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EU Reform: a new treaty or an old constitution?

Following the failure of all Member States to ratify the 2004 *Treaty Establishing a Constitution for Europe*, and a 'reflection period' to consider the fate of the treaty, the German EU Presidency in the first half of 2007 relaunched the debate on the future of Europe. It held confidential talks with Member State governments and drew up a Draft Mandate for an Intergovernmental Conference (IGC). The European Council on 21-22 June 2007 agreed the Draft IGC Mandate and the Portuguese Presidency opened the IGC on 23 July, with a view to concluding a new Reform Treaty in October 2007. Many of the Mandate's amendments are articles from the 2004 constitutional text, while others are new and reflect the particular concerns of Member States.

When a final amending treaty has been concluded, the ratification process will begin in the 27 Member States. Most Member States will ratify the new treaty by a parliamentary method, although it is likely that those holding a referendum will include Ireland and Denmark.

Vaughne Miller

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Summary of main points

In October 2004 25 European Union (EU) governments signed the *Treaty Establishing a Constitution for Europe* (here referred to as the EU Constitution) and ratification began in the Member States with a view to implementing the new treaty by 2007. However, negative referendums in France and the Netherlands in 2005 were a major setback. Although ratification continued in some Member States, others, including the UK, decided to suspend their ratification procedures. A 'reflection period' was introduced, which was brought to an end in early 2007 by the German EU Presidency. The 'Berlin Declaration' in May 2007 marked the 50th anniversary of the EU and spurred Member States towards the goal of achieving a 'renewed common foundation' in the form of a new treaty before European Parliament elections in 2009.

By this time 18 Member States had ratified (or almost ratified) the 2004 Constitution. Most of these had no problem with the substance of the Constitution and wanted to keep most of its reforms, if in a shorter, simplified text. Other States wanted parts of the 2004 text removed and a treaty that would not be 'constitutional'. Chancellor Merkel held bilateral talks with Member State leaders about how to proceed and meetings were held by Member State officials to discuss issues surrounding Treaty reform. The Presidency target was to achieve agreement on a 'roadmap' for settling the constitutional and institutional issues faced by the EU at the European Council summit in June 2007.

The British Government objected to several 2004 provisions, including legal status for the Charter of Fundamental Rights, the single legal personality for the EU, a reference to the primacy of EU law, and qualified majority voting (QMV) in police and judicial cooperation. It wanted to retain the present three-pillared structure and called for a stronger role for national parliaments. States such as Poland and the Czech Republic were regarded as UK allies in support of a new, minimalist treaty, while other so-called 'maximalist' States, including Germany, Belgium, Italy and Spain were keen to retain the substance and fundamental principles of the Constitution.

On 19 June 2007 the German Presidency released a Draft Intergovernmental Conference (IGC) Mandate to put to the European Council, which reached agreement on 22 June on the basis for a new reform treaty. Most of the 2004 text will be incorporated into the existing EC/EU Treaties as amendments, with certain modifications, protocols and declarations to take account of the specific concerns of individual Member States. These concerned in particular the competences of the EU and the Member States and their delimitation, the specific nature of the Common Foreign and Security Policy (CFSP), the enhanced role of national parliaments, the treatment of the Charter of Rights and a mechanism, in police and judicial cooperation in criminal matters, to allow a group of Member States to proceed in some areas, while others did not participate. The Czech proposal that the treaty should set out a mechanism for the repatriation of competences to Member States was tackled by means of an amendment specifying that the Treaties may be amended to remove competences from the EU as well as to add them.

The 2004 moves to QMV will be retained but the UK will keep its current opt-out and opt-in arrangements regarding the euro and measures on asylum, immigration and border controls in Title IV. There will be no extension of QMV into areas such as taxation and benefits.

There will also be a particular UK exemption from the Charter of Fundamental Rights in a protocol stating that the Charter does not create justiciable rights in the UK which go beyond the country's national law. The French delegation succeeded in removing a reference to "undistorted competition" from the article setting out the aims of the EU, but the commitment to free markets and competition is underlined elsewhere in the Mandate. The Polish delegation eventually accepted a compromise on the issue of voting weights in the Council of Ministers: the Nice Treaty provisions will operate until November 2014, and special provisions will operate until April 2017 enabling any Member State to call for votes to be taken under the old rules. The Constitution double majority voting system will begin in November 2014, but Member States representing three-quarters of a blocking minority will be able to delay decisions in the Council to enable compromises to be reached. After April 2017 this threshold will reduce to 55% of the blocking minority. The Dutch insistence on an enhanced mechanism for national parliaments to operate a 'yellow card' subsidiarity check on draft legislation was approved. An article will be inserted stating that national parliaments "shall actively contribute" to the functioning of the EU.

An Intergovernmental Conference (IGC) was launched on 23 July 2007 to discuss and refine technicalities under the Mandate, with a view to concluding Treaty amendments in October 2007. These will then be submitted to Member States for ratification in accordance with each State's constitutional requirements. Some States, including Ireland and probably Denmark, will require a referendum in order to ratify the new treaty.

Relevant texts are:

- EC/EU Treaties, <http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>
- Treaty Establishing a Constitution for Europe at <http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>
- European Council Conclusions, containing IGC draft mandate, at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf
- IGC Mandate (final text of the above) at <http://register.consilium.europa.eu/pdf/en/07/st11/st11222.en07.pdf>

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I Background

A. The 2004 Constitutional Treaty

The *Treaty Establishing a Constitution for Europe* (European or EU Constitution) was signed in October 2004 by the then 25 heads of state or government and by 2007 had been ratified (or almost ratified) by 18 of the now 27 Member States.¹ Acceding States since 2004 have all ratified the EU Constitution along with their accession treaties. In 2005 France and the Netherlands voted against the EU Constitution in referendums, thereby preventing its implementation. The Constitution has to be ratified by all Member States in order to come into force. The Constitution cannot enter into force in its current form and the 18 ratifying States cannot proceed to implement it because unanimous ratification is required.

Following the rejections the EU entered into a period of reflection on its constitutional future, during which time the debate continued informally between the EU and its Member States and among the Member States, but no new proposals were formally tabled or discussed. The French and Dutch governments did not intend to hold a second referendum on the same constitutional text. The 18 ratifying Member States were forced to reconsider how the spirit, if not the letter, of the Constitution might be implemented, but in such a way that the other nine, which had found the Constitution unratifiable, would be able to join them. The so-called 'maximalists', Belgium, Germany, Italy and Spain, for example, wanted to retain as much of the Constitution as possible, while the UK, the Czech Republic, France, the Netherlands and Poland formed a group of 'minimalists', countries which wanted only the most necessary of amendments to the present EC/EU Treaties to allow the EU to function institutionally. Some argued that the only essential reform for the immediate future, and one required by 2009 under the Nice Treaty, was the size of the Commission. Even this, it was suggested, could be incorporated into the next accession treaty (Croatia?) if entry took place by 2009. This would be a very modest amendment, and even combined with other minor amendments, would be unlikely to require a referendum.²

Ideas that emerged during the 'reflection period' are discussed in Library Standard Notes SN/IA/3911, *The European Constitution: the period of reflection* 6 March 2006,³ SN/IA/3993, *In brief: the European Constitution* 5 April 2006,⁴ SN/IA/4065, *The European*

¹ Bulgaria and Romania, which joined the EU in January 2007, acceded to the Constitution by virtue of their EU Accession Treaty. See Appendix II for information on ratification.

² BBC News 27 February 2007 at <http://news.bbc.co.uk/2/hi/europe/6400525.stm>

³ At http://pims.parliament.uk:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHE_R_PAPERS/STANDARD_NOTE/sn-03911.pdf

⁴ At http://pims.parliament.uk:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHE_R_PAPERS/STANDARD_NOTE/sn-03993.pdf

Constitution: recent developments 12 June 2006,⁵ SN/IA/4201, and *The EU Constitution: recent proposals* 6 December 2006.⁶

B. The German Presidency

1. Reviving the constitutional debate

Germany held the Presidency of the EU from January to June 2007. The German Presidency formally revived the debate after several months of bilateral consultations, with a view to reaching agreement by the end of its Presidency on how to proceed. Several of the nine non-ratifying States had made demands for changes that would make a new treaty more acceptable to a sceptical domestic public. The European Council in June 2006 asked the then incoming German Presidency to consult Member States about how to achieve this and to submit a report to the Council exploring possible future developments. The report would serve as the basis for decisions on how to proceed with the EU reform process.

The German Foreign Minister, Frank-Walter Steinmeier, told a press conference on 19 December 2006 that Berlin's priority would be the revival of the EU Constitution.⁷ The Presidency programme⁸ contained a lengthy and ambitious agenda. In the first heading, "A functioning Community – further developing the EU", the programme referred to the aims of the stalled *Treaty Establishing a Constitution for Europe*, namely

progress towards a value-oriented and socially just Europe, more civil rights, increased cooperation in the areas of justice and home affairs, clearer division of responsibilities between the Union and the Member States, greater national parliament participation and a stronger foreign and security policy. It makes the European Union more democratic, efficient and transparent and gives it more scope to act.⁹

By October 2006 the German Chancellor, Angela Merkel, was not optimistic about the German Presidency solving the constitutional issue.¹⁰ The Presidency undertook to agree at the European Council in June 2007 the definition of a 'roadmap' containing a procedure, a clear mandate and a deadline for bringing about a settlement to the constitutional impasse. The June summit would settle the main issues, leaving the ensuing Portuguese Presidency to open an IGC to agree on the technicalities. The Portuguese Prime Minister, José Sócrates, said that if the June summit did not secure a 'precise mandate' for the EU's constitutional future, the Portuguese Presidency would

⁵ At http://pims.parliament.uk:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHE_R_PAPERS/STANDARD_NOTE/snia-04065.pdf

⁶ At http://pims.parliament.uk:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHE_R_PAPERS/STANDARD_NOTE/snia-04201.pdf

⁷ "Europe-succeeding together", German Presidency Programme 1 January - 30 June 2007 at http://www.eu2007.de/includes/Downloads/Praesidentschaftsprogramm/EU_Presidency_Programme_final.pdf

⁸ Ibid

⁹ Ibid

¹⁰ *EUObserver* 30 October 2006

not continue to negotiate with individual Member States and would put the issue on the political back burner for its six-month tenure.¹¹ It was suggested that this strategy stemmed from fears that Portugal and Slovenia (which assumes the Presidency in January 2008) would not have the political clout of the larger Member States and would not be able to push through reforms.

2. The Berlin Declaration

The June 2006 European Council agreed a timetable for continuing the institutional reform process, including the adoption by the Member States, the European Parliament (EP) and Commission, of a political declaration to mark the EU's 50th anniversary.

The Berlin Declaration was signed at the Berlin European Council on 25 March 2007.¹² There had been disagreement among EU Member States as to the tone and content of the Declaration, but it fell to the Presidency, rather than the Member State governments, to write the text. Secrecy surrounded the Presidency's plans for the declaration, and some regarded it as a possible springboard towards reviving the European Constitution. However, it stated only that "50 years after the signing of the Treaties of Rome, we are united in our aim of placing the European Union on a renewed common basis before the European Parliament elections in 2009".¹³ The then Prime Minister, Tony Blair, told the Commons on 12 March 2007 that the European Council had agreed "that it was important that the Berlin declaration did not get tangled up with issues to do with the constitutional treaty, which will come up at the June summit".¹⁴ The Declaration called specifically for institutional changes to be completed by the time of the next EP elections.

Only the presidents of three EU institutions - Chancellor Angela Merkel (representing the Council), Jose Manuel Barroso (European Commission) and Hans-Gert Pöttering (European Parliament) - signed the Declaration, thereby distancing Member State governments from close identification with its content.

3. The Presidency strategy

In the run-up to the European Council in June 2007, Chancellor Merkel avoided the kind of broad consultation on a new text that had been held to help draw up the EU Constitution. As with the preparation of the "Berlin Declaration", she held confidential talks with Member States and officials (so-called 'sherpas' or 'focal points').¹⁵ The

¹¹ *EUObserver*, 14 May 2007 at <http://euobserver.com/9/24050/?rk=1>

¹² The text of the document is available on the German Presidency website at http://www.eu2007.de/de/News/download_docs/Maerz/0324-RAA/English.pdf. See Standard Note SN/IA/4288, *The 50th Anniversary of the European Union*, 26 March 2007 at http://pims.parliament.uk:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHE_R_PAPERS/STANDARD_NOTE/sn-04288.pdf

¹³ Berlin Declaration at http://www.eu2007.de/de/News/download_docs/Maerz/0324-RAA/English.pdf

¹⁴ HC Deb 12 March 2007 c 30 at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070312/debtext/70312-0004.htm#0703125000193>

¹⁵ See HC Deb 16 Jan 2007 c 641. The UK focal points were initially Kim Darroch, Prime Minister's European Policy Adviser and Head of European Secretariat, Cabinet Office, since 2004 and Nicola Brewer (head of European Union policy at the FCO). Nicola Brewer was later replaced by Shan Morgan, her successor at the FCO.

Chancellor defended her strategy of dealing with national issues through diplomatic channels, defining the Presidency as the ‘honest broker’ in the arrangement. However, the method attracted accusations of secrecy and a lack of legitimacy. Critics in the EP and the Commission, including the Communications Commissioner, Margot Wallström, asked how such an approach could be consistent with the aim of engaging with citizens and bringing the EU “closer to the people”. Ms Merkel responded by suggesting that the EP itself might organise a public discussion on the Constitution.¹⁶ She insisted that not all Europe’s ‘deals’ could be “achieved out in the open marketplace” and publicly reported at every stage, although she agreed that the “European public must be stakeholders in what we are doing”.¹⁷ Reports that the Presidency would aim for minimal changes to the Constitution, in order to get it accepted by sceptical nations such as the UK, Poland and the Czech Republic, were denied by the German Government.

There were three focal point meetings. Early on the envoys decided that parts of the Constitution that could be interpreted as “impinging on statehood”, such as the title ‘constitution’, and an EU flag and hymn, should be removed. There was also significant support for a pared down version of the Constitution, which would be ratified by parliaments rather than by referendum. After the first sherpa meeting the UK was reported to have been “the toughest opponent of an emerging compromise on a new-look treaty” and the “biggest potential obstacle to agreeing a deal”,¹⁸ largely because of the Government’s insistence on retaining its opt-out from decisions on police and judicial cooperation. Poland, another ‘problem State’, maintained its opposition to the double majority voting system proposed in the Constitution in favour of a formula based on the square root of population size. The Presidency did not apparently welcome a proposal from the Netherlands, Poland and the Czech Republic to allow national parliaments to request that some powers be returned to national level (the so-called ‘red card’ proposal).

4. Questionnaire

It was reported in the German magazine *Der Spiegel* in May 2007 that the Presidency had sent a one-page questionnaire to all Member State governments “that expressed the German view of how the debate should proceed”.¹⁹ The aim of the exercise was allegedly to help Member State governments to arrive at a “very precise and clearly defined mandate” for a re-drafted constitution. The report concluded that “Berlin wasn’t expecting concrete answers. In most cases it didn’t get them. But the questionnaire did prompt debate in almost every member nation about what Germany wants”.²⁰ The questionnaire was not published as an official document. The questions were framed

¹⁶ “MEPs debate Berlin Declaration with Merkel” EP press release 29 March 2007 at http://www.europarl.europa.eu/news/expert/infopress_page/008-4691-087-03-13-901-20070326IPR04616-28-03-2007-2007-false/default_en.htm

¹⁷ Ibid. See also House of Lords European Union Committee 10th Report 2006–07, Evidence from the Ambassador of the Federal Republic of Germany on the German Presidency, Report with Evidence, 6 March 2007, HL Paper 56 at http://10.160.3.10:81/PIMS/Parliamentary%20Information/PARLIAMENTARY_PAPER/2007/56.pdf

¹⁸ *EU Observer* 16 May 2007 at <http://euobserver.com/9/24071/?rk=1> and *Irish Times* 17 May 2007

¹⁹ *Spiegelonline* (International) 9 May 2007 at <http://www.spiegel.de/international/europe/0,1518,481925,00.html>

²⁰ Ibid

from suggestions from Member States²¹ for amending the text of the Constitution and were published on the UKIP website as follows:

1. How do you assess the proposal made by some Member States not to repeal the existing treaties but to return to the classical method of treaty changes while preserving the single legal personality and overcoming the pillar structure of the EU?
2. How do you assess in that case the proposal made by some Member States that the consolidated approach of part 1 of the Constitutional Treaty is preserved, with the necessary presentational changes resulting from the return to the classical method of treaty changes?
3. How do you assess in that case the proposal made by some Member States to use different terminology without changing the legal substance for example with regard to the title of the treaty, the denomination of EU legal acts and the Union's Minister for Foreign Affairs?
4. How do you assess the proposal made by some Member States to drop the article that refers to the symbols of the EU?
5. How do you assess the proposal made by some Member States to drop the article which states the primacy of EU law?
6. How do you assess the proposal made by some Member States that Member States will replace the full text of the Charter of Fundamental Rights by a short cross reference having the same legal value?
7. Do you agree that the institutional provisions of the Constitutional Treaty form a balanced package that should not be reopened?
8. Are there other elements which in your view constitute indispensable parts of the overall compromise reached at the time?
9. How do you assess the proposal made by some Member States concerning possible improvements/clarifications on issues related to new challenges facing the EU, for instance in the fields of energy/climate change or illegal immigration?
10. How do you assess the proposal made by some Member States to highlight the Copenhagen criteria in the article on enlargement?
11. How do you assess the proposal made by some Member States to address the social dimension of the EU in some way or the other?
12. How do you assess the proposal made by some Member States applying opt-in/out provisions to some of the new policy provisions set out in the Constitutional Treaty?²²

²¹ Question 2 is unofficially attributed to a suggestion by Tony Blair

²² UKIP website at http://www.ukip.org/ukip_news/gen12.php?t=1&id=3014

A German government spokesman, Thomas Steg, told the *Spiegelonline*: "There is no such letter from the chancellor to her counterparts".²³ The Foreign Secretary, Margaret Beckett, said on 1 May 2007 that she would 'not publish any response that we may make to the document that has been circulated'.²⁴ She told the European Scrutiny Committee on 7 June:

I do not know what the original purpose was of sending round these questions but they have played really no role in whatever discussion there has been, which is why we have resisted being drawn on some of the content because, should negotiations begin which no doubt at some point they will, some of the answers to these questions would be an issue of the British Government's negotiating stance. This document was sent round. My own impression of it is that it was meant to try and get people to think about what the position of other Member States might be, what they could live with, et cetera, but it has not I think I am right in saying played any real part in the discussion. At no point have those felicitously called our focal points been invited to address these questions or to answer them. It has just lain on the table. I really cannot tell you what the original purpose of it was but whatever it was I am not sure it has served it.²⁵

However, the alleged letter was widely regarded as crucial in helping the Presidency to prepare its negotiating strategy and its proposals for Treaty amendments in the weeks preceding the European Council summit.

II Views from the EU Institutions

This section looks at the positions taken by the EU Institutions on reforming the EC/EU Treaties, given the failure to achieve universal ratification of the EU Constitution.

A. European Commission

The Commission was above all against any attempt to water down or 'roll back' what it regarded as key elements of the European Constitution. Commission 'red lines' included retaining the 'Community method' (decision-making at EU level, often involving the use of QMV and the loss of the national veto), and the single market.²⁶ The former referred to suggestions from Poland, the Czech Republic and the Netherlands for a mechanism to allow a group of governments to request the repatriation of powers from the EU to the Member States. The latter was allegedly directed partly at the new French Government, as Nicholas Sarkozy was "expected to take a nationalistic stance on issues like foreign take-overs of French companies".²⁷

²³ Also reported in *Reuters Deutschland* 22 April 2007 at http://de.today.reuters.com/news/newsArticle.aspx?type=topnews&storyID=2007-04-22T105927Z_01_HUM239549_RTRDEOC_0_DEUTSCHLAND-EU-VERFASSUNG-WE-ZF.xml

²⁴ HC Deb 1 May 2007 c 1351 at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070501/debtext/70501-0001.htm#07050142000056>

²⁵ Uncorrected evidence 7 June 2007, at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/uc640-i/uc64002.htm>

²⁶ The Dutch Government is concerned about a new treaty expanding single market legislation into the areas of pensions, social security and health.

²⁷ *EUObserver* 15 May 2007 at <http://euobserver.com/9/24068/?rk=1>

The Commissioner for Justice, Freedom and Security, Franco Frattini, believed that removing the national veto in the areas of police and judicial cooperation was fundamentally necessary and that an emergency brake mechanism should be used only rarely.²⁸ He cautioned that Member States with opt-outs (the UK, Ireland and Denmark) would risk being left behind while others advanced using provisions for 'enhanced cooperation'.²⁹ The resulting 'two-speed Europe' would be, in his view, the lesser of two evils, given the alternative of lengthy delays due to blockages by one of two Member States.

B. European Parliament

On 2 May 2007 the EP Constitutional Affairs Committee (AFCO) had an exchange of views on a draft report drawn up by Enrique Barón Crespo (PES, Spain) and Elmar Brok (EPP-ED, Germany) on a "roadmap for the EU's constitutional process".³⁰ The Committee's draft resolution supported Presidency efforts to agree a definition of a roadmap with a procedure, clear mandate and a deadline for settling the constitutional issue. The Committee strongly supported the 2004 Constitution and would not accept any new text that diminished the level of democracy and citizens' rights it believed that text provided. It acknowledged the "major issues" that had been raised during the reflection period, which needed to be tackled. These included promoting sustainable development to tackle climate change, promoting solidarity in energy supply, developing a migration policy, improving the European Social Model in the context of globalisation, the fight against terrorism, and defining effective common mechanisms for economic policy in the eurozone while respecting the ECB and the Treaties.

In the forthcoming IGC the EP wanted to be "fully involved ... at all levels, at least to the same extent as during the 2003-04 IGC".³¹ It wanted ratification of the new treaty to be completed by the end of 2008 so that the new EP in 2009 could start work under the new provisions, and it called on Member States "to consider the possibility of coordinating their ratification procedures, in order to allow for the ratification process to be completed simultaneously".³² On 21 May the AFCO voted on the Crespo/Brok report and it was adopted, with a somewhat tougher resolution than the draft text, by 20 votes to two. The EP debated and adopted the report in plenary session on 6 June 2007 by 469 votes to 141, accepting a "repackaging" of the essential parts of the Constitution, but still suggesting it might reject any new treaty that was not ambitious enough.³³

The political groups in the EP published their views on the Presidency 'roadmap' in early June 2007. A European People's Party press release on 7 June called for agreement on

²⁸ *European Voice* 31 May – 6 June 2007 p1

²⁹ A mechanism provided by the existing Treaties whereby a group of at least eight States can adopt legislation in certain circumstances, without those States that do not wish to participate.

³⁰ Documentation available at <http://www.europarl.europa.eu/oeil/file.jsp?id=5478952>

³¹ Motion for an EP Resolution on the roadmap for the Union's Constitutional Process, (2007/0000(INI)) at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/662/662727/662727en.pdf

³² Motion for an EP Resolution on the roadmap for the Union's Constitutional Process

³³ See EP press release on the debate at http://www.europarl.europa.eu/news/expert/infopress_page/005-7566-157-06-23-901-20070606IPR07540-06-06-2007-2007-false/default_en.htm

institutional reform.³⁴ The Socialist Group stood firmly behind the Presidency efforts.³⁵ The Alliance of Liberals and Democrats for Europe welcomed the EP report and hoped for a more flexible treaty revision method that would allow those countries wanting to move forwards to do so.³⁶ The European United Left/ Nordic Green Left issued a Declaration on 6 June which was critical of the ‘roadmap’ and called ‘for a very open public debate on what should change in the orientations and structures of the Union and subsequently for ratification by referendum of the future European treaty’.³⁷

C. Views from other organisations

This section considers the views of two important groups on the future of Europe, the group led by the Convention vice-chair, Giuliano Amato, and the Friends of the Constitution.

1. The Amato Group

A “Group of Wise Men” convened by the Italian former vice-chair of the Convention that drew up the Constitution, Giuliano Amato, formally established itself in 2006 as the Action Committee for European Democracy (ACED), with the following membership:

Giuliano Amato (chair)	Italian Interior Minister
Michel Barnier	Former French Foreign Minister
Stefan Collignon	Professor at European Institute
Jean-Luc Dehaene	Belgian MEP and former Prime Minister
Danuta Hübner	European Commissioner (regional policy)
Sandra Kalniete	Former Latvian Foreign Minister, EU Commissioner
Wim Kok	Former Dutch Prime Minister
Paavo Lipponen	Former Finnish Prime Minister
János Martonyi	Former Hungarian Foreign Minister
Inigo Mendez de Vigo	Spanish centre-right MEP
Chris Patten	Former UK Minister and EU Commissioner
Otto Schily	Former German Interior Minister
Costas Simitis	Former Greek Prime Minister
Dominique Strauss-Kahn	Former French Finance Minister
António Vitorino	Former EU Commissioner (justice & home affairs)
Margot Wallström	European Commissioner (communications)

The group had a €100,000 budget from the German Bosch Foundation, and insisted that although active EU Commissioners were involved, they were acting in their private capacity.³⁸ In its mission statement, the group pledged not to “let Europe slip away”, “put up with the slow and apparently inevitable gridlock of Europe’s governance” or “allow

³⁴ <http://www.epp-ed.eu/Press/showpr.asp?PRControlDocTypeID=1&PRControlID=6142&PRContentID=10877&PRContentLG=en>

³⁵ 6 June 2007 at <http://www.socialistgroup.eu/gpes/newsdetail.do?lg=en&id=41324&href=home>

³⁶ Andrew Duff, 6 June 2007, at

http://www.alde.eu/index.php?id=42&tx_ttnews%5btnews%5d=8705&cHash=97b61811bf

³⁷ <http://www.guengl.eu/showPage.jsp?ID=4217&AREA=27&HIGH=1>

³⁸ *EU Observer* 5 October 2006

narrow nationalism destroy the European dream”.³⁹ In January 2007 Mr Amato had proposed a new kind of treaty,⁴⁰ and the group published a report in early June 2007 in which it stipulated that a new text should be “concise, accessible and readable”.⁴¹ The group argued that the strength of its proposal lay in its distinction between changes in one part of the text, and technical and legal implications in another.

The ACED published a *New Treaty and Supplementary Protocols* comprising 70 articles in eleven titles containing the texts of Parts I and IV of the Constitution, with minor modifications (the “essential reforms”), and two protocols. The latter contained only the new elements in Part III of the Constitution, representing amendments to the present Treaties (including the single legal personality, the merging of the Community and intergovernmental pillars and possibly new Treaty bases for climate change and energy). One protocol, “on the functioning of the Union”, contained institutional changes, while the other, “on the development of the Union’s policies in order to meet the challenges of the XXIst Century”, contained articles on policy innovations. These protocols would be attached to the existing Treaties and ratified along with the new treaty “as one comprehensive package”.⁴² The Charter of Fundamental Rights would have binding force by means of a single article and would remain in a separate text. There were no symbols such as flag and anthem, no long preamble and no mention of the word ‘constitution’. References were only to the ‘New Treaty’, the ‘Charter’ and the ‘EC Treaty’.⁴³

2. Friends of the Constitution

The Spanish and Luxembourg Governments convened a ministerial-level meeting of Member States which had ratified the Constitution to discuss how the EU might proceed on the basis of the 2004 Constitution. At the first meeting of 22 States⁴⁴ in Madrid in January 2007 the group concluded that “an agreement limited to just a few institutional changes is not enough to meet the expectations of our citizens, who want us to effectively address important challenges of today’s world, such as immigration, internal and external security and energy, which need also to be addressed at the European

³⁹ <http://www.eui.eu/RSCAS/Research/ACED/MissionStatement.shtml>

⁴⁰ “A better starting point for Europe’s constitution debate”, Giuliano Amato, *FT.com* 25 January 2007 at <http://www.ft.com/cms/s/bac98eb4-ac18-11db-a0ed-0000779e2340.html>

⁴¹ ACED Declaration, “The way forward for the European Union”, 4 June 2007, at http://www.eui.eu/RSCAS/e-texts/ACED2007_DECLARATION_4JUNE07.pdf

⁴² ACED *A New Treaty and Supplementary Protocols* Explanatory Memorandum, 4 June 2007, at http://www.eui.eu/RSCAS/e-texts/ACED2007_NewTreatyMemorandum-04_06.pdf

⁴³ The texts of the ACED New Treaty and Protocols are available in French on the European University Institute website at <http://www.eui.eu/RSCAS/Research/ACED/Index.shtml>.

⁴⁴ The ratifying States and observers from non-ratifying States Germany, the Netherlands, Ireland and Portugal. In 2005 law professor Karl Albrecht Schachtschneider filed a lawsuit against the Constitution on behalf of the German MP Peter Gauweiler at the Federal Constitutional Court in Karlsruhe. The Court said in October 2006 that it would not rule on whether the EU Constitution was compatible with the German Constitution until after a final decision had been taken on the overall fate of the treaty. This ruling has prevented the German President, Horst Koehler, from signing the ratification bill passed by the German *Bundestag*, the President’s signature being necessary for ratification.

level". They wanted to work on the basis of the 2004 text to "reach an agreement which respects its fundamental content and its balances".⁴⁵

A follow-up meeting planned for 27 February was cancelled, following concerns that it might be seen as disrespectful to the Presidency.

III Views in the Member States

This section considers the views of a selection of Member States, in particular those which had specific problems with ratification of the 2004 EU Constitution.

A. United Kingdom

1. The Blair Government

The British Government signed the EU Constitution in October 2004 and assured the House in June 2005 (after the no-votes in France and the Netherlands) that the UK had "achieved all its objectives", that the Government "therefore had no hesitation in recommending the new treaty to Parliament and to the country" and that it represented "a sensible new set of rules for the enlarged European Union".⁴⁶ However, the list of British 'red lines' in areas where the Government could not later accept the Constitution's provisions raised doubts about the Government's earlier pronouncements on it. It could also be argued that Treaty amendments granting significant new powers to the EU in the way the Constitution did would now be unacceptable, because the Government would be morally, if not politically, obliged to hold a referendum (which many believed it would probably lose).

The former Minister for Europe, Geoff Hoon, set out the British Government's position on the future of Europe in a statement on 5 December 2006:

The purpose of this statement is to inform the House about the principles that will underpin the Government's approach to these discussions.

Europeans need to be equipped to maximise the opportunities (and minimise the risks) that globalisation presents. By retaining our focus on the delivery of practical benefits to citizens, the EU can demonstrate the tangible contribution it makes to enhancing prosperity and security in a global age. Enlargement has delivered an unprecedented period of peace and prosperity within the EU's borders. The prospect of EU membership is extending these benefits to our neighbours. In the forthcoming discussions, the Government's overall aim will be to maintain the EU's focus on the delivery of policy and, in discussion on the future of Europe, will be guided by the following principles:

⁴⁵ Madrid, 26 January 2007 at http://www.unizar.es/euroconstitucion/library/historic%20documents/Constitution/spanish%20ministry%20OFA_Amigos_TC_Puntos_EN_DEFINITIVO.doc

⁴⁶ Jack Straw, HC Deb 6 June 2005 c 991-2 at http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/vo050606/debtext/50606-05.htm#50606-05_head0

Pursuing British interests: Our starting point is that we must safeguard our prosperity and security. Britain is a strong, confident and influential European power that can help to lead reform and modernisation, shape debates, build alliances and win the arguments. By engaging with our European partners and friends, we get the right results for Britain and for Europe as a whole. The EU's focus on delivery of policy is an example of where we have helped to steer the EU towards a path that provides practical benefits for all Europe's citizens.

Modernisation and effectiveness: The EU is crucial for delivering what we want in a whole range of areas such as: climate and energy security; promotion of trade liberalisation; and migration. We recognise that the EU must continue to adapt and modernise if it is to implement effectively the policies that we want and support. We will therefore favour proposals that modernise the workings of the EU so that it is better equipped to meet both today's and future challenges.

Consensus: The European Union is now a much broader organisation and there is a wide range of views to be taken into account. Some 15 member states have substantially completed their domestic ratification procedures. Some 10 member states have not ratified, of which two, France and the Netherlands, have held referenda which resulted in 'no' votes. Decisions on next steps will have to be agreed by all the member states and take account of all relevant interests.

Subsidiarity (working at the right level): We will continue to ensure that action is taken at the right level. In areas where the EU can add value it should do so. But where there are issues that can most effectively be tackled at the national level the onus remains on member states to take action. We continue to be in favour of measures which enhance subsidiarity and the role of national Parliaments.

Use of existing Treaties: As agreed at the June 2006 European Council, we need to make best use of the possibilities offered by the existing treaties in order to deliver practical results that citizens expect. For example, the European arrest warrant, which was agreed on the basis of the current treaties, allows us to speed up and simplify arrangements for cross border investigations and prosecutions thereby making a significant contribution to the fight against cross-border crime.

Openness: The EU must keep pace with global change. We want an EU which is outward looking, open to new developments, to trade and investment, and to developing partnerships with third countries.⁴⁷

In a press interview on 19 April 2007 Mr Blair said he was prepared to endorse a fast-track adoption of institutional reforms in order to facilitate decision-making in the EU of 27. The Government would agree to Treaty changes of an institutional nature without a referendum if the amendments did not alter the basic relationship between Europe and the Member States. There were reports in early 2007 that the Government had warned the German Presidency against "too much change" in a new treaty, because this would make a referendum necessary.⁴⁸ The Government wanted a slimmed down treaty and preferably one which could be ratified without a referendum, which would, "as with

⁴⁷ HC Deb 5 December 2006 cc 10-11WS at <http://pubs1.tso.parliament.uk/pa/cm200607/cmhansrd/cm061205/wmstext/61205m0001.htm#06120551000012>

⁴⁸ *Guardian Unlimited* 24 April 2007 at <http://www.guardian.co.uk/eu/story/0,,2064208,00.html>

previous EU treaties [...] be signed by ... the Prime Minister and then submitted to Parliament for approval as part of the ratification process".⁴⁹ The then Foreign Secretary, Margaret Beckett, believed that all EU treaties affected the relationship between Member States and the EU, but that the EU should now be aiming for a treaty with less of a constitutional impact and "the best way forward now is the traditional approach of an amending treaty rather than the constitutional treaty".⁵⁰ Press reports maintained that the incoming Prime Minister, Gordon Brown, would "not be tied to any deal made if it involves surrendering more powers to Brussels".⁵¹ The Government wanted an amending treaty rather than a treaty with the characteristics of a constitution. The Foreign Secretary told the Foreign Affairs Committee (FAC) that such a treaty would be:

A treaty that substituted or replaced existing treaties, was explicitly defined as a constitution, and contained symbolic things such as the flag, the anthem and so on, would clearly be and would have been intended to be a constitution to replace existing treaties and roll them into one document.⁵²

The Government pledged to stand by its commitment to holding a referendum if the 2004 Constitution were reintroduced. Mr Hoon said "It is absolutely clear that there should be a referendum on the European constitutional treaty, and that remains the Government's position".⁵³ However, Mrs Beckett stated that the Government's "red lines would indeed be below the threshold that would trigger a referendum", continuing, when pressed to say whether this meant the Government would not agree to anything that would require a referendum: "we will come to a view on whether a treaty requires a referendum when we see what is in the treaty. That seems to me the only sane way to approach it."⁵⁴

The Government was not forthcoming about its position on details such as abandoning the national veto. When Lord Waddington asked "In how many areas where we now have the veto is he prepared to sign away the rights of this Parliament without consulting the people?", Baroness Royall of Blaisdon replied that the Government was considering such issues and "how best they may negotiate on them at the Council in June to ensure that any agreement made is, indeed, in the best interests of this country. The Government are not prepared to conduct those negotiations in public".⁵⁵ The Government's transparency was again in question when Mrs Beckett told the European Scrutiny Committee (ESC) shortly before the June European Council that the debate on the future of Europe had not moved on at all since the negative referendums on the Constitution and that there was nothing on the table:

⁴⁹ Geoff Hoon, HC Deb 16 May 2007 c 779W at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070516/text/70516w0007.htm#07051686000697>

⁵⁰ HC Deb 14 May 2007 c 496W at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070514/text/70514w0006.htm#07051411000043>

⁵¹ *Timesonline* 10 June 2007 at <http://www.timesonline.co.uk/tol/news/politics/article1909768.ece>

⁵² Q141, Uncorrected evidence to FAC, 19 June 2007 at

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/uc166-ii/uc16602.htm>

⁵³ <http://pubs1.tso.parliament.uk/pa/cm200607/cmhansrd/cm070116/debtext/70116-0001.htm#07011643000017>

⁵⁴ Uncorrected evidence, 19 June 2007

⁵⁵ HL Deb 8 May 2007 c 1264 at <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70508-0002.htm#0705081000064>

This is a frozen debate. It remains the case that there is no consensus, as far as we are aware. It remains the case that there are areas of considerable disagreement. It remains the case that nothing that you could really call negotiations have taken place, ...⁵⁶

On 19 June she told the Foreign Affairs Committee (FAC) "With regard to anything more concrete on the content of an amending treaty, we are no further forward in terms of detail than we were".⁵⁷ Mrs Beckett then went on to describe the three sherpa meetings as a "sustained series of exchanges".⁵⁸ In her view there was a distinction between this kind of behind the scenes activity and "what I would call negotiation". The Minister for Europe, she said, had of course been

steeped in the detail in the sense that he has had extensive conversations with other Ministers for Europe in which he has set out the position of the United Kingdom, much as we have all set it out in any conversations that we have had or in any dialogue, as I would put it, with other colleagues.⁵⁹

The Government's narrow interpretation of the word 'negotiation' led Richard Younger-Ross, a member of both the ESC and the FAC, to observe: "You have used the word 'discussion', and I fear that you might have misled the European Scrutiny Committee in your evidence on 7 June".⁶⁰ The Presidency Draft IGC Mandate (see below) appeared to confirm this, stating that the modifications to certain of the 2004 innovations had been "introduced as a result of the consultations held with the Member States over the past 6 months".⁶¹

2. From Blair to Brown

Tony Blair was generally considered to be one of the UK's most pro-European leaders, second only perhaps to Sir Edward Heath, who took the UK into the European Economic Community in 1973. Many observers assume that Mr Brown will be less 'European' than Mr Blair, based on his critical views about the EU economy and his reluctance to adopt the euro. In his Mansion House speech at the beginning of the UK Presidency in 2005 Mr Brown called for a "pro-European realism". Challenging the protectionist beliefs of European leaders such as France's former President, Jacques Chirac, he stated: "The question for us is how Europe can move from the older, inward-looking model to a flexible, reforming, open and globally-oriented Europe able to master the challenge from Asia, America and beyond".⁶² The *Times* commented on Mr Brown's reputation:

⁵⁶ Uncorrected evidence, 7 June 2007 at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/uc640-i/uc64002.htm>

⁵⁷ Uncorrected evidence, 19 June 2007 at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcaff/uc166-ii/uc16602.htm>

⁵⁸ Uncorrected evidence, 19 June 2007

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Para. 4, *IGC Mandate* at <http://register.consilium.europa.eu/pdf/en/07/st11/st11222.en07.pdf>

⁶² Gordon Brown speech at Mansion House, 22 June 2005 at http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2005/press_57_05.cfm

Brown's reputation in Europe is hardly one of clubbability. Other European governments, now trying to discern his views from his past behaviour in finance ministers' meetings, have an impression of big-shouldered abrasiveness, and a desire to take Europe to task for its financial self-indulgence, beginning with its farm subsidies.⁶³

Clara Marina O'Donnell and Richard G Whitman considered Mr Brown's likely Europe policy:

Despite Brown's strong criticism of some aspects of the EU in its current form, he does have a pro-European integrationist strand to his political DNA. His political career has not been characterized by a reflexive opposition to European integration.

During Labour's period in opposition, Brown was strongly pro-European (even during the 1980s, when the Labour party was committed to an anti-EC policy),⁶⁴ and he supported joining the Exchange Rate Mechanism (ERM).⁶⁵

Brown surrounds himself with pro-European aides who have argued for an activist European policy. The fact that Brown dislikes certain economic policies pursued within the EU does not mean he is hostile to the wider underlying concept of the EU or to cooperating with his European partners. Brown may cavil at the direction that Europe is taking, but he does not contest the rationale for its existence. As he stated in his 2005 Labour party conference speech, 'we see British engagement in an outward looking reforming Europe as essential for Britain's future.'⁶⁶

In a pamphlet published by the Centre for European Reform, the then Treasury Minister, Ed Balls, called on the new Government to adopt a "hard-headed pro-Europeanism":

Here in Britain, I want to make the case for a hard-headed pro-Europeanism:

- pro-European, because we recognise that we are stronger by co-operating with our partners in the European Union to meet the shared challenges of globalisation and climate change;
- hard-headed because we must have the confidence to put our national interest first and to sometimes say 'no' and to argue our case where we believe Europe risks taking the wrong course.

To win the argument both for reform in Europe and effective British engagement in Europe, I believe that Britain must break out of the outdated debate over Europe which has dogged British policy for decades.⁶⁷

⁶³ *Timesonline* 22 May 2007 at

http://www.timesonline.co.uk/tol/comment/columnists/bronwen_maddox/article1821216.ece

⁶⁴ FN 113: Peston, *Brown's Britain*, p. 181.

⁶⁵ FN 114: Peston, *Brown's Britain*, p. 182.

⁶⁶ *International Affairs* 83: 2, 2007, "European policy under Gordon Brown: perspectives on a future prime minister", p. 268; FN 115: Brown, 'Politics is a moral duty'.

⁶⁷ "Britain and Europe: A City minister's perspective", May 2007 at http://www.cer.org.uk/pdf/balls_essay_745_forweb.pdf

O'Donnell and Whitman discussed Mr Brown's position on the EU Constitution:

Brown's position on the constitutional treaty—and, more importantly, on how to deal with its aftermath—is becoming clear. In response to the German presidency's reopening of the debate there have been indications that he favours scrapping the existing treaty and replacing it with a slimmed-down, more modest document.⁶⁸

This standpoint is consistent with Brown's previously expressed dislike of excessive EU 'federalism' and supranational integration.⁶⁹ He has argued that the federal ambitions of the EU's founders are no longer adequate in the current globalized world—'the old assumptions about federalism do not match the realities of our time'—and that the EU should develop along intergovernmental lines, according to what he refers to as 'pro-European realism', emphasizing cooperation between national states.⁷⁰ Robert Peston, one of Brown's biographers, asserts that the Chancellor repeatedly made clear to him his dislike of the constitutional project, and often lectured him about 'the supposedly pernicious economic implications of early drafts of the European Constitution'.⁷¹

The EU will be addressing the issue of the constitutional treaty during the run-up to the 2009/10 UK general election, and Brown's approach will be influenced by domestic electoral considerations. In addition to the risk of upsetting the Euro sceptic press with the adoption of an 'ambitious' reform treaty, Brown will also have to consider how to ratify any resulting treaty in the UK and whether to call a referendum, as originally promised by Blair for the constitutional treaty.

Such considerations, and their possible political costs for Brown at home, are likely to increase his caution and desire for a minimalist treaty requiring only parliamentary ratification.⁷²

The authors concluded:

There is little to suggest that Brown is hoping to realize the Blair-led government's ambition of putting the UK at the heart of Europe. Given his known standpoints on a number of European policy issues, either the option of awkward partner or that of pragmatic player appears more likely.⁷³

Mr Blair negotiated for the UK on 21-22 June, but he handed over to Gordon Brown on 27 June. Some had called for Mr Brown to attend the June summit with Mr Blair. The *Times* commented:

The danger is that Mr Blair will sign Britain up to a treaty that is too integrationist and that Mr Brown, blaming his predecessor, will then try to avoid holding a

⁶⁸ FN 76: 'Candidate's vision could threaten rescue of EU constitution', *Financial Times*, 19 Jan. 2007, p. 8.

⁶⁹ FN 77: Notably Brown, 'Global Britain, global Europe'.

⁷⁰ FN 78: Brown, 'Global Britain, global Europe'

⁷¹ FN 79: Peston, *Brown's Britain*, p. 9.

⁷² *International Affairs* 83: 2, 2007, "European policy under Gordon Brown: perspectives on a future prime minister", p 262

⁷³ *Ibid* p 272

referendum. The Prime Minister-to-be will not get away with such a strategy, and will find his premiership dominated by a poisonous row over Europe: not a propitious prospect, as John Major will attest.

The Chancellor must immerse himself in the detail of the proposed treaty and accompany Mr Blair to the Brussels summit. He must not allow the Prime Minister to sign anything that he would not be prepared to defend. Not only Mr Brown's future is at stake: the fate of Britain could be determined over the coming weeks.⁷⁴

An article in the *Monitor*, the Constitution Unit newsletter, thought the handover would be strategically planned to allow Mr Brown to escape public and political opprobrium over any decision not to hold a referendum:

Although it is believed the referendum idea had first been urged on the Prime Minister by Gordon Brown and Jack Straw, it now appears that Cabinet reluctance on EU reform has been overcome. Blair insists he will go to Brussels with 'the position of the government', meaning that he will take the political heat personally for the highly controversial referendum U-turn, opening the way for his successor to negotiate the final details of a slimmed down treaty by the end of the year.⁷⁵

A report in the *Times* quoted Charles Grant, of the Centre for European Reform, who considered Gordon Brown's difficult choice:

If he does sign up to something that looks like building a European super-state, then he will be under massive pressure to have a referendum. But if he doesn't, he loses the chance to be part of the new pragmatic, liberal team of leaders that will steer Europe over the coming years ...⁷⁶

It is not clear what position Gordon Brown will take on the referendum issue, although he told a BBC journalist on 24 June 2007 he did not think the Reform Treaty merited a referendum.⁷⁷ The new Foreign Secretary, David Miliband, said on 3 July "we do not propose to have a referendum on the reform treaty precisely because it is not a constitution".⁷⁸ On 17 July it was reported that Mr Brown had told Angela Merkel "We will not require a referendum on this. It is something that can be worked on closely by Parliament. I think we can make progress quickly on this".⁷⁹

⁷⁴ *Timesonline* 17 May 2007 at http://www.timesonline.co.uk/tol/comment/leading_article/article1801130.ece

⁷⁵ *Monitor* issue 36 May 2007 at http://www.ucl.ac.uk/constitution-unit/files/monitor/Monitor_36.pdf

⁷⁶ *Timesonline* 22 May 2007, at http://www.timesonline.co.uk/tol/comment/columnists/bronwen_maddox/article1821216.ece

⁷⁷ BBC News 24 June 2007 at http://news.bbc.co.uk/1/low/programmes/politics_show/6767999.stm

⁷⁸ HC Deb 3 July 2007 c. 801

⁷⁹ *The Independent* 17 July 2007 at <http://news.independent.co.uk/uk/politics/article2776187.ece>

3. Opposition parties

a. Conservatives

The leader of the Opposition, David Cameron, set out his vision for the future of Europe in a speech at the Movement for European Reform conference in Brussels on 6 March 2007. He stated at the outset that he was “against a European Constitution and ... in favour of a referendum if one is ever proposed”.⁸⁰ He thought the EU should focus on the “things that matter” and pledged to press for the UK’s national interest on issues like climate change and tackling poverty. He spoke of a “3G Europe” focusing on “Globalisation. Global warming. Global poverty”.⁸¹ He called for less centralisation and more flexibility, particularly in social and employment legislation, as only a decentralised political system would be able to hold together diverse countries such as Ireland, Turkey (whose membership he supported), Italy and Estonia. On institutional reform he said “Yes - of course we need a new framework to make a bigger EU work. But there is no case for the Constitution, or a Constitution-lite”.⁸² He suggested there should be a way of repatriating powers to the Member States.

b. Liberal Democrats

The Liberal Democrat shadow foreign secretary, Michael Moore, spoke about the party’s EU policy in March 2007, acknowledging the problems the EU faced in agreeing a new treaty.

And while it is clear that the constitution as it stood cannot be resurrected, it is equally clear that we need a new institutional settlement if the enlarged Union is to function effectively. If that means the negotiation of a smaller and less ambitious treaty which focuses on the institutions then so be it. Europe needs to move on from its period of reflection. The Union must refocus on the real tests at home and abroad. Confronting climate change. Confronting economic weakness. Confronting the vested interests in energy and so much else. Always making sure decisions are taken at the right level. Always ensuring they are made openly and are properly scrutinised. Always being sure they are necessary.⁸³

B. France

The French presidential election in April-May 2007 was widely regarded as crucial to progress on the implementation of constitutional reform in the EU. In his victory speech, the centre-right former Finance Minister and potential ally of the German Presidency, Nicholas Sarkozy, claimed that France was “back in Europe” and that he looked forward to “working together to reinforce the European Union”.⁸⁴ A report in *Le Figaro* in early May was more cautious about France’s ‘rehabilitation’ as a driver in the EU:

⁸⁰ “The EU - A New Agenda for the 21st Century”, 6 March 2007 at http://www.conservatives.com/tile.do?def=news.story.page&obj_id=135350

⁸¹ Ibid

⁸² Ibid

⁸³ <http://www.libdems.org.uk/conference/speech-michael-moore-Harrogate-030307.7736.html>

⁸⁴ *EUObserver* 7 May 2007 at <http://euobserver.com/9/24002/?rk=1>

Impatient to resolve the institutional crisis, the German presidency does not expect any grand projects from France in June. It simply wants France to display amenability. "We are not expecting much from the new president - just for him to adopt a constructive attitude, by endorsing the roadmap prepared by Angela Merkel!" Germany deputy Jo Leinen, chairman of the Institutional Affairs Committee, said. [...] Overall, Europe has changed its attitude to France. It no longer expects anything from the French spirit; its main fear is of "the doll that says no" [old song title]. "with enlargement, France has lost its influence in Europe. Its "no" to the referendum has relegated it to the bottom of the class, to the "problem countries" corner."⁸⁵

Europe was not a major element of Mr Sarkozy's presidential campaign, although he was known for his opposition to Turkish membership of the EU. In a key speech on the EU in 2006, he expanded on his proposal for a simplified 'mini-treaty', which he envisaged would include institutional reforms, such as the extension of QMV, particularly in justice and home affairs, an EU foreign minister, a long-term presidency, giving the Union legal personality and letting the Commission president choose his own team of commissioners.⁸⁶ According to another report, "He expects the new 'ordinary treaty' - adopted by national parliaments where possible - will have a maximum of 130 instead of the 448 articles originally proposed".⁸⁷

Mr Sarkozy's speeches may have suggested that his policies were "in defiant opposition" to the EU,⁸⁸ but upon election, he appointed pro-European Jean-Pierre Jouyet as Minister for Europe. Mr Jouyet is reportedly "convinced that France and French economic policy must be anchored in the EU", and he "may provide a useful counterweight to Sarkozy's own reflexes to intervene and protect ailing state industries".⁸⁹

The *Times* reported on 17 May:

He [Mr Sarkozy] claims to want the treaty to include only the provisions that will make the EU work more efficiently: changing the size of the Commission and the European Parliament, allowing for a permanent presidency and an EU foreign minister. It is not yet clear whether he supports more decisions being taken by qualified majority voting (which restricts the power of countries to wield a veto), but he knows that both French and British voters are wary of any reform that dilutes their national sovereignty. If such a provision were in the mini treaty, there must be a powerful case for a referendum.⁹⁰

⁸⁵ *Le Figaro* in English, 8 May 2007 at

http://www.lefigaro.fr/english/20070508.WWW000000353_europe_impatiently_awaits_france.html

⁸⁶ See *EUObserver* 23 May 2007 at <http://euobserver.com/18/24112>

⁸⁷ *EUObserver* 8 May 2007 at <http://euobserver.com/9/24015/?rk=1>

⁸⁸ "Brussels beltway need not fear Sarkozy", *European Voice* 24-30 May 2007, p.12

⁸⁹ *Ibid*

⁹⁰ At http://www.timesonline.co.uk/tol/comment/leading_article/article1801130.ece

C. Netherlands

Following elections in November 2006 the new Dutch coalition Government is again headed by the Christian Democrat (CDA) leader, Jan Peter Balkenende. The CDA and Labour Party (PvdA) reached an agreement on a coalition programme on 10 February 2007 and made the following commitments with regard to the EU:

We will seek an amendment and possible consolidation of existing European Union treaties to safeguard subsidiarity and democratic scrutiny. The outcome should be manifestly different from the previously rejected constitutional treaty in terms of its content, scope and name. The opinion of the Council of State will be sought on these and other aspects of these treaty changes. At European level the Netherlands will work for effective cooperation and a clear division of responsibilities between member states and the European Union based on the principle of subsidiarity. In this context we will aim to conclude agreements on the compatibility of the internal market concept with the organisation of the public sector (including pensions, social security, taxation, education and health care), and on greater European cooperation on measures to make European economies more competitive, transboundary environmental problems, energy policy, asylum and migration policy, external policy and the fight against terrorism and cross-border organised crime. National parliaments should be given a stronger position in relation to the subsidiarity test (a 'red card' procedure for example).⁹¹

Dutch political parties had been divided over how to proceed with the failed European Constitution, but the ruling parties, which had supported the Constitution, called for the introduction of a more limited treaty. The small Christian Union party, also part of the ruling coalition and which had opposed the Constitution, also wanted a treaty that was institutionally robust enough for the EU to function efficiently with 27 countries and admit Croatia in a few years. The opposition Socialist Party (SP) campaigned vigorously for a no-vote in 2005 and remained opposed. The second largest opposition party, the People's Party for Freedom and Democracy (VVD), wanted only the provisions on EU institutions and procedures to be introduced.⁹²

The detailed position of the Dutch Government was set out in a letter to the Netherlands House of Representatives on 19 March 2007 by the Dutch Foreign Affairs and European Affairs Minister.⁹³ Mr Balkenende addressed the EP on 23 May 2007 in his first major speech on Treaty reform since the Dutch no-vote, stating that he wanted to remove the Charter of Rights and the word 'constitution' from any future text, give national parliaments a greater role, set clear limits to EU powers and spell out precise enlargement criteria. The Netherlands, he said, was "in favour of a more traditional document, in the same vein as the treaties of Amsterdam or Nice".⁹⁴ He thought that

⁹¹ Netherlands Coalition Agreement, "An active international and European role", at http://www.government.nl/policy/balkenende4/regeerakkoord/An_active_international_and_European_role.jsp

⁹² *NIS News Bulletin* 16 January 2007 at http://www.nisnews.nl/public/160107_1.htm

⁹³ Netherlands Embassy, London, at http://www.netherlands-embassy.org.uk/press_and_media/virtual_folder_press/netherlands/

⁹⁴ *EU Observer* 23 May 2007 at <http://euobserver.com/9/24122/?rk=1>

while the EU needed to be 'daring' in extending QMV, "it should only do so after careful reflection", applying it only in "areas where international co-operation is needed, like tackling climate change or fighting terrorism".⁹⁵

Mr Balkenende, like Mr Blair, believes that a text without the characteristics of a constitution will not have to be ratified by a referendum, but this will be influenced by the *Raad van State*, the State Council, the highest government advisory body. The Government could be in a strong negotiating position at the IGC, able to argue that the State Council will recommend that a referendum is necessary for a treaty which is too similar to the old Constitution.

D. Denmark

The Danish Prime Minister, Anders Fogh Rasmussen, had been opposed to the creation in the EU Constitution of the post of full-time President of the European Union, which, he thought, would lead to large Member States having greater power over smaller ones. He supported a shorter, amending treaty which would preserve the core elements of the original EU Constitution and hoped to see a new text approved by the end of 2007. Denmark had planned to hold a referendum on the EU Constitution and according to the Danish press⁹⁶ there is pressure to hold one on the reform treaty. A decision will not be taken until the final treaty text is concluded.

E. Spain

Spain, together with Luxembourg, was one of the States behind the "Friends of the Constitution" initiative (see above), and the Spanish Government was a strong proponent of salvaging the bulk of the Constitution in the negotiation of a new treaty.⁹⁷ Prime Minister Jose Luis Rodriguez Zapatero said in February 2007 that the EU needed to find a way to "maintain the essence" of the project, while making it possible for countries that have had problems with ratification to sign up to it.⁹⁸

The Spanish Foreign Minister, Miguel Angel Moratinos, told a meeting of the Friends of the Constitution in January 2007 that the 2004 text was "a magnificent document" that should be expanded rather than "carved up". Europe Minister Alberto Navarro said Spain could not accept a 'mini-treaty' that dealt with institutional reforms, but scrapped the other parts of the Constitution. Spain wanted to retain the additional QMV areas and legal status for the Charter. It also supported the idea of an additional social protocol.

⁹⁵ Simon Taylor, *European Voice* 24 May at <http://www.europeanvoice.com/current/article.asp?id=28105>

⁹⁶ *Politiken* 18 July 2007 at

⁹⁷ *EUObserver* 1 March 2007 at <http://euobserver.com/9/23602/?rk=1>

⁹⁸ *BBC News* 25 March 2007 at <http://news.bbc.co.uk/2/hi/europe/3954327.stm#germany>

F. Luxembourg

The Luxembourg Minister Delegate for Foreign Affairs and Immigration, Nicolas Schmit, did not want to simply abandon the 2004 Constitution.⁹⁹ Common policies were needed to tackle issues such as “employment and social inclusion, environmental protection and climate change, health, external and internal security, the fight against illegal migration and poverty in the third world” through “coordinated and effective EU action”. The 18 ratifying states wanted institutional reform and a “deepening of [the EU’s] policies”, he said, continuing:

So we need a renewed consensus on a Union that works for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy that also aims at full employment and social progress, and a high level of protection and improvement of the quality of the environment. This Europe must also be able to offer its citizens an area of freedom, security and justice without internal borders. It must be a Europe that promotes economic, social and territorial cohesion, and solidarity among member states and its citizens.¹⁰⁰

He did not think the solution to the present constitutional impasse was to diminish the scope of the EU, but removing non-essential elements from the Treaties and enriching them in areas such as climate change was more likely to respond to the expectations of citizens.¹⁰¹ While solidarity among the 27 Member States was the aim, in its absence Mr Schmit was in favour of enabling progress for those States that wanted to move ahead of others, “as differentiation should not mean division but rather progress at variable speeds”.¹⁰²

G. Italy

The Italian leader and former Commission President, Romano Prodi, opposed any new treaty that would represent the lowest common denominator in terms of reform. He insisted he would not sign up to just any constitutional compromise and suggested that States unwilling to accept a minimalist solution should be able to proceed alone with more ambitious reforms.¹⁰³ Like the Spanish leader, Mr Prodi wanted to find a solution that preserved the ‘essence’ of the 2004 Constitution, but with small changes to make it acceptable to States that had not yet ratified it. He did not support “radical changes” to the 2004 institutional reforms and, addressing MEPs on 22 May 2007, he listed the EU foreign minister, a longer presidency, the extension of QMV, the EU’s legal personality and the abolition of its three-pillar structure as elements which “must be preserved”.¹⁰⁴

⁹⁹ “The EU constitution’s “yes” countries should push ahead regardless”, Nicolas Schmit, *Europe’s World* Summer 2007, at <http://www.europesworld.org/EWSettings/Article/tabid/78/Default.aspx?id=bd27cbb7-4adf-4dd2-904d-6fd6499bee4a>

¹⁰⁰ Nicolas Schmit *Europe’s World* Summer 2007

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ *EUObserver* 3 May 2007 at <http://euobserver.com/9/23984/?rk=1>

¹⁰⁴ Reported in *EUObserver* 22 May 2007 at <http://euobserver.com/9/24110/?rk=1>

H. Ireland

The Irish Government, which has had problems ratifying EC Treaty amendments in the past, wanted to maintain the “balance of the entire package” of the Constitution,¹⁰⁵ according to the Irish European Affairs Minister, Noel Treacy, reported in the *EUObserver*. He continued:

We are pleased with the constitution. We negotiated the constitution. We didn't agree with all of the things that are in it, nor did we get everything that we wanted, but at the end of the day it is a very conclusive democratic document. And on that basis we believe it should be accepted.

The *Irish Times* reported on 17 May that the new Irish Government following elections on 24 May 2007 “could be forced to choose between signing up to similar opt-outs in justice matters with the UK or moving ahead with more EU integration in this sensitive area”.

Mr Treacy thought Ireland would have a referendum on a new text, whatever the outcome of the IGC negotiations

I. Poland

In elections in October 2005 the Kaczynski twins Lech and Jaroslaw became respectively President and Prime Minister of Poland. Their views on Europe were regarded as unpredictable but with eurosceptic leanings. Poland wanted from a new treaty a voting system giving it more influence than under the 2004 Constitution, a list of exclusive national competencies, a ‘red card’ subsidiarity mechanism and an energy solidarity clause.

The current Treaty provisions are favourable to Poland in terms of voting weights. Germany (the largest Member State) has 29 votes and Poland (a medium sized State) has 27. This privilege was removed in the Constitution, under which Germany would have 82 votes and Poland 38 according to a complex double majority formula. Warsaw promoted its own alternative model, giving Germany nine votes and Poland six, based on the “Penrose square root law”. Whereas the Constitution double majority system required at least 15 out of 27 EU states representing at least 65% of the total EU population to make a decision, the Penrose square root law would require at least 14 out of 27 EU states representing at least 62% of national votes, awarded on the basis of square roots of population. Three academics writing about the Penrose system in the *European Voice* opted for a compromise based on the Penrose law combined with a simple majority of States. Werner Kirsch, Wojciech Somczynski and Karol Zyczowski wrote:

To create a voting system based on the square root rule, it is reasonable to start with voting weights proportional to the square root of the population of the respective country. In addition, we also have to choose the majority quota. As the

¹⁰⁵ *EUObserver* 22 January 2007 at <http://euobserver.com/9/23315/?rk=1>

voting weight a state does not necessarily reflect the voting power of that country, we have to compute the voting powers according to this assignment.

For an EU of 27 member states the system with a quota of 61.6% is optimal: it fulfils the Penrose square root rule almost exactly, thus being representative: the voting power of each citizen of any member state is the same. Furthermore, this simple one-criterion system, dubbed the Jagiellonian compromise by the media, is easily extendable, transparent, efficient and moderately conservative.

This compromise solution may be combined with the idea of a union of states, ie, with a simple majority of states. Such a 'modified double majority' voting system based on the Penrose law is determined by the following two rules:

- A. The voting weight attributed to each member state is proportional to the square root of its population;
- B. The decision of the voting body is taken if:
 - the sum of the weights of members of a coalition exceeds the 61.6% quota (eg. 222 out of 360 votes);
 - the coalition consists of at least 50% of member states (14 out of 27)¹⁰⁶

A former Polish diplomat, Pawel Swieboda, who runs the *demosEUROPA* think-tank in Warsaw, did not see "how any government could sell this kind of square root model in a popular referendum", speculating that the Polish Government might "end up aiming for something different down the line - such as placing a cap on the maximum voting weight that anybody could have, effectively counting Germany as, say, 70 million people instead of 82 million".¹⁰⁷

Sebastian Kurpas, of the Centre for European Policy Studies, thought Poland's fears about losing influence were probably unfounded, as governments tended to follow a "consensus-building culture," working towards mutual agreement and voting only as a last resort in the decision-making process.¹⁰⁸ Mr Kurpas also thought Poland lacked support for the Penrose formula from other medium-sized States.

J. Czech Republic

In January 2007 the newly elected centre-right Prime Minister, Mirek Topolánek, called on the EU to work towards a new, simpler and more comprehensible agreement. The ODS-led Government opposed far-reaching EU integration and EU legislation that obstructed the free market. The Government proposed a new clause allowing groups of states to withdraw from EU policies or legislation they did not like and, along with Poland and the Netherlands, called for a new 'red card' mechanism to allow a third of national parliaments to request that EU powers be returned to Member States. The Czech sherpa, Jan Zahradil, decried the Constitution voting system, which, he believed, would result in smaller States being "more frequently outvoted in controversial issues, such as

¹⁰⁶ *European Voice* 3-9 May 2007

¹⁰⁷ *EUObserver* 22 February 2007

¹⁰⁸ *EUObserver* 30 May 2007 at <http://euobserver.com/9/24157/?rk=1>

social schemes, environmental issues or [...] consumer protection”.¹⁰⁹ The Czech Republic is likely to hold a referendum if the IGC renegotiations result in a similar text to the 2004 one.¹¹⁰

K. Member State Parliaments: COSAC

The Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) met in Berlin on 13-15 May. COSAC supported the “firm stance” taken by the Presidency in seeking to reach an institutional settlement before the next EP elections. It respected the “substance and objectives” of the 2004 Constitution, approving a solution which took account of and responded to Member States’ concerns. The COSAC conclusions reiterated views widely expressed elsewhere that the new treaty should address the challenges of climate change and energy security, and expected to be kept “fully involved” with the IGC process, with its views taken into account. Finally, COSAC insisted that any institutional settlement had to take into account the important role of national parliaments in EU integration and EU policy formulation, concluding that “[t]heir future role must be at least equal in strength to that foreseen in the Constitutional Treaty.”¹¹¹ COSAC proposed joint parliamentary meetings between national parliaments and the EP to exchange views and to evaluate the outcome of the European Council and the perspectives for treaty reform during the IGC.

L. Emerging consensus

The extended reflection period gave some EU governments, including the British Government, time to reconsider and in some cases revise their positions on elements of the EU Constitution. The ‘maximalists’ wanted to retain as much of the 2004 Constitution as possible, while the minimalists, including the UK, wanted only the most necessary of amendments to the present Treaties to allow the EU to function institutionally. There was talk of proceeding with further integration at different speeds and levels; of implementing parts of the treaty without ratification; of a ‘mini-treaty’ containing only the elements necessary for institutional reform; and of a ‘simplified’ treaty with the constitutional characteristics (e.g. symbol, anthem, human rights guarantees) expurgated.

A consensus emerged during the German Presidency on the need for a ‘simplified treaty’ - an amending treaty, rather than a constitutional treaty - but by June 2007 there were still divisions among Member States as to what was meant by a ‘simplified treaty’ and how to reconcile the various ‘red lines’ from Member States.

In a document sent to Member States on 14 June 2007 the Presidency identified seven outstanding issues for the European Council to discuss, stating that “All member states

¹⁰⁹ *EUObserver* 9 May 2007 <http://euobserver.com/9/24029/?rk=1>

¹¹⁰ *EUObserver* 7 March 2007 at <http://euobserver.com/9/23639/?rk=1>

¹¹¹ Contribution adopted by the XXXVII COSAC Berlin, 13-15 May 2007 at <http://www.cosac.eu/en/documents/contributions/>.

recognise that further uncertainty about the treaty reform process would jeopardise the Union's ability to deliver".¹¹² The seven areas were:

- The inclusion of symbols, such as the flag, hymn and anthem
- An explicit statement that EU law has primacy over national law
- "possible terminological changes"
- the status of the Charter of Fundamental Rights;
- the "specificity" of the common foreign and security policy;
- the "delimitation of competences" between the EU and the member states
- the role of national parliaments.

The Polish request to amend the voting system was not on the list.

The paper outlined in detail three areas for discussion: the structure of a future treaty, the balance of power between Member States and the EU, and additional elements that could be added to the new treaty. The paper also stated that the substance of the 2004 innovations should be kept, while underlining respect for the national identity of Member States. The removal of the Charter would be acceptable, but only with a cross-reference in the body of the treaty to its legally binding status. Most States, according to the paper, would accept new articles on climate change and energy, as long as this did not mean more powers for the EU.

On 17-18 June the General Affairs and External Relations Council (GEARC) considered a Presidency report on EU institutional reform in preparation for the European Council a few days later. The Council also discussed methodology (returning to the traditional method of Treaty changes through an amending treaty), changes in terminology, a single legal personality for the EU, the status of the Charter of Fundamental Rights and overcoming the existing pillar structure.

IV The Presidency IGC Mandate

The Presidency *Draft Mandate for the IGC* was prepared in secret and released to Member States on 19 June. This was the basis for discussion at the European Council on 21-22 June 2007. After a long meeting that continued well into the early hours of the morning of 22 June, Member States agreed on the final text of the Draft IGC Mandate, which was published as an annex to the European Council Conclusions on 22 July.¹¹³ The text was subject to final revision and was republished as the *IGC Mandate* on 26 June 2007.¹¹⁴

¹¹² *EUObserver* 14 June 2007 at <http://euobserver.com/9/24285/?rk=1>

¹¹³ Presidency Conclusions at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf

¹¹⁴ Presidency document 11222/07 at <http://register.consilium.europa.eu/pdf/en/07/st11/st11222.en07.pdf>

A. General Observations

In the first section on 'General Observations', the Mandate proposes that the IGC will draw up a "Reform Treaty", stipulating that the Treaty amendments "will not have a constitutional character". The present denominations of regulations, directives and decisions will be retained. The Reform Treaty's two substantive clauses will amend the *Treaty on European Union* (TEU) and the *Treaty Establishing the European Community* (TEC) but change the name of the latter to the *Treaty on the Functioning of the EU*. The EU will have a single legal personality which will not usurp national representation on international bodies such as the United Nations. All references to the 'European Community' will be removed and replaced by 'European Union' and there will be no reference to symbols of statehood, such as an EU flag, anthem and motto.

The statement in the Constitution of the primacy of EU law will be replaced by a declaration "recalling the existing case law of the European Court of Justice". The primacy declaration was clarified further in the final draft mandate and now reads:

The Conference recalls that, in accordance with well settled case-law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case-law.

To reinforce this principle, the opinion of the Council Legal Service on the "Primacy of EC Law" will be annexed to the Final Act of the Conference. This states:

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgement of this established case-law (Costa/ENEL, 15 July 1964, Case 6/64)¹¹⁵ there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.¹¹⁶

B. Key amendments to the *Treaty on European Union*

The EU's values and objectives: the reference to "free and undistorted competition" is removed from the EU's aims, but the importance of competition is underlined in a draft Protocol on internal market and competition. Asked whether this would undermine the EU by weakening the commitment to "free and undistorted competition" the Commission replied:

No. Competition policy is fundamental to the effective functioning of the single market for the benefit of consumers. That commitment is not weakened. While

¹¹⁵ "It follows (...) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

¹¹⁶ Doc 11197/07 22 June 2007 at <http://register.consilium.europa.eu/pdf/en/07/st11/st11197.en07.pdf>

the existing treaties were not altered a proposal to include "free and undistorted competition" in the objectives of the Union was reconsidered. This reflected the recognition that competition is not an objective in itself but a means to an end. A legally binding Protocol confirmed this. Competition Commissioner Neelie Kroes underlined this when saying: "The Commission will continue to enforce Europe's competition rules firmly and fairly: to bust cartels and monopolies, to vet mergers, to control state subsidies".¹¹⁷

Charter of Fundamental Rights: this will have "legally binding value", though it will not be reproduced in the Treaties. The text, initially proclaimed in Nice in 2000, was incorporated into the EU Constitution. It is currently not enforceable by the ECJ, even though it has informed the judgments of that Court on several occasions.¹¹⁸ It is also referred to explicitly in recitals to EC legislation, generally in the form of a statement that the proposal complies with fundamental rights and the principles recognised in the Charter.¹¹⁹ In addition, the EU has already established a Fundamental Rights Agency, based in Vienna, to monitor the EU institutions and Member State governments for compliance with EC law and human rights obligations and to issue opinions to the institutions or governments concerned.

The Charter will be re-enacted by the three main EU Institutions. A declaration will specify the scope of application of the Charter and its relationship with the European Convention on Human Rights. A protocol will declare that the UK courts or the ECJ may not declare UK law incompatible with the Charter. The effect of this exemption is questionable, however, as it would appear to undermine fundamental principles about the obligation of Member States to adhere to the *acquis communautaire* (EC law, the Treaties and the case-law of the European Court of Justice). It has been suggested that the Charter could still have an indirect impact on UK law, particularly in cases where the ECJ ruled on Charter-related issues in other EU Member States.¹²⁰ The Commission's Opinion on the Draft Mandate (issued under Article 48 TEU) does not shed any light on its view of the legally binding nature of the Charter when combined with the obligation to apply EU law uniformly in all Member States. It states:

The Charter of Fundamental Rights will offer Europeans guarantees with the same legal status as the treaties themselves, bringing together civil, political, economic and social rights which the Union's action must respect. Its provisions will also apply in full to acts of implementation of Union law, even if not in all Member States.¹²¹

¹¹⁷ Memo 07/283 10 July 2007

¹¹⁸ See, for example, cases C-540/03, *Parliament v Council* [2006], Case C-411/04 P, *Mannesmannröhren-Werke AG v Commission* [2007], Case C-432/05, *UNIBET (London) LTD v Justitiekanslern* [2007] and Case C-303/05, *Advocaten voor de Wereld* [2007].

¹¹⁹ For example, in proposal on criminal penalties for intellectual property infringements and recital 3 of draft Decision to establish the Culture 2007 programme

¹²⁰ *EUObserver* 27 June 2007 at <http://euobserver.com/9/24368/?rk=1>

¹²¹ COM (2007) 412. See Commission press release at <http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1044&format=PDF&aged=0&language=EN&guiLanguage=en>

The exemption may also present problems for Germany, if it breaches a principle of reciprocity under which the German Constitutional Court has in the past been prepared to accept the constitutionality of EU treaties.

Poland made a unilateral declaration on the application of the Charter to the right of Member States “to legislate in the sphere of public morality, family law as well as the protection of human dignity and respect for human physical and moral integrity”.

Competences: the Constitution provisions on relations between the Union and the Member States will be retained, with the addition of a specific provision that the EU “shall act only within the limits of competences conferred upon it by the Member States in the Treaties”. National security will be explicitly stated as a Member State competence.

National Parliaments: a new article will set out the role of national parliaments in the EU, and how they “shall contribute actively to the good functioning of the Union”. This will be the first time the EC/EU Treaties have mandated national parliaments to act. Their contribution will be by:

- receiving information and draft legislation from the Institutions
- ensuring that the subsidiarity principle is respected
- participating in evaluation mechanisms for Justice and Home Affairs (JHA) policies, in particular in monitoring and evaluation of Europol and Eurojust
- participating in the procedures envisaged for revision of the Treaties
- receiving notifications of applications for accession to the EU, and
- participating in inter-parliamentary cooperation between national parliaments and the EP

The EU Constitution had provided for national parliaments to object to draft EU legislation on grounds of lack of compliance with the subsidiarity principle. If objections were raised within six weeks from one third of Member State parliaments, the Commission would review the proposal.

The Mandate sets out a system that had been supported by the Netherlands, Poland and Czech Republic, that if a third of national parliaments object to a proposed EU law then it will automatically fail. The ‘yellow card’ subsidiarity check for national parliaments will be as follows:

- national parliaments will have eight weeks to examine a legislative proposal and give a reasoned opinion on subsidiarity. Each national parliament will have two votes (one per chamber in bicameral parliaments): if the total number of opinions against a legislative proposal on subsidiarity grounds reaches a simple majority (i.e. 28 votes out of 54), the Commission must consider whether to maintain, amend or withdraw it.
- If the Commission decides to maintain the draft, it must give a reasoned opinion, which will be forwarded to the EP and the Council together with the reasoned opinions of national parliaments

- The EP and the Council will be required to consider the compatibility of the legislative proposal with the subsidiarity principle, taking into account the submissions from national parliaments and the Commission
- The proposal can be set aside if a majority of MEPs, or 55 per cent of members of the Council, consider that the proposal is not compatible with the principle of subsidiarity.

Currently, parliaments are more likely to pursue subsidiarity concerns with their governments with a view to them being taken up at Council of Ministers level. However, there is nothing to prevent them from writing directly to the Commission about subsidiarity concerns.

At a European Subsidiarity Conference in St. Poelten in April 2006 the Austrian Presidency and the Commission supported the swift introduction of a subsidiarity early-warning mechanism without Treaty amendment. The Commission pursued this in a Communication in May 2006, stating that 'national parliaments must be more closely involved with the development and execution of European policy. The increased involvement of national parliaments can help make European policies more attuned to diverse circumstances and more effectively implemented'.¹²² The Commission proposed transmitting directly all new proposals and consultation papers to national parliaments, "inviting them to react so as to improve the process of policy formulation".¹²³ The European Council in June 2006 endorsed this proposal, although some warned that such an arrangement would only work if national parliaments made proper use of it. The proposal was not without its critics, and the draft European Council Conclusions were amended from stating that the Commission should "take into account" any comments by national parliaments, to the somewhat weaker "duly consider".¹²⁴ In September 2006 the Commission started an informal mechanism whereby national parliaments could make comments on legislative proposals directly to the Commission. This is not expected to be given a Treaty base.

The British Government supports reforming the way in which national parliaments try to influence EU business, and the former Foreign Secretary, Jack Straw, made clear in June 2005 that he was in favour of measures to improve national scrutiny processes to facilitate this.¹²⁵ The Government has not yet decided how it will give Parliament more or better opportunities to scrutinise EU business in general but in its White Paper on the IGC and the reform treaty (see below), it stated that "Throughout the process, the Government will also keep Parliament informed in terms of scrutiny, evidence sessions and debates".¹²⁶

Institutions: the 2004 institutional changes will be integrated into the TEU as follows:

¹²² http://ec.europa.eu/commission_barroso/president/pdf/com_2006_211_en.pdf

¹²³ http://ec.europa.eu/commission_barroso/president/pdf/com_2006_211_en.pdf

¹²⁴ *EUobserver* 16 June 2006 at <http://euobserver.com/9/21879/?rk=1>

¹²⁵ HC Deb 14 June 2005 994-5

¹²⁶ Cm 7174 at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

- From 2014, there will no longer be a Commissioner to represent every Member State, but two-thirds the number of States. The Commission must reflect satisfactorily the demographic and geographical scope of the Union. Commissioners will be selected on a system of equal rotation among Member States to serve five-year terms.
- The European Council will be established as an EU Institution, with a permanent Presidency not connected to the rotation of Member State presidencies of the Council of Ministers
- The Council will move towards 18-month “team Presidencies”¹²⁷
- The voting system in the Council as agreed by the Treaty of Nice continues to apply until 1 November 2014, whereupon the double majority voting system in the Constitution will apply (a qualified majority will require 55% of votes in the Council representing 65% or more of the EU’s population). In addition, between 1 November 2014 and 31 March 2017, any Member State can request a return to the Nice voting rules; between 1 November 2014 and 31 March 2017, if Member States representing 75% of the Council votes or 75% of the population needed to constitute a blocking minority in the Council, signify their opposition to a proposal, a final vote on the proposal may be deferred in an attempt to seek agreement; from 1 April 2017 this final vote can be deferred if 55% of a blocking minority (either in votes or in population) signifies its opposition.

EU Foreign Policy: The controversial EU Constitution title of ‘Union Minister for Foreign Affairs’ (i.e. the person discharging the functions of the present External Relations Commissioner and CFSP High Representative) will be changed to “High Representative of the Union for Foreign Affairs and Security Policy”. EU external action is currently organised by the Council of Ministers under the CFSP, or by the Commission representing the EU in international fora and in trade and treaty negotiations. The Constitution envisaged a Union Foreign Affairs Minister combining the two posts, who would also chair the Foreign Affairs Council, instead of the foreign minister of the State holding the EU Presidency. The basis for this position was the perceived need for coherence, consistency, effectiveness and visibility for EU external actions. The Commission has already considered ways of improving coordination between the Commission and Council, the EU institutions and the Member States. One ‘double-hatted’ mission has already been established in Macedonia, where the roles of Head of EC Delegation and EU Special Representative (EUSR) have been combined.

The British Government had ruled out the creation of these posts outside the Constitution and could “see no prospect of their being brought into force, save through the vehicle of a constitutional treaty”,¹²⁸ but is in principle not averse to such a role for the EU. In an exchange in the House of Lords in May 2006, the Foreign Office Minister, Lord Triesman, thought it was undoubtedly sensible on occasions to share diplomatic premises with other EU Member States, for security reasons, for economies of scale and

¹²⁷ Teams of three to five Member States representing a geographic and demographic balance within the EU would chair the sectoral councils by rotation for a set period of time. The burden of chairmanship would be spread between the Member States and would provide longer-term continuity, while maintaining the current connection between the Member States and the EU in the rotating presidency system.

¹²⁸ HC Deb 6 June 2005 c1001

for cooperation when a major natural disaster strikes to “optimise resources on the ground”. He continued: “That is not the same as saying that we depart one jot from our responsibility for the security of United Kingdom citizens”.¹²⁹

External actions and CFSP: the provisions of the Constitutional Treaty on the European External Action Service and structured cooperation in defence policy will be retained, but a Declaration will underline the existing responsibilities of Member States for the formulation and conduct of foreign policy and representation in international organisations. The chapter on external action and CFSP will specify the procedures and rules to apply to decisions in the field of CFSP. The CFSP will remain intergovernmental in nature with decisions taken by unanimity. CFSP provisions will remain in the TEU and the IGC Mandate contains a declaration confirming that the CFSP provisions will not affect the responsibilities of the Member States, as they currently exist, for the formation and conduct of their foreign policy, or of their national representations in third countries and international organisations.

Enhanced cooperation: enhanced cooperation actions can be launched with a minimum of nine Member States

Final provisions:

- The EU is to be given legal personality, though a Declaration will “confirm” that the EU is not thereby authorised to act beyond the competences conferred by the Member States in the Treaties.
- The Constitution article on voluntary withdrawal from the EU remains.
- Constitution provisions for revising the Treaties without recourse to an IGC will be recast in one article, which will now also clarify that Treaty revision can reduce the competences conferred on the EU as well as increase them.

EU Accession: Conditions for accession to the EU will be amended by the addition of text recalling the “conditions of eligibility agreed upon by the European Council” (i.e. the so-called Copenhagen Criteria).¹³⁰

C. Key amendments to the EC Treaty

Name and status: In the renamed *Treaty on the Functioning of the European Union* all references to the European Community will be removed, reflecting the collapse of the ‘pillar structure’ established in 1992 and the establishment of an omni-competent European Union.

¹²⁹ HL Deb 4 May 2006 c564

¹³⁰ Candidate states must prove they will be in a position to respect the rule of law, minorities and human rights; have a functioning market economy; cope with the competitiveness of the single market; and implement the *acquis communautaire*. This was one of the Dutch Government’s ‘red lines’. Addressing the EP on 23 May 2007, Jan Peter Balkenende called for stricter enlargement criteria to help address dissatisfaction in the Netherlands about the prospect of further EU enlargement to include Turkey and several Western Balkan states.

Functions of the EU: the Treaty will be amended to include the provisions of the 2004 Constitution on:

- areas of competence
- the scope of qualified majority voting: the Constitution moved 15 Articles from unanimous voting to QMV and introduced 24 new Articles with QMV.¹³¹
- the scope of codecision with the European Parliament
- distinctions between legislative and non-legislative acts
- a “solidarity clause”
- improvements to the governance of the eurozone
- specific provisions on individual policies
- provisions on own resources, the multiannual financial framework of the EU and on the EU’s budgetary procedure
- provisions on JHA matters: changes to the voting system and a right of veto.

The Commissioner for justice, freedom and security, Franco Frattini, thought that if the justice and home affairs elements of the Constitution, involving removal of the national veto in the remaining third pillar areas, were not accepted by Member States, “a two-speed Europe was inevitable” because some Member States would use enhanced cooperation provisions to press ahead of others in these areas.¹³² The removal of the remaining veto areas was resisted by the British Government, although during the discussion of the possible activation of the *passerelle* in 2006 the Government said it was prepared to consider moves to QMV on a case by case basis.¹³³

Amendments to the 2004 Constitution: a number of modifications of the text of the Constitutional Treaty will be made on insertion into the “Functions Treaty”, including:

- specific language on the definition of Member State and EU competences
- amendment of the Treaty base on diplomatic and consular protection to provide for coordination and cooperation measures
- provision to halt measures on the portability of social security benefits if the European Council fails to act within four months
- a Protocol with interpretative provisions on services of general economic interest (i.e. state-provided social services)
- specific language to enable some Member States to proceed with measures on police and judicial cooperation while others do not participate
- an extension of the UK’s 1997 opt-out on JHA issues to judicial cooperation in criminal matters and police cooperation

¹³¹ See Annex III for tables showing how QMV would be applied. Figures vary from 39 to 60 for the number of QMV innovations, depending on various factors, such as whether sub-paragraphs of articles are included, and whether new articles are counted or only transfers from unanimity.

¹³² *European Voice* 31 May-6 June 2007

¹³³ The *passerelle* is a bridging clause currently found in Article 137 TEC and Article 42 TEU, providing for a unanimous Council decision to change the voting procedure in certain areas from unanimity to qualified majority voting. In mid-2006 the Commission, in its Communication, ‘A Citizens’ Agenda—Delivering Results for Europe’, suggested the *passerelle* might be used to transfer policing and judicial cooperation in criminal matters from the Third Pillar (intergovernmental) to the First Pillar (Community). In the end there was no agreement on such moves.

- a role for national parliaments in applying a *passerelle* clause on judicial cooperation in civil matters relating to family law
- a specific reference to energy supply solidarity between Member States
- a restriction on European space policy
- specific authorisation to the EU to take action to combat climate change at international level
- retention of Article 308 TEC (the flexibility clause), but with a provision stipulating that it may not apply to the CFSP.

D. Timetable and procedure

The Portuguese Presidency opened an Inter-Governmental Conference on 23 July, which met at ministerial level in the margins of the General Affairs and External Relations Council (GAERC) to discuss the first draft of the Reform Treaty.¹³⁴ Technical work will be taken forward by working groups. The Presidency aims to conclude the Reform Treaty at the European Council in Lisbon on 18 October 2007 and to formally sign it at the European Council on 13-14 December.

IGCs are convened under Article 48 TEU, which requires a submission to the Council for such a meeting, and an Opinion from the Council after consulting the EP and sometimes the Commission, in favour of opening one. The preparatory work of an IGC is usually carried out by representatives of the Member State governments and a representative of the Commission. The EP has long called for a more formal role in the treaty amendment process and has adopted resolutions to this effect. The final decisions are taken by the heads of state or government.¹³⁵ In 2004 the then ten EU candidate states were invited to be observers at the IGC, but there was some opposition to inviting as observers Turkey, Croatia and Macedonia, which opened membership negotiations in October 2005. The Presidency said it would “take the necessary measures to ensure that the candidate States are kept fully and regularly briefed throughout the Intergovernmental Conference”.¹³⁶

This IGC will be unusual in that its work is premised on the basis of a text largely extrapolated from a previously agreed but unimplemented treaty. Although governments agreed the mandate for the IGC and the outline content of a reform treaty, the IGC “then has to find the right expression for the leaders’ selection”.¹³⁷

Ratification of the new treaty will begin in all the Member States in 2008 (including those that have already ratified the EU Constitution) according to their constitutional requirements. It is not yet clear which of the 27 Member States will hold a referendum on any treaty emerging from the IGC, although it is highly likely that Ireland and Denmark will hold one. Portugal might hold a referendum; there were, after all, plans to hold one in 2005 on the EU Constitution. On the other hand, if there is no constitutional imperative

¹³⁴ The official draft was in French and the translations (non legally revised) were to be distributed as soon as possible.

¹³⁵ The 2004 IGC, unusually, was preceded by a Convention and a wide-ranging public consultation.

¹³⁶ 12004/07 19 July 2007 at <http://register.consilium.europa.eu/pdf/en/07/st12/st12004.en07.pdf>

¹³⁷ *European Voice* 7-13 June 2007

(which is not yet clear), the Portuguese EU Presidency might for political reasons decide against a referendum.

If the new treaty cannot be ratified by all Member States, the present EC/EU Treaty as amended by the Treaty of Nice will remain in force. There is no Plan B at the moment and it is difficult to foresee how the EU would survive a second Treaty amendment failure. In an article on the June summit Dominik Hierlemann of the Bertelsmann Stiftung and Sarah Seeger of the Center for Applied Policy Research conclude:

[...] the EU would not be incapacitated if it once more proved impossible to introduce the proposed treaty amendments. The institutions would continue to function on the basis of the Treaty of Nice, and it would also be possible to implement certain reforms envisaged in the Constitutional Treaty without resorting to the protracted treaty amendment procedure. Prominent examples of this are the already established European Defence Agency, the opening of meetings of the Council of Ministers to the media and the public, or the enhanced involvement of national parliaments in the EU decision-making process. Over and above this, minor reforms can be implemented with the help of inter-institutional agreements. Furthermore, the Open Method of Coordination makes it possible to take joint action in areas which are not covered by the competences of the Union. However, it will not be possible to implement the central innovations relating to the decision-making procedure such as the extension of majority decisions in the Council and the strengthening of the co-decision procedure without the usual treaty amendment process based on unanimity. Therefore, there is certainly a need for a kind of "Treaty amending the Treaty of Nice". Otherwise there would continue to be striking shortcomings and imperfections with regard to transparency, efficiency, participation, and the democratic structures of the European Union.¹³⁸

E. Initial reaction to the Draft IGC Mandate

Chancellor Merkel was reported to be very satisfied with the European Council Conclusions, while Nicolas Sarkozy was pleased that the mandate provided the basis for a 'simplified' treaty. Some French Socialist Party Senators have warned, however, that a constitutional amendment may be required to enable a new treaty to be ratified, and that Mr Sarkozy may not have a sufficient majority in both the *Assemblée* and Senate to achieve this. Romano Prodi was critical of Poland and the UK for their "doggedness". The Polish Government was not satisfied that all its demands had been met and said it intended to press for a permanent mechanism allowing a minority of dissenting states to delay EU decisions for up to two years. In the Netherlands the prospect of another referendum has emerged. In June it was reported that the Dutch Labour Party would accept a recommendation of the State Council against a referendum if a new treaty no longer had the ambition of being a constitution.¹³⁹ However, recent reports suggest the party is now in favour of a referendum. The parliamentary Labour Party leader, Jacques Tichelaar, who supports the proposed Treaty reform, thought there was nothing to fear

¹³⁸ *Spotlight Europe* 2007/03, June 2007, "Who wants what and why? FAQs about the EU Constitutional Summit" at http://www.cap.lmu.de/download/spotlight/Spotlight_2007_03_eng.pdf

¹³⁹ See *NRC Handelsblad* 25 June 2007 at http://www.nrc.nl/europa/article728684.ece/Coalitie_en_VVD_tevreden_over_afloop_Eurotop

from a referendum. If Labour MPs back a referendum it might be difficult for Mr Balkenende to resist. Ireland and Poland reserved the right to join the UK protocol exempting it from the Charter of Rights and the Irish Congress of Trade Unions (ICTU) has said it will campaign against the treaty in the referendum if this clause remains. The Danish Prime Minister, Anders Fogh Rasmussen, was reported as welcoming the IGC Mandate: "The good thing is that all the symbolic elements are gone, and that which really matters – the core – is left".¹⁴⁰

In the European Parliament, pro-integration MEPs praised the text for safeguarding the substance of the EU Constitution, while Eurosceptics criticised EU leaders for agreeing to the rejected Constitution but with another heading.¹⁴¹ On 11 July the EP discussed a report by Jo Leinen on the IGC mandate, which had been adopted by the Constitutional Affairs Committee on 9 July.¹⁴² In their resolution on the text, MEPs regretted the concessions made to Member States, the UK in particular, which provided opt-outs and removed the constitutional elements. In defiance of the abandonment of the EU flag and anthem, Beethoven's "Ode to Joy", the EP stated that it would give "official character" to such symbols in its Rules of Procedure.¹⁴³

The EP nominated three Members to participate in the IGC negotiations - Elmar Brok (EPP), Enrique Baron Crespo (PSE) and Andrew Duff (ALDE) - who were appointed on 12 July at the conference of political group leaders. They will attend IGC ministerial meetings, while the EP President, Hans Gert Pöttering, will participate in meetings at heads of state and government level.

The very idea of an IGC mandate from the European Council immediately gave rise to criticism from some quarters. The Bruges Group questioned the European Council's action in agreeing a mandate, maintaining that it had carried out a "coup d'état in the European Union by usurping the powers of the member states' governments" to decide how to amend the EC Treaties.¹⁴⁴ In a letter to the *Daily Telegraph* Bill Cash rejected Mr Barroso's claim that the UK was bound by the IGC mandate agreed by the European Council, arguing that it did not have the "legal authority to enforce the mandate on the Council of Ministers, the national parliaments or the electors of the member nations".¹⁴⁵ A Commission Q & A Memo tackled the question of the legal status of the Mandate: which, it stated, was "not the final text of the Treaty. Over the coming months, the Intergovernmental Conference will work to put the political agreement into legal form. The final outcome will be a Reform Treaty".¹⁴⁶ The Memo outlined how the Mandate could be changed:

¹⁴⁰ *Jyllands-Posten* 25 June 2007

¹⁴¹ For a summary of reactions, see *EurActiv* 25 June 2007 at <http://www.euractiv.com/en/future-eu/eu-treaty-deal-meets-praise-criticism/article-164921>

¹⁴² A6-0279/2007 at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0279&language=EN&mode=XML>

¹⁴³ 11222/2007 - C6-0206/2007 at <http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2007-0328&language=EN>

¹⁴⁴ "European Council usurps powers of governments", Dr Helen Szamuely at <http://www.brugesgroup.com/mediacentre/releases.live?article=13993>

¹⁴⁵ *Daily Telegraph* 2 July 2007

¹⁴⁶ MEMO/07/284 10 July 2007

The IGC mandate and the European Council conclusions are political agreements. They have been agreed by all member states. From a strict legal standpoint, a member state may raise an issue at any point during an Intergovernmental Conference, but the principle of "bona fide" would mean that this IGC is not used to change arguments already entered into.¹⁴⁷

The European Trade Union Confederation (ETUC) welcomed the statement that the Charter of Fundamental Rights would be legally binding but deplored "the UK's denial of European-based social rights for British workers" and hoped "this will be rectified as soon as possible".¹⁴⁸ The TUC General Secretary, Brendan Barber, expressed extreme disappointment "to see that UK workers and citizens are to enjoy fewer rights than those in the rest of Europe following the opt-out from Europe's Charter of Fundamental Rights".¹⁴⁹

The eurosceptic Open Europe group published an analysis of the mandate for the IGC,¹⁵⁰ while the pro-EU think tank, Federal Europe, published a comparative table showing how the reform treaty would differ from the 2004 treaty.¹⁵¹ The Centre for European Policy Studies (CEPS) published a commentary on 25 June 2007, "The new deal, a good deal?"¹⁵²

F. UK reaction

1. Blair Government statement

In his statement to the House on 25 June 2007, Tony Blair congratulated Chancellor Merkel "on concluding successfully an exceptionally difficult negotiation and on an outstanding presidency of the European Union", going on to outline how the British Government had achieved all it had set out to achieve:

Before the European Council, I made it clear that the concept of a constitutional treaty for Europe had to be abandoned and that we should agree instead a conventional amending treaty like the Nice, Amsterdam and Maastricht treaties and the Single European Act. I also made it clear that the UK had four central demands which had to be met. First, on the charter of fundamental rights, we secured a legally binding protocol, specific to the UK, and applicable both to the British courts and to the European Court of Justice. [...] In respect of our criminal law system and police and judicial processes, we obtained an extension of the opt-in rights that we secured in an earlier treaty on migration, asylum and immigration issues. This means that we have the sovereign right to opt in on individual measures, where we consider it would be in the British interest to do so, but also to stay out, if we want to. It is precisely the pick and choose policy often advocated. It gives us complete freedom to protect our common law system, but it also allows us to participate in areas where co-operation advances British interests. In asylum and immigration, for example, we have opted in on

¹⁴⁷ Ibid

¹⁴⁸ ETUC 23 June 2007 at <http://www.etuc.org/a/3752>

¹⁴⁹ Press release 23 June 2007 at <http://www.tuc.org.uk/international/tuc-13442-f0.cfm>

¹⁵⁰ At <http://www.openeurope.org.uk/research/byanyothename.pdf>

¹⁵¹ At <http://www.federalunion.org.uk/news/2007/070623reformtreatyanalysis.shtml>

¹⁵² Daniel Gros and Stefano Micossi at http://shop.ceps.be/BookDetail.php?item_id=1514

measures dealing with illegal immigration, and in measures allowing us to return asylum seekers to other European countries—both unquestionably in Britain’s interests. But it will be within our exclusive power to decide on a case-by-case basis, which is exactly what we wanted.

In respect of social security, we negotiated a provision which allows us to insist on unanimity in any case where we—that is, Britain—declare that any proposal from the Commission would affect important aspects of our social security system, including its scope, cost, or financial structure or balance. Our social security and benefits system is therefore completely protected.

As for the common foreign and security policy, the basis of this will now remain unchanged in a separate treaty, and a separate pillar, from the first pillar Community method. The essential features of the CFSP remain as they were. Unanimity voting is the rule. There is no sole right of initiative for the Commission. There is no role for the European Parliament in decision taking. There is no jurisdiction for the European Court of Justice, except in the particular case of safeguarding the rights of individuals subject to EU sanctions. The two jobs of Commissioner for External Relations and High Representative which, of course, exist already, will be amalgamated in a single job. But this reform does not extend the EU’s substantive powers to act in foreign policy. In particular, the Union Representative, when working on common foreign and security policy issues, will operate within a policy framework set by the European Union Foreign Ministers, by unanimity.

All these guarantees not merely remain in the new treaty, but are reinforced in a new overview article that reaffirms them and has full legal force. For the avoidance of doubt, we also obtained a declaration that sets out the unanimous view of all member states about the meaning of those guarantees.[...]

There was also a discussion at the Council about competition. The treaties have always made it clear that competition in the internal market should not be distorted. The now defunct constitutional treaty’s objectives would have included new wording about “free and undistorted competition”. When the treaty was set aside, that provision was lost, but we agreed on a new and legally binding protocol to be annexed to the treaties, which reaffirms the commitment to ensuring that competition is not distorted, and the other references to competition in the existing treaties will remain: for example, articles 4, 27, 34, 81 to 89, 96, 98, 105 and 157 from the European Community treaty. The legal position in relation to competition therefore remains unchanged.

Alongside meeting our four essential requirements, we secured a number of further improvements. The new treaty will confirm for the first time, explicitly, that national security is the sole responsibility of member states. The Union already signs international agreements, but the treaty formalises its legal personality. However, we have now agreed a declaration by all countries for this intergovernmental conference confirming that the fact of this legal personality does not authorise the Union in any way to legislate or act beyond the powers conferred on it by member states in the treaties. There are also new powers for national Parliaments to object to Commission proposals on subsidiarity grounds.

There are a number of extensions of qualified majority voting. In the most sensitive areas of QMV—justice and home affairs, and social security—we obtained the right either not to participate or to insist on unanimity. In addition, a number of other QMV measures—for example, those about rules within the

eurozone, or those in justice and home affairs—do not apply to us. As for the rest, we have agreed them, because qualified majority voting is often in Britain's interest. [...]

Among the QMV provisions in the treaty is one that provides a new legal base and QMV for energy market liberalisation, and another that provides QMV for decisions on emergency humanitarian aid to third countries—both of them manifestly in the UK's national interest.

The other main reform is the fixed term, two-and-a-half-year presidency of the European Council, replacing the current rotating six-monthly arrangements. This is necessary for the Union's efficiency, but does not involve any extension of presidency powers. The President of the European Council will remain the servant of the leaders of the member states.

The most important aspect of the new treaty is that it allows the European Union to move on to the issues that really matter. For too many years, we have been bogged down in a debate about institutions. With the increase from 15 to 27 member states, change is essential, but with this agreement, we can now concentrate on issues that really matter: energy security, organised crime and terrorism, globalisation, further enlargement and making Europe's voice more effective internationally.

This agenda is surely quintessentially one in Britain's interests. Over the past 10 years, Britain has moved from the margins of European debate to the centre. This is absolutely right for Britain. Whether in defence or economic reform or in energy policy or the environment, or of course most particularly in enlargement and the appointment of the new Commission President, Britain has for a decade been in a leadership position in Europe. That is exactly where we should stay.¹⁵³

In spite of the Government's assurances that the mandate prescribed a reform treaty that would be quite different from the constitutional treaty, there was some scepticism among opposition Members and eurosceptics. The Leader of the Opposition, David Cameron, accused the Prime Minister of agreeing to "a transfer of power from Britain to Brussels without the permission of the British people".¹⁵⁴ The Constitution, allegedly abandoned, had been 'resuscitated', he said and he questioned the claim that all British 'red lines' had been met and that British sovereignty had not been compromised. He called for a referendum on the new treaty. Mr Blair dismissed these allegations and elaborated on the QMV issue:

Let me go through the 49 articles that create QMV. Thirteen of them do not apply to the UK because they are about the eurozone or judicial and home affairs, which we have opted out of. Six involve issues such as allowing a group of citizens to propose initiatives; the negotiation of a withdrawal agreement—I should have thought that the Opposition would want QMV on that; two relate to ending special state aid provisions for Germany post-reunification and to diplomatic and consular protection measures, which are not about the service, but about protection. Nine are minor and technical, including such extraordinary matters as the Council review of general rules on the composition of the

¹⁵³ HC Deb 25 June 2007 cc21-23

¹⁵⁴ Ibid c23

Committee of the Regions, and the Comitology Committee, whatever that might be. Nine of them relate simply to new legal bases, but powers already exist.

There are nine articles of genuine substance on matters such as the implementation of own resources decisions, which it is in Britain's interests to have QMV on, because it allows us to ensure that countries cannot block that; on the authorisation, co-ordination and supervision of intellectual property rights protection, which, again, it is absolutely in Britain's interests to have; and on matters such as urgent aid to third countries and humanitarian aid operations.¹⁵⁵

For the Liberal Democrats, Sir Menzies Campbell, referred to the concerns of the Confederation of British Industry (CBI) that competition policy had been weakened by the amendments to the internal market wording, suggested that protectionism might rise, questioned the UK 'opt-out' from the Charter of Rights, asked how the proposed reform would ensure a successful outcome of the Doha Round and how the EU's humanitarian role would be put to effect in Gaza.¹⁵⁶

Asked what the differences were between the EU Constitution and the new treaty, the Europe Minister, Jim Murphy, insisted that the Constitution was "now defunct", and said:

the Reform Treaty will differ fundamentally from the Constitutional Treaty in both form and substance. Among other things, we have ensured that there is nothing in the mandate for the Reform Treaty which will require us to change our existing labour and social legislation. Our common law system and our police and judicial processes will be protected. Our independent foreign and defence policy will be maintained. Our tax and social security system will be protected.¹⁵⁷

2. Brown Government White Paper

On 23 July 2007 the Government published a White Paper entitled *The Reform Treaty: The British Approach to the European Union Intergovernmental Conference*,¹⁵⁸ which sets out its approach to the IGC. In the Foreword the Prime Minister states that the amending treaty "will allow the EU to move on from debates about institutions to creating the outward-facing, flexible Europe that we need to meet the fundamental challenges of globalisation".¹⁵⁹ On pages 12 to 19 the Government sets out the changes in the IGC Mandate to be incorporated into the reform treaty, commenting on their significance and stating how they conform with its principles and 'red lines'.

¹⁵⁵ HC Deb 25 June 2007 cc25-6

¹⁵⁶ Ibid

¹⁵⁷ HC Deb 10 July 2007 cc 1459-60W at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070710/text/70710w0022.htm#07071063000650>

¹⁵⁸ Cm 7174 at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

¹⁵⁹ Ibid p 1

V Public Opinion

Following the 2005 negative referendums, *European Citizens' Consultations* carried out a survey of public opinion on the EU, asking what people thought the EU should deal with and not deal with. The results were published on Europe Day (9 May) in a report entitled "European Citizens' Perspectives on the Future of Europe".¹⁶⁰ A high priority for more EU action in most countries was social policy – health and child care in particular – where the EU presently does not have a major role and which is not viewed generally as an area for major future initiatives. Specific measures proposed at national and European level included rights to child care, working time flexibility for parents or job protection for those returning from parental leave; better job protection; harmonised minimum work-related standards, such as a common definition of a minimum wage; standards ensuring accessible, dignified, high-quality and affordable health care treatment.¹⁶¹

A *Eurobarometer* survey in April-May 2007 found that the level of support for a European Constitution had increased to 66% compared to 63% in Autumn 2006, with 20% against and 14% 'don't know'.¹⁶² The summary noted:

Behind this lack of change in the overall figure, however, we see a number of notable swings, in both directions. Since Autumn 2006, support for a constitution has increased by 13 points in Spain, 6 points in Estonia and 5 points in Germany, Hungary and Poland.

Over the same period, the support for a European Constitution has fallen considerably in Greece (-11 points) and to a lesser extent Cyprus and Finland (both -6 points).

In general, however, shifts in opinion seem to be largely driven by general favourability towards the EU – for example, the large positive swing in Spanish opinion on enlargement should be viewed in context of a similar surge in the perception that the country has benefited from enlargement and that Membership of the EU is a good thing.¹⁶³

Considering the results for a first wave of States comprising Spain, Estonia, Germany, Hungary, Poland, Finland, Cyprus and Greece, *EB67* notes:

[...] it can be seen that there are no countries where those against a constitution outnumber those in the 'for' camp. In particular, we note that support in France and the Netherlands, the two countries rejecting the constitution via referenda, stands at 68% and 55% respectively. However, those holding the 'against' view do form a very significant segment of opinion in Finland (43% 'against', 4 points lower than 'for') and the UK (36% 'against', 7 points lower than 'for').¹⁶⁴

¹⁶⁰ http://www.european-citizens-consultations.eu/fileadmin/user_upload/Synthesis_Citizens_Perspectives.pdf

¹⁶¹ There is a summary of the analysis in the *EUObserver* 11 May 2007 at <http://euobserver.com/9/24041/?rk=1>

¹⁶² *Standard Eurobarometer 67*, June 2007, at http://ec.europa.eu/public_opinion/archives/eb/eb67/eb_67_first_en.pdf

¹⁶³ *Ibid*

¹⁶⁴ http://ec.europa.eu/public_opinion/archives/eb/eb67/eb_67_first_en.pdf

The *EB67* concludes:

Despite the fact that the younger age groups tend to be more pro-European, this factor has minimal influence on opinion regarding a constitution. Education remains relevant, with positive opinions running at almost three-quarters (73%) amongst those studying until the age of 20 or over. The extent to which respondents trust in the EU is important, with 80% of those who hold such trust supporting a constitution, compared to 49% of those who tend not to have this trust.¹⁶⁵

Two June 2007 UK polls, ICM for Open Europe poll¹⁶⁶ and YouGov/Speakout¹⁶⁷ sought opinion on the EU, an EU constitution and whether there should be a referendum on it. An analysis by Anthony Wells in *UK Polling Report* summarised their findings:

Both polls show around half the public think that the EU already has too much power (in slightly differently worded questions YouGov found 59% thought the EU had too much power, ICM found 49%). Few people (6% in YouGov's poll and 15% in ICM's) thought the EU should have greater powers.

Both also found an overwhelming majority in favour of a referendum if the new treaty gives extra powers to the EU - 78% in YouGov's poll and 86% in ICM's.

ICM asked how people would vote in a referendum on a treaty that "gives more powers to the EU" - 65% said they would vote against, with only 26% voting in favour. YouGov's question was slightly more subtle - only 4% said they would vote in favour, 40% said they would vote against, 45% said it would depend upon the exact details of the treaty. This is actually an interesting result, and one that shows the difficulty facing the government in trying to win any such referendum: 40% of people say they will vote against a European treaty almost regardless of what the actual contents are. To win a referendum, the government would need to win over the vast majority of the 45% of people who say their vote would depend on what was actually in the treaty and, presumably, are open to persuasion.

Finally ICM asked whether it would make people less likely to vote Labour if Gordon Brown ratified the treaty without allowing a referendum. 21% of people said it wouldn't make them less likely to vote Labour, 74% said it would. As regular readers will know, I'm not a fan of questions like this and prefer the format YouGov sometimes use where people are given the option of saying "No difference - I'll vote Labour anyway" and "No difference - I wouldn't vote Labour anyway". A lot of the people answering this question and saying it would make them less likely to vote Labour wouldn't vote Labour if hell froze over. 86% of Tory identifiers, for example, say it would make them less likely to vote Labour. In this case though, it doesn't seem to be just Tories expressing concern - 43% of Labour identifiers also say it would "definitely" make them less likely to vote Labour. Of course, saying that to a pollster to send a message is different to

¹⁶⁵ Ibid

¹⁶⁶ <http://www.openeurope.org.uk/research/constitutionpoll.pdf>

¹⁶⁷ <http://www.yougov.com/archives/pdf/Yatesresults070614.pdf>

actually changing your vote, but it's worth remembering that Europe isn't an issue that only worries Tory voters in the shires.¹⁶⁸

Referendum campaigns have been launched in several Member States. According to a poll by Internet polling agency *peil.nl* published on 26 June, 51% of Dutch nationals support a second national referendum on the new European treaty, with 47% against. If there were another referendum, 46% would vote in favour of the new treaty, while 29% would vote against it, according to the poll. Most of the opponents of a referendum were voters of Government parties and the leftist Greens, an opposition party.¹⁶⁹

¹⁶⁸ *UKpollingreport* 21 June 2007 at <http://www.ukpollingreport.co.uk/blog/archives/date/2007/06>

¹⁶⁹ *EUX.TV* 26 June 2007 at <http://eux.tv/article.aspx?articleId=10496>

Appendix I Future of Europe Chronology¹⁷⁰

2001

14-15 December - The European Council in Laeken adopts a 'Declaration on the Future of Europe' and establishes a 'Convention' which in the following months brings together representatives of national governments and parliaments, the European institutions, non-governmental organisations and the general public, to prepare an institutional and constitutional reform of the EC Treaties.

2002

28 February - The Convention holds its inaugural meeting.

2003

20-21 June – The European Council meets in Thessaloniki, Greece. The *Draft Treaty Establishing a Constitution for Europe* is welcomed as a good basis for forthcoming negotiations on the future of Europe.

18 July - The *Draft Treaty Establishing a Constitution for Europe* is submitted to the President of the European Council in Rome.

9 September - The UK Government sets out its views on the draft text in a White Paper and announces that there would be a similar procedure to enable Parliament to scrutinise the IGC as had been established for the Convention on the Future of Europe.

17 September - The Lords debate the draft Constitution.

4 October - An Intergovernmental Conference (IGC) is launched to consider the text and amend it if necessary but it ends in disarray as Heads of State and Government fail to agree a final text.

2004

25-26 March - The European Council meet in Brussels for its annual meeting on the Lisbon Strategy and reaffirms its commitment to reaching agreement on the European Constitution.

18 June – 25 Heads of State and Government adopt the Constitutional Treaty.

29 October - The Heads of State and Government and the EU Foreign Ministers sign the *Treaty establishing a Constitution for Europe*.

2005

12 January - The European Parliament votes in support of a resolution endorsing the *Treaty establishing a Constitution for Europe*.

25 January - The *European Union Bill* is introduced to pave the way for UK ratification of the *Treaty Establishing a Constitution for Europe*, on condition that the Treaty is approved in a referendum. The Bill falls on the calling of the general election.

¹⁷⁰ This chronology was drawn up by Tina Shingler, International Affairs and Defence Section.

20 February - The result of a referendum in Spain is in favour of the Constitutional Treaty.

24 May - The *European Union Bill* is reintroduced in the UK.

29 May - The result of a referendum in France is against the Constitutional Treaty.

1 June - The result of a referendum in The Netherlands is against the Constitutional Treaty.

6 June – In a statement to the House of Commons, Jack Straw, Foreign Secretary, announces “...until the consequences of France and the Netherlands being unable to ratify the treaty are clarified, it would not in our judgment now be sensible to set a date for the Second Reading [of The *European Union Bill*]...We reserve completely the right to bring back for consideration the Bill providing for a UK referendum should circumstances change, but we see no point in doing so at this moment ...” (c992)

10 July - The result of a referendum in Luxembourg is in favour of the Constitution Treaty.

After the rejection of the Treaty in France and the Netherlands a period of reflection on the future of Europe is launched to reconnect the citizens with the European project and to decide the fate of the Constitution.

2006

July to December - The Finnish Presidency starts preliminary work on exploring the options regarding the Constitutional Treaty.

22 November - The Commission gives its assessment of the cost of the absence of the Constitution in a staff working paper entitled “The cost of the non-Constitution.”¹⁷¹

2007

17 January - German Chancellor Angela Merkel states that the reflection period is over.

25 March - Celebrating the EU's 50th anniversary at an informal summit in Berlin, the Berlin Declaration is adopted which pledges to have a new treaty in place by 2009.

16 May – New French President, Nicolas Sarkozy, visits German Chancellor, Angela Merkel, to set out his views on efforts to revamp the Constitution.

21-22 June – European Council agrees a Draft IGC Mandate

23 July - Draft Reform Treaty circulated in French and Intergovernmental Conference launched

¹⁷¹ http://ec.europa.eu/commission_barroso/wallstrom/pdf/final_report_21112006_en.pdf

Appendix II Ratification of the 2004 EU Constitution

The following table shows the state of play on ratification of the *Treaty Establishing a Constitution for Europe*. 18 Member States are deemed to have ratified the Constitution, although strictly speaking only 15 have ratified while three (Finland, Germany and Slovakia) have completed parliamentary procedures required for ratification, but have not yet completed formal ratification.

Member State	Ratification status	Major EU-related referendum?
Austria	Ratified by national parliament. Lower house voted in favour of ratification on 11 May 2005 by 181 votes to 1. Upper house completed ratification process on 25 May 2005.	1994 - EU membership
Belgium	Ratified on 8 February 2006 by Belgium's regional parliaments. The King and the Government completed formal ratification on 13 June 2006.	
Bulgaria	Ratified by parliament on 11 May 2005 linked to Accession Treaty.	
Cyprus	Ratified by Parliament on 30 June 2005.	
Czech Republic	Plans to hold a referendum in June 2006 alongside the national general election have been postponed indefinitely following the French and Dutch 'no' votes.	June 2003 - EU membership
Denmark	Referendum scheduled for 27 September 2005 was cancelled following 'no' votes in France and the Netherlands.	1972 - EC membership 1986 - Single European Act 1992 - Treaty of Maastricht 1993 - Treaty of Maastricht (with opt-outs) 1998 - Treaty of Amsterdam 2000 - EMU membership
Estonia	Ratified by parliament's unique chamber on 9 May 2006 by 73 votes to one.	September 2003 - EU membership
Finland	On 5 December 2006 Parliament approved Constitution by 125 votes to 39. Awaiting formal ratification by President.	1994 - EU membership
France	In a referendum on 29 May 2005 55% 'no' 45% 'yes'. Voter participation: 70%. Treaty rejected.	1972 - EC enlargement 1992 - Treaty of Maastricht
Germany	Approved by German parliament's lower house, the <i>Bundestag</i> on 12 May 2005 and German parliament's second chamber, the <i>Bundesrat</i> on 27 May. Bill yet to be signed by President Horst Köhler, pending outcome of case at Federal Constitutional Court.	
Greece	Ratified by parliament on 19 April 2005 by 268 votes to 17.	Tradition of ratifying treaties by parliament
Hungary	Ratified by parliament on 20 December 2004.	April 2003 - EU membership
Ireland	A binding referendum provisionally scheduled for October 2005 has been postponed indefinitely after the results of the French and Dutch	1972 - EC membership 1987 - Single European

	referendums.	Act 1992 - Treaty of Maastricht 1998 - Treaty of Amsterdam 2001 - Treaty of Nice 2002 - Treaty of Nice
Italy	Lower chamber ratified the Constitution in January 2005. The senate completed approval by a majority of 217 votes to 16 on 6 April 2005.	
Latvia	Ratified by parliament on 1 June 2005.	September 2003 - EU membership
Lithuania	Ratified by parliament on 11 November 2004.	May 2003 - EU membership
Luxembourg	In a referendum on 10 July 2005 56.5% voted in favour and 43.5% against. The Luxembourg parliament formally ratified the Constitution on 25 October 2005.	
Malta	Ratified by the Maltese parliament on 6 July 2005.	March 2003 - EU membership
Netherlands	In a consultative referendum on 1 June 2005 61.8% 'no', 38.2% 'yes'. Voter participation: 62%. Government respected outcome. Treaty rejected.	
Poland	Original plans for a referendum on 9 October 2005 to coincide with the Presidential election have been suspended .	June 2003 - EU membership
Portugal	Original plans to hold a referendum on 9 October 2005 to coincide with local elections have been suspended following failed referenda in France and the Netherlands.	
Romania	Ratified by parliament on 17 May 2005 linked to Accession Treaty.	
Slovak Republic	Approved by parliament on 11 May 2005 by 116 votes to 27 with 4 abstentions. Complaint made to Constitutional Court that there should have been a referendum on the Constitution. Slovak president unable to complete ratification process until Court has issued its ruling.	May 2003 - EU membership
Slovenia	Ratified by parliament on 1 February 2005.	March 2003 - EU membership
Spain	In referendum on 20 February 2005 76.73% 'yes', 17.24% 'no'. Voter participation: 42.32%. Approved by parliament's lower house on 28 April 2005 and upper house on 19 May 2005. Formal ratification followed.	
Sweden	Decision on whether to proceed with ratification process has been delayed .	1994 - EU membership 2003 - EMU membership
United Kingdom	Parliamentary process and plans to hold a referendum in 2006 suspended on 6 June 2005 following French and Dutch no votes.	1975 - EC membership

Appendix III QMV in the 2004 EU Constitution

Part I articles state the general principles of Union policy or action, while Part III sets out detailed policies and voting mechanisms. Constitution articles marked in bold are those which would be new articles or would move from unanimity or cooperation to decision-making by QMV.

Qualified Majority Voting (with European Laws, Framework Laws or special procedures)	Present Procedure under TEC or TEU
PART I	
I-23(4): European Council to establish list of Council configurations other than Foreign Affairs Council (81/04)	New article
I-23(6): European Council to set conditions for rotation of Council Presidency (81/04)	Article 203 TEC, unanimity
I-26(2): European Council proposal to EP for candidate for Commission President or for new candidate (85/04)	Article 214 TEC: QMV
I-27: European Council to appoint Foreign Affairs Minister (81/04)	New article
I-36: arrangements for control of implementing powers (50/03)	202 TEC: unanimity with EP opinion
I-41: approximation of national laws in Part III to achieve area of freedom, security and justice (50/03)	TEU Preamble and Article 2 TEU: Union objectives
I-46(4): determining procedures for citizens' initiative, including minimum number of Member States required (50/03)	New article
I-49(3) and (4): general principles and limits governing the right of access to Union documents and institutions' rules of procedure on access to documents (50/03)	Article 255 TEC (co-decision with QMV; see also Constitution III-305)
I-50(2): protection of personal data by Union institutions and by Member States when carrying out Union law (50/03)	Article 286 TEC: co-decision with QMV
I-52 (3) and (4): expenditure under Article III-318 (50/03)	Article 279 TEC (part QMV, part unanimity; see also Constitution Part III-318)
I-55: establishing budget under III-310 (50/03)	Article 272 TEC (QMV)
I-59: conclusion of agreement with Member State wishing to withdraw from Union and with the Union, with EP consent (81/04)	New article
PART III	
III-6: defining principles and conditions, especially economic and financial, on which services of general interest should operate (81/04)	16 TEC: general statement on making sure that such services operate within the requirements of the Treaty
III-7: rules to prohibit discrimination on grounds of nationality (50/03)	12 TEC: co-decision with QMV
III-8(2): basic principles for incentive measures to support Member State action in III-8(1), excluding harmonisation (50/03)	13 TEC: co-decision with QMV
III-9(1): measures on freedom of movement	18 TEC: co-decision with QMV
III-11: diplomatic and consular protection measures, with EP consultation (50/03)	20 TEC: cooperation among Member States
III-19: freedom of movement for workers (50/03)	40 TEC: co-decision with QMV

III-21(1): freedom of movement for migrant workers – social security provisions (2) contains referral clause: if Member State thinks its own social security system would be affected, QMV procedure suspended and matter referred to European Council, which may refer draft back to Council or ask Commission to submit new proposal (81/04)	42 TEC: co-decision with unanimity
III-23: freedom of establishment as regards a particular activity (50/03)	44 TEC: co-decision with QMV
III-24: exempting activities from application of sub-section excluding “exercise of official authority” from freedom of establishment rules (50/03)	45 TEC: QMV
III-25: coordinate national provisions on treatment of foreign nationals (50/03)	46 TEC: co-decision with QMV
III-26: measures to make it easier for persons to take up and pursue activities as self-employed persons (50/03)	47 TEC: co-decision with QMV; unanimity in specific circumstances regarding training and conditions of access
III-29: measures to extend freedom to provide services within Union to third country nationals in the Union (50/03)	49 TEC: QMV
III-32: liberalisation of a specific service (50/03)	52 TEC: QMV
III-41: measures to strengthen customs cooperation between Member States and between M.S. and the Union (50/03)	135 TEC: co-decision with QMV
III-46(2): movement of capital to and from third countries involving direct investment, establishment, provision of financial services or admission of securities to capital markets (50/03)	57 TEC: QMV, but unanimity where step back regarding liberalisation in 57(2)
III-49: administrative measures regarding capital movements and payments (e.g. freezing funds, assets etc) (81/04)	60 TEC: QMV
III-65(1): approximation of Member State provisions for establishing and functioning of internal market, with ESC consultation, except for fiscal provisions, free movement of persons and rights of workers (50/03)	95 TEC: co-decision with QMV
III-66: measures to eliminate distortion of conditions of competition in the internal market (50/03)	96 TEC: QMV
III-68: provisions on uniform intellectual property rights protection, for authorisation, coordination and supervision of arrangements, except unanimity for sub-paragraph 2 on language arrangements for the above (50/03)	New article
III-71: rules for multilateral surveillance procedure for coordination of Member States’ economic policies (50/03)	99 TEC: co-decision with QMV
III-79: amendments to ESCB and ECB Statutes (50/03)	107 TEC: QMV on ECB recommendation or unanimity on proposal from Commission and consultation of ECB. EP assent in both cases.
III-83: measures for use of EURO as single currency, with ECB consultation (50/03)	123(4) TEC: QMV with ECB consultation
III-101: incentive measures to encourage cooperation in employment through exchanges of information and best practice, comparative analysis, promoting approaches etc, excluding harmonisation (50/03)	129 TEC: co-decision with QMV
III-104(2): support and complementing measures for Member State activities in	137 TEC: co-decision with QMV, except unanimity for 137(1) (c), (d), (f) and (g), with

workers' conditions, rights etc, measures to encourage cooperation between Member States, exchange of information and best practice etc, minimum requirements for "gradual implementation" (must not hold back SMEs) (50/03)	possibility of <i>passerelle</i> to QMV for (d), (f) and (g)
III-100: measures to ensure principle and application of equal opportunities between men and women in pay and employment (50/03)	141 TEC: co-decision with QMV
III-113/114/115: implementing measures of European Social Fund (50/03)	146/147/148 TEC: co-decision with QMV
III-117: specific measures outside Structural Funds (50/03)	159 TEC: co-decision with QMV
III-119(1) and (2) defining tasks, priorities and organisations of Structural Funds and to set up Cohesion Fund, but first Cohesion Fund after entry into force of Constitution will be by unanimity (81/04)	161 TEC: unanimity; QMV after January 2007 if multiannual financial perspective adopted by then.
III-120: implementing measures regarding the ERDF (50/03)	162 TEC: co-decision with QMV
III-127(2): common organisation of agricultural markets and other CAP and CFP measures (50/03)	Article 37 TEC: QMV with EP consultation
III-130(1): environment measures to achieve objectives in III-129, except unanimity for provisions primarily of a fiscal nature (2a) and general action programmes (3) (50/03)	175, 176 TEC: co-decision with QMV, except unanimity for provisions primarily of a fiscal nature, town and country planning, water resource management, land use (except waste management), measures significantly affecting choice of energy source and structure of energy supply.
III-132: consumer protection measures which support or supplement and monitor Member State policy (50/03)	153 TEC: co-decision with QMV
III-133/4: transport across Member States: conditions for non-state carriers to operate in Member State; improving safety, other appropriate measures (50/03). III-134(2): measures must take account of effects on standard of living (85/04)	Articles 70,71 TEC: co-decision with QMV, except unanimity for where serious effect on standard of living or employment
III-143: appropriate measures for sea and air transport (50/03)	80 TEC: QMV, but derogation as for 71
III-145: guidelines and measures for Trans-European Networks (TENs) (50/03)	155 TEC: coordination among Member States and with Commission
III-149(3) and (4): establishing programmes to implement multi-annual framework programme and establishing measures to implement European Research Area (81/04)	166 TEC: co-decision and QMV
III-150/151/152/153: rules for participation of undertakings, research centres, universities; rules for dissemination of research results for implementing multi-annual framework programme; for establishing supplementary programmes to the above; for participating in the above (50/03)	172 TEC: co-decision and QMV
III-155: measures for drawing up a European space policy (50/03)	New article
III-157: energy measures, except if primarily of a fiscal nature (85/04)	New article
III-166: measures on common visa policy, short-stay residence permits, border controls, freedom of third country nationals to travel in	62 TEC: unanimity for 5-year transitional period under Article 67; then decision by unanimity to decide which areas to be decided by co-decision

Union for short period; gradual establishment of integrated external border management; absence of internal border controls (50/03)	with QMV. Certain elements of this Article by QMV from entry into force of Amsterdam (May 1999). QMV for elements of 67(1), except for family law aspects
III-167: measures on: uniform status of asylum for third country nationals, uniform status of subsidiary protection for third country nationals, common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for granting/withdrawing uniform asylum/subsidiary protection; standards for conditions for reception of asylum applicants; cooperation with third countries to manage inflows (50/03) III-168(2): measures on: conditions of entry/residence, standards for long-term visas/permits, including for family reunion; definition of rights of third country nationals living legally in Union; illegal immigration and residence in Union, including removal and repatriation; combating person trafficking, especially women and children (50/03) III-168(4): incentive and support measures to promote integration of legal third country nationals, excluding harmonisation (50/03)	63(1) and (2), 64(2) TEC: unanimity for 5-year transition period, under Article 67
III-170: judicial cooperation in civil matters, especially for the proper functioning of the internal market (except for family law measures – see below) (81/04)	65 and 66 TEC: as above
III-171: judicial cooperation in criminal matters (81/04), except other aspects of criminal procedure identified by a European decision (50/03).	31(1) TEU
III-172: minimum rules on definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions and (2), minimum rules regarding definition of criminal offences and sanctions in the area concerned, but with referral mechanism to European Council and possible withdrawal (81/04)	New article
III-173: measures to support Member States in crime prevention (50/03)	New article
III-174(2): Eurojust structure, operation, field of action, tasks, arrangement for EP and national parliament involvement in evaluating Eurojust activities, taking into account national rules and practices regarding criminal investigations (85/04)	31(2) TEU: Council to encourage cooperation
III-176(2): police cooperation: collection, storage, processing, analysis and exchange of information; staff training and exchange, equipment research; common investigative techniques, but (3) operational cooperation between authorities by unanimity (50/03)	30(1) TEU: cooperation among Member States but under conditions and limitations laid down by Council for operations in another Member State (Article 32)
III-177: Europol's structure, operation, field of action and tasks; procedures for scrutiny by EP and national parliaments (50/03)	30(2) TEU: as above
III-179(4) and (5): public health measures to	152 TEC: co-decision with QMV

contribute to objectives of safety of organs, substances of human origin, blood etc; veterinary and phytosanitary measures, and incentive measures to combat major cross-border health scourges, including tobacco use and abuse of alcohol (81/04)	
III-180: support measures to achieve competitiveness, excluding harmonisation (50/03)	157 TEC: co-decision with QMV
III-181: incentive actions to encourage cooperation between Member States in cultural matters, conservation of cultural heritage, exchanges, artistic and literary creation, excluding harmonisation (50/03)	151 TEC: co-decision with unanimity
III-181a: measures in tourism to complement Member State action (excluding harmonisation) (81/04)	New article
III-182: incentive actions in education, exchanges, cooperation, mobility, development of sport, distance learning, excluding harmonisation (50/03)	149 TEC: co-decision with QMV
III-183: measures to improve vocational training (50/03)	150 TEC: co-decision with QMV
III-184: measures to encourage cooperation in civil protection, to protect against man-made and natural disasters, excluding harmonisation (50/03)	New article
III-185: measures to help Member States to implement Union law (50/03)	New article
III-201(2): Council adoption of decision defining Union action or position (81/04)	23 TEU: QMV for decisions adopting a Union action or position
III-213(2): Council decision on permanent structured cooperation and list of participating Member States after consulting Foreign Affairs Minister (81/04) III-213(3): Council will confirm participation of Member State fulfilling the criteria for permanent structured cooperation (81/04) III-213(4): Council may suspend a Member State from a structured cooperation (81/04)	New article
III-217: measures to implement the Common Commercial Policy (50/03) and (7) negotiating and concluding agreements with one or more states or international organisations (81/04)	133 TEC: QMV; but unanimity for agreements where provisions require unanimity for internal rules or where Community does not have conferred powers; by unanimity for agreements on intellectual property
III-219: measures to implement the development cooperation policy (50/03)	179 and 181 TEC: co-decision with QMV; unanimity when internal rules are decided by unanimity
III-221: measures to implement economic, financial and technical cooperation, especially aid, with third countries other than developing countries (50/03)	181a TEC: QMV, but unanimity for association and accession agreements
III-223: measures defining framework in which Union's humanitarian operations are implemented	New article
III-224: measures breaking economic or financial relations with a third country on proposal from Foreign Affairs Minister (81/04)	301 TEC: QMV
III-227: concluding agreements to which the ordinary legislative or special legislative procedure applies (50/03) and (8): adoption of agreements with third parties: QMV in procedure but unanimity	300 TEC: QMV, with certain provisions for unanimity (see above)

where there is a unanimity requirement for the adoption of a Union act in that area, also for Association Agreements and others in III-221 (85/04)	
III-235: EP right of inquiry: EP own initiative with Council and Commission approval (50/03)	193 TEC: common accord of EP, Council and Commission
III-264: establish specialised Court attached to High Court (Former CFI); rules on organisation and jurisdiction of Court (50/03)	225a TEC: unanimity
III-268: giving ECJ unlimited jurisdiction regarding penalties (50/03)	229 TEC: EP and Council to adopt under Treaty provisions
III-289: amend ECJ Statute, except title 1 and Article 64 (50/03)	245 TEC: unanimity
III-289a and (2)b: European Council to appoint executive board of ECB and President, Vice-President, and executive board (81/04)	112, 113 TEC: common accord of heads of state or government
III-299: amending Articles 4, 11, 12, 18(5) of European Investment Bank Statute (50/03)	266 TEC: unanimity with EP consultation
III-304: establish provisions for an open, efficient, independent European administration to support institutions, bodies, offices and agencies of the Union (50/03)	New article
III-309: establishing Union budget	272 TEC: QMV special procedure
III-310(5): joint text with EP on law establishing budget (81/04)	272 TEC: QMV special procedure
III-318: procedure for adopting and implementing budget and auditing accounts; rules for checking responsibilities of financial actors, especially authorising and accounting officers (50/03)	279 TEC: unanimity, with EP consultation. QMV after January 2007
III-321: measures to combat fraud against the financial interests of the Union (50/03)	280 TEC: co-decision with QMV
III-330: application of Constitution to certain regions (Guadeloupe, Azores, French Guiana and others) (50/03)	299 TEC: QMV
III-333: staff regulations of officials and conditions of employment of other servants of the Union (50/03)	283 TEC: QMV
III-335: measures for the production of statistics (50/03)	285 TEC: co-decision with QMV