



A guide to the constitutional treaty

Second edition February 2008



A guide to the constitutional treaty

Second Edition

February 2008

February 2008

Published by

Open Europe
7 Tufton Street
London
SW1P 3QN

T. 0207 197 2333

F. 0207 193 2307

E. info@openeurope.org.uk

Contents

3	What people are saying around Europe: This is the same as the original Constitution
5	Executive summary
20	Institutional changes
32	Foreign policy: majority voting and further moves to a common defence
39	The Charter of Fundamental Rights
51	Justice and home affairs: new powers for the European Court of Justice
62	Immigration and asylum
71	Public services, economy and energy
80	Annex 1: Vetoes being given up
86	Annex 2: New powers of the European Parliament
87	Annex 3: Comparison between the new version of the Constitution and the original

What people are saying around Europe: This is the same as the European Constitution

Germany

"The substance of the Constitution is preserved. That is a fact."
(Angela Merkel, German Chancellor, Telegraph, 29 June 2007)

Spain

"We have not let a single substantial point of the Constitutional Treaty go... It is, without a doubt, much more than a treaty. This is a project of foundational character, a treaty for a new Europe."
(Jose Zapatero, Spanish Prime Minister, speech, 27 June 2007)

Ireland

"90 per cent of it is still there... these changes haven't made any dramatic change to the substance of what was agreed back in 2004."
(Bertie Ahern, Irish Taoiseach, Irish Independent, 24 June 2007)

Czech Republic

"Only cosmetic changes have been made and the basic document remains the same."
(Vaclav Klaus, Czech President, Guardian, 13 June 2007)

Finland

"There's nothing from the original institutional package that has been changed."
(Astrid Thors, Finnish Europe Minister, TV-Nytt, 23 June 2007)

Denmark

"The good thing is...that all the symbolic elements are gone, and that which really matters - the core - is left."
(Anders Fogh Rasmussen, Danish Prime Minister, Jyllands-Posten, 25 June 2007)

Austria

"The original Treaty for a Constitution was maintained in substance."
(Austrian government website, 25 June 2007)

Belgium

The new treaty "takes up the most important elements of the Constitutional Treaty project."
(Guy Verhofstadt, Belgian Prime Minister, Agence Europe, 24 June 2007)

Italy

"As for our conditions... I outlined four red lines with respect to the text of the Constitution: to keep a permanent president of the EU, to keep the single overseer for foreign policy and a common diplomatic service, to keep the extension of majority voting, to keep the single legal personality of the Union. All of this has stayed."
(Romano Prodi, Italian Prime Minister, La Repubblica, 24 June 2007)

Lithuania

Lithuania has "100 percent fulfilled the tasks set forth before the meeting, including the primary objective of preserving the substance of the Constitutional Treaty."
(Office of the President of Lithuania, official press release)

Luxembourg

"The substance has been preserved from Luxembourg's point of view."
(Jean-Claude Juncker, Luxembourg Prime Minister, Agence Europe, 24 June)

Slovenia

With the new treaty, the EU gets "content that is not essentially different from the Constitutional Treaty... All key institutional solutions remain... Some symbolic elements will be cleared up and some formulations toned down."
(Janez Jansa, Slovenian Prime Minister, Government Communication Office, 23 June 2007)

The author of the EU Constitution

"This text is, in fact, a rerun of a great part of the substance of the Constitutional Treaty."
(Valery Giscard d'Estaing, Telegraph, 27 June 2007)

European Parliament

The European Parliament "welcomes the fact that the mandate safeguards the substance of the Constitutional Treaty."
(European Parliament resolution, 10 July 2007)

The European Commission

"It's essentially the same proposal as the old Constitution."
(Margot Wallstrom, EU Commissioner, Svenska Dagbladet, 26 June 2007)

The UK Government

"The new reform treaty is fundamentally different from the Constitution, it's not a Constitution."
(David Miliband, UK Foreign Secretary, BBC Today programme, 16 October 2007)

Is this an honest process?

Giscard d'Estaing

"Public opinion will be led to adopt, without knowing it, the proposals that we dare not present to them directly" ... "All the earlier proposals will be in the new text, but will be hidden and disguised in some way."
(Le Monde, 14 June 2007 and Sunday Telegraph, 1 July 2007)

Former Italian Prime Minister Giuliano Amato

"They decided that the document should be unreadable. If it is unreadable, it is not Constitutional, that was the sort of perception... Should you succeed in understanding it at first sight there might be some reason for a referendum, because it would mean that there is something new."
(CER meeting, 12 July 2007)

Karel de Gucht, Belgian Foreign Minister

"The aim of the Constitutional Treaty was to be more readable; the aim of this treaty is to be unreadable... The Constitution aimed to be clear, whereas this treaty had to be unclear. It is a success."
(Flandreinfo, 23 June 2007)

Jean Claude Juncker, Prime Minister of Luxembourg

"Britain is different. Of course there will be transfers of sovereignty. But would I be intelligent to draw the attention of public opinion to this fact?"
(Telegraph, 3 July 2007)

Executive summary

An issue of trust?

"The new Constitutional Treaty ensures the new Europe can work effectively... We will put it to the British people in a referendum."
(2005 Labour manifesto)

"The manifesto is what we put to the public. We've got to honour that manifesto. That is an issue of trust for me with the electorate."
(Gordon Brown, BBC Politics Show, 24 June 2007)

How close is the Lisbon Treaty to the Constitution?

The debate over whether the Lisbon Treaty is substantively different to the Constitution is effectively over. Virtually every EU Government has admitted that the Lisbon Treaty maintains the substance of the Constitution.

The "new" treaty reintroduces virtually all the changes proposed in the original Constitutional Treaty, by transferring them into the two existing treaties, the Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC). The latter will be renamed the Treaty on the Functioning of the European Union (hereafter referred to as TFEU).

Open Europe's analysis finds that only 10 out of 250 proposals in the "new" treaty are different from the proposals in the original EU Constitution. In other words, 96% of the text is the same as the rejected Constitution.¹ Of the few changes that there are, few are of any significance - for example, the new version of the Constitutional Treaty no longer mentions the symbols of the union, like its flag and anthem. However, of course - these symbols already exist.

In fact on almost every article the draft treaty amends the existing EU treaties using exactly the same text as that of the Constitution. Earlier drafts of the treaty even made explicit reference (in square brackets) to article numbers in the original version of the Constitution.

Professor Steve Peers, EU law specialist, summarises the situation:

"The different structure of the Reform Treaty (i.e. amendments to the current EC and EU Treaties) as compared to the Constitutional Treaty means that the two treaties will look quite different. However, the content, as proposed in the draft mandate is largely the same."

Michael Connarty, the Labour Chairman of the Commons European Scrutiny Committee, notes that:

"Every provision of the Constitutional Treaty, apart from the flags, mottos and anthems, is to be found in the Reform Treaty. We think that they are fundamentally the same, and the Government have not produced a table to contradict our position."²

¹ See www.openeurope.org.uk/research/comparison.pdf

² Hansard Column 196, Hansard Columns 206, 208 and 211, 11 December

The Commons Foreign Affairs select committee have said:

"We conclude that there is no material difference between the provisions on foreign affairs in the Constitutional Treaty which the government made subject to approval in a referendum and those in the Lisbon Treaty on which a referendum is being denied".³

The UK Government remains virtually isolated in claiming that the Lisbon Treaty is different to the Constitution. Foreign Secretary David Miliband argues that "in terms of structure the new reform treaty is fundamentally different from the constitution, it's not a constitution."⁴

What the treaty does

"This treaty is the tipping point. It is the point at which we will begin to adopt the European Community method on most matters, apart from tax and social security, and in a number of respects—perhaps most of them—in common foreign and security policy. In most other things, we will move into a situation where we will have QMV [Qualified Majority Voting], where the Commission will administrate and where the European Court of Justice will judge."

Michael Connarty, Chairman of the Commons European Scrutiny Committee, House of Commons 21 January 2008

Creates powerful new EU institutions

The new version of the Constitutional Treaty will create powerful new positions and institutions in Brussels, and will make existing EU institutions more powerful in relation to the member states. Setting up new institutions like an EU President, an EU Foreign Minister, and an EU diplomatic service would mean a major shift of power from the start - and they are also likely to grow in strength over time.

The EU President will manage the work of the 3,500 civil servants in the Council Secretariat. This would give the new President a substantial power base - and the President would have an incentive to expand his or her own powers further over time.

The Treaty creates an EU Foreign Minister, who will be in charge of a new European diplomatic service - the exact size of which is yet to be determined. The new Minister will have an automatic right to speak for the UK in the UN Security Council on issues where the EU has taken a position. Perhaps most importantly of all, when the Council asks the Foreign Minister for a proposal on a particular subject, once he or she has made that proposal it will be subject to majority voting (see section below on foreign policy). The new text carries over the exact same language of the Constitution (merely changing the name of the Foreign Minister), stating that "when the Union has defined a position on a subject on the agenda of the UN Security Council, the member states who sit there shall ask that the High Representative be invited to present the position of the Union."

³ Foreign Affairs Committee, 'Foreign Policy Aspects of the Lisbon Treaty' (20.01.08)

⁴ Interview BBC Today programme (16.10.07)

The Foreign Affairs Select Committee has noted that:

*"...the Government risks underestimating, and certainly is downplaying in public, the importance and potential of the new foreign policy institutions established by the Lisbon Treaty, namely the new High Representative and the European External Action Service. We recommend that the Government should publicly acknowledge the significance of the foreign policy aspects of the Lisbon Treaty."*⁵

Weakens Britain's power to block legislation by 30%.

Changes to the system by which votes in the EU Council are taken will mean that almost all member states would find it more difficult to block legislation under the new system. Germany is the only large member state whose power stays roughly the same. The UK stands to lose nearly 30% percent of its ability to block EU legislation in the Council. The net effect of this change is that it will become easier for the EU to pass law. But most people in business believe that the EU is already producing too much regulation. An ICM poll of 1,000 UK Chief Executives at the end of 2006 found that 59% thought that the burden of EU regulation was rising, and 54% now think the benefits of the Single Market are outweighed by the costs of EU regulation.

National vetoes scrapped in 61 areas

The Constitution introduces 61 new areas where qualified majority voting applies, in areas ranging from justice and home affairs to sport, transport and energy policy. This would be the largest number of vetoes given up in any of the EU treaties to date.

New EU powers to harmonise civil and criminal laws and legal procedures

New articles allow the EU to set common rules concerning legal procedures in criminal cases. EU rules, decided by Qualified Majority Voting [QMV], could determine the rights of criminal suspects and control the admissibility of evidence in Court. There is also a provision for EU rules to cover "any other specific aspects" of legal procedure if EU leaders so decide.

Extensive new EU powers over asylum systems

The Treaty allows the EU to set up a Common European Asylum system. This becomes a treaty objective for the first time, and will lead to the laying down of uniform standards on how asylum applications are processed and the benefits asylum seekers will receive while their cases are being considered. The Treaty requires that any new asylum policies should be governed by the principle of solidarity and fair sharing. This paves the way for what the Commission has called "corrective" burden sharing (i.e. transferring successful asylum seekers from one member state to another). Indeed, the Commission has already proposed to amend existing EU asylum legislation in order to build in burden sharing.

EU powers to define criminal offences and set minimum sentences

The Treaty allows the EU to set "rules concerning the definition of criminal offences and sanctions" and lists the types of crimes over which the EU can

⁵ Foreign Affairs Committee, 'Foreign Policy Aspects of the Lisbon Treaty' (20.01.08)

harmonise sentences. These include drug trafficking, people smuggling and money laundering. The list was supposed to limit the EU to dealing with cross-border crimes. But the list of crimes over which the EU can rule includes vaguely-defined categories such as "organised crime" and "corruption", which is likely to enable the EU to rule over a wide variety of offences. The list of offences is also designed to be expanded over time, as a clause allows EU leaders to add to the list of crimes on which the EU can legislate.

Enabling EU bodies to initiate criminal investigations of EU citizens

The Treaty gives the European prosecutors network "Eurojust" sweeping new powers. The relevant article states that the tasks of Eurojust, to be defined by qualified majority voting in the EU Council, "may include the initiation of criminal investigations". Johannes Thuy, a spokesman for Eurojust, confirmed that under the new treaty, "*We could compel the British police to make a prosecution.*" (Sunday Times, 5 August 2007)

Provision for a European Public Prosecutor - now an even stronger possibility

The new Treaty states that: "In order to combat crimes affecting the financial interests of the Union, the Council, by means of a regulation adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust." Unlike in the original version of the Constitution, under which the Prosecutor could only be established by unanimity, in the new version the Prosecutor can be set up by enhanced cooperation (ie. if a group of at least nine member states wish to proceed in this area). During the European Convention the UK Government said there should be no possibility of setting up a European Public Prosecutor - *even if they had a veto*. Peter Hain wrote: "We are firmly opposed to establishing a European Public Prosecutor. *Unanimity does not mean that this article can be accepted....* There is clearly no need for a separate prosecution body at EU level."⁶ The UK's objection was ignored.

A 'division of competences' that means more and more power for the EU

The Constitutional Treaty was supposed to set out a clear division of powers between the member states and Brussels, to stop the gradual drift of powers from member states to the EU. However, it does the opposite - it defines most powers as "shared", and says that where powers are "shared" the member states can only act if the EU has chosen not to.

Charter of Fundamental Rights becomes legally binding

The Charter is likely to affect national law and give the European Court of Justice substantial new powers. Although the debate in Britain has focused on the Charter's effect on business, it does, in fact, cover a very wide range of topics. The Court will have substantial new powers to review and change national laws. But how the Court will use these powers is difficult to predict. The net result of giving the Court greater power through the Charter is unlikely to be a clear "left" or "right" outcome. It would, however, mean that the small group of judges on the Court of Justice would be called upon to make contentious and essentially political judgements in a wide range of areas.

⁶ <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20170%20Hain%20EN.pdf>

The Government continues to claim that the Charter does not contain any new rights. Europe Minister Jim Murphy said "The Charter of Fundamental Rights doesn't create any new rights in the United Kingdom, or in any other member state." (Today Programme 9 October 2007). If this were true there would be no need for the other convoluted safeguards that the Government has attempted to erect. In reality the rights in the Charter go beyond existing rights - particularly in the UK.

The European Commission has a rather different line to the UK Government noting on its website: "Citizens' rights and Charter of Fundamental Rights: the Treaty of Lisbon preserves existing rights while introducing new ones. In particular, it guarantees the freedoms and principles set out in the Charter of Fundamental Rights and gives its provisions a binding legal force."⁷

New EU powers over health

Provisions of the Treaty would put the EU in charge of standards for pharmaceuticals, medical equipment and medical products like blood and tissue. The EU would also be given the power to legislate by QMV on any "serious cross border threats to health". The Commission already indicates that diseases such as tuberculosis, measles and influenza are such cross-border risks to human health. It is also possible that infectious agents in chronic conditions such as cancer, heart diseases or allergies could be brought within this category.⁸ Under the new Treaty, it is easy to envisage a situation in which the Commission could propose legislation setting clinical priorities on the basis of the above criteria. The British Medical Association has noted that "the clause which empowers the EU to act on 'serious' threats to health, opens the way for the EU to initiate legislation on a whole range of health determinants."

The proposed health services directive is a particularly sensitive matter for the UK, with its unique system of public funding for healthcare. The new EU powers over health could open the way for more controversial legislation like this in future. The role of the European Court of Justice could also be strengthened through the provisions in the Charter of Fundamental Rights outlining a "right to preventative healthcare" - this could be important given that the proposed health services directive is an example of legislative proposals following on from earlier ECJ judgments. Since public health would be classified as a "shared competence" under the Treaty (a move opposed by the UK) the scope for the Union to extend its powers over health is again widened.⁹

Gisela Stuart MP, who represented the UK at the European Convention, has described how the EU has so far expanded its powers over health policy, and how the process is likely to continue in future: "people say, 'well of course, bird flu and CJD don't recognise national boundaries, so public health must be an EU competence.' So we make public health an EU competence; we make health service delivery a court judgment ... so what's the next thing? A European commission draws up a proposals for an EU health directive, which it did before Christmas... this just illustrates that there is nothing where the EU doesn't have means - whether it's court judgments; whether it's internal market; free movement

⁷ http://europa.eu/lisbon_treaty/glance/index_en.htm

⁸ http://ec.europa.eu/health/ph_threats/com/comm_diseases_en.htm

⁹ The treaty affirms that "Member States shall exercise their competence to the extent that the Union has not exercised its competence". Article 2 [2a] TFEU

of labour - the way it makes laws. In every way it now has means, and once it has taken away a UK competence, there is no way you can ever go back."¹⁰

New EU powers over social security

The Treaty states that: "The Union may take initiatives to ensure coordination of Member States' social policies". It also allows the Commission to establish "guidelines and indicators" for social policies. The UK Government tried to have these provisions deleted during negotiations on the original Constitution.

Social security rights for migrant workers are shifted to majority voting. The UK Government is keen to emphasise that an 'emergency brake' applies to this area. However, EU policy in this area has traditionally been driven forward by European Court of Justice, with EU legislation 'catching-up' with Court rulings. Under Lisbon, the Court will have a specific new power to ensure equality of social security entitlements for EU migrants - hence allowing the emergency brake to be circumvented via the judicial avenue.

Abolition of veto on employment law for self-employed workers

The Lisbon Treaty abolishes the veto on employment law relating to self employed workers. This covers everything from whether plumbers, electricians and other self-employed service providers have their qualifications recognised in other countries, health and safety questions and their rights at work. A Commission green paper in 2006 suggested that the EU should extend the same rights that full time workers have to the self-employed. In so far as these provisions allow for recognition of qualifications and standards, they might also touch on some of the issues as raised by the controversial EU services directive. Legislation in this area is also likely to spill over into wider employment law.

More EU power over economic coordination and public spending.

The Treaty states that: "The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies."

New powers over EU trade policy in public services and inward investment

The European Commission notes that the treaty "will extend the scope of the trade policy to include all foreign direct investments and makes it clearly an exclusive competence of the Union." Under current arrangements, in some fields both the member states and the EU can negotiate trade deals, allowing member states to have their own trade agreements alongside those of the EU as a whole. For example, the UK and other EU member states have signed a number of Bilateral Investment Treaties with other countries around the world. Exclusive competence in this area would make such bilateral agreements impossible. The revised Constitution deletes the clause in the existing treaty (Article 133.5 TEC) which states that EU trade policies "shall not affect the rights of the Member States to maintain and conclude agreements with third countries".

Trade in health and education services, currently decided by unanimity, would also be affected - under the new treaty the EU would have the same powers over these issues that it has over trade in goods.

¹⁰ Interview, Guardian (18.01.07)

New powers over energy - with a potential £6bn price tag for the UK

The EU Constitution will mean new EU powers over energy policy. The UK Government made a good argument against giving the EU more powers in this area when the original Constitution was being drawn up, but then later gave in. Moving to majority voting in this area could prevent the UK from blocking a costly proposal to increase oil reserves, which could cost the UK £6bn.

The Government is now advancing a dishonest argument to cover up its failure in this area, claiming that the new power is needed to break up energy monopolies - but the EU already has power to do this, as this is covered by majority voting under the Internal Market.

The Treaty is a toolbox for future changes: the implications are both unpredictable and wide

It is often claimed by supporters of the Treaty that it will help to end legal uncertainty on the issue of member states' relations with the Union. Nothing could be further from the truth.

Aside from the specific new powers which the revised Constitution creates for the EU, the Treaty is a legal toolbox which provides activist EU institutions (particularly the notoriously expansionary European Court of Justice) with the means to incrementally build on existing powers and expand into new areas. The Treaty provides for EU action in virtually every policy area - from health to defence - and can be used as a basis for radical future developments in Union policies.

There are a large number of important 'unanswered questions' relating to how the new arrangements would work in practice. A confidential strategy paper prepared by the Slovenian EU Presidency for heads of Governments identifies 31 such areas of the Lisbon Treaty. A few examples of these include: the structure, operation and field of action of Europol; the new powers and operation of Eurojust; the rules governing the European Public Prosecutor and its functions; the "organisation and functioning" of the EU External Action Service (diplomatic service); the role and powers of the EU Foreign Minister; and arrangements for the implementation of the Defence "Solidarity Clause." The final decisions taken on all of these issues *will* affect the UK, but as the leaked Presidency paper notes, these tough negotiations will only take place after ratification in "difficult" countries such as the UK.

The widening in the jurisdiction of the European Court of Justice to almost all areas of policy is particularly significant in this respect. The new legal force given to the Charter of Fundamental Rights is also likely to amplify this effect further. The Charter is a sprawling agglomeration of rights and obligations - it is both vague and wide-ranging, and is likely to provide a rich resource for the expansion of Union power through the judicial avenue.

Another highly significant point is that the Treaty re-introduces the proposals from the Constitution which would make the Treaty self-amending for the first time. Article 48 [48] of the Treaty on European Union (which contains both IV-444 and IV-445 of the old Constitution) would allow EU leaders to change the treaties incrementally, without the need for a new treaty.

But don't we need these changes to make EU enlargement work?

Some argue that unless the rules are changed to make it easier to pass legislation then the EU will "grind to a halt." However, there is no evidence to support this assertion. In fact, the EU of 27 member states has proved to be a more nimble legislative machine than the EU of 15.

A study of legislation by academics at Paris-based university Sciences-Po found that the EU has in fact been adopting new rules and regulations some 25% *faster* since the EU's enlargement to 10 new member states in 2004, and that "old" member states are in fact twice as likely to block measures as "new" countries. A more recent study by Professor Helen Wallace from the LSE confirmed that the notion that the EU has become "gridlocked" since enlargement and that it needs the EU Constitution to function properly again is wrong. She said, "The evidence of practice since May 2004 suggests that the EU's institutional processes and practice have stood up rather robustly to the impact of enlargement."

Are the UK Government's 'red lines' effective safeguards?

1) The UK "opt outs" are the same as in the original Constitution

Following the numerous declarations from other EU leaders that the Lisbon Treaty is essentially the same as the EU Constitution, the UK Government has fallen back on the argument that the treaty is different for Britain on account of the 'red lines' - which the Government claims safeguard the UK in four key areas. The Government points to the following:

- A 'clarification' on the Charter of Fundamental Rights
- An opt-in on Justice and Home Affairs
- Retaining the veto in foreign policy
- Safeguards on social security and tax

Firstly and most importantly, *these are the same guarantees that the Government gave regarding the original Constitution, on which it promised a referendum.* The Government is now saying exactly the same things it said last time round, before going on to promise a referendum. The Government wants to try to imply that the "red lines" are new, when they are not.

What they said last time round:

"We have our clear red lines and these are not changing at all. We cannot accept any move away from unanimity on tax or a federal fiscal policy. The referendum will come after the negotiations, and after the debate in the House of Commons. If we secure a treaty that is acceptable for Britain, then I believe we can also put it successfully to the British people."

- Gordon Brown, *Guardian*, 12 May 2004

"We have the right results on policy areas of particular importance to the UK, including in respect of the charter of fundamental rights and the veto on areas such as foreign policy, defence, tax, social security, criminal law and treaty revision."

- Jack Straw, *Hansard*, 9 September 2004

"Unanimous agreement is still required for the most important decisions: for tax, social security, foreign policy, defence, and decisions on the financing of the EU

affecting the British budget contribution. Britain also retains the right to opt out of measures affecting our laws on asylum and immigration. This is clearly not a Treaty which reduces our powers as a nation."

- Tony Blair, introduction to 2004 White Paper on the Constitution

2) The red lines are not effective safeguards

The European Scrutiny Committee Chairman Michael Connarty warned in October 2007 that without changes the UK red lines would simply "leak like a sieve". He said: "We believe the red lines will not be sustainable. Looking at the legalities and use of the European Court of Justice we believe these will be challenged bit by bit and eventually the UK will be in a position where all of the treaty will eventually apply to the UK." (Today Programme, 9 October) The Government ignored this warning and has not secured any changes to the UK-specific provisions.

Home affairs: The UK's opt-in arrangement on justice and home affairs has been weakened relative to the original Constitution.

The Government continues to claim that nothing can happen in this area without its consent. But the Government has signed up to give the Court of Justice jurisdiction in this area for the first time. The Government previously argued strongly *against* giving the Court this power. Back in 2000 the Government stated in a memorandum to the Lords EU select committee that:

"The Government does not accept that we should agree to extend full ECJ jurisdiction over the very sensitive areas covered by the Third Pillar. These raise sensitive issues relating to national sovereignty – law and order and the criminal justice process."

In November 2006 Geoff Hoon told the Lords EU committee that giving the ECJ jurisdiction over asylum policy could create problems:

"There is clearly a risk that adding what is in effect an avenue of appeal at a very early stage in the process might be an opportunity of further complicating our existing asylum and immigration processes."

After Gordon Brown took over as PM the UK Government fought for an exemption from the jurisdiction of the Court in this area. According to a report by the respected French journalist Jean Quatremer:

"London wanted to be exempted from this control including for the JHA norms that it decided to apply - 'That is not acceptable, that would upset the equality between member states', a French diplomat recently explained. 'There will be no immunity of jurisdiction for the United Kingdom.'" (4 October)

However, the UK failed to secure a carve-out from the Court's jurisdiction. Instead, the jurisdiction of the Court will merely be delayed for five years. Moreover, this delay only applies to existing legislation - any new legislation or amended legislation will come under the jurisdiction of the Court. After five years, if the UK does not agree to the full jurisdiction of the Court it will be thrown out of all Justice and Home Affairs legislation. As Chairman of the EU Scrutiny Committee, Michael Connarty, pointed out in a letter to David Miliband,

" The United Kingdom must then choose whether or not to accept the jurisdiction of the ECJ and the powers of the Commission. If the UK does not accept such jurisdiction and powers, the draconian consequence seems to follow that all of the measures which have so far been adopted under the EU treaty will cease to apply, and the Council will also gain the power to determine by QMV that the United Kingdom, 'shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of its cessation of its participation in those acts.'"

" If we have understood it correctly, the intention of this provision seems to be to oblige the UK to accept the jurisdiction of the ECJ, and the powers of the Commission, on a retrospective basis, over EU measures which have already been adopted." (11 October)

The Government may hope that this provision will allow it to argue that the UK does not have to be bound by the Court. However, in reality it is highly unlikely that the Government will agree to leave all Justice and Home Affairs legislation. The failed attempt to opt out also raises a difficult question for the Government - if the jurisdiction of the Court is a good thing then why did it initially seek an opt out, and now a delay in its application?

In another setback, the October draft of the treaty saw a new Article 4a added to the protocol which undermines the opt-in arrangement further. In short, the new protocol puts a gun to the head of member states which want to opt out of future developments in Justice and Home Affairs. If the UK does not want to take part in further developments based on existing legislation which applies to the UK then it will be thrown out of that piece of legislation. For example this would affect:

- The Dublin II agreement on return of asylum seekers to their country of origin;
- The Reception Directive on conditions of asylum faced by applicants;
- The European Arrest Warrant.

The Commission plans to update the "Dublin II" agreement to build "burden sharing" arrangements (allowed under the new Treaty) into it. The UK Government is sceptical about burden sharing and does not want to take part. On the other hand, the Government wants to remain part of Dublin II - which allows the UK to deport 100 asylum claimants a month back to the country where they first entered the EU. It is therefore very unlikely that the UK Government would be prepared to abandon the agreement. This would be a powerful lever to force the UK to opt in to the amended version of the legislation.

A similar situation also exists with proposed amendments to the Reception Conditions Directive - which sets minimum standards on what benefits and other welfare rights asylum seekers should get while their applications are processed. The Commission wants to amend the existing directive to harmonise further material reception conditions, access to employment, health care, free movement rights and identification and care of vulnerable persons. The UK Government is particularly opposed to giving asylum seekers the right to work, as it believes that this encourages false asylum claims. However, under the Lisbon Treaty, if the UK did not agree to opt into the amended version, it could be threatened with being "thrown out" of the existing rules.

The Labour Chairman of the European Scrutiny Committee, Michael Connarty, has described the clause setting up this unpalatable choice as a “bullying” clause. He told Foreign Secretary David Miliband:

“Do not pretend that this is not a bullying tactic by whoever proposed it to pressurise the UK. These are bullying clauses to cajole and pressurise us into opting in and I am shocked that you try to defend them. Honestly, I really am.... I do not think anyone with a bit of principle would sign up to them... It interferes in a great way because it puts massive pressure and there are now penalties for not opting in that were not there before.” (ESC hearing, 16 October)

The Charter: Huge legal uncertainty remains over the effect of the controversial Charter of Fundamental Rights on national law. The UK Government originally claimed to have an ‘opt-out’ from the Charter, but this was never accurate. Indeed Europe Minister Jim Murphy has now admitted: “It is clear that the UK does not have an opt-out on the Charter of Fundamental Rights.”¹¹ As Swedish Prime Minister Frederick Reinfeldt pointed out “It was important for the [Swedish] Government to keep the Charter legally binding, which now is the case... the UK accepted this... *It should be stressed that the UK was given a clarification, not an opt-out.*” (Swedish Parliament, 26 June 2007)

The Protocol states that the Charter “does not extend” the ability of the ECJ to find that UK law is inconsistent with the rights and principles elucidated in the Charter. The most obvious problem with this curious wording is its implication that it will be the ECJ which decides whether or not UK law provides for the rights in question. The Government’s legal advisor (Mike Thomas) recently admitted in evidence to MPs that the final decision would indeed rest with the ECJ:

“Mr Clappison: Who decides when it gets to the European Court of Justice whether it is an existing right or not?”

Mr Thomas: I think you probably know the answer to that question. Who decides when something goes to court? It is the court.”¹²

Moreover, there is an obvious problem with the idea of trying to create a UK-specific carve-out for a whole area of EU law. Firms operating in more than one member state would clearly be affected. Migrants coming from another member state to the UK would presumably still be covered. And anyone who travelled to another EU country - e.g. to use health services - would still be able to use the Charter. Given the nature of EU law, it is hard to see how a carve out could work in practice, and it is likely the UK-specific opt-out deal will quickly unravel. The Commission’s legal experts take the same view, and expect that the British opt-out will be tested in the Courts. (Guardian 26 June 2007) The Commission’s legal service estimates that British opt-outs to the Charter are “limited” and one legal source said that “the opt-out is potentially very thin” (Telegraph 12 July 2007).

This has been confirmed through analysis that followed the publication of the draft mandate from the Legal Adviser to the Commons European Scrutiny Committee, Michael Carpenter. He questioned the claim by Tony Blair that the Charter of Fundamental Rights will not extend the ability of the European Court of Justice to

¹¹ House of Commons, 21 January 2008

¹² Evidence from David Miliband MP, Patrick Reilly, Mike Thomas and Kevan Norris in front of the ESC - <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf> (16.10.07)

challenge UK laws. He said: "This is a high standard to set, and I doubt if what appears to have been agreed secures this result." He indicated that the Charter could have an indirect impact on UK law, if the Court gave a ruling on the Charter's effect on a given EU law in another member state. Indeed, the protocol explicitly reaffirms that the UK will remain bound by "other obligations" devolved from the Treaties regarding the implementation of Union law. These concerns were echoed by the Government's legal advisor in evidence to MPs:

"Mr Clappison: When the court is making that decision, can it take into account decisions which have been reached in other cases involving other countries where the whole Charter of Fundamental Rights applies?"

*Mr Thomas: The whole Charter of Fundamental Rights applies in all the Member States, but the answer is yes."*¹³

Professor Damian Chalmers, Professor in European Union Law at the London School of Economics concluded that:

"The protocol does not say the Court cannot apply the Charter to the UK: it just says it cannot extend it. If you look at what happens at the moment when the Court refers to the Charter, it then relies very extensively for its reasoning on the case law of the European Court of Human Rights. People who think we have some sort of opt-out are going to be in for a surprise in that regard because that is what will happen."

Professor Sir David Edward of the University of Edinburgh told a Lords' Committee that:

*"It is a very limited Protocol as I see it. It is not a total opt-out of the application of the Charter. On the contrary, it begins in the preamble by reaffirming Article 6 of the Treaty on European Union. As to where that leaves us - I am not sure that I can either offer elucidation or comfort in that respect."*¹⁴

Foreign Policy: The Government's argument that "unanimity remains the rule" in foreign policy is an extraordinary distortion of the facts. In fact the Constitutional Treaty would end the veto in eleven different areas of Foreign Policy:

1. Proposals from the EU Foreign Minister
2. The design of the EU diplomatic service
3. Setting up an inner core in defence
4. Terrorism and mutual defence
5. Urgent financial aid
6. Humanitarian aid
7. The election of the EU Foreign Minister
8. Civil protection
9. Terrorist financing controls
10. The new EU Foreign Policy Fund
11. Consular issues

Is it meaningful in practical terms to say that unanimity remains the "rule", when there are so many exceptions? Section two explores these issues in more detail.

¹³ Evidence from David Miliband MP, Patrick Reilly, Mike Thomas and Kevan Norris in front of the ESC - <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf> (16.10.07)

¹⁴ House of Lords, 6 December 2007.

Social Security and tax. The new Constitutional Treaty, like the original, includes an “emergency brake” on one particular article relating to social security, for migrant workers. However, the Court of Justice would be given new powers to ensure the equality of social security entitlements of EU migrants (and third-country migrants) anyway - so this “emergency brake” is effectively going to be directly circumvented by a judicial requirement. Section six below explores this. The “red line” on tax is particularly misleading. During the summit negotiations the Government ran implausible scare stories about having to “defend the veto on tax” - which was never under discussion. As the European Scrutiny Committee noted, “In our view, control of tax and social security was never seriously threatened. The previous Treaty establishing a Constitution for Europe contained no proposals to move to QMV in relation to tax.”¹⁵ BBC Europe Editor Mark Mardell even reported on his blog that: “*The government had the good grace to privately admit it was a bit of a con and ‘purely presentational’.*”

To summarise: The red lines are the same as before; there are good reasons to think that they will be circumvented, and of course, these are the issues that the Government wants discussion to focus on, in order to distract from what it is giving up without a fight elsewhere.

What the treaty does not do

Does not reform farm subsidies or protectionist trade policies - will in fact strengthen the status-quo in these areas

The EU’s farm subsidies and trade barriers cost the poorest countries in the world billions every year - as well as costing the average family of four in the UK £1,500 a year in higher prices and tax. The new Treaty will make these chronic problems even harder to reform by giving the European Parliament powers of co-decision for the first time over the Common Agricultural Policy element of the EU budget. Despite its current lack of power in this area Parliament has consistently voted against CAP reform. And it has used its existing powers over the framework to block reform - e.g. in March 2007 the Parliament succeeded in blocking an attempt by the Council and Commission to allow 20% of CAP spending to be “modulated” (spent on other rural development projects). Giving the Parliament far more powers in this field will give protectionist interests a second line of defence against attempts to reform the CAP.

Does nothing to solve corruption and waste

The new treaty has no provisions to sort out the EU’s chronic problems with fraud and waste. According to its own figures, the EU loses £1 million every working day to fraud. Its budget has not been signed off by its own auditors for twelve years in a row.

The EU now has 63,000 civil servants working full time churning out new laws. It spends £200 million a year just ferrying euro-MPs back and forth between its two parliament buildings in Strasbourg and Brussels every month. This will remain unchanged under the new treaty.

¹⁵ European Scrutiny Committee (27.11.07)

No power to improve failing environmental policies

Whilst supporters of the treaty, including the UK Government, claim that the treaty is essential to enable the EU to 'take action' on important transnational issues like the environment, the treaty makes almost no changes to the EU's capacities in this respect, merely adding a few words to emphasise the importance of the objective fighting climate change. In reality, the EU currently has (and already exercises) plenty of power over environmental policy, but has simply failed to use it effectively due to flawed policies and lack of political will. The EU Emissions Trading Scheme has failed to cut emissions and has been converted by politically powerful corporate interest groups into a means of covert industrial subsidy. Meanwhile, EU targets for biofuels are less about helping the environment than bolstering the CAP.

Does not aid energy liberalisation

The UK Government frequently claims that the Treaty will be necessary to allow the EU Commission to break up energy monopolies. This is not true, as these powers already exist: the Commission has proposed legislation to break up large continental energy monopolies like EDF and Eon under the internal market article (Article 95) and is covered by majority voting. As with environment policy, the reason this area of EU policy is stalling is not due to lack of majority voting but rather lack of political will. The innovations of the Treaty insofar as energy is concerned relate more to extending EU-level control over national energy resources.

No new powers for national parliaments

The protocol on national parliaments has been watered down to become even more meaningless than it was in the original Constitution. Compared to the 2004 text, the protocol on parliaments in the revised Constitutional Treaty has been altered so that half of national parliaments need to object to trigger the process of blocking a proposal rather than 'just' a third. In the unlikely event that fourteen national parliaments all vote against their governments on the same proposal, on subsidiarity grounds, during an eight week window, then the Commission has to 'reconsider' - but it can still override national parliaments.

The timetable and the handling of the negotiations - a democratic deficit

The Government has handled the negotiations on the revised Constitution in an untransparent and undemocratic way, seeking to shut down all discussion of the issue. As the European Scrutiny Committee has noted, "The process could not have been better designed to marginalise the role of national parliaments and to curtail public debate, until it has become too late for such debate to have any effect on the agreements which have been reached."¹⁶

The Government has refused to answer the most basic questions about its negotiating position. Representatives of EU heads of government met regularly to negotiate over the new version of the Constitutional Treaty from January 2007 onwards.

But just before the final agreement of the mandate for the IGC, then-Foreign Minister Margaret Beckett was still telling the Commons European Scrutiny

¹⁶ <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf>

Committee that "There have not been negotiations... nothing is going on." On 19 June 2007 she told the Foreign Affairs Committee that "You say there have been negotiations between other countries - I don't believe that is so." However, just four days later on 22 June the Government signed up to the detailed IGC mandate which had been negotiated over the previous six months.

When the consolidated text of the "reform treaty" was finally published on 23 July, it was, almost uniquely for such an important document, only published in French. The Foreign Office decided not to produce a translation for over a week - until after Parliament had risen for the summer.

MPs did not return from recess until 8 October - which gave them just eight working days to discuss the text before the final agreement on 18 October. Nonetheless, despite this extraordinary handling of the negotiations, the Government has the nerve to argue that calls for a referendum "undermine parliamentary democracy".

(1) Institutional changes

The new Constitutional Treaty will create powerful new positions and institutions in Brussels, and will make existing EU institutions more powerful in relation to the member states. Setting up new institutions like an EU President, an EU Foreign Minister, and an EU diplomatic service would mean a major shift of power from the start - and they are also likely to grow in strength over time.

The Constitutional Treaty also makes some fundamental structural changes to the legal relationship between the member states and the EU. For example, the treaties become self-amending for the first time, the EU gets a single legal personality allowing it to sign all kinds of treaties, and the Court of Justice is given jurisdiction over Justice and Home Affairs (something the Government resisted very strongly and said would be a major shift of national sovereignty).

On top of this, it will become harder for the UK to stop the EU from doing things the UK opposes. The national right of veto is given up in over 60 areas, and the UK's power to block legislation is cut by 30% when the EU does take majority votes, because of changes to the majority voting rules. This clearly makes Britain weaker in Europe.

An EU President

Managing the work of the 3,500 civil servants in the Council Secretariat would give the new President a substantial power base - and the President would have an incentive to expand his or her own powers further over time.

The new President would fundamentally change the nature of the legislative process in Brussels. Instead of negotiations between the supranational Commission and a national head of Government with a vested interest in protecting the rights of member states, negotiations would in future take place between one unelected, independent Brussels institution and another.

"The new President will only be held accountable behind closed doors to the European Council so no democratic breakthroughs with this potentially powerful new post... Nor looking forward is it clear that the new president will anyway act in the way the UK hopes. As a new permanent and full-time position in Brussels, with the Council secretariat at its service, it is quite possible that such a new president may prove more pan-European and less biddable than the current rotating part-time presidency. Fortunately for the UK government, this will be not be tested in advance of a referendum."

- Kirsty Hughes, Visiting Fellow, European Institute, 1 January 2005

One more federalist vision is that the Council President will later be merged with the President of the Commission. The author of the EU Constitution, former French President Valéry Giscard d'Estaing has argued that, "We will probably have to have at least two executives in the beginning. But the process of reform will not be complete in twelve months." (Speech at NYU, 13 May 2002)

Former Italian PM and member of the European Convention Lamberto Dini said, "We should ask ourselves whether it makes sense to maintain two presidents of the executive, one for the Council and the other for the Commission, or whether it

would be better to have a single office, presiding over both institutions." (FT, 10 January 2003)

During the drafting of the original Constitutional Treaty the UK Government failed to block a last minute change which would allow the two roles to eventually be merged. Early Convention drafts of the Constitution excluded this possibility: "The President of the European Council *may not be a member of another European institution* or hold a national mandate" (CONV 724/03). But in the final stages of the negotiations this separation was abandoned and the final text stated only that: "The President of the European Council shall not hold a national office."

The EU's "Europa" website explicitly states:

"The Convention also proposes that the President of the European Council may not hold a national mandate at the same time. However, this arrangement does not prevent the President of the European Council from holding another mandate within another European institution. This allows for the possibility, in future, of combining the roles of President of the European Council and President of the Commission, if the Member States so wish."

Back in 2003, Jack Straw told the Standing Committee on the IGC:

"We would have preferred to have explicit separation of those two posts. I do not believe that in practice they will merge. The institutional balance between the Council and the Commission is absolutely fundamental to the proper orientation of the EU, and for a variety of reasons member states would not accept that they should merge into one position. Although it is not a red line, it is something that we must consider, and I promise to do so." (10 November 2003)

However, the Government did not manage to get the separation reinstated, and there is widespread expectation that if a post of EU President is created, then the two roles will merge. Giuliano Amato, Italian Interior Minister and the Vice President of the Convention which drew up the original Constitution, has called for the merger of the two roles in 2015, asking "Can an animal with two heads survive for long?" (New York Times, 15 June 2003) Former Italian Foreign Minister Gianfranco Fini said that although the time is not yet "politically ripe" to merge the two roles, the idea should be considered "in the near future". (European Convention Plenary, 21 January 2003)

Integrationists want the President to be directly elected in the future, just like in the US. French President Nicolas Sarkozy has also backed the idea that the President should be directly elected. He endorsed a proposal by the NGO *Europanova* to create a directly elected EU President. (Le Figaro, 29 April 2007) More recently he suggested that Tony Blair would be a good candidate for first President (FT, June 15 2007).

"In the American system the Presidency was designed since the beginning, for Europe I guess it will be different. What will certainly have to change with time is the way of choosing the President. In 10 to 20 years there will be a demand for a more democratic election process."

- Valery Giscard d'Estaing, *Wall Street Journal Europe*, 7 July 2003

An EU Foreign Minister
[“High Representative of the Union for Foreign Affairs and Security Policy”]

“The voice of the future Union Minister for Foreign Affairs will be louder than that of the ministers of each nation when he expresses joint positions”

- Denis MacShane, former UK Europe Minister, Le Figaro, 28 February 2005

While the mandate for the IGC states that “The Union Minister for Foreign Affairs will be called High Representative of the Union for Foreign Affairs and Security policy”, he or she will have all the same powers as proposed in the original Constitution - against the wishes of the UK.

The new minister will have an automatic right to speak for the UK in the UN Security Council on issues where the EU has taken a position. The UK also eventually accepted that the new minister will be a member of the Commission (the UK has resisted giving the Commission a role in Foreign Policy since 1992). He or she would also have the power to appoint EU envoys. At the end of the negotiations the UK also eventually accepted that the Foreign Minister / HRUFASP will chair meetings of the EU General Affairs and External Relations Council.

As the Guardian noted: “Britain said the new official should not chair regular meetings of EU foreign ministers, nor take over the resources of the European Commissioner for external affairs. It lost.” (26 June 2007)

Perhaps most importantly of all, when the Council asks the Foreign Minister for a proposal on a particular subject, once he or she has made that proposal it will be subject to majority voting (see section below on foreign policy).

The new text carries over the exact same language of the Constitution (merely changing the name of the Foreign Minister), stating that “when the Union has defined a position on a subject on the agenda of the UN Security Council, the member states who sit there shall ask that the High Representative be invited to present the position of the Union.” (Old article III-305(2); now Article 34 [19] TEU)

Initially the UK Government (represented by Peter Hain) put down an amendment in the European Convention saying that this whole paragraph should be struck out. Peter Hain wrote: “The UK cannot accept any language which implies that it would not retain the right to speak in a national capacity on the UN Security Council.” However, this was ignored, and so the UK then fell back to saying that it had to at least be changed, in order to remove the minister's seemingly automatic right to speak. In a second amendment the UK proposed a change to say that the Minister could only *request* to speak on its behalf. But the UK's objections were ignored.

So despite the change of name (and most people are likely to call him the EU Foreign Minister for shorthand anyway), all the substance of the powerful new post remains. As Spanish Europe Minister Alberto Navarro told the FT, “We were prepared to find a title other than Foreign Minister, but we are not prepared to change the substance of his role” (19 June 2007). Italian Prime Minister Romano Prodi pointed out: “as long as we have more or less a European Prime Minister and

a European Foreign Minister then we can give them any title." (Speech in Lisbon, 2 May 2007)

An EU Diplomatic Service

A single "European External Action Service" as proposed in the Constitutional Treaty would for the first time bring together national officials with the 745 civil servants in the Commission's DG external relations and the 4,751 members of staff in the Commission's existing "delegations" around the world.

The new TEU Article 27 [13a] (the Constitution's Article III-296 (3)) states that decisions relating to the creation of a diplomatic service will be taken by qualified majority vote on a proposal from the EU Foreign Minister. A paper published by Javier Solana in March 2005 suggested that only a third of the staff of the service will come from member states' diplomatic services. Estimates of the size of the service vary widely. One EU official briefed that the number of diplomats alone would be 7,000, but that it could rise to 20,000. (European Voice, 9 November 2004)

The European Parliament's External Relations Committee has raised concerns over the proposed EU diplomatic service. It warned that if the diplomatic service was set up as an independent institution it would "take on an uncontrollable life of its own" and would result in an "independent super administration". It suggested that the service would consist of between 5,000 and 7,000 diplomats. (EUobserver, 28 February 2005)

The UK Government originally opposed the EU Diplomatic Service. In the negotiations on the draft Constitutional Treaty Denis MacShane said, "We believe that it remains for EU Member States to organise their respective bilateral diplomatic services at the national level." (Hansard Written Answer, 17 June 2002)

In November 2006 the European Commission published a Green Paper which revealed plans to establish EU "consulates" around the world. It argued that "Setting up common offices would help to streamline functions and save on the fixed costs of the structures of Member States' diplomatic and consular networks... these offices could be housed in various representations or national embassies or in just one, or they could share the Commission delegation." It went on to say that "the EU consulates could take over functions now controlled by member states, including issuing visas. "In the long term, common offices could perform consular functions, such as issuing visas or legalising documents."

Under the revised Constitutional Treaty article 23 TFEU [20](formerly III-127 of the Constitution) is amended so that the EU can pass laws by majority vote determining rules on diplomatic and consular protection - so moves towards common consulates and embassies would be likely to accelerate.

"We will undoubtedly see European embassies in the world, not ones from each country, with European diplomats and a European foreign service. We will see Europe with a single voice in security matters. We will have a single European voice within NATO. We want more European unity."

- Jose Luis Rodriguez Zapatero, Spanish Prime Minister, AP, 17 February 2005

"We want a political Europe that can speak with one voice, and with one minister of foreign affairs and a common foreign service."

- Nicolas Schmit, Luxembourg Foreign Minister, BBC, 26 January 2007

A self-amending treaty for the first time

The new version of the Constitutional Treaty re-introduces the proposals from the Constitution which would make the treaty self-amending for the first time. Article 48 [48] of the TEU (which contains both IV-444 and IV-445 of the old Constitution) would allow EU leaders to change the treaties incrementally, without the need for a new treaty.

At present, the treaties on which the EU is based can be amended only by the convening of an Intergovernmental Conference (IGC) such as the one that agreed the EU Constitution. Any amendments must be agreed unanimously by all governments and then ratified in the member states according to their Constitutional traditions, i.e. by referendum or by parliamentary vote (Article 48 TFEU).

However, Article 48 (2) TEU of the new treaty allows the Council to vote by unanimity to change any of the text of part three of the Treaty on the Functioning of the Union (basically all the detail of the treaties). Such a change would have to be ratified by each country in line with its Constitutional requirements (so a bill or a statutory instrument in the UK).

Article 48 (3) TEU of the new treaty allows the Council to move to majority voting in any of the remaining areas covered by unanimity, (including foreign policy, but excluding defence). However, in this case the change would not need to be ratified by national parliaments.

There is a provision that says that if a parliament does complain within six months then such a proposal won't go through. But the presumption would be reversed. Unless the Government allows parliament time to vote against something (something the executive has signed up to, after all) then it goes through automatically.

This would undermine the role of parliament in controlling treaty changes. It would mean a shift of power towards the EU's leaders and away from national parliaments.

The process under the current treaties has meant that changes in the Single European Act, and the Maastricht, Amsterdam and Nice treaties have been 'package deals', introducing many changes at once, which attracted public interest and sparked debate. The mechanisms set out in the revised Constitution, which would allow it to be gradually altered, would be likely to reduce the level of scrutiny of future changes. *In theory, its adoption could be the last opportunity to call for a referendum.*

Nor is the new treaty in line with what the Government promised during the negotiations.

Denis MacShane told the Standing Committee on the IGC: "We think that a self-amending Constitutional Treaty does not make a lot of sense" and "There is no enthusiasm for the clause in the European Union." (20 October 2003)

The Government's 2003 White Paper said that: "There is also a proposal for a clause which would allow the European Council to vote by unanimity to move any

Treaty article to QMV. We oppose anything which would undermine the role of national parliaments in Treaty change."

Jack Straw told the Standing Committee on the IGC:

"We would not agree to the draft treaty with that provision in it. The presidency notes that were issued alongside the draft texts stated that the new scheme contained a nihil obstat clause. I pointed out that that means that 'no one objects'. However, its proposal is that national parliaments can impose a block only if more than no one objects. That is unacceptable and illogical."

"We have made it clear all along that we would find acceptable a situation in which the Council could, by unanimity, agree to a shift of powers from unanimity to QMV in respect of a particular dossier or area of activity of the Union provided that there was a lock that required every national Parliament to endorse that decision. I do not believe that there is any argument about that. There was much support for that. As I said, this is one of those areas where the draft must be acceptable or we simply do not sign up to it." (1 December 2003)

He also said that "what we cannot have is a situation where even though [this article] has to be by unanimity, late at night at an ordinary European Council, a decision on one other country's milk quotas is traded for a concession on moving from unanimity to QMV... that is not acceptable." (Hansard, 5 November 2003)

The end of the one Commissioner per country

Member states will no longer have a Commissioner each. This would mean that there will be periods in which member states do not know what's going on within the Commission. The Constitutional Treaty proposes that from 2014 the number of Commissioners will be two thirds of the number of member states. The third of members who don't have a commissioner will rotate around each time.

While some argue that this would make the EU less bureaucratic, removing nine Commissioners at the top will not make much of a dent in the EU's huge staff of 63,000 employees. On the other hand it will break down the idea of a Europe of nation states further, and will make it harder for countries with no Commissioner to find out what's going on in the Commission.

European Parliament electing the President of the Commission

The draft treaty retains the original Constitutional Treaty's proposal that the President should be elected by the European Parliament. Currently, the President of the Commission is elected by member states after approval from the European Parliament. Under the Constitution, the European Parliament would elect the European Commission President by a majority of its members, after the recommendation of a candidate by the European Council, deciding by QMV. The UK was against an elected president for the Commission fearing it was a further step towards a European government.

Peter Hain argued:

"Another suggestion is for the European Parliament to elect the Commission President. However, I am sceptical of that idea. My concern is

that such an independent figure, who must be acceptable to the member states through the Council, will get caught up in the politics of the European Parliament." (Speech in Westminster Hall, 20 March 2003)

The Government resisted the proposal throughout the original negotiations, but eventually gave way in spring of 2004. Peter Hain said in an interview with the European Affairs Committee that electing the Commission President "is not something we sought and we remain deeply sceptical about it", but conceded that, in order to get an elected President of the Council, it "is something that we might have to adjust to." (25 March 2004)

Vetoes abolished - and majority voting is made the norm

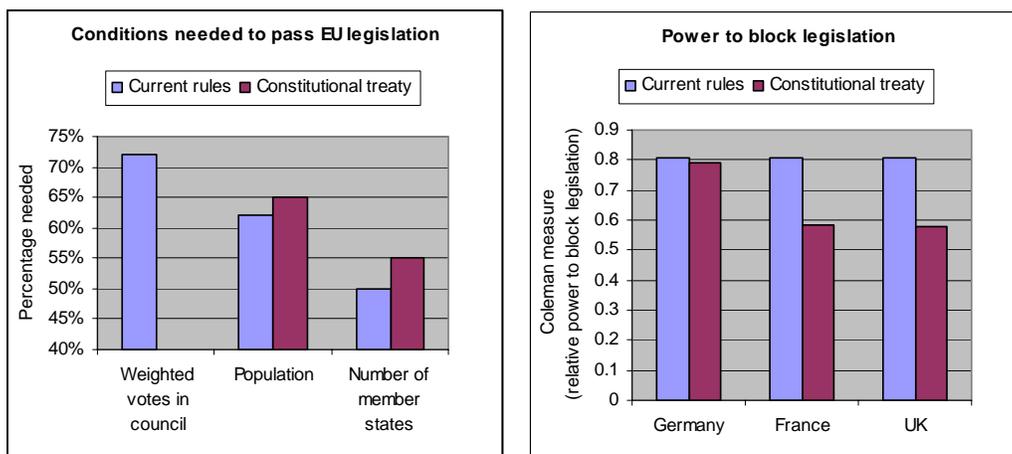
Under the new Constitutional Treaty majority voting will be extended to 61 more areas. Majority voting is also made officially the norm, and described as the "ordinary legislative procedure". The few remaining exceptions to majority voting are described as being decided under a "special legislative procedure". These remaining vetoes can also be abolished without the need for a further treaty using the simplified revision procedure (see above).

The veto is given up in all kinds of significant areas: the powers of Europol and Eurojust, energy, transport, employment policy, the ECB's powers over financial regulation, the appointment of the EU President, and many areas of foreign policy (see below for foreign policy and Annex 1 for a full list).

Cutting our power to block EU legislation by 30%

As proposed in the original Constitution, the voting system will be altered so that it is harder for member states to block legislation they are opposed to.

Under the current system laws have to pass three hurdles: 74% of the weighted votes in the Council, plus 62% of the population, and a majority of member states. Under the new system there are just two hurdles: 65% of the population and 55% of the member states. Essentially, the highest "hurdle" has been taken away, making it easier to pass legislation. This is what EU leaders mean when they talk about "streamlining" the process of making decisions.



(Source: Felsenthal and Machover, 2004)

Academic research suggests that almost all member states would find it more difficult to block legislation under the new system. The extent to which a country

will be affected depends largely on its population, which now becomes a more important factor. Germany is the only large member state whose power stays roughly the same - its hugely increased share of the vote offsets the effect of the higher threshold needed to block legislation.

Britain and France see their power to block legislation reduced by a roughly equal amount. The UK stands to lose nearly 30% percent of its ability to block EU legislation in the Council.

If the new voting system comes into play then several controversial measures the UK is currently blocking might then pass. For example, by teaming up with other liberal member states Gordon Brown managed to block some damaging aspects of recent financial services laws - particularly on the MIFID directive. This might well not have been possible under the new rules.

Even pro-euro groups like the Centre for European Reform and "Business for New Europe" acknowledge this point: they note that "Under the new system, those opposing a law would find it slightly harder to block it." (Joint briefing paper, May 2007)

Compared to the original Constitution, there is a slight delay in this measure coming into force under the new Constitutional Treaty. At the insistence of Poland the new voting system will not come into effect until five years after the rest of the Constitutional Treaty is intended to come into force.

Some argue that unless the rules are changed to make it easier to pass legislation then the EU will "grind to a halt." But a study of legislation by academics at Paris-based university Sciences-Po found that the EU has in fact been adopting new rules and regulations some 25% *faster* since the EU's enlargement to 10 new member states in 2004, and that "old" member states are in fact twice as likely to block measures as "new" countries.

Indeed, most people in business believe that the EU is already producing too much regulation. An ICM poll of 1,000 UK Chief Executives at the end of 2006 found that 59% thought that the burden of EU regulation was rising, and 54% now think the benefits of the Single Market are outweighed by the costs of EU regulation.

A 'division of competences' that means more and more power for the EU

The Constitutional Treaty was supposed to set out a clear division of powers between the member states and Brussels, to stop the gradual drift of powers from member states to the EU. However, it does the opposite - it defines most powers as "shared", and says that where powers are "shared" the member states can only act if the EU has chosen not to.

The new version of the Constitutional Treaty repeats the original text (which now becomes Article 2 (2a) TFEU), merely changing the word 'Constitution' to 'Treaties':

"When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts... When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area."

However it states that in these supposedly “shared” areas: “The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”

Exclusive competences of the EU	Shared competences	Supporting competences
<p>(a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the member states whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.</p> <p>The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.</p>	<p>(a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty.</p>	<p>(a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, youth, sport and vocational training; (f) civil protection; (g) administrative cooperation."</p>

Confusingly, within the section on the division of powers, several other powers of the union are cited, but not assigned to any category. Article 5 TFEU [2d](formerly article I-15 of the Constitution) states that:

1. *The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.*
2. *The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.*
3. *The Union may take initiatives to ensure coordination of Member States' social policies.*

The UK was deeply unhappy with this whole structure - making at least twelve failed attempts to amend or delete sections of this part. For example:

- The UK argued that: "Shared competences should be a residual category. They should therefore not be listed explicitly. To have an 'indicative list' of some shared competences is the worst of both worlds." ¹⁷
- The UK argued that: "Competition policy is not an exclusive competence. It is a shared competence." ¹⁸
- The UK wanted to insert a sentence stating that "supporting action shall not prevent Member States from exercising their competence in that area." ¹⁹
- The UK argued that employment, public health, consumer protection, and transport networks were not shared competences.
- The UK tried to delete the article on the EU's powers to coordinate employment and economic policies. ²⁰

Protocol on national parliaments watered down to become meaningless

Compared to the 2004 text, the protocol on parliaments in the revised Constitutional Treaty has been altered so that half of national parliaments need to object to trigger the process of blocking a proposal rather than 'just' a third.

In the unlikely event that fourteen national parliaments all vote against their governments on the same proposal, on subsidiarity grounds, during an eight week window, then the Commission has to 'reconsider' - but it can still override national parliaments. Which is exactly what happened the very first time the mechanism was given a 'trial run' several years ago. Such proposals are actively damaging, because they give the impression of accountability without the reality, and are used to fob off proposals for real democracy in Europe.

More power for the European Parliament at the expense of national governments

The new Constitutional Treaty proposes that in 40 new areas the European Parliament would get power of co-decision over legislation - giving it an effective veto over decisions taken by the heads of Government. The European Parliament is generally the most federalist EU institution and presses for more power for the EU and more power for itself (a list of the areas is in Annex 2).

One of the many significant areas in which the Parliament is given co-decision for the first time is over the Common Agricultural Policy element of the EU budget. This is bad news for attempts to reform the CAP. While national leaders are more likely to be able to see the big picture, MEPs are more inclined to be captured by producer interests in their constituency. Despite its current lack of power in this area Parliament has consistently voted against CAP reform. And it has used its existing powers over the framework to block reform - e.g. in March 2007 the Parliament succeeded in blocking an attempt by the Council and Commission to allow 20% of CAP spending to be "modulated" (spent on other rural development projects). Giving the Parliament far more powers in this field will give protectionist interests a second line of defence against attempts to reform the CAP.

¹⁷ <http://european-convention.eu.int/Docs/Treaty/pdf/12/Art12Hain.pdf>

¹⁸ http://european-convention.eu.int/Docs/Treaty/pdf/11/11_Art%201%2012%20Hain%20EN.pdf

¹⁹ <http://european-convention.eu.int/Docs/Treaty/pdf/15/Art15Hain.pdf>

²⁰ http://european-convention.eu.int/Docs/Treaty/pdf/13/13_Art%201%2014%20Hain%20EN.pdf

Exit clause

The draft treaty includes the "Article on voluntary withdrawal from the Union" from the previous version of the Constitution.

This establishes a procedure for leaving the EU in which the leaving member would have to negotiate with all the other member states. In reality this is a purely political proposal, designed to divert discussion onto leaving the EU.

It also raises an important issue of principle - it is not the EU which grants its member states the right to leave the EU. Member states already have the right to leave at any time.²¹

A European Public Prosecutor

The draft treaty retains the proposals in the original Constitution for a European Public Prosecutor - a move that the UK opposed vehemently. In the original version of the Constitution the EPP could only have been set up by unanimous agreement and the UK had a veto. In the new version of the Constitution the prosecutor can be set up under enhanced cooperation even if the UK objects.

During the original talks, the Government said that the Prosecutor should not be included, even if the decision to set it up was to be taken unanimously. In suggested amendments during the European Convention Peter Hain wrote, "We are firmly opposed to establishing a European Public Prosecutor. Unanimity does not mean that this article can be accepted. There is clearly no need for a separate prosecution body at EU level."

Under the original Constitution the prosecutor could only be established by unanimity, but under the new version of the text the new office could be set up using enhanced cooperation even if the UK objects.

The Prosecutor is supposed to be developed out of the existing EU prosecutors network "Eurojust". Johannes Thuy, a spokesman for Eurojust, confirmed that "We could compel the British police to make a prosecution." (Sunday Times, 5 August 2007)

A single legal personality for the EU

The draft treaty states that the Union shall have "a single legal personality", as in the original Constitution. This would mean that for the first time the EU, rather than member states, could sign up to international agreements on foreign policy, defence, crime and judicial issues (currently the EC can only sign agreements in first pillar issues like trade). That would be a huge transfer of power and make the EU look more like a country than an international agreement.

Talking about the original version of the Constitution, Italian PM Romano Prodi said that this change was "A gigantic leap forward. Europe can now play its role on the world stage thanks to its legal personality". The French government's referendum website argued that, "The European Union naturally has a vocation to be a permanent member of the Security Council, and the Constitution will allow it to be, by giving it legal personality."

²¹ E.g. Greenland unilaterally voted to leave the EEC in a referendum in 1982 and left in 1985.

Even the UK Government admitted that it could cause problems. When the Constitution was first being drafted, Peter Hain said that "We can only accept a single legal personality for the Union if the special arrangements for CFSP and some aspects of JHA are protected." He told MPs:

"...we could support a single legal personality for the EU but not if it jeopardises the national representations of member states in international bodies; not if it means a Euro-army; not if it means giving up our seat on the United Nations Security Council; and not if it means a Euro-FBI or a Euro police force."

The UK Government had long been opposed to the idea of giving the EU a legal personality. Back in 1997 Prime Minister Tony Blair boasted that he had successfully stopped a provision for this appearing in the Amsterdam Treaty. He said, "Others wanted to give the European Union explicit legal personality across all the pillars of the treaty. At our insistence, that was removed." (Hansard, 18 June 1997)

Enhanced cooperation - safeguards removed

"Enhanced cooperation" is EU jargon for the idea that smaller groups of member states can go ahead with projects within the EU framework, while other member states choose not to get involved.

The UK Government has long been cautious about enhanced cooperation. After the Amsterdam treaty in 1997 Tony Blair said, "We secured a veto over flexibility arrangements which could otherwise have allowed the development of a hard core, excluding us against our will." (Hansard, 18 June 1997)

The Government has been particularly wary of extending enhanced cooperation into foreign affairs. In 2000 Robin Cook warned, "We have no idea what enhanced co-operation might lead to."

Under the draft treaty many of the safeguards which currently apply to enhanced cooperation are removed. For the first time enhanced cooperation groups can decide to move to majority voting within their group, with no veto for non-members of the group (Art. 333 TFEU [280h], formerly article III-422 of the Constitution). So, for example, the veto could be abolished for a group working on tax issues, which could then be used to put pressure on the UK.

Enhanced cooperation would apply to the whole of foreign policy. An "emergency brake" mechanism which applies in foreign affairs to enhanced cooperation under the existing treaties is deleted by the new Constitutional Treaty.

(2) Foreign Policy

‘Within the EU itself, we will have to move closer to establishing a common European army.’

- German Chancellor Angela Merkel, Bild, 23 March 2007

‘When I was talking about the European army, I was not joking. If you don't want to call it a European army, don't call it a European army. You can call it ‘Margaret’, you can call it ‘Mary Ann’, you can call it any name.’

- Italian Prime Minister Romano Prodi, Independent, 4 February 2000

‘The Constitution lays the legal basis for a future European Army. It fixes a ‘common defence’ as an objective.’

- Former French Finance Minister Dominique Strauss-Kahn, ‘Oui!, Lettre ouverte aux enfants de l'Europe’, October 2004

‘Europe must believe that it can be in 20 years the most important world power... The Constitution is an important step in this direction.’

- Spanish Prime Minister Jose Zapatero, Der Spiegel, 8 November 2004

‘I am sure that in medium-term we will have a European army financed by the EU budget.’

- German ambassador to the EU Wilhelm Schönfelder, Handelsblatt, 19 April 2007

‘The basis for a European Defence exists. We must make it grow. I want Europe to be capable of ensuring its security autonomously.’

- French President Nicolas Sarkozy, EUobserver, 16 July 2007

The institutional changes affecting foreign policy - such as the de facto EU Foreign Minister, and the creation of an EU diplomatic service, single legal personality and the introduction of enhanced cooperation into foreign policy, are dealt with above.

But as well as these significant new institutions, there are a large number of other important new powers for the EU in this area - not least the introduction of majority voting, a new “hard core” in defence, and a mutual defence commitment.

The Foreign Affairs Select Committee has noted that:

“...the Government risks underestimating, and certainly is downplaying in public, the importance and potential of the new foreign policy institutions established by the Lisbon Treaty, namely the new High Representative and the European External Action Service. We recommend that the Government should publicly acknowledge the significance of the foreign policy aspects of the Lisbon Treaty.”²²

Majority voting in eleven different areas of Foreign Policy

At the start of the original negotiations on the Constitution Peter Hain promised that “QMV is a no-go area in CFSP” [Common Foreign and Security Policy]. (Hansard, 25 March 2003)

²² Foreign Affairs Committee, ‘Foreign Policy Aspects of the Lisbon Treaty’ (20.01.08)

During the IGC, Jack Straw said that the move to QMV in this area was “simply unacceptable.” (Hansard, 1 December 2003) Nonetheless the Government has now accepted it, according to its own analysis, in nine different areas of foreign policy.²³ In fact there is also majority voting on at least two other aspects of foreign policy – so the veto would in fact be given up in a *eleven* different areas. Areas of Foreign Policy on which the veto would be given up:

1. **Proposals from the EU Foreign Minister.** Perhaps the most important introduction of QMV relates to the new Foreign Minister. Article 31 TEU [15b](formerly Article III-300 (2) of the Constitution) stipulates that the Council shall act by qualified majority, “when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request to him or her from the European Council, made on its own initiative or that of the High Representative.”

This change could have important repercussions. EU states could (unanimously) ask the Foreign Minister to come up with a plan but then, if individual states such as the UK don't agree with what he comes back with, could find themselves in a majority voting situation. For example, on the squabble between NATO and the EU over who will supply air transport to the African Union troops in Darfur, the UK might not be able to block the EU from pointlessly duplicating NATO – if this was proposed as part of a plan from the Foreign Minister.

“I made it clear that Article III-201, which proposes QMV on proposals made by the Union's Minister for Foreign Affairs, is simply unacceptable. I do not remember exactly how much support there was for that view in the room, but there was a great deal. Again, we made it clear that common foreign and security policy is an intergovernmental matter, and must be established unanimously.”

- Jack Straw, Standing Committee on the IGC, 1 December 2003

2. **The design of the EU diplomatic service.** The new Article 27 TEU [31a] (formerly Article III-296 of the Constitution) also allows the organisation and functioning of the new EU diplomatic service to be decided by QMV. As noted above, the tasks and even the eventual size of the service are still unclear. The Council will act on a proposal from the Foreign Minister after getting the consent of the Commission.
3. **Setting up an inner core in defence.** Under Article 46 TEU [28e](Article III-312 in the Constitution), the decision to set up the “permanent structured cooperation” group would also be taken by QMV, as would subsequent decisions to expel members, or to admit new ones to the group.

²³ The UK Government lists these areas as “EU humanitarian aid operations”; “Civil protection”; “Implementation of solidarity clause”; Creation of a 'start-up fund' for urgent Common Foreign and Security Policy measures; Urgent EU aid to third countries; Membership of structured co-operation in defence; Appointment of High Representative of the Union for Foreign Affairs and Security Policy by the European Council; Role of the High Representative of the Union for Foreign Affairs and Security Policy in CFSP implementing measures; Measures to facilitate diplomatic and consular protection”

There is also the prospect of majority voting within the inner core. Article 333 TFEU [280h](the old Article III-422 (1) of the Constitution) allows for the Council to act by qualified majority voting in the context of enhanced cooperation, if the Council, acting unanimously, so decides. This is a new article. This is not supposed to cover “defence” decisions, but will affect the common foreign and security policy.

4. **Terrorism and mutual defence.** Article 222 TFEU [188r] (Article III-329 of the Constitution) stipulates that the detail and meaning of the “terrorism solidarity clause” is to be decided by QMV.

This is important because the Government had clear reservations about this article. A proposed amendment by Peter Hain called for the key provision of the article - that “Should a Member State fall victim to a terrorist attack, the other Member States shall assist it” - to be deleted. But he was ignored. Article 222 (2) reads, “Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities.” In a separate proposal, the Government asked for the new EU power to “prevent” terrorist threats to also be deleted. At a plenary session of the European Convention Hain objected that, “if it carries real military obligations to offer military assistance it is duplicating the NATO guarantee. If it does not ... it is empty rhetoric.”²⁴ However, his objection was ignored.

5. **Urgent financial aid, and**
6. **Humanitarian aid.** Two new Articles 213 [188i] and 214 [188j](formerly III-320 and III-321 of the Constitution) set up majority voting on urgent macro-financial aid and humanitarian aid.

Although this ostensibly seems a benign change (and is cited by the Government as an “uncontroversial” example of a move to QMV), it could raise highly important questions. To give a past real-world scenario, this might have been used to decide whether the Union should continue to fund the Palestinian Authority after the 2006 elections which returned Hamas to power - the UK and other Member States disagreed about this, the UK being keen only to fund NGOs and not the Hamas-led authority.

The UK tried to have these articles deleted. The UK argued that “Macro-financial assistance has been agreed urgently when required.” Both amendments were ignored.²⁵

7. **The election of the Foreign Minister.** New article 18 TEU [9e] (formerly I-28 of the Constitution) specifies that the Foreign Minister / High Representative is elected (and can be sacked) by qualified majority voting. Because he or she is going to be a member of the Commission, whichever country he or she is from will lose its national commissioner if it has one, when he or she is appointed.

²⁴ See http://www.europarl.eu.int/europe2004/textes/verbatim_021206.htm

²⁵ See <http://european-convention.eu.int/Docs/Treaty/pdf/869/Art29Hain.pdf> and <http://european-convention.eu.int/Docs/Treaty/pdf/870/Art%20III%20218%20Hain%20EN.pdf>.

NB 188j also sets up a “European Voluntary Humanitarian Aid Corps”. The UK also argued against this, saying that, “The idea of establishing a European Voluntary Humanitarian Aid Corps should have no place within the EU’s humanitarian action”. This third amendment was also ignored.

8. **Civil protection.** New article 196 [176h] (formerly article III-284 of the Constitution) allows the EU to pass laws by majority vote on the response to natural or man-made disasters. The UK asked for this move to majority voting to be removed, arguing that it wanted to preserve “the current flexible arrangements”.²⁶ However, this request was ignored.
9. **Terrorist financing controls.** A new article 75 [61h] (former article III-160 of the Constitution) allows for decisions on measures to control the financing of international terrorism to be taken by QMV. The UK Government was not against this article per se, but wanted it to be changed to stop it restricting member states’ freedom to act. The UK argued that “At present, the scope of [the] article ... is certainly too wide and open-ended. Member States should retain competence to take further action consistent with the European law, for example to take immediate action to freeze assets of terrorists identified in accordance with national procedures and laws.” However, the UK did not get the changes it wanted.
10. **The new EU Foreign Policy Fund.** New article 41(28) TEU (formerly article III-313 of the Constitution) creates a “start up fund” for foreign policy operations. This new fund is seen by many as the first step towards a common defence budget for the EU. Everything about the fund is to be decided by QMV - including the amounts paid by member states. The UK Government demanded that decisions about the fund should be taken by unanimity. However, this was ignored.
11. **Consular issues.** Under the Constitutional Treaty article 23 [20] TFEU (formerly III-127 of the Constitution) is amended so that the EU can pass laws by majority vote determining rules on diplomatic and consular protection - so moves towards common consulates and embassies would be likely to accelerate.

The “structured cooperation” group - an inner core in defence

The new treaty will carry over the original Constitution’s proposals on structured cooperation.

Articles 42 [28a] and 46[28e] TEU (respectively carrying over I-41 (6) and III-312 of the Constitution) provide for the establishment of a special sub-group of member states “whose military capabilities fulfil higher criteria and which made have more binding commitments to one another in this area with a view to the most demanding missions”. This provision for so-called “permanent structured cooperation” within the EU framework would allow neutral countries to opt out, and create an “inner core” of EU members interested in taking forward military integration.

“The responsibility of our generation is to give a more ambitious dimension to defence Europe... Soon, a new institutional treaty will permit reinforced cooperation, notably in the area of defence, since defence Europe will move forward by using a hard core of countries which want to take on their own security.”

- French Defence Minister Hervé Morin, La Tribune, 19 July 2007

²⁶ <http://european-convention.eu.int/Docs/Treaty/pdf/857/Art%20III%20179%20Hain%20EN.pdf>

"The Young European Federalists... Welcome the possibility to establish Structured Co-operation in the field of Defence, which is a significant step towards a Single European Army."
- Young European Federalists briefing paper

The arguments over this group are much like those over the European Defence Agency - that the focus on harmonisation of forces within Europe will work to the detriment of cooperation with NATO.

Article 46 (2) [28e] TEU will specify that the group can be set up by QMV. The rough outline of how the group would work is explained in a protocol annexed to the Treaty. This outlines a number of qualifications which member states would have to pass to join permanent structured cooperation. Article 1 of the Protocol stipulates that it is open to any member state undertaking to:

a) *"proceed more intensively to develop its defence capacities through the development of its national contributions and participation" in multinational forces and activities of the European agency; and b) "have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned... and which can be sustained for an initial period of 30 days and be extended up to at least 120 days."*

Article 2 of the Protocol specifies that participating member states would cooperate to:

- a) achieve "approved objectives concerning the level of investment expenditure on defence equipment";
- b) "bring their defence apparatus into line with each other";
- c) "take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces";
- d) "make good ... the shortfalls perceived in the framework of the 'Capability Development Mechanism'"; and
- e) "take part... in the development of major joint or European equipment programmes in the framework of the Agency."

The Government was initially strongly opposed to the structured cooperation proposal. Peter Hain argued in an amendment:

"The UK has made clear that it cannot accept the proposed ESDP reinforced cooperation provisions. While we support Member States making higher capability commitments and co-operating with partners to this end, the approach described here - a self-selecting inner group - undermines the inclusive, flexible model of ESDP that the EU has agreed."

Indeed, the UK Government has long been cautious about enhanced cooperation. After the Amsterdam treaty in 1997 Tony Blair said, "We secured a veto over flexibility arrangements which could otherwise have allowed the development of a hard core, excluding us against our will." (Hansard, 18 June 1997) This veto has now been given up.

However, the Government failed in its attempts to remove the provision for enhanced cooperation from the Constitution, and after the meeting between the UK, France and Germany in October 2003, the UK agreed to back the idea in return

for assurances that member states could not be excluded from the group if they wanted to join.

A commitment that the EU will move to a common defence

Article 42 TEU [28a] (formerly article I-41(2)) states that "The common security and defence policy shall include the progressive framing of a common Union defence policy. *This will lead to a common defence*, when the European Council, acting unanimously, so decides."

The UK objected to this, arguing that "We believe there is no prospect of the Council taking a decision to agree common defence in the near future. It is therefore inappropriate for the text to pre-judge the decision of the Council." However, the UK later gave way.

A new mutual defence commitment

Article 42 (7) [28a] TEU (formerly article I-41(7) of the old Constitution) states that, "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States." This is essentially a mutual defence commitment.

Irish Foreign Minister Dermot Ahern has said, "The European Constitution provides for a mutual defence commitment. This establishes an obligation to assist another Member State that is the victim of armed aggression on its territory."

Lord Robertson, former Secretary General of NATO, warned that it is "dangerous to introduce a mutual defence clause into the Constitution if you do not have the means to carry it through."

The Government wanted this entire paragraph to be deleted from the Constitution, and issued an unsuccessful amendment to this end, in which Peter Hain wrote, "Common defence, including as a form of enhanced cooperation, is divisive and a duplication of the guarantees that 19 of the 25 Member States will enjoy through NATO." However, the UK Government abandoned this objection.²⁷

A new requirement to consult other EU members on foreign policy actions

Article 11 [24] TEU (Article I-40 of the original Constitution) contains a requirement for a Member State to consult other Member States before taking foreign policy action:

"Before undertaking any action on the international scene or any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity."

²⁷ http://european-convention.eu.int/Docs/Treaty/pdf/30/30_Art%20I%2040%20Hain%20EN.pdf

During the European convention the UK asked for this text to be removed, arguing that “We will need to ensure that we are not prevented by any provision in the Constitution from carrying out an independent foreign policy”.²⁸ However, this request for an amendment was ignored.

A new terrorism solidarity clause

New article 222 TFEU [188r] (formerly article III-329) states that “Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities.”

It states that:

“The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack; [and to] assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.”

The UK Government wanted to delete the sentence “Should a Member State fall victim to a terrorist attack or a natural man-made disaster, the other Member States shall assist it.”²⁹ In a separate amendment the Government also asked for the new EU power to “prevent” terrorist threats to be deleted.³⁰ However, both objections were later abandoned.

The political motivation behind the clause is to reinforce moves towards a mutual defence commitment (see above). The only sense in which the terrorism solidarity clause is not a mutual defence guarantee is that it is addressed to threats from “non state actors.”

The power to take action to “prevent” rather than respond to terrorism is likely to be used by the EU to expand its role. Crucially, the meaning of the new article is to be defined by QMV, meaning that it could be used as a flexible basis for EU action.

²⁸ http://european-convention.eu.int/Docs/Treaty/pdf/29/29_Art%20I%2039%20Hain%20EN.pdf

²⁹ <http://european-convention.eu.int/Docs/Treaty/pdf/874/ArtXHain.pdf>

³⁰ <http://european-convention.eu.int/Docs/Treaty/pdf/9901/XHain.pdf>

(3) The Charter of Fundamental Rights

The Government promised the Charter would not be legally binding -
Under the new Constitutional Treaty it would be

When the Charter of Fundamental Rights was drawn up, the UK Government promised that it would not become legally binding. The then Europe Minister Keith Vaz promised that it would be no more legally binding "than the Beano."

"Our case is that it should not have legal status and we do not intend it to"
- Tony Blair, 11 December 2000

"It will not be legally enforceable"
- Former Europe Minister Keith Vaz, 22 November 2000

"It is certainly not the intention of this Government to see it as anything other than a political declaration"
- Baroness Jay, 11 December 2000

However, despite the Government's promises, article 6 [6] of the new Constitutional Treaty gives the Charter legally binding status. Indeed the Lisbon Treaty puts the Charter on a legal par with the core treaties. Article 6 states that:

"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted on [... 2007], which shall have the same legal value as the Treaties."

Even the Government has admitted that the incorporation of the Charter is 'not ideal'. Peter Hain said, "Well, in an ideal world, we would not have gone down the route of incorporating the Charter. We would have preferred it as a statement of declaratory rights." (Hansard, 8 July 2003)

When the Government was opposing the inclusion of the Charter in the treaties Baroness Scotland said making the Charter binding was "not desirable because a text incorporated into the treaties requires legal precision". She added, "The Charter uses a breadth of language well suited for a political declaration." (Hansard, 29 November 2000)

Even during the European Convention in 2002 the Government was still promising that the Charter would not be included in the Constitution. Peter Hain said:

"The people who say that it is a great idea to have a charter of rights do not seriously appreciate what the implications would be if it were incorporated wholesale in the treaty. My right hon. Friend the Foreign Secretary has made it absolutely clear that we shall not do that ... people want a charter of motherhood and apple pie at one level, but are not willing to recognise what full incorporation would signify." ³¹

³¹ Hansard, 18 June 2002

Will the protocol stop the Charter from affecting UK law?

The UK doesn't have an opt-out - only one part is said not to create new rights

Having allowed the Charter to be made legally binding, the UK Government agreed a protocol which it argues will prevent the Charter from affecting UK law, or at least reduce its impact.

Initially the Government claimed that the protocol amounted to an "opt-out" for the UK. However, now they have admitted that there is no such opt-out. In his statement to Parliament on 25 June Tony Blair said, "It is absolutely clear that we have an opt out from both the Charter and judicial and home affairs." However, in a letter dated 31 July Europe Minister Jim Murphy admitted: "The UK specific protocol which the UK secured is not an 'opt out' from the Charter. Rather, the protocol clarifies the effect that the Charter will have in the UK." More recently, Murphy admitted "It is clear that the UK does not have an opt-out on the Charter of Fundamental Rights".

The text of the protocol states that:

" Article 1

1. The Charter does not extend the ability of the Court of Justice, or any Court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom."

Interestingly, when Tony Blair presented this protocol to parliament he purported to "read out" the text of this protocol, but - surely by mistake - neglected to mention that only "Title IV" is said not to create new rights. Blair said that:

"First, on the charter of fundamental rights, we secured a legally binding protocol, specific to the UK, and applicable both to the British Courts and to the European Court of Justice."

"Let me read the terms. 'The Charter does not extend the ability of the Court of Justice, or any Court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that the Charter reaffirms. In particular, and for the avoidance of doubt, nothing in the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.'" (Hansard, 25 June 2007)

What effect will the protocol have?

The protocol is curiously worded. Only one part of the Charter (Title IV on social rights), is said not to create justiciable rights applicable to the United Kingdom - and even then - "except in so far as the United Kingdom has provided for such rights in its national law" - which is the whole point. The ECJ will be in the business of interpreting the meaning of UK law in the light of the Charter.

The protocol appears to imply a greater degree of protection against the evolving jurisprudence of the ECJ in this one area. However, the inevitable conclusion of an "avoidance of doubt" clause which only applies to one part of the Charter is that is clearly *doubtful* whether the other areas covered by the Charter will not be affected by the Charter. Saying that only one section cannot be used to create new rights suggests that the others *will*.

While there clearly seems to be a *greater* level of protection against the evolving jurisprudence of the Court in relation to Title IV compared to the other sections, even there, the Court will decide for itself whether the UK has attempted to provide for such rights in its national law. It will then be able to decide whether the attempt to provide such rights is adequate in the light of the Charter.

A UK-specific protocol will quickly be circumvented

The Government sometimes appears to accept that the Charter will have some effect at EU level, but argues that it will not affect "national" law.

Baroness Amos told the Lords that, "On the Charter of Fundamental Rights, I know that it looks as though the Government were seeking to opt out of issues. The charter ensures that the institutions, bodies and agencies of the Union will be bound to recognise rights in exercising any of their powers. The charter should help to ensure that citizens' basic rights and liberties are protected at EU level, as they are in their own countries. However, we feel absolutely certain that, with our human rights legislation, employment protection legislation and other legislation, we have already secured those rights within current UK domestic law."³²

This argument effectively begs the question - as it will be the European Court of Justice that will decide - (a) where the boundary between national law and European law is, and (b) whether the United Kingdom intended to provide for a given right in its national law. The Government's legal advisor (Mike Thomas) admitted in evidence to MPs that ultimately the ECJ would decide whether or not a given right is provided for in UK law:

"Mr Clappison: Who decides when it gets to the European Court of Justice whether it is an existing right or not?"

Mr Thomas: I think you probably know the answer to that question. Who decides when something goes to court? It is the court."³³

Furthermore, there is an obvious problem with the idea of trying to create a specific national carve-out for the UK. Firms operating in more than one member

³² Hansard, 25 June

³³ Evidence from David Miliband MP, Patrick Reilly, Mike Thomas and Kevan Norris in front of the ESC - <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf> (16.10.07)

state would clearly be affected. Migrants coming from another member state to the UK would presumably still be covered. And anyone who travelled to another EU country - e.g. to use health services - would still be able to use the Charter.

Given the nature of EU law, it is hard to see how a carve out could work in practice, and it is likely the UK-specific opt-out deal will quickly unravel. As the European Scrutiny Committee argue:

*"If the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, the duty to interpret the measure in accordance with that ruling arises, not under the Charter, but under the UK's other Treaty obligations. Nothing in the Protocol appears to excuse the UK from this obligation."*³⁴

In fact, the protocol on the Charter *explicitly reaffirms* that the UK will remain bound by its other obligations³⁵ devolved from the Treaties regarding the implementation of Union law.

These views are shared by many others around Europe:

- Jacques Ziller, a Professor at the European University Institute in Florence, said that the idea of one country opting out of the Charter was "nonsense" and would quickly be challenged in the Courts.³⁵
- EU Commissioner Margot Wallstrom has said the Charter will apply to large parts of British law, despite UK Government claims that the opt-out will prevent this. She said, "The Charter will be binding for the European institutions, and also for member states when they implement EU law, even if it does not apply to all of them."³⁶
- Former EU Justice Commissioner Antonio Vitorino has also questioned the legal basis for the British opt-out from the Charter of Fundamental Rights and warned that it would not work.³⁷
- More importantly, the Commission's legal experts take the same view, and expect that the British opt-out will be tested in the Courts.³⁸ The Commission's legal service estimates that British opt-outs to the Charter are "limited" and one legal source said that "the opt-out is potentially very thin".³⁹
- This has been confirmed through analysis that followed the publication of the draft mandate from the Legal Adviser to the Commons European Scrutiny Committee, Michael Carpenter. He questioned the claim by Tony Blair that the Charter of Fundamental Rights will not extend the ability of the European Court of Justice to challenge UK laws. He said: "This is a high standard to set, and I doubt if what appears to have been agreed secures this result." He indicated that the Charter could have an indirect impact on UK law, if the Court gave a ruling on the Charter's effect on a given EU law in another member state.

³⁴ <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf>

³⁵ European Voice, 31 May 2007

³⁶ Telegraph 12 July 2007

³⁷ Guardian 26 June 2007

³⁸ Guardian 26 June 2007

³⁹ Telegraph 12 July 2007

- Professor Damian Chalmers, Professor in European Union Law at the London School of Economics has said that “the protocol does not say the Court cannot apply the Charter to the UK: it just says it cannot extend it.” He argued that the ECJ could simply profligate about the sources it uses in cases it gets from the UK, as almost all the rights set out in the Charter are also found elsewhere. He concluded that “People who think we have some sort of opt-out are going to be in for a surprise in that regard because that is what will happen.”⁴⁰
- Professor Sir David Edward of the University of Edinburgh told a Lords’ Committee that, “It is a very limited Protocol as I see it. It is not a total opt-out of the application of the Charter. On the contrary, it begins in the preamble by reaffirming Article 6 of the Treaty on European Union. As to where that leaves us - I am not sure that I can either offer elucidation or comfort in that respect.”⁴¹
- A senior European Parliament source close to negotiations on the new EU treaty told the Telegraph that MEPs are planning to sponsor early challenges to Britain’s opt-outs. “We are going to make sure that this issue is constantly before the European Court of Justice,” he said. “There is 30 years of EU jurisprudence to say there can be no two-tier system of European rights.”⁴²

As the *Economist* explained:

“The problem, as freely admitted by the head of the European Commission legal service the other day, is that there is nothing in the opt-out to stop British judges being invited to pay attention to European rulings and case law that involves other countries. In other words, the British opt out from the Charter would be watertight if British Courts were an island unto themselves, with an exclusive, vertical relationship with the European Court of Justice (ECJ).”

“But they are instead affected by all manner of case law generated by the ECJ in relation to other members of the EU. To give an example in plain English: imagine that a Czech trade union takes the Czech government to Court some time in the future, arguing that Czech employment law is in conflict with rights enshrined in the Charter, and the ECJ finds in favour of the trade union.”

“That creates jurisprudence that is based on the Charter. Then, there is nothing to stop a British trade union going to a British judge, and asking him or her to consider the Czech case as a precedent, that signals that a piece of similar British labour law is in conflict with EU rights.”⁴³

British Liberal Democrat MEP Andrew Duff argues that:

“The Protocol also looks flawed juridically. Regardless of the UK’s exclusion clause, the EU Courts will be bound to develop jurisprudence in fundamental rights matters which steadily evolve into general principles of EU law which all member states must respect. Moreover, the European

⁴⁰ House of Lords, 20 November 2007.

⁴¹ House of Lords, 6 December 2007.

⁴² Telegraph, 12 July 2007

⁴³ Economist, 9 August 2007

Court of Justice will be blind to the nationality of an EU citizen who chooses to invoke the Charter under EU jurisdiction."⁴⁴

The Government ignored the warnings of the European Scrutiny Committee on the protocol

In October last year, the European Scrutiny Committee asked the Government to secure changes to the protocol on the Charter which stop the Charter having an effect on the UK when the Court interprets EU law in the light of the Charter. They argued:

"As the Charter would apply to Member States when implementing Union law, the question arises of whether the UK would be bound by ECJ case law when the latter interprets Union law as implemented in other Member States in circumstances where the same Union law is also implemented in the United Kingdom... In our view, there is here at least an ambiguity which should be resolved and the UK's safeguards made firmer in the course of the IGC if the results claimed by the Government are to be secured. We would wish the Government to show how they have secured the UK from such interpretations and ask that they secure the phrasing 'notwithstanding other provisions in the Treaties or Union law generally' in the text of the Protocol." (Thirty-Fifth Report, 8 October)

However, the Government has ignored the Committee's proposal.

Judges of the ECJ are sceptical about the attempt to create "safeguards"

In 2005 we interviewed several judges at the European Court of Justice (ECJ), who said that they believed the Charter would change national laws, despite the various safeguards that the UK had established. Several of them were fundamentally sceptical about the attempt to create safeguards, given the evolving jurisprudence of the Court. This is crucial, as it would be the Court's judges who would ultimately decide on how to interpret the Charter if the Lisbon Treaty is ratified.

- Judge Tizzano, former Advocate General and now a judge at the European Court of Justice, suggested that the failure of previous safeguard clauses in EU treaties implies that the attempt to limit the impact of the Charter will not stand the test of time. He asked, "Will they be able to limit and to safeguard, and to maintain the limits of the application of the Charter as the people who suggested this clause wanted, or not? *I guess not, because I saw what was the destiny of other safeguard clauses in the treaty.*"
- Asked whether the Charter means "more powers for the ECJ?" Tizzano said, "Yes, more powers and more work."
- Former European Court Judge Jean-Pierre Puissechet told us, "The ordinary citizen could engage in procedures before their national judges, and they could invoke legal means derived from violation of fundamental rights as conferred by the Charter."
- Puissechet also warned, "This Court has always been innovative in the interpretation of certain fields ... You have to keep this in mind when you assess the possible impact of the Constitutional Treaty on the role of this

⁴⁴ Andrew Duff, *A primer on the EU's reform treaty* (02.07.07)

Court.”

- Asked, “Do you think that Charter will give the ECJ more power?” he replied, “I think it could well be the case... competencies would be enforced in those fields in which for the time being - even in customary law - there is no provision, and there is no guarantee. That goes for the two or three or four social provisions, which are, or will be, absolutely a new thing.”
- European Court Judge George Arestis told us, “The incorporation of the EU Charter into the primary constitutional law of the EU will have an impact on the Member States, bound by the Charter through the doctrine of supremacy of EU law. Case law seems certain to evolve over the years ahead.... The EU Charter could be used to deliver rights at work: (i) as a legal source, by itself, through the doctrines of 'direct' and 'indirect' effect, (ii) as a basis for challenging national law which incorrectly or inadequately transposes EU law.”
- He concluded that, “The Court will decide disputes where Member States are charged with failing to implement, or allegedly violating rights in the EU Charter.”

The Government has potentially created a lawyers' paradise with this messy fudge. It has clearly broken its repeated promise that the Charter would not become legally binding, whilst it has become increasingly clear that the so-called safeguards simply will not work.

Commission President Jose Barroso said shortly after the signing of the outline agreement that he was happy that his son was studying law, because under the Constitutional Treaty : "lawyers have a beautiful future."⁴⁵

The Charter will act as a legal basis for EU legislation

As well as a basis for the Court to rule on the legality of member states' laws, the Charter will also provide a basis for the Commission to propose legislation in new areas.

A good example of how far the Commission will stretch the Charter is the directive on free movement. In a series of logical leaps, the Commission admits that it was proposed on the basis of a right which it “deduced” from a right in the Charter, which was in turn “deduced” from “member states' traditions” - even though it is not in the existing treaties:

“While it is true that the right of movement and residence of family members of Union citizens is not explicitly referred to by the Treaty, the right does flow from the right to preserve family unity, which is intrinsically connected to the right to the protection of family life, a fundamental right forming part of the common Constitutional traditions of the member states, which are protected by Community law and incorporated in the Charter of Fundamental Rights.”

The Commission is already using the Charter as a justification (though not a legal base) for legislation before it is even made legally binding. Making the Charter

⁴⁵ Süddeutsche Zeitung, 25 June 2007

legally binding would let the Commission stretch its remit even further.

The ECJ's former Advocate General Leendert Geelhoed has argued that the incorporation of the Charter would lead to "a lot of implementing legislation":

Q: Would you say that the Charter, as a part of the Constitution will give rise to a lot of new law, a lot of new legislation?

Geelhoed: Yes. That will be the consequence of those values, especially the third part of the Charter - that will require a lot of implementing legislation.

These are clearly new rights

The Government keeps on claiming that the Charter does not contain any new rights. Jim Murphy said on the Today Programme that "The Charter of Fundamental Rights doesn't create any new rights in the United Kingdom, or in any other member state." (9 October 2007)

If this were true there would be no need for the other convoluted safeguards that the Government has attempted to erect. In reality the rights in the Charter go beyond existing rights - particularly in the UK.

The European Commission has said that the Charter contains "certain new rights which already exist but have not been explicitly or formally protected as fundamental rights". More recently, the Commission said "Citizens' rights and Charter of Fundamental Rights: the Treaty of Lisbon preserves existing rights while introducing new ones. In particular, it guarantees the freedoms and principles set out in the Charter of Fundamental Rights and gives its provisions a binding legal force."⁴⁶

Even where the articles of the Charter are based on previous agreements the scope is often wider. The official "text of explanations" which has been produced to explain how the rights have been derived makes it clear that these are new rights:

- Seven of the articles which are supposedly "based on" the European Convention on Human Rights, have had their scope or meaning widened in the Charter.⁴⁷
- Thirteen articles of the Charter were derived at least in part from interpretations of the ECJ's own case law. Because the ECJ will be able to decide for itself how to interpret its own case law, this allows gradual ECJ expansion of the rights in the Charter - it is effectively built on shifting sands.
- Some of the "sources" from which the rights are derived are treaties to which the UK is not currently party to at all. For example, the explanations state that Articles 5 and 50 of the Charter are derived in part from the Schengen Convention and its *acquis*.
- Several of the articles are said to be derived from the revised (1996)

⁴⁶ http://europa.eu/lisbon_treaty/glance/index_en.htm

⁴⁷PT See explanation 52.2

version of the European Social Charter, to which the UK and various other member states are not signatories. Although the UK is a signatory to the original 1961 European Social Charter, the revised version added a set of new articles numbered 20 - 31, which do not currently bind the UK. The explanations state that seven of the articles of the Charter are based on this source.⁴⁸

Even the UK Government's own Commentary on the Constitution admits that certain of the Charter rights have no previous basis in the treaties or previous agreements. Its note on Article II-73 (on "freedom of the arts and science") notes that this article "has no equivalent in the current treaties" and has in fact been "deduced" from other rights.

This point led to the following exchange at a 2005 meeting of the Commons European Scrutiny Committee:

Mr Heathcoat-Amory: Article 13 of the Charter, Part II, says that scientific research shall be free of constraint ... your commentary against that Article says that it has no equivalent in the current Treaties or in other parts of the Constitutional Treaty and also does not exist in a separate European Convention on Human Rights ... This is a new right. Why are you saying that the Charter creates no new rights?

Mr Straw: It is a declaration of rights that already exist. Those rights certainly already exist and they would exist here and elsewhere across Europe.

Mr Heathcoat-Amory: Can you tell me where they exist?

Mr Straw: In practice, they exist. (Hansard, 8 February 2005)

What will the Charter mean in practice?

The Charter is likely to affect national law and give the European Court of Justice substantial new powers. Although the debate in Britain has focused on the Charter's effect on business, it does, in fact, cover a very wide range of topics.

The Court will have substantial new powers to review and change national laws. But how the Court will use these powers is difficult to predict. The only thing which is certain is that the European Court will have more power. The Court is neither particularly left or right-leaning, although individuals on the Court clearly have their own biases. However the Court does have a clear bias towards the promotion of further European integration.

For example, Judge Tizzano has stressed the social rights in the Charter, and argued that it would move the UK economy towards the continental model. He said:

" The problem for the UK is that the social rights of the Charter could make it obligatory for the UK to accept some rights that they don't accept in the same way as other European countries. What makes a problem for the UK is the Charter of social rights. Because in the UK the

TP⁴⁸PT In the old version of the Constitution these are numbered: II-83, II-85, II-87, II-90, II-91, II-93, and II-94

system of relations between the social partners is different than in other countries.... they are afraid that because of the social rights in the Charter the Court and the EU would extend the practice of other member states to the UK."

He added, "I'd say that it's more [like] a continental model, than an English model of social relations. So in this sense I understand that the companies' owners are worried because you could have the exportation of the continental model on them."

However, on the other hand, the then-Advocate General at the European Court, Leendert Geelhoed, said that he believed the Court would employ a "restricted" approach to the social rights in the Charter, but an "expansive" approach to the more liberal rights: "The Court will be rather restricted in its interpretation, just in the case of the social and economic rights - whereas the Court could be a little bit expansive in the classical and fundamental rights."

The net result of giving the Court greater power through the Charter is unlikely to be a clear "left" or "right" outcome. It would, however, mean that the small group of judges on the Court of Justice would be called upon to make contentious and essentially political judgements in a wide range of areas. Some examples of issues the Court would be asked to rule on:

Article 3: Right to the integrity of the person

Anti-abortion groups have said they believe this will allow the restriction of certain types of abortion. The "Pro-Life alliance" argued that aspects of this article would restrict abortions carried out because of handicaps. Scientists have also argued that aspects of this article will restrict scientific research.

Article 8: The right to protection of personal data

Data protection rules have a big impact on police investigations - with some arguing that they make it harder for the police. Under the Charter the Court would be able to define rules on data protection. It would also have big implications for the ongoing series of cases on passenger data sharing with the US. In May 2006, in Joined Cases C-317/04 and C-318/04, the Court annulled the decision authorising the conclusion of the agreement between the US and the EU on the transfer of personal data. But the EU and US are still keen to have an agreement, and have set July this year as a deadline for a deal. As soon as a new agreement is concluded it is likely to face a new legal challenge. The Charter would almost certainly be used to rule on such agreements.

Articles 7 and 9: The "Right to family life" and the "Right to marry and found a family"

These rights could tip the balance in various cases relating to immigration and family reunification. In Case C-540/03, Parliament v Council [2006] the Court rejected an attempt by the European Parliament to overturn limits on family reunification, because, as it argued, existing pieces of EU legislation "do not establish any absolute right regarding family reunification. Nor should the application be examined in light of the Charter given that the Charter does not constitute a source of Community law." Making the Charter legally binding could clearly mean that future cases of this kind could go the other way.

Article 11: Freedom of expression and information

This article could mean that in future EU judges would rule over controversies

such as the British National Party's right to advertise during elections, which is currently tightly controlled. This article would also have commercial implications - the Court would be able to rule over the press and the extent to which public broadcasters have to be opened up to commercial competition, as well as issues like tobacco and junk food advertising.

Article 16: Freedom to conduct a business

This is controversial with trade unions and the left, who fear the Court may use this to apply internal market rules to public services. The "in principle" freedom to conduct a business could reverse the sorts of decision made by the Court for example in *Sodemare v Regione Lombardia*. In this case the Court ruled that Italy would still be allowed to specify that only non-profit organisations could get public contracts to run old people's homes. It could also tip the balance in cases such as *Eysen*, in which the Court ruled that the Netherlands was entitled to ban food preservatives it believed to be dangerous.

Article 17: Right to Property

This article was promoted by the European Landowners Organisation (ELO), and was controversial with environmental groups because the ELO was hoping to get exemptions from nitrate regulations. This article also requires "fair compensation being paid in good time for loss" of property.

This might have meant, for example, that the UK Government would have had to pay compensation after it brought Railtrack under public ownership. It would also have implications for the Mayor of London's attempt to bring London Underground under public ownership. While there are political arguments on both sides about such decisions, it is unclear why they should be made by the European Court of Justice.

Article 21: No discrimination on grounds of nationality

The UK Government made several attempts to delete this idea from other parts of the original Constitution. While the idea of no "discrimination" obviously sounds uncontroversial in some ways, in legal terms the inability to make any decisions which affect nationals of non-EU member states differently to those of EU member states would have significant implications for social security and border policy. In an amendment to the European Convention the UK Government said that such an article "would have very wide-ranging consequences if applied to all nationalities, as opposed to only those of the Union." However, it remains in the Charter.

Article 28: The right to collective bargaining and action

The Charter's best known feature is its seemingly open ended right to take industrial action. "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action." Some fear this might conflict with UK laws restricting, for example the right to secondary picketing. The Court has already made reference to this right in its rulings in the controversial *Vaxholm* and *Viking* cases - although it could not decide these cases as long as the Charter is non-legally binding.

Article 31: Fair and just working conditions

The UK Government is currently fighting to protect its opt-out from the EU maximum working week. Because part two of this article covers working hours, some businesses fear it could be used by the Court to by-pass the UK's opposition.

Article 49: Principles of legality and proportionality of criminal offences and penalties

This article states that, "The severity of penalties must not be disproportionate to the criminal offence." In the UK the Home Secretary currently has a wide margin of discretion to recommend prolonged sentences for particularly serious criminals. This could be challenged if the Charter were made legally binding.

Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

The UK Government has amended double jeopardy rules to allow for just such a possibility. This allowed the killers of Damilola Taylor to be brought to justice, but this would clearly not be possible under the Charter. Critics argue that regardless of whether one agrees with the principle of double jeopardy, it should be decided at national rather than EU level.

(4) Justice and home affairs

“The UK will not transfer any substantial part of our sovereignty as a consequence of this treaty”

- Jim Murphy, Europe Minister, Newsnight, 2 August 2007

“The Government does not accept that we should agree to extend full ECJ jurisdiction over the very sensitive areas covered by the Third Pillar. These raise sensitive issues relating to national sovereignty – law and order and the criminal justice process”

- Foreign Office memorandum to Lords EU Select Committee, July 2000

Home affairs is one of the areas in which the Constitutional Treaty will make the biggest difference. All the proposals and text from the original Constitution in this area are simply dropped into title IV of the TEC. The changes proposed are very radical:

- The Court of Justice would be given full jurisdiction over this area for the first time.
- Eurojust would gain the power to initiate investigations of UK citizens. The EU judges group Eurojust would be given the power to start investigations of EU citizens - despite the fact that the UK Government opposed this power during the negotiations.
- The role of Europol would be extended to include “organisation and implementation of investigative and operational action” - despite the fact that the UK opposed this power during the negotiations.
- Vetoes in this area would be abolished across the board.
- The EU would gain a new competence to define what counts as a criminal offence.
- The EU would gain a new competence to set minimum and maximum prison sentences.
- The Charter of Fundamental Rights would give the European Court of Justice the power to rule that sentences are “disproportionate.”
- The EU would get new powers to harmonise civil and criminal laws and legal procedures. This could include questions such as the admissibility of evidence and the rights of criminal suspects in Court.
- The Constitution provides for the creation of a European Public Prosecutor despite the fact that the UK has always opposed any such moves. Despite an ‘emergency brake’ the Prosecutor could be set up even if the UK objects.

The Constitution gives the EU powers to enforce “mutual recognition” of legal judgments. Mutual recognition of legal judgements is controversial in itself and has raised civil liberties concerns. The European Commission acknowledges that it will also create further pressure for harmonisation in the future.

The extended jurisdiction of the Court is delayed - but will apply after five years; The UK fought and failed to have the jurisdiction of the Court removed

The Constitutional Treaty would give the European Court of Justice jurisdiction over Justice and Home Affairs for the first time.

The Government previously opposed giving the Court this power and indeed argued that to do so would be a significant transfer of national sovereignty. A memorandum from the Foreign Office to the Lords European Union Committee in 2000 said that:

"The Government does not accept that we should agree to extend full ECJ jurisdiction over the very sensitive areas covered by the Third Pillar. These raise sensitive issues relating to national sovereignty – law and order and the criminal justice process. An acceptance of extended jurisdiction would have to be on a 'once and for all' basis. This would be a significant extension of the ECJ's legal responsibilities."

The Government also argued that this would further complicate the immigration appeals process. In November 2006 Geoff Hoon told the Lords European Union Committee:

"There is clearly a risk that adding what is in effect an avenue of appeal at a very early stage in the process might be an opportunity of further complicating our existing asylum and immigration processes."

After Gordon Brown took over as PM the UK Government fought for an exemption from the jurisdiction of the Court in this area. According to a report by the respected *Libération* journalist Jean Quatremer:

"London wanted to be exempted from this control including for the JHA norms that it decided to apply - 'That is not acceptable, that would upset the equality between member states', a French diplomat recently explained. 'There will be no immunity of jurisdiction for the United Kingdom.'" (4 October)

However, the UK failed to secure a carve-out in this area. Instead, the jurisdiction of the Court will merely be delayed for five years. Indeed, this delay only applies to existing legislation - any new legislation or amended legislation will come under the jurisdiction of the Court. After five years, if the UK does not agree to the full jurisdiction of the Court it will be thrown out of all Justice and Home Affairs legislation.

As Michael Connarty pointed out in his letter to David Miliband:

"The United Kingdom must then choose whether or not to accept the jurisdiction of the ECJ and the powers of the Commission. If the UK does not accept such jurisdiction and powers, the draconian consequence seems to follow that all of the measures which have so far been adopted under the EU treaty will cease to apply, and the Council will also gain the power to determine by QMV that the United Kingdom, 'shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of its cessation of its participation in those acts.'"

"If we have understood it correctly, the intention of this provision seems to be to oblige the UK to accept the jurisdiction of the ECJ, and the powers of the Commission, on a retrospective basis, over EU measures which have already been adopted." (11 October)

The Government may hope that this provision will allow it to argue that the UK does not have to be bound by the Court. However, in reality it is unlikely that the Government will agree to leave all Justice and Home Affairs legislation, for the same reasons set out above.

The failed attempt to opt out also raises a difficult question for the Government - if the jurisdiction of the Court is a good thing then why did it initially seek an opt-out, and now a delay in its application?

New powers, new objectives - and majority voting across home affairs

The legislative powers and tasks of the EU are hugely expanded in the new Constitutional Treaty, and the former articles of the treaties are replaced wholesale by the text proposed in the original Constitution.

According to the UK Government's analysis the veto is abolished in nine areas of justice and home affairs:

- Immigration and frontier controls
- Judicial co-operation in criminal matters
- Minimum rules for the definition of criminal offences and sanctions
- Eurojust (structure, operation, field of action and tasks)
- Police co-operation (data sharing and training)
- Europol (structure, operation, field of action and tasks)
- Establishment of an integrated management system for external borders
- Mechanism for peer review of member states' implementation of policies in the Justice and Home Affairs (JHA) area
- Measures to promote crime prevention

The powers of the EU are also widened in several areas in which the Government has already given up the veto - including asylum, legal migration and civil law.

Why the UK 'opt-in' on Justice and Home Affairs is not an effective safeguard

The UK stresses that new legislation in these areas will be covered by opt-in arrangements. However, there is good reason to believe that these can never be effective safeguards. In fact the position of the UK in this regard has been severely weakened since the original Constitution.

1) The opt-in arrangement for JHA is effectively disabled in the Lisbon Treaty under the 'bullying' clause - it is even weaker than under the original Constitution. Under a provision created by Lisbon (article 4a of the UK protocol), when amendments to an existing piece of legislation are proposed where the UK has opted in already, it must either go along with the amended version or be thrown out of the existing legislation altogether. In other words - keeping the status quo will not be an option for the UK.

This is certain to mean tough future choices for the UK. For example, the Commission has announced that it will propose to update the "Dublin II" agreement (which the UK has opted into) by building "burden sharing" arrangements into it.

The UK is opposed to this but would definitely not want to be thrown out of the Dublin system, which allows the UK to deport 100 asylum claimants a month back to the country where they first entered the EU.

The Commission also plans to amend the Reception Conditions Directive - which sets minimum standards on what benefits and other welfare rights asylum seekers should get while their applications are processed. The Commission argues that the Directive, which the UK has opted into - gives member states far too much discretion in the running of their asylum systems. In particular, the Commission is determined to "create a level playing field." This will mean increasing the rights of claimants. Franco Frattini has said: "Creating a level playing field in the area of reception conditions is a priority for the Commission: therefore, I intend to propose amendments to the Directive, in order to limit the discretion allowed with regard to the level and form of material reception conditions, access to employment, health care, free movement rights and identification and care of vulnerable persons." (7 November 2007)

The UK Government is particularly opposed to giving asylum seekers the right to work, as it believes that this encourages false claims. However, under the Lisbon Treaty, if the UK did not agree to opt into the amended version, it could be threatened with being "thrown out" of the existing rules.

The UK could face similar dilemmas in criminal justice - for example, if the Commission proposes an amendment to the European Arrest Warrant.

The Labour Chairman of the European Scrutiny Committee, Michael Connarty, has described the clause setting up this unpalatable choice as a "bullying" clause. He told David Miliband:

"Do not pretend that this is not a bullying tactic by whoever proposed it to pressurise the UK. These are bullying clauses to cajole and pressurise us into opting in and I am shocked that you try to defend them. Honestly, I really am.... I do not think anyone with a bit of principle would sign up to them... It interferes in a great way because it puts massive pressure and there are now penalties for not opting in that were not there before." (ESC hearing, 16 October)

Connarty wrote to Miliband at an earlier date arguing that:

"The provisions appear to be designed to dissuade Ireland or the United Kingdom from exercising a right not to opt in. In the case of Article 4a, the provision appears to have the effect of obliging the UK to participate in an amending measure under Title IV, or face the loss of the existing measure in its entirety." (11 October)

In evidence to the Lords EU Committee, Professor Steve Peers noted that:

"For the first time there is a possibility of pressure that could be placed on the UK to opt in to something, whereas at the moment there is not any mechanism to place pressure on us to opt in to something." (21 November).

James Flynn QC told the Lords that the clause was a way of other member states "applying a certain amount of pressure." (12 December)

In its report, the European Scrutiny Committee concluded by highlighting the danger of:

*"...exposing the UK to new and unpredictable consequences and risk if it decides not to opt in to any transposed or amended measure. The 'opt-in' decision under these proposals will become one which may lead to serious consequences for the UK through the transfer of jurisdiction on important measures dealing with civil and criminal justice."*⁴⁹

2) The whole opt-in approach has been radically undermined by a landmark ruling of the European Court of Justice. Legal experts have warned that a controversial ruling by the European Court of Justice in September 2005 (Case C-176/03) will undermine the UK's opt-in arrangement.

The Commission sued the Council for passing a framework decision on environmental crimes, instead of a first pillar directive, arguing that the environment was one of its competences. After its surprise victory in the Court the Commission was quick to argue that "The judgement lays down principles going far beyond the case in question. The same arguments can be applied in their entirety to the other common policies and to the four freedoms."

As a result of the case the Commission is able to propose criminal sanctions in all areas of 'Community competence'. When it does so, the UK has no option not to 'opt-in', and decisions are taken by majority vote. It would therefore have to participate in any criminal justice measure that the Commission feels is necessary to "ensure the full effectiveness of a Community policy".

The judgement was a dramatic and unexpected ruling. At the time a dismayed British official told the Times, "We firmly believed it was inappropriate to harmonise criminal law at EU level." (Times, 14 September 2005)

However, so far the impact of the ruling is at least limited by the restricted scope of community competence - e.g. the Commission can propose criminal legislation for environmental crimes, which are under its competence, but not criminal laws in general, as criminal law in general is not currently within its competence.

However, the new version of the Constitutional Treaty *would* make criminal justice a community competence, and effectively unshackle the Commission from the current constraints by bringing criminal law in general within its competence (by inserting the former contents of the third pillar into the community treaty).

Richard Plender QC, who represented the UK in the case, told us that the ruling would create "a problem" for the UK when attempting to use its opt-in as "**There is no opt-in or opt-out under this judgment.**" (Interview, 7 September 2006)

Another leading European lawyer, Gerald Barling, QC, notes that the ECJ "has acknowledged that as a general rule criminal law does not fall within EU competence. But really the Court is paying lip service to this principle, because it then goes on to say that, as in this case, it can insist on criminal offences and penalties in member states where necessary or desirable." (ESharp, May 2007)

Steve Peers, Professor of European Law at Essex University, argues that "In short, *to the extent that criminal law falls within the scope of the first pillar* it is no longer intergovernmental and member states have lost what they have long regarded as an absolute sovereign right to determine what activity should be

⁴⁹ <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf>

regarded as a criminal offence." (EU Justice and Home Affairs Law, Oxford, 2006) (italics added)

3) An 'opt-in' arrangement will not give the UK as much control as a veto - and once opted-in, there's no going back. Member states have to opt in at the start of the process of drawing up a piece of legislation. If, as the legislation is drafted, the UK or Ireland do not like the way it subsequently develops, it is not possible to opt back out again. This in itself is a potential problem, which the European Scrutiny Committee has called on the Government to try and rectify. Committee Chairman Michael Connarty said, "We want an opt out clause that says we can look at least to opt in, but if we are not happy we can opt out."⁵⁰

As the leading textbook on the subject notes:

"It would appear, in the absence of any contrary provisions in the Title IV protocol that a British or Irish opt in to a proposal will entail the possibility that those member states could be out-voted and therefore required to apply a proposal which they disagree with". (S.Peers, EU Justice and Home Affairs Law, Oxford, 2006)

Ireland is the only other EU country which has an opt-in procedure like the UK. In evidence to the House of Lords Irish Justice Minister Michael McDowell cast doubt on the claim that the 'opt-in' was like a veto:

"I am not clear that the opt-in power gives us effectively the same outcome – it may or may not. Politically obviously opt-in means that the other Member States will go and be able to do their own thing, so to speak, and politically that may be more difficult to resist and more difficult to resist an opt-in rather than a unanimity requirement, and that depends on the politics of any issue at the time it comes to be decided."

New EU powers to harmonise civil and criminal laws and legal procedures

New articles 82 and 83 [69A and 69B] TFEU (formerly Articles III-270 and 271 of the original Constitution) allow the EU to set common rules concerning legal procedures in criminal cases. EU rules, decided by QMV, could determine the rights of criminal suspects and control the admissibility of evidence in Court. There is also a provision for EU rules to cover "any other specific aspects" of legal procedure if EU leaders so decide.

One problem with this proposal is that it would no longer be possible for voters in individual member states to alter the balance of the legal system between the rights of victims and suspects' rights. For example, if EU rules were to set the balance in such a way as to favour protection for suspects, voters in any one member state would not be able to vote for a policy which would make it easier to secure convictions. The rules could only be changed subsequently if the majority of other members agreed.

The UK Government was initially unhappy with this proposal, and called for major changes. However, it gave way on this issue as part of the overall agreement on the EU Constitution.

⁵⁰ BBC Today 9 October 2007

Peter Hain told the cross-party European Scrutiny Committee that the current Article was “unacceptable” and that his principle was “cooperation yes, harmonisation no”. (25 March 2003)

In a series of proposed amendments to these articles Peter Hain wrote that:

“Criminal procedures and evidence go to the heart of Member States’ legal systems. It is essential that the legal base for procedural standards is not so broad that it would provide a basis for harmonisation of legal systems. We must recognise and respect the diversity of our legal systems, rather than seek to create a common system.”

But his call for the proposed EU powers to be watered down was ignored.

He described the article as “unacceptable” because it “would cover almost any aspect of criminal procedure during an investigation, prosecution and conviction”.

EU powers to define criminal offences and set minimum sentences

Article 83 [69B] TFEU (formerly Article III-271 of the original Constitution) allows the EU to set “rules concerning the definition of criminal offences and sanctions”. This is intended to prevent criminals “shopping around” for countries where their activities will carry the lightest penalties. Article 83 [69b] TFEU (formerly III-271 in the Constitution) lists the types of crimes over which the EU can harmonise sentences. These include drug trafficking, people smuggling and money laundering. The list was supposed to limit the EU to dealing with cross-border crimes. But the list of crimes over which the EU can rule includes vaguely-defined categories such as “organised crime” and “corruption”, which is likely to enable the EU to rule over a wide variety of offences.

The list of offences is also designed to be expanded over time, as a clause allows EU leaders to add to the list of crimes on which the EU can legislate.

Franco Frattini, the Justice and Home Affairs Commissioner, has already begun to propose EU-wide minimum standards. In January 2005 he called for minimum prison sentences of five years for gang members and a minimum of ten years for gang leaders. He has argued that he will not prescribe the sentences member states’ justice systems should set because “the method I prefer is to indicate minimum and maximum, a range leaving Member States free to harmonise”. He claimed that, “We cannot live without a European definition of what is a criminal organisation and trafficking in human beings.”

The Government opposed giving the EU this power to set minimum and maximum sentences. Peter Hain wrote, “Framework laws on substantive criminal law must not require the imposition of mandatory minimum penalties. We hope that the Treaty would exclude the possibility of measures requiring all Member States to impose a minimum penalty of at least x years on anyone convicted of a crime... irrespective of the circumstances or any mitigating factors.” However, the UK Government later abandoned its objections.

New EU powers to enforce “mutual recognition” of legal judgments

New articles 81 and 82 [65 and 69A] (formerly articles III-269 and III-270 of the Constitution) set out a legal basis for the mutual recognition of legal judgments in

civil and criminal cases respectively. Mutual recognition of judgments is intended to end existing barriers to successful prosecution of cross-border crimes. The article covers the mutual recognition not just of final judgments on cases, but also other judicial decisions such as the power to search homes and seize evidence.

There are two main problems with mutual recognition. Firstly, there are potential complications with mutual recognition in itself. Several of the other member states have poor records of fairness in their legal systems. Secondly, mutual recognition is intended to lead to legal harmonisation.

Problems with mutual recognition

Civil rights activists have voiced concerns, among other things, about standards of trials, legal aid, access to counsel, rules on admissibility of evidence which will vary considerably across an enlarged EU.

Mutual recognition in civil cases raises concerns that there could be what Steve Peers, Lecturer in Law at Essex University, calls a "race to the bottom", where "the risk is that defendants will fall subject to the member state with the lowest standards of rights for the accused". As well as the high profile Greek "plane spotters" case in 2001 there have been recent examples of problems with procedure in other member states.

Creating pressure for harmonisation

Mutual recognition is sometimes presented as an alternative to harmonisation. However, in other areas of EU policy - such as the development of the single market during the 1980s - mutual recognition has led quickly to pressure for harmonisation.

In the Constitutional Treaty the link between mutual recognition and harmonisation is quite explicit. Article 82 (1) on mutual recognition of criminal judgments explicitly states that mutual recognition "shall include the approximation of the laws and regulations of the member states".

In a proposed amendment to the article on mutual recognition of civil law, Peter Hain wrote that:

"...the principle of mutual recognition is welcome. However there is no need for ... approximation of the civil law. It is neither necessary nor appropriate. The purpose of civil judicial co-operation should be to ensure that borders do not represent an obstacle to litigation or the recognition and enforcement of judgments. Whilst that might require a degree of harmonisation of civil law and procedure we should respect and recognise each others' legal systems and work on the interface between them, promoting compatibility between them. Unfortunately the current draft suggests that approximation of law should be an end in itself."

The House of Lords' EU select committee has warned that:

"Approximation of the criminal laws of Member States is likely to have a significant impact on Member States' legal cultures and traditions and on national sovereignty... the more progress that is made on developing the mutual recognition programme, the greater the need will be for some sort

of minimum standard across the EU of procedures in the legal processes for which mutual recognition will be claimed."

The Lords warn that "A degree of harmonisation of the criminal laws of Member States may be necessary to facilitate the development of the mutual recognition programme."

The Law Society has also warned that it is concerned that mutual recognition could result in harmonisation "through the back door."

The cross-party European Scrutiny Committee of the House of Commons said:

" We draw attention to the danger that measures which are ostensibly concerned with mutual recognition will have the effect of creating uniform rules which will then apply to all cases, whether they have any cross-border implications or not. As we have commented before, Commission proposals on the 'area of freedom security and justice' have appeared to treat this 'area' as synonymous with a unitary State, with only one legal system." (European Scrutiny Committee, 28th report July 2004)

A European Public Prosecutor - now a stronger possibility than under the Constitution

Article 86 [69E] of the new Constitutional Treaty says that: "In order to combat crimes affecting the financial interests of the Union, the Council, by means of a regulation adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust."

Unlike in the original version of the Constitution, under which the Prosecutor could only be established by unanimity, in the new version the Prosecutor can be set up by enhanced cooperation.

During the European Convention the Government said there should be no possibility of setting up a European Public Prosecutor - *even if they had a veto*. Peter Hain wrote: "We are firmly opposed to establishing a European Public Prosecutor. *Unanimity does not mean that this article can be accepted....* There is clearly no need for a separate prosecution body at EU level." ⁵¹

In a later amendment he again called for it to be deleted. He wrote:

" We are opposed to establishing a European Public Prosecutor... Proposals for a European Public Prosecutor have never satisfactorily addressed a series of objections. First, any body which would have the power to bring prosecutions in a Member State must in some way be accountable within that Member State. Secondly, the powers which would be vested in a European Public Prosecutor's Office are not compatible with respect for the diversity of legal systems, a principle set out in Article 1."

But again this was ignored. ⁵²

Any attempt by the UK or other member states to derogate from the Prosecutor is likely to prove unworkable, not least because Eurojust (which all member states

⁵¹ <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20170%20Hain%20EN.pdf>

⁵² <http://european-convention.eu.int/Docs/Treaty/pdf/850/20Hain.pdf>

are already part of) is also being given the same powers to initiate prosecutions under the Constitutional Treaty (see section below).

In an amendment to the European Convention Peter Hain's stand-in Lord Tomlinson said that Eurojust's proposed new power to initiate prosecutions should be deleted because this would turn it into a de-facto public prosecutor: "If Eurojust were to have the power to initiate prosecutions (first indent), it would be a European Public Prosecutor in all but name."

The UK made a second attempt to get rid of it. Hain wrote that: "If Eurojust were to have the power as a College to initiate prosecutions it would have powers similar to that of a European Public Prosecutor. Eurojust acting as a College should have the power only to ask that an investigation/prosecution is initiated." In return he even suggested a clause which would allow the powers of Eurojust to be expanded later. But he was ignored.⁵³

Enabling Eurojust to initiate investigations of EU citizens

Article 85 [69H] of the new treaty (formerly Article III-273 of the Constitution) gives the European prosecutors network "Eurojust" sweeping new powers. The Article says that the tasks of Eurojust "may include the initiation of criminal investigations".

Johannes Thuy, a spokesman for Eurojust, confirmed that under the new treaty, "*We could compel the British police to make a prosecution.*" (Sunday Times, 5 August 2007)

The UK Government was initially opposed to giving Eurojust these new powers. Peter Hain called for the article to be amended so that Eurojust would only be able to propose to member states that they initiate investigations.

Hain argued that the article needed to "set boundaries on Eurojust's tasks". He threatened that, "this is an essential precondition for majority voting ... Eurojust should have the power only to *ask* that an investigation or prosecution is initiated." However, the Government later gave way on this issue.

Increased powers for Europol

New articles 87, 88, 89 TFEU [69J, K, L] (formally Articles III-275, 276, and 277 of the Constitution) strengthen the role and powers of Europol. Previous treaties have gradually expanded the role of Europol but its scope has remained limited to coordination. Article 88 would widen its role to include "organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities."

The new power to directly implement operational action could mean that Europol would be able to take part in police raids alongside national police, giving it a similar sort of role to America's FBI.

During the hearings of the justice working group of the European Convention, the then head of Europol, Jurgen Storbeck, made a distinction between investigations, in which he could imagine a greater role for Europol (for example allowing Europol

⁵³ <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20169%20Hain%20EN.pdf>

to interrogate witnesses) and executive powers (such as confiscation or arrest warrants), which he agreed should remain with national authorities.

The UK Government has raised various objections to this proposal. In an amendment Peter Hain wrote, "the word 'operational' should be deleted. 'Investigative' is sufficient and avoids the suggestion of Europol having operational powers on the territory of Member States."

Hain added that "[the words] 'carried out jointly' should be replaced by 'in support of'. It is essential that Europol is not able to carry out independent operational activities or to direct Member States' operational activities." However, the changes Hain called for were not made.

The European Scrutiny Committee has argued, "We see objections of principle to giving Europol its own investigative powers... This would fundamentally change Europol from an agency for the exchange and analysis of criminal intelligence into a European police force."

Caroline Flint also admitted that the Government does "not think that there is a role for" Europol to have investigative powers, but would prefer it to concentrate on information sharing.

Europol has already acquired major new powers and a much enlarged budget since the Amsterdam Treaty. It now has a staff of over 350, projected to rise to 480.

Europol has major problems which have not yet been addressed. In 2001, its offices were raided by Dutch police over fraud allegations. Europol has a very poor record on transparency, refusing to share information with the European Parliament and classifying a great deal of its material as confidential for the use of Europol officers only. Bodies appointed in order to supervise it formally have complained that they are being denied information. Officers of Europol are not compelled to testify in Court, unlike members of national police forces, and are immune from prosecution for acts performed in the course of duties under the Europol convention.

(5) Immigration and asylum

The immigration and asylum powers of the Union would be expanded by the Constitutional Treaty in two main ways.

It would give the Court of Justice new powers in this area by giving it jurisdiction over home affairs, and also by making the Charter of Fundamental Rights legally binding. The increased role of the Court is likely to impact not just on whether applicants gain asylum or the right of legal residence, but also on the welfare and work entitlements of asylum applicants and migrants. The Government sought to limit the role of the Court in this area in an amendment - but the changes it requested were not made.

The Constitutional Treaty also sets out a framework and a legal basis for the further development of the EU common asylum and immigration system. It would end the national veto over legal migration issues.

Expansion of the jurisdiction of the Court into immigration and asylum

During the original negotiations on the Constitution the UK Government twice unsuccessfully attempted to re-insert limits on the role of the Court in assessing asylum cases.

Under the current treaties, the role of the Court is very limited in this area, which was originally in a separate pillar for decisions between Governments. The provisions in the original Constitution would remove the restrictions on the role of the Court. Under the current treaty articles (35 and 46 TEU and 68.1 TEC) the Court only has jurisdiction where specified, and 68 TEC allows only a very limited role for the Court, including provisions that the ECJ can only take up a case once it has exhausted all appeals in the member state. As a result only one immigration case has reached the Court.

In an amendment to the European Convention Peter Hain called for two new paragraphs to be added to the text of article Article III-377 (276 [240b] TFEU), which would have meant that the ECJ could only have been called upon to make a preliminary ruling after a high court ruling on a case. However, the changes the UK proposed were not made.

In November 2006 Geoff Hoon told the Lords EU Committee that:

" There is clearly a risk that adding what is in effect an avenue of appeal at a very early stage in the process might be an opportunity of further complicating our existing asylum and immigration processes."

The Government warned that:

*" The United Kingdom is concerned that there would be a much greater number of preliminary rulings in asylum and immigration cases in particular, which the Court of Justice is not equipped to manage, if it was open to any court or tribunal to refer a case."*⁵⁴

⁵⁴ <http://european-convention.eu.int/docs/treaty/pdf/847/9Hain.pdf>

Professor Steve Peers has predicted that if the EU Constitution comes into force "one would expect to see a significant increase in the number of cases concerning asylum reaching the Court."⁵⁵

Professor Damian Chalmers of the London School of Economics told a Lords committee that the provision in the revised Constitutional Treaty requiring detention cases to be expedited could significantly increase the number of asylum cases brought the ECJ - something the court is not equipped to handle. He argued that:

*"Currently the work of the Court of Justice is actually very narrowly focused because most EU law is not the type of law that gets before the courts. Immigration, asylum, crime are. It could become, if we are not careful, an asylum court where large numbers of cases are sent up to it by NGOs referring, pressurising tribunals to make references and it would only require 70-100 cases a year for that to really change the nature of the docket."*⁵⁶

A legal basis for common asylum and immigration systems, and moves towards a single system

The Constitutional Treaty sets out a framework and a legal basis for the further development of the EU common asylum and immigration system.

The Constitution also proposes the end of member states' right of veto over asylum and all categories of immigration. In December 2004 the UK Government agreed to give away the veto on asylum and *illegal* immigration, but did not agree to end the veto on legal migration.

The UK has an "opt in" arrangement over asylum and immigration decisions. However, the way the opt-in arrangement works means that the UK makes an *on principle* decision to opt in, before legislation is actually drawn up. The end of the veto would mean that if the UK opts into an area, but does not subsequently agree with the way legislation is drawn up, it will not be able to opt out again (see above on justice and home affairs).

The UK has so far opted in to all asylum legislation, and some legislation on immigration.

Asylum - from minimum standards to uniform standards

The Commission has recently announced the completion of the first phase of the Common European Asylum System and the Constitution and subsequent Commission proposals have suggested that the trend in the second phase of the development of asylum policy will be to move away from *minimum* standards, and towards *uniform* rules and common processing. The Commission's stated objective is to reduce the discretion given to member states to set their own asylum policies.

During the original negotiations the UK called for the main article on the common asylum system (Art III-266, now 78 [63] TFEU) to be completely rewritten. In particular the Government called for the deletion of the proposals to create:

⁵⁵ EU Justice and Home Affairs Law, Steve Peers, Oxford EC Law Library, 2006

⁵⁶ House of Lords, 20 November 2007.

- "A uniform status of asylum for nationals of third countries, valid throughout the Union"
- "A common system of temporary protection for displaced persons in the event of a massive inflow"
- "Common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status"
- "Partnership and cooperation with third countries with a view to managing inflows of people applying for asylum or subsidiary or temporary protection."

The UK Government twice tried to have the whole article re-written. Peter Hain wrote that:

" This is a fundamentally important amendment.... The Treaty should not contain a catalogue of measures to be taken... The UK would prefer to see an asylum article which sets general objectives rather than catalogued competences." ⁵⁷

The UK Government also protested in general against the plans to create a single set of rules, and suggested that the proposals violated the UK's previous understanding about how the European Asylum System would operate.

Peter Hain wrote, "The Tampere conclusions nowhere said that the second stage of work on a common system should consist of converting the minimum standards under negotiation as part of the first stage into common rules." ⁵⁸

However, the article was not changed.

Asylum burden sharing

Article 80 [63b] TFEU (formally Article III-268 of the original Constitution) requires that any new asylum policies should be governed by the principle of solidarity and fair sharing. This paves the way for what the Commission calls "corrective" burden sharing. This would mean physically transferring successful asylum seekers from one member state to another or sharing out the financial burden. The Commission is already talking about producing legislative proposals for burden sharing later in the year, once the treaty has been ratified.

The Government called for changes to new article 80 [63b] TFEU (formerly III-268). It tabled an amendment to rule out the possibility that the cost of processing asylum and immigration claims would be funded from the EU budget:

" The intention of writing the principle of solidarity into the Treaty is... presumably not that the European Union budget should bear the entire cost of Member States' asylum and immigration systems, or to develop a mechanism for sharing the full costs between the Member States, which would not be realistic. The Union's role is to promote solidarity. Our amendments make this clear." ⁵⁹

Again, the article was not changed.

⁵⁷ <http://european-convention.eu.int/Docs/Treaty/pdf/848/Art%20III%20162%20Hain%20EN.pdf>

⁵⁸ <http://european-convention.eu.int/Docs/Treaty/pdf/848/11Hain.pdf>

⁵⁹ <http://european-convention.eu.int/Docs/Treaty/pdf/848/Art%20III%20164%20Hain%20EN.pdf>

The end of the veto on legal migration

The Government also had clear reservations about the section on legal migration.

Amongst other things, in an amendment the Government argued that the free movement rights of third country nationals should be brought back under unanimity.

Article 79 [63A] TFEU of the new treaty allows the Council to decide by majority vote on the "definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing the freedom of movement and of residence in other Member States."

The UK wanted to change this to "The Council *acting unanimously* on a proposal from the Commission after consulting the European Parliament shall adopt laws and framework laws defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States." ⁶⁰ However, this change was not made.

Social security implications

In the article on the common immigration system, article 79 [63A] TFEU (formerly III-267), the Government called for the deletion of a new EU power which would have implications for migrants' access to labour markets and social security.

Peter Hain wrote, "Article 2(b) allows for decisions on all aspects of the rights of third country nationals including access to the labour market and social security - this is a considerable extension of the Union's competence from that in the current treaty." ⁶¹

When the article was not deleted the UK Government called for any such powers at least to be kept under unanimous voting. But the article was not changed.

EU migration policy background:

From minimum standards to harmonisation

The revised EU Constitution would commit the EU to press ahead with the second phase of the asylum and immigration systems. However, the implications of the first round of EU action in this area are still far from clear.

The cross-party Commons Scrutiny Committee warned:

"Some of the Commission's proposals for the next five-year justice and home affairs work programme affect policies which are at the core of national sovereignty. Moreover, we are particularly concerned by the following issues: the omission from the Communication of an evaluation of the practical benefits achieved so far as a result of the Tampere programme; the omission of a statement of the practical benefits expected from the Commission's proposals for the next five years; the Commission's apparent wish to rely on qualified majority voting to secure the adoption of JHA legislation against the wishes of some Member States; the further harmonisation of asylum policy, going beyond the establishment of reasonable common minimum standards."

⁶⁰ <http://european-convention.eu.int/Docs/Treaty/pdf/848/12Hain.pdf>

⁶¹ <http://european-convention.eu.int/Docs/Treaty/pdf/848/Art%20III%20163%20Hain%20EN.pdf>

The Refugee Council has argued:

"From the British Refugee Council's perspective, the process of harmonisation has been a relentless downward spiral to the lowest common denominator. At the end of this first stage towards a Common European Asylum System it is essential that the process of transposition of the new legislation is monitored and evaluated before progressing further with harmonisation."

That this is taking place so far in advance of public opinion and public debate seems counter to the Laeken Declaration's stated aim of bringing the EU closer to the citizen. This is particularly true given the absence of public support for such policies. Polls show that 83 percent of voters think that decisions on asylum should be made by the UK Government, while only 12 percent support making such decisions at the European level.

The agenda set out in the revised EU Constitution and the Hague Programme also seems to diverge from the UK Government's preference for a system based on minimum standards as opposed to full scale harmonisation. The development of the first phase of the CEAS and CEIS has been controversial enough. The second phase, as set out in the EU Constitution, seems set to be even more so.

Phase one

At the European Council in Tampere, October 1999, EU heads of government agreed to "work towards establishing a Common European Asylum System". The system was to be built in two phases. The first phase is now nearly complete, and the Constitution sets out the framework for the second phase. But the last element of the first phase has already sparked controversy. Britain has signed up to all four of the main pieces of legislation, while Ireland, which has a similar opt-in arrangement, has signed up only to "Dublin 2".

- **January 2000: The European Refugee Fund.** The first European Refugee Fund was set up from 1 January 2000 to run to 31 December 2004. It is funded out of the EU's annual budget, following an initial 216m euro sum for implementing the Decision. The Fund is intended to support Member States' actions relating to reception conditions, integration, and repatriation. A new fund has been agreed to cover the period 2005-2010.
- **January 2003: The Reception Directive,** which sets minimum standards for the conditions of asylum faced by applicants. The directive means that applicants are guaranteed the right to work if their application takes more than six months to process.
- **February 2003: the "Dublin 2" agreement,** which sets out a system to determine which country should deal with an asylum claim.
- **March 2004: The Definition of a Refugee Directive,** which sets out minimum criteria to be assessed as an asylum seeker, and more minimum standards for those who gain asylum. Following the grant of refugee status, a refugee must be granted a renewable residence permit of at least 3 years. The directive specifies that member states must facilitate travel for refugees and those granted subsidiary

⁶² http://www.unhcr.bg/events_records/2005/20050331_en.pdf

⁶³ <http://www.publications.parliament.uk/pa/ld200405/ldselect/ldcom/84/84we08.htm>

protection, and must allow refugees access to the labour market immediately after they have been granted refugee status. Refugees are to receive equal rights to nationals of the Member State in education, accommodation, social welfare and health care.

- **November 2004: The Asylum Procedures Directive.** The Directive was agreed by ministers, but without its key element. Ministers put off trying to agree a "white list" of "safe countries of origin" as a number of member states - in particular Sweden - lodged objections to some countries proposed for the list on the grounds of their human rights records. This decision was controversial. The UNHCR attacked the plan, saying that it had "serious concerns" and the directive would "give rise to a real danger of breaches, in practice, of international law and standards."⁶²

The Refugee Council accused the UK Government of "playing a central role in driving down standards across Europe" and "pushing for some of the most controversial aspects of legislation currently making its way through Parliament in Britain to be incorporated into a common European system."

Human rights group Justice has argued, "It is unacceptable that, on a matter that concerns fundamental rights, the Council now seeks to overcome opposition by subjecting the measure to QMV."⁶³

The Immigration Law Practitioners Association warned:

"Many of the Directive's provisions will lead to fundamental rights violations in their implementation. The volume of litigation this will bring forth can only be avoided by the annulment of the Directive in its entirety... Aside from the clear human rights concerns and the issue of procedural propriety in agreeing the common list by QMV, ILPA has serious reservations about the legality of a common EU list of safe countries of origin. As highlighted in our legal analysis of the Directive, some Member States do not currently operate safe country of origin systems. Accordingly, this is the first time that EU Member States will be required to dilute their standards of protection by a measure of Community law. This raises serious competence concerns, as the EU is only entitled to establish 'minimum standards' in this area. We believe that there is no power to adopt the common list under Title IV of the EC Treaty and any further efforts to do so should be abandoned."

The next steps - moving beyond minimum standards

The first round of EU asylum and immigration legislation has been controversial enough. But the proposals now being tabled by the Commission move beyond the minimum standards approach which the UK Government has endorsed, and signal moves towards what is intended to eventually become a single system. The UK Government and others have expressed scepticism about the measures which are now being proposed. However, it still plans to press ahead with moves to give the EU more power in this area.

Towards a common asylum policy

The Constitutional Treaty will also drive forward the process of full scale harmonisation of member states' asylum systems. The original draft of the Constitution as prepared by the 2003 Convention stated that the EU would only be able to set "minimum" standards - but this was deleted from the final text allowing the EU to harmonise much more extensively. This change in emphasis is maintained in the new version of the Constitution.

The EU's competence in asylum issues would be enhanced significantly, particularly through the Constitution's commitment to creating a "common" policy. Professor Steve Peers argues that this would give the EU "the power to harmonise national asylum law as fully as it wished".⁶⁴

The extent of the Commission's ambition in asylum policy can be seen in a communication it issued in February 2006 which calls for "the establishment of a fully harmonised EU system". By 2010 the Commission aims to have adopted a raft of measures which will establish a common asylum procedure, a uniform status for those granted asylum or subsidiary protection, standardised Country of Origin Information, and a single European Support Office which would oversee all common asylum issues.⁶⁵

The Commission now plans to amend the Reception Conditions Directive - which sets minimum standards on what benefits and other welfare rights asylum seekers should get while their applications are processed. The reforms envisaged would constitute a major change, harmonising material reception conditions, access to employment, health care, free movement rights and identification and care of vulnerable persons. These are particularly sensitive issues for the UK, which opposes giving asylum seekers the right to work, as it believes that this encourages false claims.

As explained in the boxed text in the previous chapter the UK's opt-in arrangements have been severely weakened - so if the UK did not agree to opt into the amended version of the Reception Conditions Directive, it could be threatened with being "thrown out" of the existing rules. This will prove a powerful lever to coerce the UK into signing up to these measures - whether the Government wants to or not.

Towards a common immigration policy

The abolition of the national veto over legal migration is one of the most significant moves in the revised Constitutional Treaty, particularly given the Commission's ambitions in this field. The Constitution would give the EU a new power to determine "the rights of third-country nationals residing legally in a Member State", a duty to pass laws aimed at integrating migrants and an express requirement that the EU create a "common immigration policy".

In December 2005 the EU Commission released its "Policy Plan on Legal Migration", which proposes that the EU passes a series of directives over the next three years which would establish a harmonised work/residence permit for across the EU; a separate EU "Green Card" residence permit aimed at attracting highly skilled migrants - which would allow the migrant to work anywhere in Europe once issued by the member state of entry as well as allowing for multiple stays of several years; an EU-level "independent assessment" to decide who would be allowed entry; a harmonised system for entry of seasonal workers; measures on corporate

⁶⁴ EU Justice and Home Affairs Law, Steve Peers, Oxford EC Law Library, 2006

⁶⁵ Communication on Strengthened Practical Cooperation in the area of asylum, 17 February 2006

transfers and paid trainees. Commissioner Franco Frattini is also lobbying for the power to begin to negotiate immigration quotas with non-EU countries on behalf of member states.⁶⁶

The Commission is also planning measures aimed at integrating migrant communities into the EU which would include “information packages for newly arrived economic immigrants, as well as language and civic orientation courses aimed at ensuring that immigrants understand, respect and benefit from common European and national values. Education, training and cultural initiatives will continue to support integration processes.”⁶⁷

As well as proposing measures on ‘legal’ migration the EU is also attempting to harmonise member states’ approach to tackling irregular or illegal immigration. In July 2006 the Commission released a communication aimed at drawing up a “comprehensive EU approach to combat illegal immigration”. It stressed that “Solidarity, mutual trust and shared responsibility between Member States is a key requirement in an area without internal borders, which poses a particular burden with respect to pressure from illegal immigration on Member States who control an external border.”⁶⁸ This has included the funding of joint sea and air patrols - particularly in the Mediterranean, organised by the EU’s External Borders Agency - Frontex.

The Commission is also pushing for the creation of harmonised EU wide criminal offences and penalties for the employers of illegal migrants. This has been particularly controversial as many member states do not believe that the EU has competence to set criminal sanctions for areas such as migration.

A directive aiming to create harmonised standards for returning illegal immigrants is being discussed by EU ministers at the moment. If passed it would lay down common rules concerning return, use of coercive measures, temporary custody and re-entry. Under the Constitution the EU would also gain competence to begin negotiating deportation and repatriation agreements on behalf of member states.

The Charter’s impact on asylum and immigration

Several articles of the Charter of Fundamental Rights will also have an impact on immigration and asylum cases.

Article 4

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 7

Everyone has the right to respect for his or her private and family life, home and communications.

Article 15

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the

⁶⁶ Speech, 3 July 2007, Brussels

⁶⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0669:EN:NOT>

⁶⁸ Policy priorities in the fight against illegal immigration of third-country nationals, July 2006

Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 18

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the New York Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Article 19

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Article 21

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 45

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, nationals of third countries legally resident in the territory of a Member State.

Article 47

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Source: S.Peers *European Journal of Migration and Law* 3: 141-169, 2001

(6) Public services, economy and energy

The new Constitutional Treaty, like the original version, would have a significant impact on public services and the economy as a whole.

In public services there are proposals that would affect the health system, and social security. The Government argues that while it is giving up the veto on social security for migrant workers it has obtained an emergency brake in return. However, under the Constitutional Treaty the Court of Justice is given very similar new powers to make rulings over the social security entitlements of migrants - so this emergency brake could be circumvented judicially.

In terms of the economy the Constitutional Treaty would give the EU new powers over economic coordination, trade agreements in services and foreign direct investment. The EU would gain new powers over employment policy for self employed workers (covering both their rights and qualifications). The EU would gain a broad new competence over energy, which would be decided by QMV. For the first time the statute of the European Central Bank could also be altered by majority vote on a proposal from the Commission, allowing it to gain new powers over financial regulation which would affect the UK.

New EU powers over health

Article 168 [152] TFEU of Lisbon (Article III-278 of the old Constitution) puts the EU in charge of standards for pharmaceuticals, medical equipment and medical products like blood and tissue. The EU would also be given the power to legislate by QMV on any "serious cross border threats to health". The Commission already indicates that diseases such as tuberculosis, measles and influenza are such cross-border risks to human health. It is also possible that infectious agents in chronic conditions such as cancer, heart diseases or allergies could be brought within this category.⁶⁹ Under the new Treaty, it is easy to envisage a situation in which the Commission could propose legislation setting clinical priorities on the basis of the above criteria. The British Medical Association has noted that "the clause which empowers the EU to act on 'serious' threats to health, opens the way for the EU to initiate legislation on a whole range of health determinants."

Article 35 of the Charter of Fundamental Rights enshrines a new right to 'preventative health care'. Lawyers fear the loose definition here could lead to a surge in compensation claims when patients are denied drugs or therapies they claim might have helped prevent their illness.

More compensation claims would also be bad for the struggling NHS - in 2001, for instance, almost 8% of the money earmarked for health went to funding compensation claims.⁷⁰

Court rulings on the meaning of this article could also lead to the Court making decisions about the right of people to use public services in other member states. The European Court of Justice has already ruled that under some circumstances people can go and get treatment abroad (including private treatment) and then be reimbursed by the NHS (e.g. the case of Yvonne Watts vs. Bedford, May 2006).

⁶⁹ http://ec.europa.eu/health/ph_threats/com/comm_diseases_en.htm

⁷⁰ BBC, 30 June 2003

There are concerns that if this became more widespread it would become impossible to prioritise NHS spending. In particular it might mean that lots of money would be spent on high-end treatments for a relatively small number of people, rather than being able to rationally prioritise how to spend public funds.

Indeed, following on from the *Watts vs. Bedford* case mentioned above, the Commission is soon to publish a new directive on health services. This can take place under the current EU Treaties, but is a sufficiently controversial issue for the legislation to be delayed. The discussion so far has been dominated by the fact that it will enable patients to seek private treatment in foreign hospitals, triggering an ideological clash between those who favour the greater involvement of the private sector and those who do not. This is a particularly sensitive issue in the UK, with its unique approach to funding healthcare. The controversy over the health services directive is likely to be a prelude to future arguments over the role of the EU in health policy - which would have scope for expansion into new areas under the revised Constitution.

The proposed directive is also a good example of how EU legislation follows in the path of court judgements, showing that the Court can be a major agent driving expansion in Union powers. Both the expansion of majority voting in this area and the 'legal toolbox' of the Charter of Fundamental Rights are likely to act as a catalyst for this process. Furthermore, since public health would be classified as a "shared competence" under the Treaty (a move opposed by the UK) the scope for the Union to extend its competences over health is again widened.⁷¹

New EU powers over social security

Article 5(2D) TFEU (formerly article I-15(3) of the Constitution) states that: *The Union may take initiatives to ensure coordination of Member States' social policies.* Article 140 allows the Commission to establish "guidelines and indicators" for social policies.

The UK Government objected to both of these provisions during the European Convention, and asked for them to be deleted. Peter Hain said the idea of passing legislation in this area was "inappropriate for these activities." He argued, "There have been no directives under the corresponding provisions in the current Treaty." However, the UK later gave way.

Article 48 [42] TFEU moves social security rights for migrant workers to majority voting.

"The Council shall, acting in accordance with the ordinary legislative procedure, 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 employed and self-employed migrant 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 different countries; (b) payment of benefits to persons resident in the territories of Member States."

⁷¹ The treaty affirms that "Member States shall exercise their competence to the extent that the Union has not exercised its competence". Article 2 [2a] TFEU

The UK Government stresses that there is an emergency brake on this article. However, the “red line” on social security is mainly intended to distract from what else is being given up on social security. The Court of Justice would be given new powers to ensure the equality of social security entitlements of EU migrants (and third-country migrants) anyway - so this “emergency brake” is effectively going to be directly circumvented by a judicial requirement.

Article 34 of the Charter of Fundamental Rights could provide a basis for new ECJ jurisprudence, stating that:

- “1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.*
- 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.*
- 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.”*

Article 34.2 appears to apply to only those residing legally in the EU. On the other hand 34.1 and 34.3 appear to be even more widely applicable. According to the text of explanations the latter is also “based on” part of the European Social Charter - to which the UK is not currently a signatory.

In practice the main motor for radical changes in this area appears not to be the legislation from the Council but judgements of the ECJ. The Council has already legislated to keep up with the evolving jurisprudence of the Court in this area - e.g. the Free Movement Directive of 2004 which dealt with social security and residency rights for EU migrants and the families effectively “caught up with” judgements in *Grzelczyk* (2001), *Trojani* (2004), *Collins* (2004) and *Bidar* (2005), while the 2003 directive on the social security position of third country nationals “caught up with” the *Khalil* and *Addou* judgement (2001).

Employment policy - abolition of veto on regulations for self-employed workers

Article 5(2) [2D] TFEU states that: “The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.”

The UK Government tried to have this deleted several times. In an amendment issued to the European Convention, UK Government negotiator Lord Tomlinson called for this clause to be deleted. However, this objection was ignored. The Government also asked for employment policy to be moved from the list of “shared competences” into the list of “supporting competences”, so that it would not be covered by the provision that where competences are shared, member states may only act if the EU chooses not to. But this request was also ignored.

Article 53 [47] TFEU would abolish the veto on employment law relating to self employed workers. This covers everything from whether plumbers, electricians and other self-employed service providers have their qualifications recognised in

other countries, health and safety questions and their rights at work.

A Commission green paper in 2006 suggested that the EU should extend the same rights that full time workers have to the self-employed. In so far as the article allows for recognition of qualifications and standards it might also touch on some of the same kinds of issues as raised by the controversial services directive. Legislation in this area is also likely to spill over into wider employment law.

The Charter of Fundamental Rights also contains a large number of articles which might affect employment law (see above). For example, it also states that third country nationals who are entitled to work on member states' territories "are entitled to working conditions equivalent to those of citizens of the Union."

Economic coordination and public spending

Article 5 [2D] TFEU (formerly article I-15 of the Constitution) states that: "The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies."

The Government made several attempts to have this deleted. Peter Hain argued that "as drafted the language moves too far from the current Treaties" and suggested a completely different text.⁷²

As well as this very general competence, article 121 [99] TFEU (formerly III-179 of the Constitution) changes the provisions relating to the EU's annual Broad Economic Policy Guidelines. Unlike the present treaty provisions, this article stipulates that a member state which is threatened with censure under the guidelines will have its vote taken away when it comes to decide on whether or not it should be censured. This is likely to lead to much tighter enforcement of the guidelines.

During the negotiations on the Constitution, the Government opposed this change. In an amendment Peter Hain wrote, "The Praesidium draft would disturb the existing institutional balance on the Broad Economic Policy Guidelines. It would particularly be a problem to exclude the Member State concerned ... There is no consensus in the Convention to change this article." He also warned that introducing codecision in this area "would disturb the existing institutional balance." However, the Government later gave way on this point.

New powers over EU trade policy in public services and inward investment - trade becomes an "exclusive competence" of the EU

Under the current treaties (Article 133 TEC) EU ministers generally act unanimously when negotiating trade deals relating to trade in services and intellectual property rights (wherever these would touch on issues where unanimity is required for the adoption of internal rules). The current treaties also provide for unanimity when negotiating over health and education services. Agreements in these areas remain shared competences, and require national parliaments to ratify them. Foreign direct investment is not mentioned at all in the current treaties, and a proposal to include it was defeated at the Nice conference in 2000.

⁷² <http://european-convention.eu.int/Docs/Treaty/pdf/13/Art13Hain.pdf>

"The Reform Treaty will extend the scope of the trade policy to include all foreign direct investments and makes it clearly an exclusive competence of the Union."
- European Commission, July 2007

Under the new Article 207 [188C (1)] TFEU (the original Constitution's Article III-315), trade in services, intellectual property rights, and foreign direct investment are brought under the umbrella of the "uniform principles" on which the Common Commercial Policy is based, for the first time. This would give the EU the same powers over these issues that it has over trade in goods.

The UK also wanted to reinstate the clause in the existing treaties which says that the EU's new powers "shall not affect the rights of the Member States to maintain and conclude agreements with third countries".

In a proposed amendment Peter Hain wrote, "This paragraph introduces a significant change from the current Article 133, by placing trade in services and commercial aspects of intellectual property on the same basis as trade in goods rather than limiting the application of the Common Commercial Policy in these areas to the negotiation and conclusion of agreements in the fields of trade... we cannot support the present formulation."

Under current arrangements in some fields both the member states and the EU can negotiate trade deals, allowing member states to have their own trade agreements alongside those of the EU as a whole. For example, the UK and other EU member states have signed a number of Bilateral Investment Treaties with other countries around the world. Exclusive competence in this area would make such bilateral agreements impossible. The revised Constitution deletes the clause in the existing treaty (Article 133.5 TEC) which states that EU trade policies "shall not affect the rights of the Member States to maintain and conclude agreements with third countries".

New powers over energy

The Constitution would introduce a new EU competence in energy policy, and would allow the EU to introduce legislation by qualified majority vote:

" 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States⁷³, to:

- (a) ensure the functioning of the energy market;*
- (b) ensure security of energy supply in the Union;*
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy, and*
- (d) promote the interconnection of energy networks."*

In comparison to the original version of the Constitution this article has been expanded - to include the power to pass laws on energy "solidarity" and also to promote energy interconnection.

The UK initially tried to have the *whole article* on energy deleted, arguing that:

⁷³ This new text on 'energy solidarity' was inserted at the request of Poland.

" This provision is unnecessary as all aspects of energy policy are effectively covered elsewhere in the Treaty e.g. single market, environment. In addition, we have detailed concerns on the text, which we consider may have the unintended effect of changing the boundaries of EU competence and the types of measure which will be subject to unanimity." ⁷⁴

The Commission has ambitious plans in this area. It made several controversial proposals on energy in its 2008 "work programme". These included:

- *A gas network and European Grid:* which might imply a single regulator. It is also unclear how much an increase in EU wide interconnection would cost and what the benefits would be for the UK.
- *An oil stocks system and enhanced energy solidarity:* If this implies an increase in statutory reserve requirements the cost could be quite substantial - up to £6bn, with ongoing annual costs of £600m. The UK Government has vetoed such requirements in the past. However, under the new conditions of majority voting, this would no longer be an option. Furthermore, the accession to the EU of new member states from central and eastern Europe with a far higher dependence on Russian gas would represent a powerful new voting bloc in the European Council likely to support increased reserve requirements.

New article 122 [100] (formerly article III-180 of the Constitution) also states that "Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy."

This suggests that member states such as the UK could be compelled to shift energy resources during times of serious shortage in other parts of the EU. The UK currently has well-diversified gas supplies and relatively low levels of dependency on Russian gas. But reduction of this energy independence could mean higher costs for UK consumers during such a scenario.

The British Government continues to argue that the new energy powers in the Treaty will aid liberalisation of energy markets. However, this is a false argument, as the Commission already has sufficient powers to pursue liberalisation under the current Single Market rules, and under qualified majority voting. Indeed, such legislation was proposed in late 2007. The major block to energy liberalisation is not the exercise of national vetoes, but rather a lack of political will amongst the most powerful EU member states, keen to protect large, integrated domestic utility firms. The new energy powers in the Treaty relate more to control over national energy resources.

New powers for the ECB and the eurogroup - including financial regulations

Article 129 [107] (formerly III-187 of the Constitution) states that a number of Articles in the Statute of the European System of Central Banks can, for the first time, be amended by QMV, on a proposal from the Commission:

⁷⁴ <http://european-convention.eu.int/Docs/Treaty/pdf/845/Art%20III%20152%20Hain%20EN.pdf>

" Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of the Statute of the ESCB may be amended by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure."

The Articles which can be changed include significant ECB powers such as: the power to set minimum reserve requirements for banks and the power to fine financial institutions; the power to conduct foreign exchange operations and make international agreements for currency coordination; the power to set up and regulate clearing systems; and arrangements for sharing the profits of the ECB.

These would affect UK financial institutions, even if the UK is not a member of the ECB, as almost every single significant financial institution has branches in other member states.

Article 136 [115A] of the new treaty (which was Article III-194 of the original Constitution) will make the Eurogroup - the informal meetings of finance ministers from eurozone countries - into a formal body with its own President, elected for two and a half years. The Eurogroup will also gain various new powers.

During the negotiations in the Convention Peter Hain tried three times to have the whole Article and protocol removed, arguing that it would create an unfair system by which euro members could vote on laws that affect the UK, whilst the UK would be unable to vote on measures affecting them. He wrote:

" Formalisation of the Eurogroup and strengthening the powers of the "ins" is inappropriate ... We have always recognised that the "ins" will want to meet to discuss issues to do with sharing a currency, but greater powers for the Eurogroup to decide on the Broad Economic Policy Guidelines or excessive deficits of Euro-ins will create an asymmetry, whereby the outs will vote only on outs' issues, while ins will vote on ins and outs."

Nonetheless the UK allowed it to go ahead.

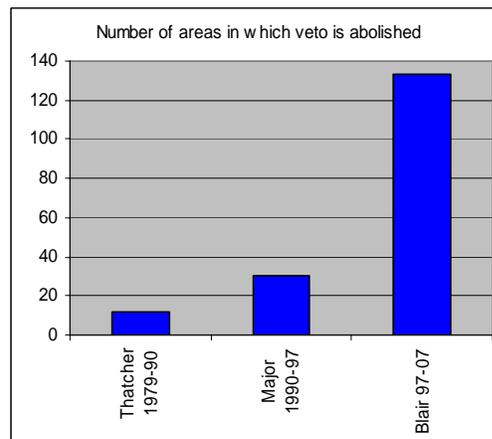
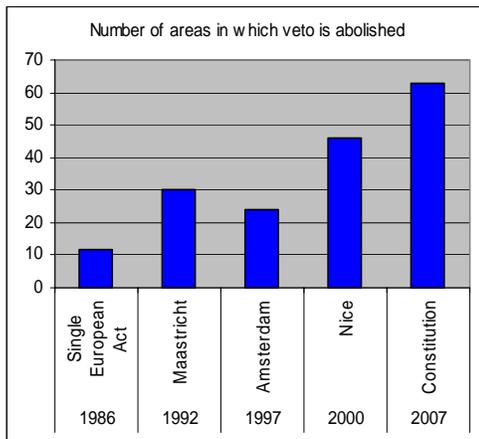
Annex 1: Giving up the veto?

In a written parliamentary answer in 2004 the Government listed 41 areas in which the EU Constitution would mean giving up the veto.⁷⁵ The Government now acknowledges more areas in which the veto is given up, and has recently produced a list of 50 areas.

In reality the number of areas in which the national right of veto would have been abolished is even higher. Even taking a very conservative approach there seem to be 61 new areas where qualified majority voting applies (the areas not acknowledged by the Government appear in green in the list below).

This would be the largest number of vetoes given up in any of the treaties to date. The Government has appeared to acknowledge this. Foreign Secretary David Miliband attacked the opposition for voting "against a referendum on the Maastricht treaty, which involved a smaller transfer of power." (Hansard, 3 July 2007)

Adding up the powers transferred under the treaties signed by the current Government shows the rapid increase in the pace of integration in recent years.



Some examples of areas where the veto is given up (which are not dealt with above) include:

- **Culture.** New powers over culture might allow the Commission to push through its pet project of a 'European Institute of Technology'. The UK has been blocking the idea - intended to rival MIT in the US.
- **Space.** The EU wants to spend £12 billion building the "Galileo" satellite system. It was supposed to be built as a commercial venture - but private sector partners have refused to fund it. The UK and the Netherlands oppose the Commission's plan to bail out the system using public funds from the EU - but this could go through under QMV. The Galileo project has important implications for EU transport policy.

⁷⁵ <http://www.theyworkforyou.com/wrans/?id=2004-07-05.180436.h&s=eu+veto#g180436.q0>

- **Sport.** Current initiatives could, for example, mean the EU setting wage and transfer caps for professional football. The EU Commission is considering plans to restrict the amount European football clubs can spend on players' wages and transfer fees. Clubs would not be allowed to spend more than they earn in these areas of expenditure. This would have implications for clubs subsidised by rich owners - like Chelsea.⁷⁶ In addition to these innovations, an earlier report from Portuguese Sports Minister Jose Luis Arnaut suggested creating a "European Sports Agency", which would "institutionalise" the EU's relationship with UEFA, giving the EU Commission power over football throughout Europe.⁷⁷

⁷⁶ Independent, 21 September 2006 <http://www.independentfootballreview.com/doc/A3619.pdf>

⁷⁷ Jose Luis Arnaut, "Independent European Sport Review 2006"

Annex1: areas where the veto is being given up

Veto given up	New Constitution article number	Original Constitution article number	Explanation
Election of European Council President	15 [9b]	I-22	Post did not exist before - EU Council presidency currently rotates automatically among member states.
Presidency of Council configurations	16 TEU, 236 TFEU [9c TEU, 201b TFEU]	I-24	Currently automatic rotation every six months. Though the Council can alter the order of rotation it has to do so by unanimity.
Appointment of European Foreign Minister	18 [9e]	I-28	Post did not exist before.
Council review of general rules on composition of the Committee of the Regions and European Economic and Social Committee	300 [256a]	I-32	
Comitology	291 [249c]	I-37	Control over the "Comitology" committees which monitor what the EU Commission is doing. Decisions on this are currently taken by unanimity.
Citizens' initiatives	11 [8b]	I-47	The citizens' initiative is a new process. It allows the Council to control the rules governing such initiatives by majority voting.
Implementation of own resources decisions	311 [269]	I-54	Determines how the EU raises its budget, what kinds of taxes and contributions from members. This in turn could affect how much each member pays in.
Negotiation of withdrawal agreement	50 [49a]	I-60	New procedure setting out formal procedure for member states to leave the EU. The remaining member states would have a majority vote amongst themselves about how to come to an agreement with the leaving member state.
Services of general economic interest	14 [16]	III-122	Introduces majority voting on what counts as a public service and is exempted from normal competition policy. Could be used by a majority to avoid opening up industries to competition.
Diplomatic and Consular protection measures	23 [20]	III-127	
Social security	48 [42]	III-136	Very significant, as social security rules for migrant workers are likely to "spill over" and affect social security systems in general.

Co-ordination of provisions for self-employed persons	53 [47]	III-141	Could have wide ranging consequences, also likely to spill over into affecting wider employment law. Also covers mutual recognition of qualifications.
Customs cooperation between member states and the Commission	33 [27a]	III-152	The scope of QMV has been widened here because the TEC previously specified that "These measures shall not concern the application of national criminal law or the national administration of justice." This has now been deleted.
Administrative and financial measures to prevent terrorism	75 [61h]	III-160	
Provisions enabling repeal of the aspects of this article related to state aid policy and the effect of the past division of Germany	107 [87]	III-167	
Authorisation, co-ordination and supervision of intellectual property rights protection	118 [97a]	III-176	
Amendments to certain parts of the Statute of the European System of Central Banks	129 [107]	III-187	The bank's statute can now be amended by majority vote on a proposal from the Commission. Previously it could only be changed by QMV if the bank itself recommended the change. The articles which can be changed include significant ECB powers such as: the power to set minimum reserve requirements for banks and the power to fine financial institutions; the power to conduct foreign exchange operations and make international agreements for currency coordination, and the power to set up and regulate clearing systems.
Use of the euro	133 [111a]	III-191	TEC 123.4 talked about "other measures necessary for the rapid introduction of the ecu" but this is much broader.
Measures relating to the Broad Economic Guidelines and excessive deficit procedure	136 [115a]	III-194	This article would enable the euro countries to pass any law needed to "strengthen coordination". Euro members would have no veto and non euro members would not even have a vote.
Procedure for entry into the euro	140 [117a]	III-198	

Transport	90 [70]	III-236	The Constitution removes the option for a member state to demand unanimous voting if it believes a proposal is a threat to a particular region.
Provisions enabling repeal of an article on transport policy as it affects areas of Germany affected by its past division	98 [78]	III-243	Option to end the exemption of eastern Germany from state aid rules by majority vote.
European Research Area	182 [166]	III-251	The ERA is intended to coordinate scientific research in the EU.
Space Policy	189 [172a]	III-254	New policy, decided by QMV. The UK Government was originally opposed and asked for it to be deleted.
Energy	191 [176a]	III-256	The Government is now happy with this article because energy taxes are still covered by unanimity. But other EU policies in energy e.g. reserve requirements, could be very costly and could be adopted by majority vote.
Mechanism for peer review of Member States' implementation of policies in this area	70 [61c]	III-260	
Border checks	77 [62]	III-265	
Common Immigration Policy	79 2 (a) [63a]	III-267(2)	The UK gave up the veto over asylum and illegal immigration in November 2004. This would abolish the UK's veto over issues such as legal migration and visas as well and could lead to the introduction of the EU "blue card" as championed by Franco Frattini.
Repatriation Treaties	79 2 (b)[63b]	III-267(3)	The EU would gain competence for repatriation negotiations with non-EU countries. This could see the UK being outvoted on an issue of vital importance for national security.
Integration of Migrants	79 2 (c)[63c]	III-267(4)	
Judicial co-operation in Criminal Matters	82 [69a]	III-270	
Minimum rules for criminal offences and sanctions (with emergency brake)	83 [69b]	III-271	This allows the EU to adopt criminal laws to enforce any other aspect of EU policy - using the same voting method as was used to establish that EU policy.
Crime prevention	84 [69c]	III-272	
Eurojust	85 [69d]	III-273	EU laws passed by majority vote could give Eurojust new powers and change the way it operates.

Police co-operation	87 [69f]	III-275	Majority voting could increase police cooperation further in the future especially on cross border crime.
Europol	88 [69g]	III-276	Majority voting controls Europol's activities, and can give it new powers.
EU laws on public health	168 [152]	III-278	Was under QMV before, but the competence to pass laws over public health is new. There is also a new competence (under QMV) to "encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas". The implications of this are unknown.
Culture	167 [151]	III-280	151.5 TEC stated that "The Council shall act unanimously throughout the procedure referred to" but these words have been deleted in the Constitution. Culture policy is sometimes used as a defence against competition e.g. at a national level the French <i>amendement</i> Pelchat from 1996 enforced a 40% minimum quota of French music on radio.
Tourism	195 [176]	III-281	The aims of this article are very general.
Sport	165 [149]	III-282	A new competence in sport has been added to an article which was already under QMV. "Sport" was never mentioned in the old treaties.
Civil protection	196 [176c]	III-284	Goals such as "risk prevention" are loosely worded. The EU's new powers over civil protection would be likely to "spill over" and affect emergency services more generally.
Administrative co-operation	197 [176d]	III-285	
External Action Service	27 [13a]	III-296	The EU diplomatic service will be set up by QMV.
Role of the European Foreign Minister in CFSP implementing measures	31 [15b]	III-300	If the European Foreign Minister is asked by the European Council to come up with a proposal, the decision based on that proposal is then taken by QMV.
European Defence Agency	45 [28d]	III-311	

Membership of structured co-operation in defence	46 [28e]	III-312	This new sub-group of EU members will take forward EU defence without some members having to be involved. The UK Government has signalled that it is likely to join the group. The UK can be outvoted on the decision to allow another country into the structured cooperation group - membership is not automatic for members who want it. Member states can be ejected from structured cooperation by QMV if the other members decide it no longer meets the objectives of the group.
Urgent financing of CFSP measures	26 [13]	III-313	
Common Commercial Policy	207 [188c]	III-315	Under TEC 133.5 services and IP were covered mainly by unanimity: "the Council shall act unanimously when negotiating and concluding an agreement in [services and IP] where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it."
Agreements with EU candidate countries and association agreements	212 [188h]	III-319	TEC 181a said "The Council shall act unanimously for the association agreements referred to in Article 310 and for the agreements to be concluded with the States which are candidates for accession to the Union." But this has been deleted from the Constitution.
Urgent aid to third countries	213 [188i]	III-320	The Government protested about this but was ignored.
Humanitarian aid operations	214 [188j]	III-321	
Restricting aid to persons or groups	215 [188k]	III-322	Although restricting aid was already done by QMV, it appears the Constitution gives the EU a new Competence to take restrictive measures against people or non-state groups.
Implementation of solidarity clause	222 [188r]	III-329	If another member state falls victim to a disaster etc, the Council decides by majority whether and how the rest of the members should help or give aid. This could have very significant implications, and what counts as a "disaster" is very

			broadly defined. Only measures taken under this article having defence implications would still be taken by unanimity.
European Council procedure	235 [201a]	III-341	The European Council has never adopted rules of procedure before - e.g. its voting rules are currently not defined anywhere because it doesn't vote at present.
Judicial appointments panel	255 [224a]	III-357	223 TEC said: " they shall be appointed by common accord of the governments of the Member States". How the panel would operate would be decided by QMV. This could mean less say over how the judges are chosen.
Specialised Courts	257 [225a]	III-359	TEC only allowed the creation of judicial panels not whole new Courts, and even this was by unanimity
ECJ Statute	281 [245]	III-381	In the TEC this had to be unanimous.
Appointment of ECB Executive Board	283 [245b]	III-382	These important figures would be appointed by QMV, instead of by "common accord".
Principles of European Administration	298 [254a]	III-398	QMV to establish how the EU's civil service operates. This is broader than the staff regulations in III-333 which are already decided by QMV - and would allow general legislation on the role of the EU machinery
EU budget oversight	322 [279]	III-412	The words "acting unanimously" have been deleted.
Criminal laws on combating fraud	325 [280]	III-415	The scope of this article - already decided by QMV - has been expanded to cover national criminal law. At the end of point 4 TEC said "These measures shall not concern the application of national criminal law or the national administration of justice." But this has been deleted.

Annex 2: new powers for the European Parliament

The 40 areas to which co-decision was extended under the original Constitution

(Source: FCO Commentary on the EU Constitution, FCO website)

I-37 Comitology
I-47 Citizens' initiatives
III-359 Specialised Courts
III-364 ECJ jurisdiction on intellectual property rights
III-381 ECJ Statute
III-398 Principles of European Administration
III-427 Staff Regulations of Union officials
III-412 Financial Regulations
III-122 Services of general economic interest
III-139 Official and Government Employment
III-144 Freedom to provide services for established third country nationals
III-147 Freedom to provide services
III-157 Movement of capital to or from third countries
III-160 Freezing of assets
III-174 Distortion of competition
III-176 Authorisation, co-ordination and supervision of intellectual property rights protection
III-319 Economic, financial, and technical cooperation with third countries
III-321 Humanitarian aid operations
III-179 Multilateral surveillance procedure
III-187 Amendments to certain parts of the Statute of the European System of Central Banks
III-191 Use of the euro
III-223 Structural and Cohesion Funds
III-231 Agriculture and Fisheries
III-236 Transport
III-251 European Research Area
III-254 Space Policy
III-256 Energy
III-281 Tourism
III-282 Sport
III-284 Civil protection
III-285 Administrative co-operation
III-265 Border checks
III-267 Immigration and Frontier Controls
III-270 Judicial co-operation in Criminal Matters
III-271 Minimum rules for criminal offences and sanctions
III-272 Crime prevention
III-273 Eurojust
III-275 Police co-operation
III-276 Europol
III-315 Aspects of the Common Commercial Policy

Annex 3: comparison between the new version of the Constitution and the original

New article number	Content	How is it altered?	How does it compare to the Constitution?
Treaty on European Union			
1[1]	Establishment of the Union	This is altered to include part of Article I-1 of the Constitution	Some but not all of the same content
2[1a]	The Union's values	Article I-2 of the Constitution inserted	Exactly the same text
3[2]	Objectives of the union	Replaced with Article I-3 of the Constitution	Exactly the same text
4[3a]	Relations between the Union and its members	Replaced with Article I-5 of the Constitution	Exactly the same text
5[3b]	Fundamental principles of union competence	Replaced with Article I-11 of the Constitution	Exactly the same text
6[6]	Fundamental Rights	An even more extended version of Article I-9 of the Constitution	Exactly the same text + more
7[7]	Suspension of membership rights	Makes the same amendments as Article I-59 of the Constitution	Same content
8[7a]	The union and its neighbours	Inserts Article I-57 of the Constitution	Exactly the same text
9[8]	The principle of democratic equality	Inserts Article I-45 of the Constitution	Exactly the same text
10[8a]	The principle of representative democracy	Inserts Article I-46 of the Constitution	Exactly the same text
11[8b]	The principle of participatory democracy	Inserts Article I-47 of the Constitution (47.4 moved to 21 TFEU)	Exactly the same text
12[8c]	National parliaments	New article on national parliaments - controversy over this in papers 23/07	New
13[9]	The institutions of the union	Inserts Article I-19 (though section 3 on the ECB is moved to a later article)	Exactly the same text
14[9a]	The European Parliament	Inserts Article I-20 of the Constitution	Exactly the same text
15[9b]	The European Council and its president	Inserts Article I-21 and I22 of the Constitution	Exactly the same text
16[9c]	The Council, its Presidency and the definition of a qualified majority	Inserts Articles I-23, I-24 and I-25 of the Constitution	Same content but delayed
17[9d]	The European Commission and its President	Inserts Article I-26 and I27 of the Constitution	Exactly the same text
18[9e]	The Union Minister for Foreign Affairs	Inserts Article I-28 of the Constitution	Same text with name change

19[9f]	The Court of Justice of the European Union	Inserts Article I29 of the Constitution	Exactly the same text
20[10]	Enhanced cooperation	Inserts Article I-44 of the Constitution	Exactly the same text
21[10a]	External action: general principles	Inserts Article III-292 of the Constitution	Exactly the same text
22[10b]	Role of the European Council in Foreign Policy	Inserts Article III-293 of the Constitution	Exactly the same text
23[10c]	External action: general principles	Based on 292.3	Same content
24[11]	Common Foreign and Security Policy general principles	II.1 and II.2 insert Article I-16 of the Constitution, and a new paragraph from the IGC mandate is added	Exactly the same text + new paragraph
25[12]	Common Foreign and Security Policy general principles	Inserts Article III-294.3 of the Constitution	Exactly the same text
26[13]	Common Foreign and Security Policy - emergency meetings	Inserts Article III-295 of the Constitution	Same content
27[13a]	Role of the Foreign Minister	Inserts Article III-296 of the Constitution	Exactly the same text
28[14]	European decisions in foreign policy	Modifies article 14 in exactly the same way as Article III-297 of the constitution	Same text
29 [15]	European decisions in foreign policy	Inserts Article III-298 of the Constitution	Same text
30 [15a]	Foreign Minister can call extraordinary meetings in foreign policy	Inserts Article III-299 of the Constitution	Exactly the same text
31[15b]	QMV in foreign policy	Inserts Article III-300 of the Constitution (and Article III-341 (3) on procedural questions)	Exactly the same text + line excluding adoption of legislative acts in this area
32[16]	Obligation to consult before taking any action on the international scene	Inserts Articles I-40.5 and III-301 of the Constitution	Exactly the same text
33[18]	Appointment of Special Representatives by the Foreign Minister	Turns this into Article III-302 of the Constitution	Exactly the same text
34[19]	Foreign Minister shall be asked to present the Union's position at the UN	Inserts Article III-305 of the Constitution	Exactly the same text
35[20]	Union delegations in third countries	Inserts Article III-306 of the Constitution	Exactly the same text

36[21]	Foreign Minister to consult the European Parliament	Inserts Article III-304 of the Constitution	Exactly the same text
37[24]	The EU can sign treaties with countries or groups of countries	Inserts Article III-303 of the Constitution	Exactly the same text
38[25]	Foreign Minister to run the political and security committee	Turns this into Article III-307 of the Constitution	Same content
39[25a]	Data protection	Amends this to introduce Article I-51 of the Constitution	Same content
40[25b]	Foreign policy must not affect the competences of the community and vice versa	Inserts Article III-308 of the Constitution	Exactly the same text
41[28]	Urgent financing of foreign policy decisions	Inserts Article III-313 of the Constitution	Exactly the same text
42[28a]	Common Security and Defence policy - including "will lead to a common defence"	Inserts Article I-41 of the Constitution	Exactly the same text
43 [28b]	List of the tasks of the Common Security and Defence Policy	Inserts III-309 of the Constitution	Exactly the same text
44[28c]	Creation of EU task forces	Inserts III-310 of the Constitution	Exactly the same text
45[28d]	European Defence Agency	Inserts III-311 of the Constitution	Exactly the same text
46[28e]	Permanent Structured cooperation	Inserts III-312 of the Constitution	Exactly the same text
47[46a]	Legal personality for the EU	Inserts I-7 of the Constitution	Exactly the same text
48[48]	Simplified revision procedures (ratchet clause and flexibility clause)	Inserts articles IV-443, IV-444 and IV-445	Exactly the same text (+ couple of words on how it can be used to increase "or reduce" the powers of the EU)
49[49]	New obstacles to countries joining	Based on Article I-58 of the Constitution	Modified to include new stress on admission criteria
50[49a]	Right to leave the EU	Inserts Article I-60 of the Constitution	Exactly the same text
51[49b]	Protocols and annexes	Inserts IV-442 of the Constitution	Exactly the same text
52[49c]	Territorial application	Inserts IV-440 of the Constitution	Exactly the same text
53[51]	Duration	Inserts IV-446 of the Constitution	Exactly the same text

	Relation to the TEC / TFEU	Technical article establishing the relationship between the treaties	New article
54[52]	Ratification and entry into force	Inserts Article IV-447	Similar text but does not name a date
55[53]	Authentic texts	Inserts IV-448 of the Constitution	Exactly the same text
Treaty on the Functioning of the European Union			
1[1a]	Introduces the Treaty on the Functioning of the Union (aka TEC)	A new header article explaining the role of the TFEU	New technical article
2[2a]	Categories of competence	Inserts Article I-12 of the Constitution	Exactly the same text
3[2b]	Areas of exclusive competence	Inserts Article I-13 of the Constitution	Exactly the same text
4[2c]	Areas of shared competence	Inserts Article I-14 of the Constitution	Exactly the same text
5[2d]	The coordination of economic and employment policies	Inserts Article I-15 of the Constitution	Exactly the same text
6[2e]	Areas of supporting, coordinating or complementary action	Inserts Article I-17 of the Constitution	Exactly the same text
7[2f]	Power to ensure consistency	Inserts Article III-115 of the Constitution	Exactly the same text
8[3]	Goal of eliminating inequalities	Inserts Article III-116 of the Constitution	Exactly the same text
9[5a]	Promoting high social standards	Inserts Article III-117 of the Constitution	Exactly the same text
10[5b]	Combating discrimination	Inserts Article III-118 of the Constitution	Exactly the same text
11[6]	Environmental protection	Inserts Article III-119 of the Constitution	Exactly the same text
12[6a]	Consumer protection	Inserts Article III-120 of the Constitution	Exactly the same text
13[6b]	Animal welfare	Inserts Article III-121 of the Constitution	Same text + words "as far as sensible"
14[16]	EU laws on services of general interest	Inserts Article III-122 of the Constitution	Slightly different text, same meaning
15[16a]	Openness and limits on openness of EU procedures	brings into line with article I-50 and II-102 of the Constitution	Same content as articles I-50 and II-102 but with new exemption for ECB, ECJ and EIB
16[16b]	Data protection - European laws on	Inserts Article I-51 of the Constitution	Exactly the same text with new derogation regarding specific rules in another article
17[16c]	Status of churches and religious groups	Inserts Article I-52 of the Constitution	Exactly the same text

18[16d]	Laws on non discrimination	Inserts Articles I-4 and III-123 of the Constitution	Exactly the same sense
19[16e]	Laws on non discrimination - ending veto	Inserts Article III-124 of the Constitution	Exactly the same sense
20[17]	European Citizenship	Inserts Article I-10 of the Constitution	Exactly the same text
21[18]	Freedom of movement, social security/social protection	wording and order changed, and explicit reference to id cards and other documents removed. This has been shifted to Art 69.	Same sense as III-125 of Constitution
22[19]	Euro laws on right to vote and stand in elections	Veto on restrictions to right to vote and stand for EU parliament removed to make this the same in content as Article III-126	Same sense as III-126
23[20]	EU laws on harmonisation of diplomatic and consular protection	Unchanged: Article III-127 of the Constitution was based on the original TEC article	Same content
24[21]	Laws on the operation of the citizens initiative mechanism	Inserts part of I-47.4 of the Constitution on adoption of provisions for procedures and conditions required for citizens initiative.	Same content on adoption of provisions and procedures, but without Constitution's requirement of 1million citizen minimum
25[22]	Regular reports on the development of European Citizenship	Amended to rule out using article 22 to expand 21	New technical article
26[22a]	Establishing the internal market	Inserts Article III-130 (1) - III-130 (3) of the Constitution	Exactly the same text
27[22b]	Establishing the internal market	Inserts Article III-130.4 of the Constitution	Exactly the same text
28[23]	Customs union: movement of goods	Inserts Article III-151 (1) and (2)	Same text
29[24]	Customs union: products from third countries	Inserts Article III-151 (3) of the Constitution	Exactly the same text
30[25]	Customs duties	Inserts Article III-151 (4) of the Constitution	Exactly the same text
31[26]	Customs union: tariff duties	Inserts Article III-151 (5) of the Constitution	Same text
32[27]	Customs union: Commission guidelines	Inserts Article III-151 (6) of the Constitution	Exactly the same text
33[27a]	EU Laws (and criminal laws) on customs cooperation	Inserts Article III-152 of the Constitution	Exactly the same text
34[28]	Prohibition of restrictions on import between MS	Inserts article III-153 of the Constitution	Article III-153 has been divided in to two parts, but same content

35[29]	Prohibition of restrictions on import between MS	Inserts article III-153 of the Constitution	Article III-153 has been divided in to two parts, but same content
36[30]	Exceptions to restrictions in import/export	Inserts Article III-154 of the Constitution	Exactly the same text
37[31]	State monopoly	Inserts Article III-155 of the Constitution	Exactly the same text
38[32]	Agriculture and Fisheries	Inserts detail on fisheries as per Article III-225 and III-226 of the Constitution	Same content
39[33]	Objectives of CAP	Insert Article III-227 of the Constitution	Exactly the same text
40[34]	Common agricultural market	Inserts Article III-228 of the Constitution	Exactly the same text
41[35]	Coordination of research and training in agriculture	Inserts Article III-229 of the Constitution	Exactly the same text
42[36]	State aid must be granted by the council on a proposal from the Commission	Inserts text from Article III-230 of the Constitution	Same content
43[37]	Running of the CAP - introduces codecision with MEPs	Inserts Article III-231 of the Constitution	Exactly the same text
44[38]	The Commission can impose charges on market-distortion	Inserts Article III-232 of the Constitution	Exactly the same text
45[39]	Freedom and rights of workers within the union	Inserts Article III-133 of the Constitution	Same content
46[40]	QMV to decide measures which bring about freedom of workers	Inserts Article III-134 of the Constitution	"European laws" and "framework laws" replaced by "directives and "regulations". Otherwise same content.
47[41]	MS shall encourage exchange of young workers	Inserts Article III-135 of the Constitution	Exactly the same text
48[42]	Social Security for migrant workers	Inserts Article III-136 of the Constitution	Exactly the same text (except "employed" becomes "salaried")
49[43]	Freedom of establishment	Inserts Article III-137 of the Constitution	Same content
50[44]	Freedom of establishment	Inserts Article III-138 of the Constitution	Exactly the same text
51[45]	Exceptions from freedom of establishment	Inserts Article III-139 of the Constitution	Exactly the same text

52[46]	Right of establishment shall not intervene with public policy, security or health	Inserts Article III-140 of the Constitution	Adds paragraph on QMV for the coordination of exceptions to right of establishment
53[47]	Employment law for self employed workers - end of veto	Inserts Article III-141 of the Constitution	Exactly the same text
54[48]	Equal treatment of foreign firms	Inserts Article III-142 of the Constitution	Exactly the same text
55[48a]	Equal treatment of foreign nationals in foreign companies	Inserts Article III-143 of the Constitution	Exactly the same text
57[50]	Definition of services	Inserts Article III-145 of the Constitution (wording tweak)	Exactly the same text
58[51]	Liberalisation of services in transport, banking and insurance	Inserts Article III-146 of the Constitution	Exactly the same text
59[52]	EP codecision over services liberalisation	Inserts Article III-147 of the Constitution	Exactly the same text
60[53]	Member states must declare readiness to liberalise	Inserts Article III-148 of the Constitution	Exactly the same text
61[54]	Freedom to provide services	Inserts Article III-149 of the Constitution	Exactly the same text
62[55]	Specifying that articles 51 and 54 will apply to chapter	Inserts Article III-150 of the Constitution	Exactly the same text
63[56]	Restrictions on movement of capital between member states prohibited	Inserts Article III-156 of the Constitution	Adds new paragraph on payments between MS
64[57]	Permitted restrictions on investment - EP codecision	Inserts Article III-157 of the Constitution	Exactly the same text
65[58]	New powers to launch restrictive tax measures against third countries	Inserts Article III-158 of the Constitution	Exactly the same text
66[59]	Safeguard measures on movements of capital from third countries	Inserts Article III-159	Changed wording, same content
67[61]	An area of Freedom Security and Justice	Inserts Article III-257 of the Constitution	Exactly the same text
68[61a]	European Council defines guidelines	Inserts Article III-258 of the Constitution	Exactly the same text
69[61b]	Review by national parliaments	Inserts Article III-259 of the Constitution	Exactly the same text

70[61c]	Evaluation & mutual recognition of legal judgements	Inserts Article III-260 of the Constitution	Exactly the same text
71[61d]	Standing committee for internal security	Inserts Article III-261 of the Constitution	Exactly the same text
72[61e]	Member states responsibility	Inserts Article III-262 of the Constitution + another paragraph repeating same point	Same text
73[61f]	Possibility to coordinate between member states departments to ensure national security	Not in Constitution	
74[61g]	EU legislation on administrative cooperation	Inserts Article III-263 of the Constitution	Exactly the same text
75[61h]	Financial measures against terrorism	Inserts Article III-160 of the Constitution plus extra clause on legal safeguards	Exactly the same text
76[61i]	Commission right of initiative, end of individual member states right of initiative in this field	Inserts Article III-264 of the Constitution	Exactly the same text
77[62]	Border Control, Visas and Asylum	Inserts Article III-265 of the Constitution, plus text on ID cards from III-125	Exactly the same text
78[63]	Common asylum policy	Inserts Article III-266 of the Constitution	Exactly the same text
79[63a]	Common immigration policy	Inserts Article III-267 of the Constitution	Exactly the same text
80[63b]	Burden sharing for the cost of asylum	Inserts Article III-268 of the Constitution	Exactly the same text
81[65]	Harmonisation of civil law	Inserts Article III-269 of the Constitution + tweak to involve parliaments in use of passerelle	Same text
82[69e]	Harmonisation of criminal law	Inserts Article III-270 of the Constitution (with tweak to emergency brake on enhanced cooperation)	Same text
83[69b]	Definition of criminal offences and penalties	Inserts Article III-271 of the Constitution (with tweak to emergency brake on enhanced cooperation)	Same text
84[69c]	Crime Prevention	Inserts Article III-272 of the Constitution	Exactly the same text
85[69d]	Powers of Eurojust	Inserts Article III-273 of the Constitution	Exactly the same text
86[69e]	European public prosecutor	Inserts Article III-274 of the Constitution (with automatic enhanced cooperation added)	Same text

87[69f]	Police cooperation	Inserts Article III-275 of the Constitution (with automatic enhanced cooperation added)	Exactly the same text
88[69g]	Europol	Inserts Article III-276 of the Constitution	Exactly the same text
89[[69h]	Conditions on cross-border policing decided by unanimity	Inserts Article III-277 of the Constitution	Same content
90[70]	Transport	Wording tweak to bring into line with III-236.1 of the Constitution	Same content
91[71]	Exceptions from rules on transport	Inserts Article III-236.2 - of the Constitution	Exactly the same text
92[72]	Transport policy and accession	Inserts Article III-237 of the Constitution	Same content
93[73]	Aid for transport	Insert Article III-238	Exactly the same text
94[74]	Transport measures must consider circumstances of carriers	Inserts Article III-239 of the Constitution	Exactly the same text
95[75]	Codecision on transport	Inserts Article III-240 of the Constitution	Exactly the same text
96[76]	Protectionism in transport policy prohibited	Inserts Article III-241	Exactly the same text
97[77]	Charges to carrier crossing borders must be reasonable	Inserts Article III-242 of the Constitution	Exactly the same text
98[78]	End of special measures for Germany	Inserts Article III-243 of the Constitution	Exactly the same text
99[79]	Deletion of role of EcoSoc	Inserts Article III-244 of the Constitution	Exactly the same text
100[80]	Regulation of sea and air transport - codecision	Inserts Article III-245 of the Constitution	Exactly the same text
101[81]	List of measures incompatible with internal market and exceptions	Inserts Article III-161 of the Constitution	Exactly the same text
102[82]	Monopoly/state aid incompatible with internal market	Inserts Article III-162 of the Constitution	Exactly the same text
103[83]	Decisions on functioning on internal market by QMV	Inserts Article III-163 of the Constitution	Exactly the same text
104[84]	Provisions until Article 101 and 102 come into force	Inserts Article III-164 of the Constitution	Exactly the same text
105[85]	Infringement of state aid rules	Inserts Article III-165 of the Constitution	Exactly the same text

106[86]	Services of general interest subject to the treaties	Inserts Article III-166 of the Constitution	Same content
107[87]	State aid, special measures for Germany	Inserts Article III-167 of the Constitution	Exactly the same text
108[88]	Commission regulations on categories of state aid exempt from normal rules	Inserts Article III-168.4 of the Constitution	Exactly the same text
109[89]	QMV to decide application of Articles 107 and 108.	Inserts Article III-169 of the Constitution	Exactly the same text
110[90]	Taxes cannot serve as indirect protection	Inserts Article III-170.1 of the Constitution	Exactly the same text
111[91]	Internal taxation on products	Inserts Article III-170.2 of the Constitution	Exactly the same text
112[92]	Charges apart from indirect taxation prohibited	Inserts Article III-112.3	Same content
113[93]	VAT harmonisation - changes to text	Inserts Article III-171 of the Constitution	Exactly the same text
114[94]	Fiscal harmonisation	Inserts Article III-172 of the Constitution	Exactly the same text
115[95]	Harmonisation of administrative measures	Inserts Article III-173 of the Constitution	Exactly the same text
116[96]	Distortions of competition	Inserts Article III-174 of the Constitution	Exactly the same text
117[97]	Distortions of competition	Inserts Article III-175 of the Constitution	Same content
118[97a]	EU intellectual property rights	Inserts Article III-176 of the Constitution	Exactly the same text
119[97b]	Euro - wording changed	Inserts Article III-177 of the Constitution	Exactly the same text
120[98]	MS economic policy consistent with the objectives of the union	Inserts Article III-178 of the Constitution	Exactly the same text
121[99]	Broad economic policy guidelines - country criticised cannot vote	Inserts Article III-179 of the Constitution	Exactly the same text
122[100]	Financial assistance to member states in case of disasters	Inserts Article III-180 of the Constitution	Exactly the same text
123[101]	Overdraft facilities	Inserts Article III-181 of the Constitution	Exactly the same text
124[102]	Certain measures to financial institutions prohibited	Inserts Article III-182 of the Constitution	Deletes paragraph 124.2

125[103]	Liability for governmental commitments	Inserts Article III-183 of the Constitution	Same text
126[104]	Commission can reprimand members directly over deficits	Inserts Article III-184 of the Constitution	Same content
127[105]	EP only needs to be consulted over ECB powers of financial regulation	Inserts Article III-185 of the Constitution	Same content
128[106]	Euro bank notes	Inserts Article III-186 of the Constitution	Same content
129[107]	Abolishing the veto over changing the statute of the ECB	Inserts Article III-187 of the Constitution	Same content
130[108]	Independence of the ECB	Inserts Article III-188	Same content
131[109]	Regulations of the ESCB	Inserts Article III-189 of the Constitution	Exactly the same text
132[110]	Regulations of the ESCB	Inserts Article III-190 of the Constitution	Exactly the same text
133[111]	Measures necessary for the use of the euro	Inserts Article III-191 of the Constitution	Exactly the same text
134[114]	Special Economic and Financial Committee set up	Inserts Article III-192 of the Constitution	Same content
135[115]	Council can instruct Commission to make proposals on economic guideline	Inserts Article III-193 of the Constitution	Exactly the same text
136[115a]	Fiscal discipline in the euro group	Inserts Article III-194 of the Constitution	Exactly the same text
137[115b]	Eurogroup	Inserts Article III-195 of the Constitution which in turn inserts the protocol on the euro group	Exactly the same text
138[115c]	Representation in international financial institutions	Inserts Article III-196 of the Constitution	Exactly the same text
139[116a]	Conditions for members with a derogation	Inserts Article III-197 of the Constitution	Exactly the same text
140[117a]	Convergence reports and criteria for joining	Inserts Article III-198 of the Constitution	Exactly the same text
141[118a]	Coordination with non-euro members	Inserts Article III-199 of the Constitution	Exactly the same text
142[118b]	Exchange rates to be regarded as a matter of common interest	Inserts Article III-200 of the Constitution	Exactly the same text
143[119]	Balance of payments crises	Inserts Article III-201 of the Constitution	Exactly the same text

144[120]	Balance of payments protective measures	Inserts Article III-202 of the Constitution	Exactly the same text
145[125]	Coordinated strategy for employment	Inserts Article III-203 of the Constitution	Exactly the same text
146[126]	Employment policies a matter of common concern	Inserts Article III-204 of the Constitution	Exactly the same text
147[127]	The Union to contribute to high level of employment	Inserts Article III-205 of the Constitution	Exactly the same text
148[128]	The Council to draw up employment guidelines decided by QMV	Inserts Article III-206 of the Constitution	Exactly the same text
149[129]	Best practices in employment policies, decided by QMV	Inserts Article III-207 of the Constitution	Exactly the same text
150[130]	Employment Committee to be set up, decided by simple majority	Inserts Article III-208 of the Constitution	Exactly the same text
151[136]	Promotion of social rights	Inserts Article III-209 of the Constitution	Exactly the same text
152[136a]	Official role of the social partners and tripartite summit	Inserts Article I-48 of the Constitution	Exactly the same text
153[137]	Laws on working conditions	Inserts Article III-210 of the Constitution	Exactly the same text
154[138]	European social dialogue	Inserts Article III-211 of the Constitution	Exactly the same text
155[139]	European social agreements	Inserts Article III-212 of the Constitution	Exactly the same text
156[140]	Equal pay - guidelines on best practice	Inserts Article III-213 of the Constitution	Exactly the same text
157[141]	Equal pay - QMV	Inserts Article III-214 of the Constitution	Same content
158[142]	Paid holiday schemes	Inserts Article III-215 of the Constitution	Exactly the same text
159[143]	Report on equality progress	Inserts Article III-216 the Constitution	Adds paragraph on role of Parliament
160[144]	Social Protection Committee, by QMV	Inserts Article III-217 of the Constitution	Exactly the same text
161[145]	Report on social developments	Inserts Article III-218 of the Constitution	Exactly the same text
162[146]	European Social Fund	Inserts Article III-219 1 of the constitution	Same content

163[147]	ESF administered by the Commission	Inserts Article 219 2 of the Constitution	Same text
164[148]	ESF decided by QMV	Inserts Article 219 3 of the Constitution	Same content
165[149]	Sport policy	Inserts Article III-282 of the Constitution	Exactly the same text
166[150]	Vocational training - EU can adopt legislation	Inserts Article III-283 of the Constitution	Exactly the same text
167[151]	Culture - EU can adopt incentive measures	Inserts Article III-280 of the Constitution	Exactly the same text
168[152]	Public health - new powers for EU	Inserts Article III-278 of the Constitution	Exactly the same text
169[153]	Consumer protection	Inserts Article 169[153] of the Constitution	Same text
170 [154]	Trans-European networks	Inserts Article III-246 of the Constitution	Exactly the same text
171[155]	Trans-European networks	Inserts Article III-247 of the Constitution	Same text
172[156]	QMV in Trans-European networks	Inserts Article III-247 of the Constitution	Same text
173[157]	Industry	Inserts Article III-279 of the Constitution	Almost exactly the same text
174[158]	Territorial cohesion added as new objective	Inserts Article III-220 of the Constitution	Exactly the same text
175[159]	Co-ordination of cohesion policies	Inserts Article III-221 of the Constitution	Exactly the same text
176[160]	European Regional Development Fund	Inserts Article III-222 of the Constitution	Exactly the same text
177[161]	Codecision on structural funds	Inserts Article III-223 of the Constitution	Same content
178[162]	QMV in implementing ERDF	Inserts Article III-224 of the Constitution	Same text
179[163]	Creation of a European research area	Inserts Article III-248 of the Constitution	Exactly the same text
180[164]	Research objectives	Inserts Article III-249 of the Constitution	Exactly the same text
181[165]	Research coordination	Inserts Article III-250 of the Constitution	Exactly the same text
182[166]	Multiannual framework programme	Inserts Article III-251 of the Constitution	Almost exactly the same

183[167]	Management of the Framework Programme for Research	Amendments to give effect to Article 252.1 of the Constitution	Same text broken into four
184[168]	Management of the Framework Programme for Research	Amendments to give effect to Article 252.2 of the Constitution	Same text broken into four
185[169]	Implementation of the Framework	Amendments to give effect to Article 252.3 of the Constitution	Same text broken into four
186[170]	Management of the Framework Programme for Research	Amendments to give effect to Article 252.4 of the Constitution	Same text broken into four
187[171]	Joint undertakings in research	Amendments to give effect to Article III-253 of the Constitution	Same text broken into two
188[172]	QMV in adopting decision on framework	Amendments to give effect to Article III-253 of the Constitution	Same text broken into two + new paragraph on decision on framework
189[172bis]	European Space Policy	Inserts Article III-254 of the Constitution	Exactly the same text + without prejudice
190[173]	Report on technological developments	Inserts Article III-255 of the Constitution	Exactly the same text
191[174]	Environmental policies	Adds to the dash in Article III-233 on "worldwide environmental problems" specific words on climate change	Adds words "in particular the fight against climate change."
192[175]	Passerelle on environmental laws	Inserts Article III-234 of the Constitution	Exactly the same text
193[176]	More stringent environmental policies allowed	Inserts Article III-234.6 of the Constitution	Exactly the same text
194[176a]	Energy policy	Inserts Article III-256 of the Constitution + new reference to "energy solidarity" and "interconnection"	Exactly the same text
195[176b]	Tourism	Inserts Article III-281 of the Constitution	Almost exactly the same text
196[176c]	Civil protection	Inserts Article III-284 of the Constitution	Exactly the same text
197[176d]	Administrative co-operation	Inserts Article III-285 of the Constitution	Exactly the same text

198[182]	Association of overseas countries and territories	Inserts Article III-286 of the Constitution	Same content (status of Greenland moved to separate Article, 204[188])
199[183]	Overseas association	Inserts Article III-287 of the Constitution	Same text
200[184]	Customs duties on imports from overseas territories	Inserts Article III-288 of the Constitution	Same text
201[185]	Customs duties on imports from overseas territories	Inserts Article III-289 of the Constitution	Exactly the same text
202[186]	Rights for workers from overseas territories	Inserts Article III-290 of the Constitution	Exactly the same text
203[187]	Unanimity on decisions relating to overseas territories	Inserts Article III-291 of the Constitution	Same text
204[188]	Status of Greenland	Inserts parts of Article III-286.1 of the Constitution	Same content + reference to protocol
205[188a]	External action: general principles	Inserts Article III-292 of the Constitution	Exactly the same text
206[188b]	Common commercial policy: EU to contribute to abolitions of restrictions to trade	Inserts Article III-314 of the Constitution	Exactly the same text
207[188c]	Common commercial policy: principles and provision	Inserts Article III-315 of the Constitution	Same text
208[188d]	Development cooperation	Inserts Article III-316 of the Constitution	Exactly the same text
209[188e]	Co-decision in development policy	Inserts Article III-317 of the Constitution	Same text
210[188f]	Coordination of development policy	Inserts Article III-318.1-2 of the Constitution	Same text divided in two

211[188g]	Cooperation with third party on development policy	Inserts Article III-318.3 of the Constitution	Same text divided in two
212[188h]	Economic cooperation with third countries	Inserts Article III-319 of the Constitution	Same text
213[188i]	Urgent financial needs in third countries	Inserts Article III-320 of the Constitution	Exactly the same text
214[188j]	Humanitarian aid - sets EU strategy and creates various new bodies	Inserts Article III-321 of the Constitution	Exactly the same text
215[188k]	Restrictive measures	Inserts Article III-322 of the Constitution	Exactly the same text
216[188l]	International agreements	Inserts Article III-323 of the Constitution	Exactly the same text
217[188m]	Establishing association agreements	Inserts Article III-324 of the Constitution	Exactly the same text
218[188n]	Negotiating treaties - procedure	Inserts Article III-325 of the Constitution (tweaked to specify council negotiates ECHO membership)	Exactly the same text
219[188o]	International monetary agreements	Inserts Article III-326 of the Constitution	Exactly the same text
220[188p]	Liaison with UN and other international bodies	Inserts Article III-327 of the Constitution	Exactly the same text
221[188q]	EU delegations in third countries	Inserts Article III-328 of the Constitution	Exactly the same text
222[188r]	Solidarity / mutual defence clause	Merges Article I-43 and Article III-329 of the Constitution	Exactly the same text
223[190]	European Parliament	Amends 190 to bring into line with Article III-330 of the Constitution	Same content
224[191]	Laws on European Political Parties and their funding	Inserts Article III-331 of the Constitution	Same text
225[192]	Parliament can request proposals from the Commission, and it has to explain if it refuses	Inserts Article III-332 of the Constitution	Exactly the same text
226[193]	Parliament can set up a committee to scrutinise the implementation of Union law	Amends Article 193 to bring it in line with Article III-333 of the Constitution	Exactly the same text

227[194]	Citizen's right to petition the European Parliament	Inserts Article III-334 of the Constitution	Exactly the same text
228[195]	Role of the EU ombudsman	Inserts Article III-335 of the Constitution	Same content
229[196]	Parliament annual session	Wording tweak to bring it into line with III-336	Exactly the same text
230[197]	Council right to speak to parliament	Inserts Article III-337 of the Constitution	Exactly the same text
231[198]	European Parliament voting	Wording tweak to bring it into line with III-338	Exactly the same text
232[199]	European Parliament rules of procedure	Wording tweak to bring it into line with III-339	Exactly the same text
233[200]	EP will discuss the Commissions report in public	Inserts Article III-338 of the Constitution	Exactly the same text
234[201]	Motion of censure - Foreign Minister can be sacked independently	Inserts Article III-340 of the Constitution	Exactly the same text
235[201a]	European Council rules of procedure + introduction of voting	Inserts Article III-341 of the Constitution	
236[201b]	Configurations of the Council of Ministers - decided by QMV	Inserts Article I-24 of the Constitution	Same content
237[204]	Council meetings can meet on own initiative or on request by Commission	Inserts Article III-342 of the Constitution	Exactly the same text
238[205]	New voting system making it easier to pass legislation	Inserts Article I-25 of the Constitution	Same content + delay for 7 years
239[206]	Voting in the Council	Inserts Article III-343 of the Constitution	Exactly the same text
240[207]	COREPER + council secretariat	Inserts Article III-344 of the Constitution	Exactly the same text
241[208]	Commission has to explain if it refuses to publish a proposal	Inserts Article III-345 of the Constitution	Exactly the same text
242[209]	Council to consult commission on its structures	Wording tweak to bring it into line with III-346	Exactly the same text
243[210]	Decision on the salaries of the Foreign Minister etc	Inserts Article III-400 of the Constitution	Same content
244[211a]	Appointment of the European Commission	Establishes new system for rotating commissioners between member states + part of Article I-26 of the	New article + inserts part of Article I-26 of Constitution

		Constitution	
245[213]	Independence of Commissioners	Inserts Article III-347 of the Constitution	Exactly the same text
246[215]	President and EP have power over appointments to the Commission when there are vacancies	Inserts Article III-348 of the Constitution	Exactly the same text
247[216]	Members of the Commission can be compulsorily retired	Inserts Article III-349 of the Constitution	Exactly the same text
248[217]	President allocating responsibilities in Commission except for Foreign Minister	Inserts Article III-350 of the Constitution	Exactly the same text
249[218]	The Commission must provide an annual report on its activities	Inserts Article III-348	Exactly the same text
250[219]	Adoption of rules of procedure for Commission	Inserts Article III-351 of the Constitution	Exactly the same text
251[221]	Court of Justice	Wording change to bring it into line with III-353	Exactly the same text
252[222]	Annual report of the Commission	Wording tweak and move to bring it into line with III-352	Exactly the same text
219	Parliament rules of procedure	Wording change to bring it into line with III-338	Exactly the same text
253[223]	Court of Justice	Wording change to bring it into line with III-355	Exactly the same text
254[224]	Consultation of new panel on judicial appointments	Inserts Article III-356 of the Constitution	Exactly the same text
255[224a]	Creation and composition of the new Judicial Appointments Panel	Inserts Article III-357 of the Constitution	Exactly the same text
256[225]	Creation of "specialised courts"	Changes to make it into III-358	Exactly the same text
257[225a]	QMV on the creation of specialised courts	Inserts Article III-359 of the Constitution	Exactly the same text
258[226]	The Commission can bring MS before the ECJ	Inserts Article III-360 of the Constitution	Exactly the same text
259[227]	MS can bring another MS before the ECJ	Inserts Article III-361 of the Constitution	Exactly the same text
260[228]	New penalty procedures including lump sum fines	Inserts Article III-362 of the Constitution	Exactly the same text

261[229]	ECJ can be given unlimited jurisdiction to decide penalties	Inserts Article III-363 of the Constitution	Same content
262[229a]	ECJ can be given jurisdiction over Intellectual Property by Council	Wording change to bring into line with III-364	Changed at Dutch insistence so that such a decision would have to be ratified by national parliaments
263[230]	Changes to the right of standing at the European Court	Inserts Article III-365 of the Constitution	Exactly the same text
264[231]	ECJ striking down acts - process	Wording change to bring into line with III-366	Exactly the same text
265[232]	Action against EU bodies and agencies if they fail to act	Inserts Article III-367 of the Constitution	Exactly the same text
266[233]	Duty to comply with judgements	Wording change to bring into line with III-368	Exactly the same text
267[234]	ECJ has jurisdiction over interpretation of the Constitution and acts of institutions	Inserts Article III-369 of the Constitution	Same text
268[235]	ECJ jurisdiction over disputes relating to compensation	Inserts Article III-370 of the Constitution	Same text
269[235a]	Limits on court jurisdiction over suspension of membership rights	Inserts Article III-371 of the Constitution	Exactly the same text
270[236]	ECJ jurisdiction over staff cases	Wording tweak to bring into line with III-372	Exactly the same text
271[237]	ECJ	Wording tweak to bring into line with III-373	Exactly the same text
272[238]	ECJ's jurisdiction	Inserts Article III-374 of the Constitution	Same text
273[239]	ECJ's jurisdiction	Inserts Article III-375 of the Constitution	Same text
274[240a]	ECJ's jurisdiction	Inserts Article III-376 of the Constitution	Same text
275[240a]	ECJ jurisdiction over anti-terrorist financing measures and article III-308 (boundary between foreign policy and rest of EU)	Inserts Article III-376 of the Constitution	Exactly the same text
276[240b]	ECJ jurisdiction over police and justice does not include over operational police decisions	Inserts Article III-377 of the Constitution	Exactly the same text
277[241]	Grounds for appeal at court	Inserts Article III-378 of the Constitution	Exactly the same text

278[242]	Technical point about court judgements	Wording change to bring into line with III-379 of the Constitution	Exactly the same text
279[243]	ECJ may subscribe interim measures	Inserts Article III-379.2 of the Constitution	Exactly the same text
280[244]	Enforcement of ECJ judgements	Inserts Article III-380	Exactly the same text
281[245]	Statute of the European Court of Justice can be now amended by majority vote	Inserts Article III-381 of the Constitution	Exactly the same text
282[245a]	Tasks of the European System of Central Banks	Inserts Article I-30 of the Constitution	Exactly the same text
283[245b]	Appointment of the executive board of the ECB now by QMV	Inserts Article III-382 of the Constitution	Exactly the same text
284[245c]	Relation between ECB and Council/Commission	Inserts Article III-383 of the Constitution	Exactly the same text
285[246]	Composition of the European Court of Auditors	Inserts Article I-31 of the Constitution	Exactly the same text
286[247]	Composition of the European Court of Auditors	Edited to bring into line with III-385 (and III-400) of the Constitution	Exactly the same text
287[248]	"Bodies office or agency"	Inserts Article III-384 of the Constitution	Slight wording change, same content
288[249]	Different types of act	A modified version of I-33	Same content
289[249a]	QMV becomes the "normal legislative procedure"	A modified version of I-34	Same content
290[249b]	Introduces new category of "Delegated European Regulations" and mechanisms for their control	Inserts Article I-36 of the Constitution	Same text
291[249c]	QMV over control of Commission's implementing powers	Inserts Article I-37 of the Constitution	Same text
292[249d]	Use of Recommendations	Inserts Article I-35.3 of the Constitution	Same text
293[250]	Budget not in list of things council cannot amend	Inserts Article III-395 of the Constitution	Exactly the same text

294[251]	Adoption of an act by ordinary legislative procedure	Inserts Article III-396 of the Constitution	Exactly the same text
295[252a]	Inter-institutional agreements	Inserts Article III-397 of the Constitution	Exactly the same text
296[253]	The type of act to be adopted	Inserts Article I-38 and Article I-33 of the Constitution	Same text, joining together two articles
297[254]	Publication of adopted acts	Inserts Article I-39 of the Constitution	Same text
298[254a]	Provisions for staff at the EU institutions	Inserts Article III-398 of the Constitution	Same content
299[256]	Enforcement of acts	Inserts Article III-401 of the Constitution	Same content
300[256a]	Advisory body	Inserts Article I-32 of the Constitution	Same content
301[258]	Economic and Social Committee	Inserts Article III-389 of the Constitution	Exactly the same text
302[259]	Economic and Social Committee	Inserts Article III-390 of the Constitution	Exactly the same text
303[260]	Economic and Social Committee	Inserts Article III-391 of the Constitution	Same content
304[262]	Economic and Social Committee	Inserts Article III-392 of the Constitution	Same content
305[263]	Committee of the Regions	Inserts Article III-386 of the Constitution	Same text
306[264]	Committee of the Regions	Inserts Article III-387 of the Constitution	Same text
307[265]	Committee of the Regions	Inserts Article III-388 of the Constitution	Same text
308[266]	European Investment Bank	Inserts Article III-393 of the Constitution	Same text
309[267]	European Investment Bank	Inserts Article III-394 of the Constitution	Exactly the same text
310[268]	Expenditures of the EU	Inserts Article I-53 of the Constitution	Exactly the same text
311[269]	The Union's own resources, unanimity for implementation	Inserts Article I-54 of the Constitution	Same content
312[270a]	Multiannual financial framework	Inserts Article I-55.1-4 and Article III-402 of the Constitution	Wording tweaked to bring Article in line with I-55 and III-402 of the Constitution
313[270b]	Interval of annual budget	Inserts Article III-403 of the Constitution	Exactly the same text
314[272]	Establishment of budget by unanimity	Inserts Article III-404 of the Constitution	Same text
315[273]	Procedures if budget is not adopted	Inserts Article III-405 of the Constitution	Exactly the same text
316[273a]	Staff expenditure	Inserts Article III-406 of the Constitution	Same text
317[274]	Implementation of the budget	Inserts Article III-407 of the Constitution	Same text

318[275]	Commission needs to submit report on accounts to the EP	Inserts Article III-408 of the Constitution	Same text, minus requirement for Commission to submit report on Union's finances
319[276]	EP to give discharge to the Commission's implementation of the budget	Inserts Article III-409 of the Constitution	Exactly the same text
320[277]	Multiannual Financial Framework	Wording change to bring into line with III-410	Exactly the same text
321[278]	The Commission can make transfer of its holding into other currencies	Inserts Article III-411 of the Constitution	Exactly the same text
322[279]	QMV on financial management of the budget	Inserts Article III-412 of the Constitution	Exactly the same text
323[279b]	Obligations to third parties	Inserts Article III-413 of the Constitution	Exactly the same text
324[279b]	Sets up regular three way meetings of Council Commission and Parliament to manage the budget	Inserts Article III-414 of the Constitution	Exactly the same text
325[280]	Anti-fraud provisions - can now affect criminal law	Inserts Article III-415 of the Constitution	Exactly the same text
326[280a]	Enhanced cooperation	Inserts Article III-416 of the Constitution	Exactly the same text
327[280b]	Enhanced cooperation	Inserts Article III-417 of the Constitution	Exactly the same text
328[280c]	Enhanced cooperation	Inserts Article III-418 of the Constitution	Exactly the same text
329[280d]	Enhanced cooperation	Inserts Article III-419 of the Constitution	Exactly the same text
330[280e]	Enhanced cooperation	Inserts Article I-44.3 of the Constitution	Same text
331[280f]	Enhanced cooperation	Inserts Article III-420 of the Constitution	Exactly the same text
332[280g]	Enhanced cooperation	Inserts Article III-421 of the Constitution	Exactly the same text
333[280h]	Enhanced cooperation	Inserts Article III-422 of the Constitution	Exactly the same text
334[280i]	Enhanced cooperation	Inserts Article III-423 of the Constitution	Exactly the same text
335[282]	Legal capacity of the Union	Wording change to bring into line with III-426	Exactly the same text
336[283]	Codecision on the staff regulations of the EU	Inserts Article III-427 of the Constitution	Exactly the same text
337[284]	The Commission can gather information necessary for its task	Inserts Article III-428 of the Constitution	Exactly the same text

338[285]	Production of statistics	Inserts Article III-429 of the Constitution	Exactly the same text
339[297]	Restrictions on information sharing for EU staff	Inserts Article III-420 of the Constitution	Exactly the same text
340[288]	Contractual liability for EU staff	Inserts Article III-341 of the Constitution	Exactly the same text
341[289]	The seat of the EU to be decided by common accord	Inserts Article III-432 of the Constitution	Exactly the same text
342[290]	Languages of the EU institutions	Inserts Article III-433 of the Constitutions	Exactly the same text
343[291]	Institutions enjoy immunity in MS necessary to perform their tasks	Inserts Article III-434 of the Constitution	Same text + institutions added
344[292]	Restrictions on methods to settle disputes	Inserts Article III-375 of the Constitution	Exactly the same text
345[295]	Treaties shall not prejudice MS property laws	Inserts Article III-425 of the Constitution	Exactly the same text
346[296]	MS not obliged to provide information that goes against national security and interests	Inserts Article III-436 of the Constitution	Exactly the same text
347[297]	Coordination to prevent disturbance of internal market	Inserts Article III-131	Exactly the same text
348[298]	Commission can take measure sot ensure functioning for internal market	Inserts Article III-132 of the Constitution	Same content
349[299]	Special provisions for overseas territories	Inserts Article III-424 of the Constitution	Same text + provision for legislative acts
350[306]	Regional unions	Inserts Article IV-441 of the Constitution	Exactly the same text
351[307]	Agreements concluded before 1958	Inserts Article III-435 of the Constitution	Exactly the same text
352[308]	Flexibility clause: Council can change the Treaty	Inserts Article I-18 of the Constitution	Same text + new exception for foreign policy

About Open Europe

Open Europe is an independent, non-party political think tank which contributes bold new thinking to the debate about the direction of the European Union.

'Ever closer union', espoused by Jean Monnet and propelled forwards by successive generations of political and bureaucratic elites, has failed. The EU's over-loaded institutions - held in low regard by Europe's citizens - are ill-equipped to adapt to the pressing challenges of weak economic growth, rising global competition, insecurity and a looming demographic crisis.

Open Europe believes that the EU must now embrace radical reform based on economic liberalisation, a looser and more flexible structure, and greater transparency and accountability if it is to overcome these challenges, and succeed in the twenty first century.

The best way forward for the EU is an urgent programme of radical change driven by a consensus between member states. In pursuit of this consensus, Open Europe seeks to involve like-minded individuals, political parties and organisations across Europe in our thinking and activities, and to disseminate our ideas throughout the EU and the rest of the world.

Who supports Open Europe

Our supporters include men and women who run businesses operating in every industry sector and across the UK. All of them support Open Europe in a personal capacity. They include:

Sir Antony Acland

Former head of the Diplomatic Service

John Caudwell

Former Chairman & Chief Executive of the Caudwell Group

Sir Crispin Davis

Chief Executive, Reed Elsevier Group plc

Lord Derwent

Deputy Chairman, Hutchison Whampoa (Europe) Ltd

Judith Donovan, CBE

Chairman, DIY Marketing Ltd

Sir John Egan

Chairman, Severn Trent plc

Anthony Fuller CBE

Chairman, Fuller Smith & Turner plc

Howard Giles

Chairman, Gilesport plc

Rupert Hambro

Chairman, J O Hambro Ltd

Michael Jackson

Chairman, Elderstreet Investments

Sir Martin Jacomb

former Chairman, Prudential plc

Lord Kalms of Edgware

President, Dixons plc

Lord Leach of Fairford (Chairman)

Director, Matheson & Co

Sir Rocco Forte

Chairman and Chief Executive of Rocco Forte Hotels

Tim Melville-Ross

Chairman, DTZ Holdings plc

Lorna Moran MBE

CEO, NRG Group

Lizzie Noel

Director of Communications, Tribal Group plc

David Ord

Managing Director, The Bristol Port Company

Sir Michael Pickard

Former Co-Founder, London First (now Think London')

Lord Renwick

Vice-Chairman, Investment Banking JP Morgan (Europe)

Stuart Rose

Chief Executive, Marks & Spencer plc

Lord Sainsbury of Preston Candover

President, J Sainsbury plc

Derek Scott (Deputy Chairman)

Economic Advisor to the Prime Minister, 1997-2003

Lord Sheppard of Didgemere

Chairman, Didgemere Consultants

Michael Spencer

Chief Executive, ICAP plc

Tony Travis

Former Chairman, Travis Perkins Plc

Sir Neville Trotter

Chairman, British-American Chamber of Commerce North East

Monima Wardle

Managing Director, City Analytics

Sir Brian Williamson

Senior Advisor, Fleming Family & Partners

Simon Wolfson

Chief Executive, Next plc

Lord Young of Graffham

Chairman, Young Associates Ltd

Contact Us

For more information about Open Europe please contact the campaign team on 0207 197 2333 or email georgiana@openeurope.org.uk, or write to us at 7 Tufton Street, London SW1P 3QN.

To find out more please go to www.openeurope.org.uk.