

Just how “new” is the revised constitutional treaty?

The British Government claim that they will only sign up to an “amending treaty” which will be nothing like the old EU Constitution – and will not be substantial enough to put to a referendum.

This time round ministers are negotiating in secret, and the Government is refusing to even tell MPs what its own position is. So we are forced to rely on leaks and press reports to find out what is going on. However, it appears likely that the “new” text will contain many of the same controversial proposals as the previous version, which was overwhelmingly rejected by French and Dutch voters.

| Old constitutional treaty | New constitutional treaty |
|---|---|
| Permanent EU President | Yes |
| EU Foreign Minister | Yes – though the name will be changed he or she will have the same powers and will be a member of the Commission, which the UK had always opposed. |
| New EU diplomatic service and joint EU consulates | Yes |
| EU Foreign Minister to represent UK on the UN Security Council | Yes |
| Abolition of UK veto over aspects of EU foreign policy | Under discussion |
| Change in voting system leading to a 30% cut in Britain’s ability to block new EU laws it opposes | Yes |
| End of member states right to appoint one EU Commissioner each | Yes |
| End of UK veto on criminal justice | Yes – though there will be an opt in |
| End of UK veto in up to 68 other new areas | Under discussion |
| Veto over “Enhanced cooperation” completely abolished | Under discussion |
| Reference to primacy of EU law | In first draft but unlikely to appear in the final version. The EU argues that its laws already have primacy |
| EU Charter of Fundamental Rights | Under discussion: the current draft suggests making it binding through ‘cross reference’. But it is very unlikely to appear in the final version because it would be such a massive transfer of power. |

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| The title "Constitution" | No |
| The EU flag, Anthem and Europe day | No (although they already exist) |

What is likely to be in the new constitutional treaty?

The core "institutional" features of the constitutional treaty are fairly certain to be carried over into the new treaty. Like the original Constitution, the revised version would create powerful new positions and institutions, making the central EU institutions more powerful in relation to the member states.

(1) An EU President

All EU countries have already agreed that the new constitutional treaty will set up an EU President – to be appointed by the European Council for two-and-a-half year terms.

The constitutional treaty proposed that the President would not be allowed to hold a current national office. This means that unlike in the present system, whereby member states' Prime Ministers or Presidents head the EU for six months at a time, the President of the Council would have no direct link to any citizens of the EU. Indeed, by definition he or she would be likely be either retired or have been recently rejected by national voters.

The opportunity to steer the direction of the EU for 6 months that the current system affords each member state would be taken away. This would deprive each member state of a chance to propose its own measures and agenda. It would mean setting up another powerful, independent Brussels institution. Control of the 3,500 civil servants in the Council Secretariat would give the President a substantial power base – and the President would have an incentive to expand its own powers.

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 independent Brussels institution and another.

Many also see the President as a stepping stone to a US-style President of Europe. The author of the constitutional treaty, Valery Giscard d'Estaing, has already suggested that the new President of the Council will later be merged with the President of the Commission, and be directly elected. During the negotiations on the constitution Jack Straw said the UK "would have preferred to have explicit separation of those two posts". The UK Government tried to block an amendment which allows the two posts to be merged, but it later gave way.

Giscard has said, "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." (7 July 2003, Wall Street Journal Europe)

Nicolas Sarkozy has also recently backed making the President directly elected – signing a declaration calling for an elected EU President during the French elections.

(2) An EU Foreign Minister

The revised constitutional treaty is likely to set up the EU Foreign Minister that was in the original Constitution – although the name is likely to be changed. What will not change is the importance afforded to the new role. As the Spanish Europe Minister told the FT “We are prepared to find a title other than foreign minister, but we are not prepared to change the substance of his role.” (19 June 2007)

In itself this would create a powerful supranational official, and give the Commission a role in foreign policy which the UK has long opposed. Denis MacShane has predicted that “The voice of the future Union Minister for Foreign Affairs will be louder than that of the ministers of each nation.” (Le Figaro, 28 February 2005)

It is not clear what would happen if member states took a different line to the Foreign Minister, which creates the dangerous possibility of sending mixed messages to the rest of the world.

However, on top of this, the constitutional treaty also proposed that the EU Foreign Minister should have various new powers – for example: to “automatically” speak on behalf of member states in key international meetings like the UN security council. The original version of the constitution proposed that “When the Union has defined a position on a subject which is on the United Nations Security Council’s agenda, those Member States which sit on the Security Council shall request that the Union Minister for Foreign Affairs be asked to present the Union’s position“

The original version also gave the Foreign Minister the power to make proposals which would then be decided on by majority vote; and to run a powerful independent EU Diplomatic Service. During the negotiations on the constitution the UK opposed all three of these powers, but later gave way.

As Italian Prime Minister Romano Prodi has 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)

(3) Cutting our power to block EU legislation by 30%

Another proposal from the constitutional treaty that is likely to resurface in the new treaty is to change the way that the EU takes votes. The system will be altered so that it is harder for member states to block legislation which they are opposed to. Britain’s power to block legislation would be cut by nearly 30 percent.

Under the current system laws have to pass three hurdles: 72% of the weighted votes in the council, plus 62% of the population, and at least 50% 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.

A paper by the pro-euro think tank the Centre for European Reform admits that: “Under the new system, those opposing a law would find it slightly harder to block it. But that should not concern the UK or businesses, since most of the draft laws coming out of the Commission are liberalising measures.” However, several controversial measures the UK is currently blocking might then pass:

- The UK and a few other liberal states are currently blocking the Temporary Agency Workers Directive, which would give the temporary workers the same rights as permanent workers. The UK has more temporary workers than any other EU country (700,000), and lots of businesses, particularly smaller businesses, rely on them. If the measure came through it would be more expensive to hire temp workers, reducing competitiveness and increasing

unemployment. The British Chambers of Commerce has warned strongly against this coming into force, saying that it will lead to reduced employment opportunities for those who need it the most.

- By teaming up with other liberal member states Brown managed to block some damaging aspects of recent financial services laws – particularly on the MIFID directive. This might not have been possible under the new rules.
- France, Spain and others, backed by the EU Commission, want to get rid of the derogation that allows individuals in the UK to opt-out of the EU's 48 hour working week. The UK is currently able to block this through an alliance with a few other member states. But under the revised constitutional treaty, the UK might need to either extend its list of allies or accept giving up its opt-out. The DTI estimates that losing this opt-out on the working time directive would cost the UK economy £9 billion a year. And we have no idea what kind of harmful proposals we might have to block further down the line.

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 enlargement and that “old” member states are 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 study by the British Chambers of Commerce, using the government's own impact assessments, found that EU regulation has cost the UK economy £40 billion since 1998 alone. Commissioner Gunter Verheugen puts the cost of EU over-regulation for the Union as a whole at €600 billion a year – the equivalent of losing the output of a country the size of the Netherlands.

(4) The end of the national commissioner

Member states will no longer have a Commissioner each. This would mean there would be periods in which certain member states do not know what's going on within the Commission. The Constitution proposed that a third of member states would not have a Commissioner at any one time, and the new version is likely to follow this.

What other proposals are under discussion?

(a) The Charter of Fundamental Rights

There has been a proposal to refer to the EU Charter of Fundamental Rights in the new treaty, which would make it legally binding for the first time, but offer the UK a face-saving fudge which would allow the British Government to claim that it would not affect national law. However, the UK and other member states will almost certainly block this.

(b) A legal personality for the EU.

The proposal to give the EU a legal personality was thought to have been killed off. It would mean that for the first time the EU, not the member states, could sign up to international agreements on foreign policy, defence, crime and judicial issues.

That would be a huge transfer of power and make the EU look more like a country than an international agreement. Indeed, EU leaders have already said so. Talking about the original version of the constitution, Italian PM Romano Prodi said that it 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. "

Despite their reservations, last time round the UK gave way on the issue. But in the new negotiations the UK and other member states are unlikely to sign up to such an overt transfer of power again.

(c) The end of the veto in new areas.

In total there were 69 articles of the original version of the Constitution which either introduced a new EU power under qualified majority voting (QMV) or moved an existing power from unanimity to majority voting.

Initially the Government were briefing that there would be no new moves to QMV in the new version of the constitutional treaty. But the Government has not made this a red line and does not now appear to be ruling out re-introducing some of the moves to QMV which were proposed in the original constitution. It is unclear what is likely to emerge.

In the new negotiations the Government has made it clear that it will only accept a move to QMV over Justice and Home Affairs, or the Social Security rights of migrant workers, if the UK has an opt-out arrangement. This may well apply to any other moves to QMV. But many of the decisions taken under majority vote would still affect the UK even if it chose not to opt in.

Significant moves to QMV which were included in the first version of the Constitution included:

1. **Electing the new EU President**
2. **Appointing the new EU Foreign Minister**
3. **Some foreign policy decisions.** During the first negotiations Jack Straw said that "majority voting in foreign policy is a no-go area" – but the UK later gave way. The most important shift was to move to majority voting on proposals from the EU foreign minister. But the original version of the Constitution also proposed (i) majority voting on a new EU foreign policy fund; (ii) majority voting on the organisation and running of the new EU Diplomatic Service; and (iii) majority voting on consular issues.

4. **The definition of public services and their exemption from competition law.** This would cover decisions over issues like whether hospitals have to put parts of their services out to competitive tender.

5. **Employment law for self-employed workers.** This covers everything from whether plumbers and electricians have their qualifications recognised in other countries, to health and safety questions, to employment law, health and safety, 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.

6. **Public health.** The British Medical Association has said 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.” It would have put the EU in charge of standards for pharmaceuticals, medical equipment and medical products like blood and tissue. It could also lead to the EU 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 and then ask to be reimbursed. There are concerns that if this became more standard it would become impossible to prioritise NHS spending.

7. **Transport.** The EU is keen to get involved in road pricing. Road charging is one of the few possible uses of the EU’s £12 billion Galileo satellite system, and the Commission’s work programme for 2008 stresses that it wants to do lots of work on “urban transport”. The EU is also working on a “single European sky”. The Commission would like to move to a single air traffic control system. The UK is sceptical about both of these plans. As an example of a controversial decision in this area the EU has already adopted a single list of which airlines can and can’t fly into the EU (e.g. if we want to ban a dangerous airline we can’t).

The Commission is keen to do lots more in this area. Matthias Ruete, Director General of the European Commission’s DG Transport commented recently that “For many years, the issue of urban transport was kept hidden behind the principle of subsidiarity. As a consequence, very little initiatives and proposals were put forward by the EC for the last ten years. The time has come to change that attitude.”

8. **Energy policy.** The Commission made several controversial proposals on energy in its 2008 work programme. These included:
 - a. *An oil stocks system and enhanced energy solidarity.* If this implies an increase in statutory reserve requirements the cost could be quite substantial (the offshore operators association has warned of costs of up to £3 billion. The UK Government has vetoed such requirements in the past.

 - b. *A gas network and European Grid.* Critics ask to what extent these proposals might imply a single regulator. There are also concerns about how much it might cost to build all the ‘interconnectors’ that the Commission would like to see, and whether this would be justified by the benefits for the UK.

9. **The powers of Europol and Eurojust.** There is a long running row over what powers these two bodies should have. The UK is keen to stop them being turned into a de facto euro-FBI and a European Public Prosecutor. In particular the UK has always blocked giving Eurojust the right to initiate prosecutions or Europol the power to run investigations.
10. **How the EU budget is spent**
11. **Science policy**
12. **Police cooperation**
13. **Criminal justice cooperation**
14. **Tourism**
15. **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 – because it regards it as an EU vanity project which adds no value. However, it could go through under QMV.
16. **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 EU is keen to take over the independent European Space Agency, which includes non-EU members. The UK is opposed to this.
17. **Sport.** 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.¹ In addition to these innovations, an earlier report from Portuguese Sports Minister Jose Luis Arnaut suggested creating a “European Sports Agency”, which would “institutionalise” its relationship with UEFA, giving the EU Commission power over football throughout Europe.²

The new treaty is just the first step

If the new treaty is accepted without a referendum, there is nothing to stop EU leaders from then implementing all the other elements in the EU Constitution over time. Indeed, Nicolas Sarkozy has already said that this is exactly what will happen. From the first time he suggested a “mini treaty”, he has always suggested that it should be followed by a further treaty, which would go beyond even what was agreed in the Constitution. Sarkozy argues that:

“The need for EU constitutional reform remains strong. A new reference text will have to define Europe's geopolitical boundaries, establish the union's long-term political aims, and set out the means to move forward. An ambitious agenda of this sort calls for a large-scale democratic debate. But all this takes time, and time is something we do not have. I would suggest that the most

¹ Independent, 21 September 2006

² Jose Luis Arnaut, “Independent European Sport Review 2006”

urgent priorities for institutional reform could be covered in a mini-treaty that would modify the treaties of Nice and Amsterdam.... *But in the longer term, root-and-branch reforms remain essential.*" (Telegraph, 8 October 2006)

He has stressed that the mini-treaty will revive the same proposals that were in the Constitution, while a subsequent treaty will go further:

"This mini-treaty could be negotiated rapidly without re-igniting past political debates because basically it would cover provisions that were set out by the Convention and the IGC. Further discussion will undoubtedly prove necessary for a number of other fundamental issues, *including problems that the constitutional treaty in fact failed to address adequately.*" (Europe's World, September 2006)

Nor is the desire to go beyond the original constitution restricted to France. Jose Barroso has said that "the Commission and I have always supported the constitution. But let's be clear: we will ratify a treaty that is not the constitutional treaty. It will be drawing from the latter but it will be different. It's the only possible way ahead. Everyone has understood, even though it has taken some time for some of them, as if the truth were heresy! *But nothing rules out the possibility of certain more ambitious aspects later on.*" (Agence Europe 8 May 2007)

Others have also talked about a the need for a treaty which would go even further beyond the constitution. Spanish PM Jose Luis Rodriguez Zapatero has said that "Europe needs a new, *more ambitious* treaty." (EITB, 20 April 2006)