHANCED COOPERATION

Articles III-325(2), III-326(2) and III_328

The Commission very much regrets the proposal of the Italian Presidency to delete Article III-328, a *passerelle* for introducing QMV in an enhanced cooperation. This is an important change from the result from the Convention, which was not discussed at any moment in the IGC, should, in any event, not be presented under the heading '*miscellaneous*'.

Besides, the amendment proposed by the Italian presidency for Articles III-325 and III-326, adding the reference to a unanimous decision of the Council in order to trigger enhanced cooperation within the CFSP, is not consistent with the general rule of voting in this area. Indeed, Article III-201 provides for unanimity as a general rule, but replaces it with qualified majority in a number of cases. This should also be reflected in the provisions at stake. Therefore, it is suggested to replace "acting unanimously" by "acting in accordance with the voting rules provided for in Article III-201".

POINT I - NATIONAL SECURITY

Articles I-5, III-163 and III-283 [8]

The Commission regrets that the Italian Presidency supported the request of one delegation to replace in the Constitution the concept of "internal security" by "national security", although this change was rejected - for legal reasons - by the overwhelming majority of members of the legal experts group. This change creates legal uncertainty: there is no generally accepted definition of "national security". It is generally considered to be a wider notion than "internal security", but the precise difference between the two is unclear.

In particular for Articles III-163 and III-283 this change is unfortunate because these articles replace the present article 33 TEU and articles 64 and 68 (2) EC, which use the concept "internal security". Normally, a change of wording reflects a change of meaning; until now, however, no convincing explanation has been given as to what the purpose is of the change.

[8] In the « Naples document » (CIG 52/03), the change concerned only Article I-5.