

## **Open Europe briefing note: How the “red lines” are crumbling**

### **EXECUTIVE SUMMARY**

Gordon Brown is preparing to fly out to a key European Council meeting in Lisbon next Thursday, at which a final agreement on the revived Constitutional Treaty is expected to be reached.

The Government has now essentially abandoned the attempt to claim that the treaty is fundamentally different from the rejected EU Constitution. Its line now is that the so-called “red lines” make it different for the UK.

But in recent days it has become apparent that the red lines on which the Government bases its case against a referendum are crumbling.

- **Justice and Home Affairs:** A new draft of the Constitutional Treaty was released a few days ago. Compared to the previous version the UK’s “opt-in” arrangement in home affairs is greatly weakened - to the point where it will be impossible to use in practice. The new text would effectively mean the end of the opt-in arrangement which has applied since the 1997 Amsterdam Treaty. A letter from European Scrutiny Committee Chairman Michael Connarty to David Miliband this week warned that the new provisions “appear to be designed to dissuade Ireland or the United Kingdom from exercising a right not to opt in.”
- **The Charter of Fundamental Rights:** The Government’s line on the Charter is also crumbling. Initially Tony Blair claimed he had secured a protocol which was an “opt out” for the UK. Now the Government admits that it “is not an opt out.” Instead the Government now claims that the rights in the Charter are not new. But this is palpably wrong – if they were not new the Government would not have been resisting their incorporation into the treaties for the last seven years. Several of the rights are acknowledged by the attached text of explanations to be based on agreements to which the UK is not a signatory. Others are simply new and ministers are unable to say where they supposedly “exist” at present.

The report of the European Scrutiny Committee this week said that at present the red lines are not met. The Committee Chairman rightly pointed out that without changes the red lines will 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 Committee said that two major changes to the text would be needed if the “red lines” are to be met. It said that changes were needed on both the Charter and Justice and Home Affairs sections - and that was before the most recent changes which would weaken the home affairs opt-in even further.

This note looks in detail at the red lines. We conclude that:

**1) The red lines are not going to work.** The red lines are unlikely to be effective in preventing the kind of developments in the EU which the UK seeks to avoid, for the reasons set out in detail below.

**2) The red lines are not even new, and so can't be used as an excuse to back out of a referendum.** The four red lines are essentially the same as in the original Constitution. Two of the red lines (social security and foreign policy) are more or less identical to their equivalents in the original EU Constitution, and could not be used as an excuse to back out of a referendum. The other two red lines – on the Charter and Justice and Home Affairs - have been tweaked compared to the original. However, the changes do not make any substantive difference.

**3) The red lines only cover the ground the Government wants to fight on.** The red lines are the issues which the Government wants to focus attention on. They are intended to distract from the many other areas where the Government is handing over more powers to the EU. These include:

- **Majority voting in 60 new areas**, covering everything from energy policy to employment law for the self employed.
- **A 30% cut in Britain's power to block legislation when votes are taken**, meaning that more legislation the UK opposes will be passed.
- **A de facto EU Foreign Minister, an EU Diplomatic Service**, plus moves to a common defence through a new defence group.
- **A powerful EU President** – who could eventually be directly elected, like the US President.
- **New EU powers over our public services** – including health and education, public spending and transport.
- **Making it easier for the EU to gain even more powers in the future.** The new Treaty would allow EU leaders to move to majority voting in any of the areas covered by unanimity, without even needing to ratify these changes in national parliaments.

#### **Prediction: what will Brown do next week?**

Unless Gordon Brown is seen to have responded to the requests of the European Scrutiny Committee for clarifications he will further alienate a key group of MPs. Brown is therefore likely to at the very least insist on the changes to the Charter protocol and the JHA arrangements which the Committee has suggested.

Brown will probably also try to undo the changes to Justice and Home Affairs made in the October draft. The October proposal would catastrophically undermine the "opt-in" arrangement and would deal a disastrous blow to the attempt to avoid a referendum.

However, these are the very minimum changes that Brown is likely to seek. With referendum pressure building and his personal authority seen as damaged by most commentators, the PM can ill-afford to be seen to be giving way.

In reality the UK has a veto – Gordon Brown can and will insist on much more widespread changes. He will then go on to claim a “historic victory” some time on Friday. As usual, the media should be wary of taking such claims at face value...

**Red line 1: Justice and Home Affairs –  
The “opt-in” is undermined and the Court gains control**

Compared to the previous draft, the red line in Justice and Home Affairs has been significantly weakened in the new October draft of the treaty.

There are two changes: one to the UK’s opt-in arrangement, and one to the jurisdiction of the Court over in this area.

**The opt-in arrangement is effectively disabled in the new October draft**

The UK’s opt-in arrangement allows the UK and Ireland to opt in to Justice and Home Affairs legislation on a case-by-case basis.

However, the UK has to opt in at the start of negotiations on a piece of home affairs legislation if it wants to have any say over how it is drafted. This raises the problem that a UK Government might opt into something which it approved in principle, but then - if the draft is subsequently changed in ways the UK opposes – then it cannot opt 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 told the Today Programme, “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.” (9 October)

However, In the October draft of the treaty a new Article 4a has been added to the protocol which undermines the opt-in arrangement further.

In a letter from Michael Connarty to David Miliband the Chairman of the European Scrutiny Committee writes 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 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 European Arrest Warrant

It is very unlikely that the UK Government would be prepared to give up any form of agreement with other member states on extradition or on the return of asylum seekers to their country of origin. Therefore this would be a powerful lever to force the UK to opt in.

**The 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 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 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?

**Red line 2: The Charter of Fundamental Rights –  
The Government’s claim to have an “opt out” has collapsed**

**The Government now admits there is no “opt out” from the Charter**

In the new version of the Constitutional Treaty the various legal “safeguards” which the UK had negotiated in the original are brought together into a protocol.

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 released this week 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.”

**These are new rights**

The Government has now fallen back on the claim 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)

But the rights in the Charter obviously are new – otherwise the Government would not have spent seven years resisting making them legally binding.

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”.

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. (See explanation 52.2)
- 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) 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.

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") says 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)

### **The proposal of the European Scrutiny Committee**

The European Scrutiny Committee has 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)

### **What could the Charter mean?**

While a lot of attention has focussed on the Charter's effect on British labour law, the reality is that a binding Charter would be a tool for all kinds of groups from industrial lobbyists to anti-abortion groups. It is neither a left-wing or a right-wing document: it would simply mean that far more political decisions would be taken by the unelected and unaccountable judges of the European Court of Justice. The Court would have the power to rule on everything from limitations over sentences for criminals to freedom of expression, abortion, immigration, and the conditions under which public services are run.

#### **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 tried to amend double jeopardy rules to allow for just such a possibility. This has been sparked in particular by the ongoing attempt to bring the killers of Stephen Lawrence to justice, but this would clearly not be possible under the Charter. Critics argue that regardless of whether one agrees with this, it should be decided at national rather than EU level.

#### **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 re-unification, 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 mean that future cases of this kind could go the other way.

#### **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 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 11: Freedom of expression and information**

This article could mean that in future EU judges would rule over controversies such as the BNP’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 *Eyssen*, 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. For example, this might have meant 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 ECJ.

#### **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.

### **Red line 3: New EU powers over Foreign Policy and Defence** **The UK has secured a new “declaration” - but it is non-binding**

The only thing the Government can point to in the area of foreign policy is that it has agreed a non-binding “declaration” which states that member states remain in charge of their foreign policy.<sup>1</sup>

But the declaration is effectively meaningless. Its sole purpose is to act as a sop to the UK because so much else is being given up in this area.

Compare the importance of a non-binding declaration with the significance of the new foreign policy institutions and powers which the treaty creates:

**A de facto EU Foreign Minister** – the name has been changed to High Representative of the Union for Foreign Affairs and Security Policy, but as other EU leaders admit, his or her powers will be exactly the same as those laid down in the EU 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; would be able to appoint EU envoys; and will also chair meetings of EU Foreign Ministers. Also, 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.

**An EU Diplomatic Service.** The treaty would also create an EU Diplomatic Service – an idea the UK originally opposed. This 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. Decisions relating to the creation of a diplomatic service will be taken by qualified majority vote on a proposal from the EU Foreign Minister.

**Majority voting in 11 areas of foreign policy.** The Government insists that “unanimity remains the rule” in foreign policy. But this is an extraordinary distortion of the facts. The EU 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

**A “structured cooperation” group – an inner core in defence.** The Treaty sets up a “structured cooperation” group, in which the UK will participate. It states that members will have to achieve “approved objectives concerning the level of investment expenditure on defence equipment” and “bring their defence apparatus

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<sup>1</sup> <http://consilium.europa.eu/uedocs/cmsUpload/cg00003re01en.pdf>

into line with each other.” A research paper by the European Federalists notes that “Structured Co-operation in the field of defence is a significant step towards a Single European Army.”

**A commitment that the EU will move to a common defence.** The Treaty 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.** The treaty 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.

The Government wanted this entire paragraph to be deleted from the original Constitution. 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 later abandoned its objection.

**A new terrorism solidarity clause.** The Treaty includes a clause which 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.” The Government originally wanted this phrase to be deleted, and also asked for a new EU power to “prevent” terrorist threats to be deleted. However, both objections were later abandoned.

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. 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.”

**Red line 4: Social Security**  
**There's no new red line – but there are new rights**

The new version of the Constitutional Treaty, like the original, includes an “emergency brake” on one particular article relating to social security, for migrant workers. The Government argues that this “now contains a right of veto”. However, the Government said last time round that the emergency brake was as good as a veto. Challenged on this point, the Government have tended to back off.

In fact the “red line” on this article 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 states 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 only to 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 now-famous Free Movement Directive of 2004 which dealt with social security 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).

On top of this, Article 5(3) TFEU (formerly article I-15(3) of the Constitution) also 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.” However, the UK later gave way on this point.

**And finally... tax**

The so-called red line on tax which the Government sometimes claims to be “defending” 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.

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’.*”