



**CENTRE FOR POLICY STUDIES**

**WHAT IF WE SAY  
NO TO THE EU  
CONSTITUTION?**

**Lord Blackwell**

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## SUMMARY

- The proposed EU Constitution represents a significant movement for the EU from a 'single European market' towards a 'single European state'.
- Saying no to the Constitution would not mean that Britain – or any other country – would have to leave the EU. Since Treaty changes require unanimity, the immediate consequence would be to maintain the *status quo*.
- Rejection of the Constitution would, however, open up the opportunity for Britain to negotiate a new vision of Europe in which it had a relationship which suited it better – in return for allowing the countries which wished to do so to proceed with political integration.
- In determining the objectives for this alternative relationship, a primary consideration would be what kind of trading arrangements – in particular whether inside or outside of the single market – best suited the UK. There is no reason to believe that Britain could be forced into a worse trading relationship than it currently enjoys.
- The UK would also need to decide which other programmes it wished to participate in on an intergovernmental basis, and which it would opt out of. The UK's budget contribution and level of participation in EU institutions – Commission, Council, Court and Parliament – would reflect these choices.
- Subsuming our sovereignty into the EU under the Constitution represents a significant risk for Britain. The onus must fall on those who advocate further loss of sovereignty to demonstrate why this outcome is preferable for the UK when negotiating an alternative would preserve our national freedoms and established constitutional safeguards.

## CHAPTER ONE

### **BACKGROUND**

Following the publication of the draft European Constitution last summer, negotiations are now back on track with the aim of reaching agreement between Heads of Government at a summit in June 2004.

If agreed, this will replace all the current intergovernmental Treaties establishing the European Union with a new European Constitution that creates the EU as a legal entity in its own right. While the UK Government has at times argued that this is little more than a ‘tidying up’ of existing Treaty agreements, many others say that it would greatly extend EU powers beyond the ‘Single European Market’ and lock the UK into an embryonic ‘Single European State’. In recognition of the popular disquiet over the proposals, the UK Government has now reversed its previous stance and conceded that any ratification of the Constitution should be subject to a referendum.

The UK therefore faces a choice – either to go along with the proposed Constitution or to reject it. What happens if Britain says no?

A vote against the new Treaty will not require the UK to withdraw from the EU. Because Treaty changes require unanimity, if the UK does not ratify the proposed constitution the immediate consequence is simply to preserve the *status quo*. It does not follow that the UK – or any other country that votes no – would or should leave the EU.

However, in reality, a UK rejection – either at the summit in June, or in Parliament, or in a referendum – would provide an opportunity for revisiting the proposals. Indeed the Declaration accompanying the draft Constitution explicitly make provision that “if, two years after the signature

of the Treaty establishing the Constitution, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.” This Council meeting would provide a forum in which any of the Member States that wished to renegotiate its participation could discuss and agree its objectives with the other Member States.

It is probable that, at that point, some Member States will wish to proceed with further political integration. If the UK – or any other country – had voted no, then it would enjoy a strong negotiating position: the right of veto over the Constitution and in the Council of Ministers would create an opportunity to undertake a fundamental reassessment of the future vision for Europe and our role within it.

What would be the options following a rejection of the Constitution? What objectives should the UK have in any subsequent negotiation? And how do the potential outcomes compare with the consequences of saying ‘yes’.

## CHAPTER TWO

# **THE IMPLICATIONS OF THE PROPOSED CONSTITUTION**

Many of the articles in the latest (July 2003) draft Constitution reflect powers already contained in previous Treaties. However, the full proposals go substantially further towards a politically integrated union in a number of key respects. Indeed, most of our European neighbours are clear that it represents a fundamental shift from an EU which operates as a group of sovereign nation states to a new status for the EU as a sovereign entity in its own right, exercising supranational power through its own democratic institutions. Thus, for example, the President of the EU, Romano Prodi, who has declared:

The Constitution is a big change from the basic concept of nation states. It's a change of centuries.

This is echoed by the Belgian Prime Minister, Mr Verhofstadt, who stated:

The Convention's draft is quite rightly accorded the title of a Constitution: it is more than a treaty – it is the capstone of a federal state.

The Constitution for the first time establishes the EU as an international legal entity in its own right – able to stand alongside other fully fledged states – rather than, as previously, simply an organisation that administers the provisions of inter-governmental Treaties.

This legal entity, operating through its institutions – Commission, Council, Parliament and Court – lays claim to direct democratic legitimacy from the people of Europe represented in the European Parliament, with the states



represented through the Council of Ministers (effectively operating as a 'senate'). The laws enacted by these institutions will have supremacy over any national legislation.

Within these institutions, it is the Commission which is given prime place as the Executive arm of the EU, directly answerable to the EU parliament – which is the only body with the power to dismiss the Commission.

***The Protocol on Subsidiarity states that if one third of Member Parliaments lodge a protest, the Commission must review its proposals. But it then goes on to say that “after such review, the Commission may decide to maintain, amend or withdraw its proposal.”***

The scope of EU legislation that the Commission can pass under Qualified Majority Voting (QMV) is vastly extended, with a wide range of new policy areas defined as within the 'shared competence' of the EU and nation states. In addition to the internal market, agriculture and fisheries, these include:

- freedom, security and justice;
- transport and trans-European networks;
- energy;
- aspects of social policy;
- economic, social and territorial cohesion;
- environment;
- consumer protection; and,
- safety concerns in public health.

Within these 'shared' areas, the EU will have the absolute right to determine where it chooses to legislate – with Member States only able to legislate where the EU chooses to leave it to them. To these are added a number of other areas where the EU will play a 'co-ordinating role' – including economic and employment policies, and common defence and security. The Constitution does recognise some areas such as tax policy, foreign affairs and social security, where the veto is preserved. However, QMV – where the UK has no veto and only a small portion of the votes – will become the norm.

The extension of QMV is compounded by the reality that certain legislative acts by the EU will have direct applicability into UK law without the UK Parliament ever voting on them. The “Protocol on the Application of the Principles of Subsidiarity And Proportionality” does state that the Commission is required to review its proposals if one third of national

Parliaments lodge a protest that the legislation exceeds its proper boundaries. However, it goes on to say that “after such review, the Commission may decide to maintain, amend or withdraw its proposal.” In other words, the Commission, not National Parliaments, will decide the extent of its own powers.

The scope of EU legal intervention in the UK will be further extended by the formal incorporation of the Charter of Fundamental Rights into the Constitution – allowing the EU Court of Justice to strike down any UK national legislation which it interprets as contrary to this Charter.

Finally, a ‘flexibility clause’ gives the EU the right to extend its powers over Member States into any new area not explicitly covered by the Constitution if it believes that to be desirable, without needing recourse to any further national Treaty amendments.

There can be little doubt that the intention of these measures is effectively to extend the EU from a ‘Single European Market’ to become a ‘Single European State’ in all but a few areas of democratic control.

***Accepting the Constitution would represent a momentous change. The onus is on those who wish this to happen to show why it is desirable.***

Accepting the Constitution would represent a momentous change. The onus is on those who wish all this to happen to show why it is desirable. For there are alternatives that retain at least our current freedom of action and established constitutional safeguards.

## CHAPTER THREE

# **THE ALTERNATIVE: STRUCTURING A NEW RELATIONSHIP FOR THE UK**

If Britain did not sign up to the proposed Constitution, it will have the opportunity to negotiate an alternative outcome. This is unlikely to be satisfied by minor tinkering with the current draft – the extension of political integration it represents is too fundamental to be transformed by declaration of new ‘red lines’ or drafting concessions. Instead, in opening up negotiations on the alternative visions for the EU, Britain should re-evaluate and argue for its underlying objectives.

As a starting point, these objectives might include the following:

- to continue to participate in free trade with the EU as well as other major economic blocks;
- to protect or extend our freedom to pursue our own economic model of an enterprise economy, with low taxes and limited state intervention;
- to co-operate with our neighbours on issues that make sense to pursue across national boundaries. These might include policing and security issues, and the international environmental agenda;
- to encourage economic and political development of the new EU members;
- to limit (or escape from, if possible) the UK’s contribution to wasteful EU expenditure;
- to preserve our distinctive political system, constitutional freedoms and right to self-determination as a Nation.

These may be considered to be bold objectives. But the desire of many political leaders in the EU for deeper political integration should not be doubted. And they are ready to accept the principle of what has been termed 'variable geometry' in order to achieve it. For example, the German Foreign Minister, Joschka Fischer, speaking on 6 July 2000 at the EU Parliament's constitutional affairs committee, made his feelings clear:

You can't tie progress in the Union to the slowest ship in the convoy. The best solution is for all 15 states to do their historical homework and rise to the challenge together. But if they can't, countries that want to proceed will march on.

Let us be clear. The 11 countries in the euro have already given up part of their sovereignty. They have transferred it to the EU. Adopting the euro was a step towards a certain objective. We try to avoid the word 'federation' but how else can it be described."

French President Jacques Chirac, to the German Bundestag, Presidency, 27 June 2000 also forecast a similar split:

A pioneer group would be able to go further or faster during this period of transition. Starting next year I would like to see the pioneer group get to work.

The basis of negotiation would therefore be to try to agree a structure that meets the interests of the UK – and potentially some other Member States. In return, other Member States would then be free to move into the closer political and economic union unimpeded by British reluctance. If it is the clearly expressed will of the British people, other countries should then welcome this opportunity to establish a different relationship. In particular, if it wins our agreement (or removes our veto), it would be free to proceed by building on the current EU institutional structures rather than having to start afresh. This is our strongest position of leverage to get a settlement which truly suits the needs of both Britain and our EU partners.

## CHAPTER FOUR

### **IN OR OUT OF THE SINGLE MARKET?**

While the founding signatories to the Treaty of Rome may have been clear about their ultimate political objectives, the historic rationale in the UK for our membership of the EU has been presented in terms of its trading benefits. Initially this was expressed in terms of the gains of being part of an EEC customs union. Later, the economic advantages of the 'Single European Market' were advanced – although this later opened the door to extensive new powers of pan-European regulation and legislation.

It is clearly in Britain's interests to maintain favourable trading relations with the rest of Europe, accounting as it does for 50% of UK trade.<sup>1</sup> Our ability to trade freely with the continent is also likely to be an important consideration for many of the international investors who currently see the UK as a desirable location. Nevertheless, following the general reduction in world wide trade barriers, these factors are no longer as critical as they once were.

Over the last five decades, the General Agreement in Tariffs and Trade (GATT) and subsequent World Trade Organisation (WTO) negotiations have achieved a substantial reduction in most tariffs between developed economies on a multilateral basis – with the average tariff on trade between developed countries now just 3.8%.

Furthermore, Britain is unlikely to be forced to accept significant restrictions on trade. Switzerland and Norway provide useful precedents to

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<sup>1</sup> According to HM Treasury's 2003 *Pink Book*, the 2002 current account exports of goods and services to the EU represented 50.1% of total exports, while imports totalled 51.5%.

illustrate that even countries completely outside the EU can agree favourable trading agreements with the EU as a whole. In Norway's case it takes advantage of an agreement between the EU and the European Economic Area (EEA) under which it participates fully as a member of the 'single market'. Switzerland uses a separate agreement with the European Free Trade Area (EFTA) under which it operates a free trade relationship with the EU but remains outside the single market.

Increasingly, too, other areas of the world are more important to the UK's trade growth than the EU. This reflects both the poor prospects for future growth in a Europe hobbled by high public spending and social costs, excessive regulation and a flat or falling working population; and, by contrast, the rapid growth in the emerging economies such as China, India, Russia and Brazil. According to estimates by Goldman Sachs, these four countries are likely to grow from less than 15% of the GDP represented by the G6 (US, Japan, UK, France, Germany, Italy) in 2004, to over 125% of the G6 economies in 2044. These new markets are therefore likely to be of greater importance than the old markets of the EU.

In reality, it should be possible to negotiate a position that preserves our free trade relations with Europe in one guise or another, whatever the nature of our overall relationship within or outside the EU. There is no reason why our EU trading partners should want to put us in a worse position than Norway or Switzerland. In addition, the WTO's 'most favoured nation' rules would prevent any attempt at discriminatory behaviour intended to 'punish' the UK relative to the EU's other developed economy trading partners (the first article in GATT states that a country must not discriminate between its trading partners and must not discriminate between its own and foreign products, services or nationals).

## **THE SINGLE MARKET: OPTIONS FOR BRITAIN**

What kind of relationship should Britain seek? And, in particular, should Britain stay inside the single market? The options are outlined below.

### **1. Stay a member of the EU single market, with the associated privileges and obligations**

Staying a member of the single market might be the safest way of ensuring access to European markets on the same terms as other EU members, where otherwise these would have to be renegotiated and agreed.

The EFTA alternative, for example, does not explicitly cover trade in services. As the EU develops an open access regulatory framework that allows cross-border recognition of services that meet standards in the country of origin, there is a risk that a UK outside the single market might be disadvantaged in having to conform to imposed EU standards – unless reciprocal arrangements were explicitly negotiated. On the other hand, it can be argued that UK firms that wish to trade across Europe are likely to move towards common standards in any case.

There is also a risk that, if Britain were outside the single market, regulations based on ‘rules of origin’ might be used to impose tariffs on products assembled in Britain from imported components (which currently can be traded duty-free so long as duty has been paid on components when they enter the Britain.) However if Britain kept its external tariffs at the same level as the rest of the EU, then it should be able to agree an offset arrangement that would prevent imposition of double duties.

Single market membership also implies continued membership of ‘free movement of labour’ regulations which many in Britain will value; if Britain were outside the single market it would have to negotiate to preserve freedom of movement of labour if this was regarded as important.

Retaining full membership of the single market would also bring advantages in being able to influence policy decisions on standards that, sooner or later, are likely to affect Britain. As a member of the EU, Britain would have a vote in council on single market legislation (although since single market decisions are taken by QMV, it is a relative limited influence). The alternative, like Norway, is to be to be part of the single market through the EEA agreement, but without any vote.

On the other hand, the single market is increasingly becoming a prime source of excessive business regulation, where the UK Parliament has no power to intervene. Furthermore, following Britain’s accession to the so-called Maastricht ‘Social Chapter’, single market regulations are increasingly extending into labour market laws, as well as health and safety and ‘human rights’. Under the proposed constitution the scope would become even broader, reinforced by the incorporation of the Charter of Fundamental Rights into the constitution itself.

If the UK negotiates to stay inside the single market it should therefore, as a minimum, seek to reinstate derogations from labour market and social market rules that threaten our competitiveness. Ideally it should also seek the right for our own UK Parliament (and indeed other national Parliaments) to have blocking power on any new single market regulations that we do not believe are essential to European free trade.

## **2. Leave the single market but remain within the EU tariff block through the EFTA agreement**

If a satisfactory agreement within the single market cannot be agreed, it may be preferable to secure a free-trade position outside the single market, through participating in pan-European regulations where desirable.

The considerations here are the converse of the arguments above. While leaving the single market could risk some barriers on service exports and on re-export of products made from imported components, the downside may be limited – and it could free us from unwanted and costly regulatory interference. Making this judgement requires a detailed sector by sector analysis of the potential consequences, cost and benefits.

If Britain did choose to move to an EFTA-style relationship, it could agree to continue to impose the same tariffs as the EU for imports from outside the EU, and could continue to participate in the WTO as part of an EU trade negotiating block. However, since WTO agreements should apply equally to all developed economies, it may make little difference. Britain would need to weigh up the advantages of being part of a bigger grouping against the loss of our freedom to argue our own case.

### **3. Leave the single market with no formal trading arrangement**

At the extreme, if Britain left the single market and could not (or chose not to) enter into the EEA or EFTA arrangements, it would fall back on using the WTO most-favoured nation terms to prevent tariff discrimination against the UK. As noted earlier, the potential downside from this position may no longer be very large, and it would have the advantage of completely freeing the UK economy from EU regulatory interference. It would also leave Britain free to pursue alternative trading relationships with other groups such as NAFTA.

*It seems very unlikely that, whatever happens, Britain would be excluded from the single market. Switzerland, Norway and even Mexico have all negotiated favourable free-trading relations with the EU.*

In practice, however, this extreme seems very unlikely. It is not only Switzerland and Norway who have negotiated favourable free-trading relations with the EU: the same is also true of Mexico. Since Europe needs Britain's agreement for any change from the *status quo* on the current EU treaties, it would be absurd to suggest we could not use that negotiating position to agree as least as good a trading position as that granted to Mexico. The real question is which position is likely to be most advantageous to the UK.



## CHAPTER FIVE

# **PARTICIPATION IN OTHER EU PROGRAMMES**

### **ECONOMIC AND MONETARY UNION**

The arguments for and against participation in the Euro have been well debated in recent years, but it is becoming increasingly accepted that it has been – and still remains – in the UK's interests to retain economic and monetary freedom to manage our own economic cycles and to find our own exchange rate equilibrium. The UK's opt-out from EMU at Maastricht remains a powerful example of the ability of Britain to shape its relationship with the EU in the way that suits it. It is not necessary to participate in every integrationist step taken within the EU.

*The UK's opt-out from EMU remains a powerful example of the ability of Britain to shape its relationship with the EU in the way that suits it.*

Furthermore, while the focus so far within EMU has been on monetary union, the arrangements for 'economic co-ordination' set out in the proposed Constitution are clearly intended to bring about the fuller economic union that was originally intended. Indeed, monetary union can really only be sustainable if the EU is able to impose a sufficient framework of fiscal discipline across members to avoid those countries with prudent affairs suffering the interest rate and inflationary consequences of their

more profligate neighbours. The extent to which Germany and France have been able to brush aside the stability pact rules has only reinforced the need for more permanent arrangements if the Euro is to survive.

This is not a route which is attractive for Britain at present, and it is likely to remain unattractive for the foreseeable future. In particular, Britain needs to avoid getting drawn into funding implications of continental Europe's growing pension and social security costs. Even if these remain a national responsibility, the fiscal burden of the collective public sector deficit is likely to drive up Euro bond rates or tax rates and depress consumption and growth across the whole Euro area.

Britain's opt-out of the whole of Economic and Monetary Union – not just the Euro – needs to remain untouched.

## **DEFENCE AND FOREIGN AFFAIRS**

The draft text of the new Constitution already signals a strong move towards the creation of a European 'Foreign Minister' with aspirations to become the single voice of Europe on the world stage.

Although the broad outline of EU foreign policy positions will have to be agreed by unanimity, the Constitution will give substantial scope for the EU to develop its own view on the implementation of that policy – and to then call on all Member States to refrain from acting against the common position. It also clearly sets out the framework for increasing integration of defence forces within a common European command.

In negotiating its own position outside this constitutional arrangement, Britain's objectives should be:

- to participate in reaching intergovernmental agreement on common positions in foreign affairs where appropriate, but on a case by case basis. Britain should not agree to any independent role of a European 'foreign minister' representing UK interests, or seeking a European seat to displace the UK at the United Nations. Nor should Britain agree any structure under which the EU could reach a common position that is imposed on the UK by majority voting; and,
- to participate in specific common defence initiatives where it is in Britain's interests, but only through clear intergovernmental agreements where the lines of command are acceptable, and where they are compatible with Britain's NATO obligations and commitments.

## **EU PROGRAMMES AND BUDGET CONTRIBUTIONS**

In the light of its level of participation in EU programmes, the UK also needs to agree how it contributes to the EU budget – which, in total, is projected by the EU commission to reach €115 billion in 2006. Of this, the UK's share is likely to amount to a net cost of £4 billion.

Reflecting plans for an increasing range of EU competences, the Commission has proposed that the overall EU budget should take an expanding share of national incomes – rising from 0.98% of EU Gross National Income in 2006 to 1.15% in 2013. At a time when public spending in the UK is already outstripping prudential limits, it is questionable whether supporting these European spending aspirations is the right priority for UK taxpayers – particularly if Britain is not a full participant in all aspects of the EU's future development. The aim should therefore be to negotiate a level of contribution that more fairly reflects Britain's desired level of participation.

### **Agriculture and Fisheries**

The biggest issues in expenditure terms are the Common Agricultural Policy (CAP) and Common Fisheries Policy (CFP). These account for about 40% of the EU budget. There are at least some encouraging signs that reforms of the CAP to reduce the costs of subsidising EU farmers are in train – and will be further encouraged by the pressures from developing countries as the next round of WTO negotiations gets under way. Nevertheless, it remains to be seen how far those reforms can go against the continued desire to use CAP as a vehicle for rural income support in much of Europe.

Britain should, at the very least, negotiate the right to withdraw from CAP if it is not satisfied with the speed of reform, and to reduce our budget contribution accordingly. It should also consider withdrawing from the CFP now, since the noble aim of international agreement on preserving fish stocks is clearly being used and abused in ways that are contrary to fair-play for the national industry. However, Britain's position on both CAP and CFP will need to be agreed in the context of the overall negotiations.

Other programmes funded by the EU cover a wide range of objectives from economic to culture. While some may be regarded as part and parcel of the single market, others are clearly more questionable. The main areas of expenditure set out in the Commission's projections for 2006 are as follows:

### **Competitiveness for growth and employment: €8.7 billion**

This covers expenditure to support the Union's 'physical and knowledge structure', including promoting the competitiveness of enterprises, strengthening research and technological development, developing EU networks, improving education and training; and a 'social policy agenda' to help manage change.

Other than sharing the costs of EU competition policy and signing up to specific research project and networks, it must be doubtful whether much of this expenditure is best undertaken on our behalf by the EU.

**Cohesion for growth and employment: €38.8 billion**

This covers regional aid to less developed regions and states as well as cross-border programmes. In principle, it is likely to be a requirement of the single market, if Britain were to remain inside, to contribute to development of accession countries – though there is clearly scope for questioning the value for money received from EU programmes.

**Sustainable management of natural resources: €56.2 billion (of which agriculture €43.7 billion).**

If Britain were to opt out of the EU's Agriculture and Fisheries policies, most of this would go.

**Citizenship, freedom, security and justice: €1.6 billion**

This includes funding for policing of the common asylum and immigration policy, as well as for Europol; but also includes funding for 'cultural co-operation' and exchanges to support the concept of European citizenship. Since this is a fast growing area of the EU budget, it is likely to be one where Britain's participation should be very selective.

**The EU as global partner: €11 billion**

This covers EU aid programmes as well spending to support the EU's objectives of increasingly representing Europe through a single foreign affairs spokesman and common initiatives. Clare Short, when International Development Secretary, branded these programmes as "ill-conceived", "dreadful" and "harming to the environment".

Britain would be free to opt out of most of this if it does not participate in the single foreign policy.

**Administration: €4 billion**

The balance of the EU budget is administration costs, which will need to pay for the growing infrastructure costs of European Union institutions that support the 'single European State'. Britain will obviously need to avoid picking up the bill for overheads which are unrelated to our EU status.

The EU budget beyond 2006 is likely to include increasing costs from new programmes associated with the 'single European state', so the level of the UK's contribution to the European budget will need to be adjusted to reflect our participation in common European programmes rather than a fixed percentage of the total. Under most scenarios for a new constitutional settlement it will be significantly less than now, with no automatic increase.

## CHAPTER SIX

# **PARTICIPATION IN EU INSTITUTIONS**

The institutions of the EU have become institutions able to exercise supranational power. The Constitution will develop its powers still further. If Britain does not want to participate in the political union that this entails, but is happy to see others forming a smaller grouping, Britain would obviously not accept the same authority of these institutions. The development of the European Central Bank as an institution in which only members of the Euro participate is a working example of this approach in practice.

*The development of the European Central Bank as an institution in which only members of the Euro participate is a working example of this approach in practice*

The EU institutions would therefore need to evolve a ‘two circle’ approach – an inner circle that is increasingly bound by the Constitution into common EU-wide legislation and institutional structures; and an outer circle (that may include others as well as Britain) that enables decision-making in those areas shared with the inner circle.

### **THE COUNCIL OF MINISTERS**

The Council of Ministers is the senior legislative body of the EU, and has to approve all legislation by either QMV or (in a declining number of areas under the proposed Constitution) by unanimity. This will become

effectively the ‘senate’ or second chamber for the single European State, and in that capacity would exclude Britain if it were not a full participant in a EU core Group.

However, an extended Council of Ministers in its current form would need to continue to meet from time to time with Britain participating to reach agreement on those Treaty areas where the UK still had a voice and a vote – for example, the mandate for Trade negotiations and regulations of the single market (if Britain remain a member of the single market).

### **THE COMMISSION**

The Commission too is likely to become the executive structure in a more integrated EU. Under the proposed EU Constitution it will have the right to propose laws that, if enacted by the EU Council and Parliament, would translate directly into national law. If Britain were outside the inner ring, then the Commission would only have that authority with respect to those specific areas of European competence which Britain had opted to remain part of (such as the single market or trade policy). These areas of legislation would need to go through a different approval process – for example the wider Council of Ministers – than those areas which were entirely related to Member States within the inner circle.

### **THE EUROPEAN COURT OF JUSTICE (ECJ)**

Like the Council and the Commission, the European Court could end up playing two roles. Firstly it would play the role outlined in the Constitution as the supreme court of the inner circle – with ultimate legal and constitutional authority for those members within that group; and secondly, it could also potentially act as ‘keeper of the rules’ for the wider activities where Britain (and potentially others) were also engaged. However the danger would be that the court would inevitably tend to reflect the interests of the inner group. It would also risk perpetuating the notion of the European Court as a superior court with respect to UK legal precedents across a wide field.

A preferable proposal, therefore, is that the current ECJ should be divided into two separate Courts: a new ‘European Treaties Court’ for the outer circle and the EU Court for the inner circle. The European Treaties Court would then deal specifically with the rules and regulations applying to the wider circle – for example, single market rules if Britain participated. Both the EU Court and Britain’s own judicial system would nominate members. Only the European Treaties Court would have jurisdiction on UK legal matters, whereas the EU Court would be regarded as the court of a foreign jurisdiction.

Another consequence of this separation of legal jurisdictions is that we would then be free to choose not to incorporate the Charter of Fundamental Human Rights, thereby removing the risks under the current proposals of the ECJ overriding UK national laws.

## **THE EUROPEAN PARLIAMENT**

The European Parliament is an embryonic source of direct democratic accountability for the future 'Single European State'; but has very little relevance to most of those areas of common action where the UK might wish to remain part of the EU on an intergovernmental basis.

The simplest solution would be for the UK to simply opt out of the European Parliament, since most of its deliberations would not be relevant to the UK – and where they were relevant it risks being a rival to the legitimacy of the UK Parliament. However there may be an option to have UK members that were entitled to attend and perhaps speak, but could not vote on any area which did not directly affect the UK. This would be similar to the proposals some have put forward to limit the role of Scottish MPs to legislate on English affairs in the UK Parliament.

## CHAPTER SEVEN

### **CONCLUSION**

Those who argue that Britain has no option but to agree to the proposed constitution often argue that there is only one alternative: to ‘leave Europe’ – with unspecified but clearly implied catastrophic consequences.

The reality is different. Britain is now at its strongest negotiating position. In return for its consent to the Franco-German axis continuing their move to political integration, Britain can and should settle an arrangement with the EU that preserves its political and constitutional independence as well as its ability to manage its economic affairs to its own distinctive agenda.

A number of issues will need to be weighed in the balance – for example, whether Britain is in or out of the increasingly over-regulated single market, in or out of CAP and CFP, which programmes it wishes to participate in and how much it should contribute to the EU budget. There are a range of co-operative programmes where Britain can argue for participation on an intergovernmental basis. And Britain will also have a range of options to agree with our EU partners on how the EU institutions should evolve, distinguishing between those legal structures that will serve the needs of a single European State and the wider intergovernmental agreements to which Britain may remain party.

The outcome from tackling these issues in a fresh negotiation should be one which is very much in Britain’s interest. It will be an improvement on the *status quo* – where *de facto* integration is taking place through EU legal creep. And it will be a better outcome than the disastrous consequences that would follow from signing up to a constitutional settlement that few in Britain want.



## APPENDIX

# KEY PROVISIONS OF THE PROPOSED EU CONSTITUTION (draft of 18 July 2003)

### CONSTITUTION ARTICLES

### COMMENTARY

#### A. STATUS OF THE EU

##### **Article 6: Legal personality**

“The EU shall have legal personality.”

Changes the EU from an organisation administering intergovernmental treaty provisions to a legal power with sovereignty in its own right. A precondition for the creation of a single European State.

##### **Article 18: The Union’s Institutions**

“(1) The EU shall be served by a single institutional framework which shall aim to:

- advance the objectives of the union,
- promote the values of the union
- serve the interests of the Union, its citizens and its Member States...”

Confirms the EU institutions as components of the EU legal constitutional structure, forming the backbone of the single European State.

##### **Article 45: The principle of representative democracy**

“(2) Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council and in the Council of Ministers by their governments...”

Establishes the right of the EU governing institutions to regard themselves as acting directly under the democratic control of ‘EU citizens’ rather than through the delegated power of the Member States. The Council of Ministers effectively becomes a ‘senate’ where Member States are represented alongside the European Parliament.

##### **Article 25: The European Commission**

“(2) Except where the Constitution provides otherwise, Union legislative acts can be adopted only on the basis of a Commission proposal...”

“(5) The Commission, as a College, shall be responsible to the European Parliament. The Commission President shall be responsible to the European Parliament for the activities of the Commissioners. Under the procedures set out in Article III-243, the European Parliament may pass a censure motion on the Commission. If such a motion is passed, the European Commissioners and Commissioners must all resign...”

Confirms the role of the appointed Commission as the executive arm (government) of the EU single state, responsible to the EU Parliament rather than the Member States.

##### **Article 22: The Council of Ministers**

“(3) Except where the Constitution provides otherwise, decisions of the Council of Ministers shall be taken by qualified majority.”

Makes majority voting the normal procedure across all aspects of the EU. National vetoes will only be retained where explicitly provided for.

## **Article 10: Union Law**

“(1) The Constitution, and law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.”

Confirms that laws passed by these EU institutions will override national Parliaments and courts.

## **B. OBJECTIVES OF THE EU**

### **Article 3: Union Objectives**

“(3) The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Preamble that firmly entrenches in the constitution a set of ‘social market’ political objectives favoured by the current continental governments. Sets the context for action by the union below to ‘coordinate’ economic and social policies, and creates the risk that future action by a free market UK government that was interpreted by a EU court as contrary to these principles would be struck down.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children’s rights.”

## **C. POWERS OF THE EU**

### **Article 11: Categories of Competence**

“(1) When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts adopted by the Union.

Establishes that the EU is dominant not only in areas of exclusive competence (eg Trade negotiations), but also in the much wider area of shared competences where national Parliaments are only allowed to take action if the EU has decided not to legislate itself.

(2) When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and Member States shall have the power to legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.”

### **Article 13: Areas of Shared Competence**

“2. Shared competence applies in the following principal areas:

Greatly extends the areas of competence where the EU will be able to initiate legislation (see above), and where decisions will normally be by majority voting.

- internal market,
- area of freedom, security and justice,
- agriculture and fisheries, excluding the conservation of marine biological resources,
- transport and trans-European networks,
- energy,
- social policy (for certain aspects defined in Part III),
- economic, social and territorial cohesion,
- environment,
- consumer protection,
- common safety concerns in public health matters.”

**Article 14: The coordination of economic and employment policies**

“(1) The Union shall adopt measures to ensure coordination of the economic policies of the Member States, in particular by adopting broad guidelines for these policies. The Member States shall coordinate their economic policies within the Union.”

Provides a basis for progressive control of economic policies, in line with EU objectives above.

**Article 15: The common foreign & security policy**

“(1) The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy, which might lead to a common defence.

Establishes the objective of a common foreign and defence policy. Although the Constitution singles this out as an area where unanimity is required to agree the policy framework, implementation will be in the hands of the EU.

(2) Member States shall actively and unreservedly support the Union’s common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the acts adopted by the Union in this area. They shall refrain from action contrary to the Union’s interests or likely to impair its effectiveness.”

**Article 27: The Union Minister for Foreign Affairs**

“(1) The European Council, acting by qualified majority, with the agreement of the President of the Commission, shall appoint the Union Minister for Foreign Affairs. He or she shall conduct the Union’s common foreign and security policy...”

Confirms the position of a single foreign affairs minister to conduct the Union’s common foreign policy .. which implies a subsidiary role for national foreign ministers.

**Article 32: The legal acts of the Union**

“(1) In exercising the competences conferred on it in the Constitution, the Union shall use as legal instruments, in accordance with the provisions of Part III, European Laws, European framework laws, European regulations, European decisions, recommendations and opinions.

A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.

A European framework law shall be a legislative act binding, as to the result to be achieved, on the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result.”

Summarises the scope that EU institutions can exercise to create laws under the areas where it has competence which can apply directly into the laws of Member States, without requiring legislation in national Parliaments.

**Article 17: Flexibility Clause**

“If action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures.”

Allows the EU in future to add any powers over Member States not provided in the current Treaty without reference back to national Parliaments, or to the electorate in a referendum.

## **D. SUBSIDIARITY**

### **Protocol on the application of the principles of subsidiarity and proportionality**

“(5) Any national Parliament... may send a reasoned opinion stating why it considers the proposal in question does not comply with the principle of subsidiarity...

(6) Where reasoned opinions on a Commission proposal’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to Member States, the Commission shall review its proposal....After such a review the Commission may decide to maintain, amend or withdraw its proposal.”

While the enhanced role for national Parliaments in scrutinising EU legislation has been much trumpeted, the terms of these provisions make it a meaningless concession.