

Open Europe parliamentary briefing # 7: Institutional changes

Key points

- 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.
- **However, the Government simply does not know, and still less has control over, what the exact institutional effects of the Treaty will be.** The exact powers of key new institutions have yet to be decided. Moreover, these things are to a large extent beyond the UK's control, as many will be decided by majority vote. The Government is asking MPs to approve a Treaty that is effectively a blank cheque.

A recent leaked paper from the current EU Presidency named several of the key institutional questions yet to be settled. Below are listed just a few of these¹:

- Although the Government has attempted to play down the role of the **EU's External Action Service**, an EU diplomatic service, which will be created by the new Treaty, the key point to make here is that there is simply no way to be sure what the service will look like. Whatever the Government claims, the fact is that all this has yet to be negotiated - by majority vote. Wilhelm Schoenfelder, former German ambassador to the EU, has highlighted this issue: "What will be the share of member states, and how will be the share among member states? I don't know. These are all open questions."²
- The exact role of the **President** remains to be defined. For example, will he represent the EU abroad, and, if so, what will be the role of the **Foreign Minister**? How will the President interact with the rotating presidencies of the Council? Will he have the entire body of civil servants at the Council Secretariat (6,000 in total) at his disposal?
- The Lisbon Treaty provides for the European prosecutors' group **Eurojust** to acquire new powers including the "initiation of investigations". However, exactly how this will work is yet to be decided - this will be negotiated by majority vote, after ratification.

¹ EUobserver, November 27, 2007 <http://euobserver.com/9/25207>

² For a more complete list, see: <http://openeurope.org.uk/research/sloveniannote.pdf>

- The Lisbon Treaty allows for a regulation to be agreed which would establish the **European Public Prosecutor** and lay down its "general rules". Despite opposing the idea for years, under the Lisbon Treaty (unlike the Constitution) the UK would no longer have the right to stop the Prosecutor from going ahead.
- The Treaty of Lisbon brings back proposals from the old EU Constitution for a "**Standing Committee on Internal Security**", already known as 'COSI' in euro-jargon. It has suggested that this could constitute an embryonic EU interior ministry. This is transferred word for word from the original EU Constitution. There is an ongoing debate over whether the Committee will be able to propose legislation; whether there will be any parliamentary oversight of its work; and what the goal of "internal security" includes. The Lisbon Treaty article on COSI is extremely vague, and leaves the exact shape and function of COSI wide open. Negotiations on the issue are scheduled to take place in the second half of this year - after the planned ratification of the Treaty in the House of Commons, meaning MPs will not know what they have signed up to. Talks on COSI will be held in secret.
- **The Constitutional Treaty also makes fundamental structural changes to the legal relationship between the member states and the EU.** The treaties become self-amending for the first time, allowing the EU to incrementally increase its powers without the need for a new treaty. 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.
- **The Treaty weakens national parliaments.** The loss of veto in over 60 areas can only weaken the influence of national parliaments on EU policy. Furthermore, 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 German Constitutional Court's President Hans-Jürgen Papier was right to call the provisions in the Lisbon Treaty intended to strengthen the role of national parliaments "ineffective" and "impractical" ([Handelsblatt](#) 25.02.08).
- **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. Everyone admits the Treaty will weaken Britain's blocking power. A Foreign Office spokesman admitted to the Independent last year that under the new

Treaty, "our ability to block a measure would marginally decrease".³ 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) These changes clearly makes Britain weaker in Europe.

- **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 institutional reforms are not needed to 'make 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." 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. 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."

³ Independent (31.08.07)

In detail

An EU President

- 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.
- Managing the work of 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.
- As a leaked EU Presidency paper has revealed, the exact role of the President remains to be defined. For example, will he represent the EU abroad, and, if so, what will be the role of the Foreign Minister? How will the President interact with the rotating presidencies of the Council? Will he have the entire body of civil servants at the Council Secretariat (6,000 in total) at his disposal?

“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 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)
- 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."

- 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

Independent analysts say that the Foreign Policy institutions and provisions in the "Lisbon Treaty" are the same as the Constitution

- The foreign and defence policy implications of the Lisbon Treaty are nearly identical to those of the Constitution. As the Commons Foreign Affairs Select Committee noted in a recent report, "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."⁴
- The Government is trying to play down or trivalise these important changes. However, the Select Committee's report notes 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

⁴ Foreign Affairs Committee, 'Foreign Policy Aspects of the Lisbon Treaty' (20.01.08)

European External Action Service. We recommend that the Government should publicly acknowledge the significance of the foreign policy aspects of the Lisbon Treaty.”⁵

An EU Foreign Minister

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

- While the title ‘Union Minister for Foreign Affairs’ has been replaced by the 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. Under Article 34 [19] (2) TEU of the Treaty, “When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those member states which sit on the Security Council shall request that the High Representative be asked to present the Union’s position.”
- While concerns surrounding representation rights may seem premature based on the vague new treaty text alone, they are substantiated by leading EU and Member State officials’ statements. Last October, Lord Malloch Brown, then Deputy General Secretary of the UN, told Brussels diplomats that the EU was heading towards representation by a single seat within the UN institutions. He said, “I think it will go in stages. We are going to see a growing spread of it institution by institution. It is not going to happen with a flash and a bang.” He added that he hoped that it would happen “as quickly as possible. I’m a huge fan of it.”⁶ This is reaffirmed by EU officials, including the European Commissioner for External Affairs, Benita Ferrero-Waldner, who said “Europe must speak with one voice in the Security Council... I think that one should consider a special seat for the EU in the Security Council.”⁷
- 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.
- The UK also eventually accepted that the new minister will be a member (Vice-President) of the Commission (the UK has resisted giving the Commission a role in Foreign Policy since 1992). This ‘double-hatting’ blurs

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

⁶ The Times, 6 August 2007

⁷ EUobserver, 25 January 2005

the distinction between the EU's intergovernmental and 'supranational' bodies - giving the High Representative a hand in each.

- 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 High Representative 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."⁸
- 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. The proposed Article 17(2) TEU 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."
- So not only would the High Representative be able to devise proposals, (which has raised debate regarding exclusivity on the right of initiative on military missions) but the majority voting process means the UK would be prevented from vetoing such a proposal.
- 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/she 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.
- In October 2007, *Le Monde* newspaper reported that several names have already cropped up in Brussels in discussions over who should fill the new post. These include the current High Representative for CFSP, Javier Solana, Swedish Foreign Minister Carl Bildt, Austrian External Affairs Commissioner Benita Ferrero-Waldner, ex-Polish President Aleksander Kwasniewski and former French Foreign Minister Michel Barnier.

"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

⁸ 26 June 2007

An EU diplomatic service - but no one knows what it would look like

- Although the Government has attempted to play down the role of the EU's External Action Service which will be created by the new Treaty, the key point to make here is that there is simply no way to be sure what the service will look like. Whatever the Government claims, the fact is that all this has yet to be negotiated.
- This is a point Wilhelm Schoenfelder, former German ambassador to the EU, has highlighted: "What will be the share of member states, and how will be the share among member states? I don't know. These are all open questions."⁹ A recent leaked paper from the current EU Presidency named the formation of the EU diplomatic service as a key unanswered question yet to be settled.¹⁰
- These will undoubtedly be tough discussions, and the eventual structure of the Service will be decided by majority voting, in accordance with Article 27 [13a].
- Estimates of the size and composition of the service vary widely. 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. One EU official briefed that the number of diplomats alone would be 7,000, but that it could rise to 20,000.¹¹ The European Parliament's External Relations Committee has raised concerns over the proposed EU diplomatic service, suggesting that the service would consist of between 5,000 and 7,000 diplomats,¹² yet funding details of the service are not specified.
- 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". Indeed, there are questions about transparency in the operations of the High Representative and the European External Action Service, and consequently to what degree member states will be able to control the new institutions. Former Director-General of the Council Secretariat Sir Brian Crowe, a contributor to a European Policy Centre working paper on the development of EU foreign policy, cautioned that "Member states should not expect to see all communications between the High Representative/Vice President and the EEAS, as foreign services cannot operate with 'complete transparency'. Given the delicacy of the EEAS and the HR/VP positions, they would need some 'breathing space' to get going."¹³ This leads to questions regarding the EU's commitment to transparency and accountability, as well as who is ultimately the decision-maker or agent of foreign policy.

⁹ EUobserver, November 27, 2007 <http://euobserver.com/9/25207>

¹⁰ <http://openeurope.org.uk/research/sloveniannote.pdf>

¹¹ European Voice, 9 November 2004

¹² EUobserver, 28 February 2005

¹³ The EU Foreign Service: how to build a more effective common policy. November 26, 2007 <http://www.epc.eu/en/er.asp?TYP=ER&LV=293&see=y&t=2&PG=ER/EN/detail&I=&AI=756>

- The form, structure and powers of the EU External Action Service pose one of the biggest unanswered questions that will need to be resolved should the Lisbon Treaty be ratified. On this issue, as with so many others, the Government are essentially expecting MPs to sign a blank cheque.

"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."

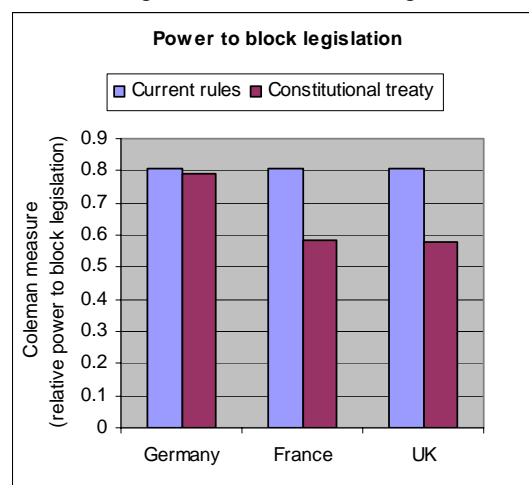
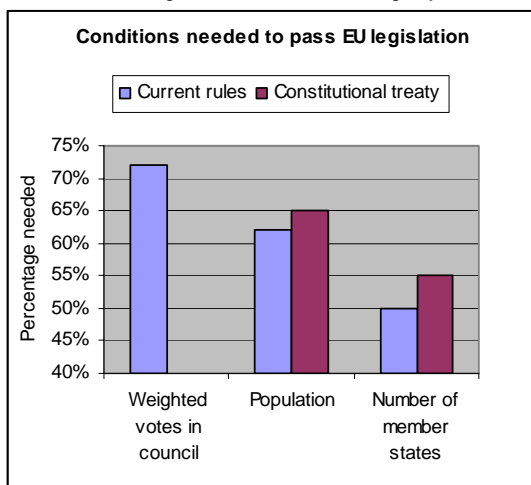
- Jose Luis Rodriguez Zapatero, Spanish Prime Minister, AP, 17 February 2005

"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

30% less power for the UK to block EU laws - will increase the flow of damaging EU regulations

- 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. This change is directly carried over from the original EU Constitution. However, (unlike in the Constitution) the new voting system will not come into effect until five years after the rest of the Treaty is intended to come into force.
- Under the proposed 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 Treaty makes passing legislation easier. This is what supporters of the Treaty mean when they speak of 'streamlining EU decision-making'.



(Source: Felsenthal and Machover, 2004)

Everyone admits the Treaty will weaken Britain's blocking power

- A Foreign Office spokesman admitted to the Independent last year that under the new Treaty, "our ability to block a measure would marginally decrease".¹⁴ 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)

Less power to resist damaging laws the UK is currently blocking

- If the new voting system comes into play then controversial measures the UK is currently blocking would be more likely to pass:
 - 1) The Working Time Directive. It will be harder for the UK to block any proposal to scrap the UK's opt-out from the Working Time Directive. The Department of Trade and Industry estimated the UK exemption from the Working Time Directive is worth £9 billion a year.
 - 2) The Temporary Agency Workers Directive. This would give temporary workers the same employment rights as permanent workers. The CBI has warned that the directive could cost the UK 250,000 jobs, and the UK Government has so far fought hard to stop the directive being passed. The ability of the UK to defend its position in regard to this Directive is even now very fragile - under the new voting system it would almost certainly become unsustainable.

More EU laws - but resentment of EU overregulation growing within business community

- The net effect of the voting system 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.
 - According to the British Chambers of Commerce, EU regulation introduced since 1997 has cost UK firms (£40bn) - this equates to 72% of costs of all regulation introduced since that date. EU regulation is already hitting business hard. **Making it easier to pass regulation means more regulation and more cost.**

¹⁴ Independent (31.08.07)

Lisbon means more quantity and less quality in EU legislation

- Changes to voting systems will not only increase the quantity, but also reduce the quality of EU legislation, making it harder for the UK and other liberal member states to block and amend harmful or protectionist laws.
- The UK, together with other liberal member states, has in the past been able to use its blocking weight to steer EU legislation away from harmful protectionism. Some of the more harmful proposals contained in the Markets in Financial Instruments Directive (MiFID), Prospectus Directive, Consumer Credit Directive, Transparency Directive, amongst others, were successfully removed under pressure from the UK, using blocking power to soften the blow of these regulations.
- Under the new system, the UK would have less power to amend legislation it is unhappy with. With important regulations in the pipeline such as Solvency II (dealing with insurance) and possible cross-border rules for selling mortgages, this could be very significant. There is also likely to be an EU response (possibly through a new wave of regulation) to the current global financial turbulence. Any EU regulation in the area of financial services generally affects the UK proportionately more than any other EU state, given the City of London's pre-eminence in this sector.

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 Annex 1 of Open Europe's *Guide to the constitutional treaty* for a full list).

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>customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the member states whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; 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>internal market; social policy, for the aspects defined in this Treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters, for the aspects defined in this Treaty.</p>	<p>protection and improvement of human health; industry; culture; tourism; education, youth, sport and vocational training; civil protection; 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:
 - *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 Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.*
 - *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." ¹⁵
 - The UK argued that: "Competition policy is not an exclusive competence. It is a shared competence." ¹⁶
 - The UK wanted to insert a sentence stating that "supporting action shall not prevent Member States from exercising their competence in that area." ¹⁷
 - 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. ¹⁸

The foundations of an EU interior ministry - the shape and function of which is still wide open

- The Treaty of Lisbon brings back proposals from the old EU Constitution for a "Standing Committee on Internal Security", already known as 'COSI' in euro-jargon. This is transferred word for word from the original EU Constitution.
- *Telegraph* Brussels correspondent Bruno Waterfield has reported that there is an ongoing debate over whether the Committee will be able to propose legislation; whether there will be any parliamentary oversight of its work;

¹⁵ <http://european-convention.eu.int/Docs/Treaty/pdf/12/Art12Hain.pdf>

¹⁶ http://european-convention.eu.int/Docs/Treaty/pdf/11/11_Art%201%2012%20Hain%20EN.pdf

¹⁷ <http://european-convention.eu.int/Docs/Treaty/pdf/15/Art15Hain.pdf>

¹⁸ http://european-convention.eu.int/Docs/Treaty/pdf/13/13_Art%201%2014%20Hain%20EN.pdf

and what the goal of "internal security" includes. Article 61d (or Article III - 261 in the Constitution) states that:

A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union... it shall facilitate coordination of the action of Member States' competent authorities.

- This is very vague drafting and leaves the exact shape and function of COSI wide open. EU [documents](#), circulated almost three years ago have admitted that "the exact nature of the committee cannot be discerned by reading" the relevant clause of the Treaty - and no new work to clarify the issue has been carried out since. Negotiations on the issue will take place in the second half of this year - after the planned ratification of the Treaty in the House of Commons, meaning MPs will not know what they have signed up to. Talks on COSI will be held in secret. ([Telegraph](#) 11.02.08)

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)

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." ¹⁹In 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. ²⁰

- 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 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. ²¹

¹⁹ <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20170%20Hain%20EN.pdf>

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

²¹ <http://european-convention.eu.int/Docs/Treaty/pdf/850/Art%20III%20169%20Hain%20EN.pdf>

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.”
- 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.

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.
- The German Constitutional Court’s President Hans-Jürgen Papier has called the provisions in the Lisbon Treaty intended to strengthen the role of national parliaments “ineffective” and “impractical”. ([Handelsblatt](#) 25.02.08)

Other changes:

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 revised 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)

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.

A meaningless 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.²²

²² E.g. Greenland unilaterally voted to leave the EEC in a referendum in 1982 and left in 1985.