



## The CER guide to the EU's constitutional treaty

**A**t the second attempt, EU leaders clinched a deal on the new constitutional treaty at the Brussels summit on June 18<sup>th</sup> 2004. However, it is far from certain that the constitutional treaty will ever enter into force. It will not become law unless parliaments in all 25 member-states ratify the document. Moreover, at least nine countries are set to hold referendums. The chances of one country voting No in a referendum, and thus scuppering the treaty, are considerable. Therefore governments face the difficult task of explaining to their electorates what the treaty really means and why it is vital to the future of the EU.

The constitutional treaty is certainly more than a mere “tidying-up exercise”, in the now infamous words of British minister Peter Hain. But it does not provide the foundation for a federal super-state, as many of its detractors claim. Rather, it is a pragmatic and mostly sensible attempt to improve the efficiency and flexibility of the EU after its enlargement to 25 member-states; to increase the EU's legitimacy by giving more of a say to parliamentarians, both in the European Parliament and in national legislatures; and to make it easier for EU governments – whether all 25 or a subset – to work together in certain tightly defined areas, such as internal security or defence.

While this outcome may disappoint both pro- and anti-Europeans who desired more radical change, it reflects the reality of EU politics. This attempt to reform the way the EU works began with an innovation: governments asked a European Convention – made up of MPs, MEPs, Commission and national government representatives – to draft a new treaty. But once the Convention, under the chairmanship of former French President Valéry Giscard d'Estaing, had thrashed out a compromise draft, the document was handed over to an inter-governmental conference (IGC), where member-states battled to defend national interests and ‘red lines’.

The result is a document that is riddled with compromises, in typical EU fashion. The treaty contains opt outs, opt ins, ‘emergency brakes’ and ‘accelerators’ in many sensitive policy areas, such as foreign policy, defence, and police and judicial co-operation. Many of these procedures were introduced on an ad hoc basis during the latter stage of negotiations, to help smooth the way towards a final agreement. Yet together they form a very clear trend: under the constitutional treaty the EU will be far more diverse and flexible than it is now. Different groups of member-states will be able to pursue integration – in defence, or criminal law, or even the harmonisation of tax bases – while others can choose to watch from the fringes.

### **Institutional reform**

The question of how to reform the EU's institutions provoked the greatest controversy during the Convention and the IGC that followed. The Convention started its work with three main objectives: to redesign the EU's institutions to cope with enlargement to 25 countries; to tackle the EU's perceived lack of legitimacy; and to simplify the Union's rulebook to make the EU more transparent and more comprehensible.

The constitutional treaty does not quite meet those lofty ambitions, although it does improve the existing institutional architecture. A series of reforms, including a simplified voting procedure in the Council of Ministers and a new president of the European Council, should improve the EU's efficiency. However, the final agreement required a number of compromises – such as ‘emergency brakes’ on majority voting – which will reduce the effectiveness and transparency of the new system. The constitutional treaty also extends the powers of the European Parliament and involves national parliaments more closely in EU law-making. On

balance, therefore, the treaty will help to make the EU more democratic, although it is unlikely to convince many European voters that the EU has become much more accountable and legitimate.

### *A more efficient Union?*

The December 2003 European summit, which was supposed to finalise the text of the constitutional treaty, foundered on the issue of majority voting in the Council of Ministers, the EU's main law-making body. Spain and Poland initially insisted that the EU stick to the fiendishly complicated 'triple majority' system agreed at the Nice summit in 2000. This system (which comes into force on November 1<sup>st</sup> 2004) gives Poland and Spain almost as many votes as the EU's largest countries, including Germany, although they have much smaller populations. Following severe criticism of their intransigence and a change of government in Spain, both countries adopted a more conciliatory stance in 2004. This opened the way for agreement on a simpler 'double majority' system, which looks similar to the Convention's initial proposal. Under the new system, which will come into force in 2009, a measure will pass if it is supported by 55 per cent of the member-states, provided these countries represent 65 per cent of the total EU population.

The new voting rules should ensure that EU decision-making does not grind to a halt in the enlarged Union. A recent analysis from the Centre for Economic Policy Reform suggests that the new rules will make it as easy for 25 or more member-states to agree on a measure as it was when the EU only had 12 members before 1995. But the agreement on double majority came at a price, namely a series of safeguards that undermine the treaty's simplicity and transparency. Poland and Spain insisted that only a group of four or more countries should be able to block a measure. The aim was to prevent just three of the largest member-states (Britain, France, Germany and Italy) working together to hold up an initiative that is supported by all the small and medium-sized member-states.

EU leaders have also agreed to use a higher threshold when voting on some sensitive policy areas, such as foreign and security policy or some aspects of economic policy. In such areas, it is sometimes the Council or a group of member-states – rather than the Commission – that initiates a legislative proposal. In these sensitive areas, a proposal would require the support of at least 72 per cent of member-states, representing 65 per cent of the EU population. The constitutional treaty contains one further transitional safeguard. Until 2014, a group of member-states, equal to three-quarters of the usual blocking minority, may request that the Council reconsiders a hotly disputed measure 'with a view to finding a compromise' – thereby effectively blocking it, at least in the short term. A similar mechanism (the 'Ioannina compromise') already exists but has never been used.

### *Extensions of majority voting*

In its attempt to keep the EU functioning after enlargement, the new treaty not only introduces a simpler voting system, but it also reduces the number of policy areas that require the member-states' unanimous agreement. In total, the treaty extends majority voting to 44 new areas. Apart from justice and home affairs (see page 5), most of these policy areas are of minor importance. They are primarily concerned with the implementation of existing policies rather than the development of new ones. For example, EU countries will be able to use majority voting to decide on sending urgent humanitarian aid to developing countries, and on setting the pay and conditions for Commission officials. Britain was not the only country cautious about more majority voting. But it was the most successful in defending its 'red lines', which for the UK covered taxation, defence and foreign policy, as well as revenues for the EU budget (to ensure that the UK's special 'rebate' stays in place). France and Denmark, meanwhile, insisted on keeping the national veto on some aspects of trade policy, such as films and other cultural goods, as well as social, educational and health services.

In several areas where the treaty extends the use of majority voting – notably on criminal procedural law and social security for Europeans working in other EU countries – EU leaders agreed to add an 'emergency brake': if a member-state dislikes a decision taken by majority vote on an issue that it considers vital to its national interests, it may refer a legislative proposal to the European Council. The European Council, acting by unanimity, can either decide to approve the measure, or ask the Commission for a new proposal. Thus a country which uses the emergency brake has a *de facto* veto. In practice, it is unlikely that any member-state would wish to invoke this complex procedure often.

A so-called *passerelle* clause in the treaty allows the EU to extend majority voting further in the future. If all member-states agree, the EU can adopt majority voting in a new area without having to renegotiate and re-ratify the whole treaty. However, the treaty also contains a significant extra safeguard: the European Council must notify all national parliaments of its decision and allow them six months to object. If one national parliament objects, the move to majority voting is blocked. Thus national parliaments have gained the right to veto the use of the *passerelle*. Moreover, member-states cannot use this mechanism to move to majority voting on anything which could have military implications.

### *A European Council 'president'*

Under the provisions of the new treaty, heads of government meeting in the European Council will elect a chair, or president, for a term of two and a half years. This innovation is designed to replace the system of rotating presidencies, which is widely seen as inefficient. At present, the presidency of the

European Council – like that of the various sectoral councils that bring together farm or health ministers – shifts from one member-state to another every six months. EU countries tend to use their stint in the chair to promote their own pet projects, which makes for erratic agendas with little follow-up. Moreover, countries outside the EU find the constant change in leadership confusing.

The Council president's main tasks will be to “drive forward” the work of the European Council, “ensuring better preparation and continuity”, and “cohesion and consensus” within it. But supporters of the new Council president, including the UK, are disappointed with the treaty's vague job description. They fear that the Council president could turn out to be like the NATO Secretary-General, who is scarcely able to launch an initiative without the consent of every NATO government, rather than a leader who can drive forward the EU's agenda. Much will thus depend on the authority and abilities of the first person to hold the job.

The treaty also modifies the way the Council of Ministers is chaired. The new system aims to ensure more consistency over time and to help smaller member-states with the burden of running the EU's business. Under the new system, a team of three member-states will assume the presidency of the various council configurations (with the exception of the Council of Foreign Ministers) for 18 months. Each of the three will chair all Council meetings for a six-month stint. The new system may marginally improve the co-ordination of the Council's work. But in the long run the creation of the European Council president is likely to prove far more important to the coherence of EU policymaking.

### *The size of the Commission*

The larger member-states pushed through a proposal that will cut the size of the European Commission. France and Germany, in particular, insisted that a Commission with 25 or more commissioners would be unlikely to function effectively. However, smaller countries fiercely resisted the loss of ‘their’ voice in Brussels and the final deal is an unwieldy compromise.

The treaty caps the overall number of commissioners (somewhat arbitrarily) at two-thirds of the number of member-states. All member-states will have an equal right to appoint a commissioner, which means that every member-state will have a commissioner in Brussels for two out of every three Commission terms. But exactly how this rotation system will function is not spelt out.

The new system will not become operational until 2014, which means that the next two Commissions will be based on the principle of one commissioner per member-state. EU leaders also left open the possibility of changing their minds about the composition of future Commissions, although they

can only do so by unanimity. The treaty includes a declaration that calls on the Commission to take full account of the views of those member-states without a commissioner. But the declaration provides no guidance as to how this might work in practice.

Whether these new arrangements will greatly improve the efficiency of the Commission remains open to question. The next two Commissions – which will include 25 or more commissioners – could prove so unmanageably large that governments will be ready to welcome the new slim-line Commission in 2014. On the other hand, the smaller Commissions of the future may appear even more remote to people in those member-states without a commissioner. A system of less than one commissioner per country could seriously damage the Commission's legitimacy, and that would be too high a price to pay for a modest boost in its efficiency.

### *A more flexible Union*

The new treaty also paves the way for a more flexible Union, offering various methods for small sets of countries to work together more closely on policy initiatives that are not backed by all 25. The current EU already operates with some flexibility. The Amsterdam treaty, which came into force in 1999, introduced the concept of ‘enhanced co-operation’, which allows a subset of countries to proceed with a policy initiative. But the conditions are so strict that the procedure has never been used. Instead, the EU has relied on individually negotiated opt-outs from certain policies, as has happened with the Schengen area of passport-free travel or the euro.

The constitutional treaty provides new incentives for member-states which wish to use enhanced co-operation. So long as the Council of Ministers, acting by majority vote, approves, a group of member-states may establish an enhanced co-operation. This subgroup must comprise at least one third of the total membership of the EU and, once established, the group can then take decisions by majority vote. For example, a group of states might establish an enhanced co-operation for taking decisions on corporate taxation by majority vote. Those countries outside the *avant-garde* would be unaffected by its decisions, and would retain a veto when tax matters were discussed in the full Council.

In addition, the treaty also introduces special rules for co-operation in defence, called ‘structured co-operation’, and in JHA, known as the ‘accelerator’ (see below). Some member-states are sure to take advantage of this proliferation of flexibility mechanisms.

However, these provisions do not mean the treaty will help to create a two-speed Europe, whereby a ‘core’ participates in every EU project and the remaining member-states tag along in an outer circle. Rather it opens up the possibility that member-states will take a ‘pick ‘n’ mix’ approach to future integration, in line

with their very different capabilities and ambitions. For example, the UK would be highly unlikely to join an *avant-garde* group which sought to harmonise corporation taxes or develop a common industrial strategy. But Britain could want to lead defence co-operation. In contrast, Austria would be far more likely to participate in the first group than to take part in defence projects.

### *Greater legitimacy?*

The new treaty seeks to enhance the EU's legitimacy in two main ways: by involving national parliaments more closely in the EU's legislative procedures, and by extending the power of the European Parliament.

Members of national parliaments have long complained that the EU does not take proper account of their views when taking decisions. The new treaty obliges the EU to keep MPs fully informed of its work: in future, the Commission must forward all its documents, from consultation papers to draft directives, to national parliaments for scrutiny and comment. The treaty also allows national parliaments to object to any EU measure which they think violates the subsidiarity principle, which says that the EU should only take action if a policy can be "better achieved at the Union level". A new subsidiarity protocol states that if a third of national parliaments object, the Commission (or whichever institution initiated the legislation) has to review the measure. But the EU is not obliged to revise or drop the proposal. This is unfortunate: if a number of parliaments were able to block, rather than merely question, a legislative measure, MPs would be seen as playing a crucial role in the law-making system.

The powers of the European Parliament have grown in every treaty revision, and this one is no exception. In particular, most EU business will now be decided through the 'co-decision procedure', whereby the Commission proposes a policy measure and the Council and European Parliament jointly decide on it. The treaty also extends co-decision to the EU's €100 billion annual budget. Currently, the European Parliament only gets a say over 'non-compulsory' expenditure, a category that excludes most EU farm spending. In future, the Parliament will be able to suggest amendments to all parts of the budget. In foreign and security policy the European Parliament will continue to have only a consultative role.

Although these reforms extend the role of directly elected parliamentarians in EU policy-making, they are unlikely to end complaints from voters and national politicians about the EU's 'democratic deficit'. Despite its steadily growing role in EU law-making, the European Parliament remains remote from most voters. MEPs must work hard to raise their profile and demonstrate they can adequately reflect the concerns of EU citizens. The treaty's provisions for national parliaments should lead to MPs becoming more involved in the EU's work. MPs will have the opportunity to comment on EU legislation at

a much earlier stage, and not only after rules and regulations have already been agreed in the Council. But the onus is now on MPs to show that they can use the new subsidiarity protocol to good effect.

### *A simpler rulebook*

The constitutional treaty tries to simplify the EU's complicated, sprawling rulebook. Currently, the legal basis of the EU consists of two treaties, amended many times. There is no single document that policy-makers and citizens can consult to find out how the EU works and how its policies are implemented. The new treaty consolidates all previous treaties into one document. With 317 pages, the new treaty is still overly long. Also, many of its provisions are difficult to understand, because they reflect complex compromises among the member-states. Nevertheless, the constitutional treaty is a big improvement on the collection of previous treaties.

The treaty consists of four parts, dividing basic principles from citizens' rights, detailed policies and other provisions. The treaty's first part lays out the EU's principles, functions and institutions in a language that is easy to read and refreshingly free of legal jargon – at least in comparison with the existing treaties. The second part is the Charter of Fundamental Rights (see page 5), which draws together the rights of European citizens with a good degree of clarity. Part III provides rules for decision-making and the implementation of the EU's various policies, ranging from economic policy co-ordination to defence. This is the longest part of the treaty, with most of its provisions taken from previous treaties. Part IV deals with how the treaty enters into force and is followed by protocols and declarations.

The new treaty, unlike its predecessors, explicitly sets out the EU's competences, seeking to make the division of powers between the EU and the member-states more transparent. It divides the competences into three categories: those where the EU may only complement or support the actions of member-states, such as education; those where the EU and the member-states share the power to act, such as the internal market and agriculture; and finally those where the EU has exclusive competence, of which there are only five – competition rules within the single market; monetary policy for the eurozone members; trade policy; customs union; and conservation of marine biological resources under the common fisheries policy. The Union already possesses exclusive powers in all these areas, so the treaty does not alter the balance of power between the EU and the member-states. Last but not least, the treaty strengthens the principle of subsidiarity (see above), which restricts the EU's ability to acquire new competences.

### **Justice and Home Affairs**

The constitutional treaty introduces significant changes in an area that is relatively new for the EU, namely Justice and Home Affairs (JHA), which includes migration, asylum, and police and judicial

co-operation. At present, JHA decision-making is mainly inter-governmental, with very limited roles for EU institutions, such as the European Commission or the European Parliament. The new treaty will allow the EU to take decisions through a system that is similar to the co-decision procedure employed in other policy areas. The treaty strengthens the Commission's power of initiative in JHA while reducing that of the member-states. An EU government will have to secure the support of one-quarter of all member-states before it can make a legislative proposal. The European Parliament gains equal rights with the Council to decide on JHA legislation.

However, the European Court of Justice (ECJ) will not be able to rule on all aspects of JHA. The Commission gains the ability to take member-states to court for failing to implement JHA legislation, whereas previously only another member-state could do so. But the ECJ only has competence to rule on the adequacy of governments' implementation of JHA measures in national law. The ECJ cannot rule on the actions of member-state police or judicial authorities.

The treaty also introduces majority voting to most areas of JHA, including police and judicial co-operation, as well as migration and asylum. Most EU governments wholeheartedly welcome this move, which will make it easier for them to work together to fight cross-border crime, terrorism and illegal migration. This should help to redress a dangerous asymmetry: under the EU's Schengen agreement, EU countries (with the exception of the UK and Ireland, but including some non-EU countries such as Norway) have created an area of passport-free travel. The EU faces the problem that while illegal migrants, traffickers and terrorists are able to move freely around the EU, policing and prosecuting authorities remain national. Member-states need to share more information and co-operate on cross-border cases to help clamp down on crime and tackle illegal immigration. But the EU has only made slow progress in achieving these goals, not least because current EU rules require unanimity for any policy initiative in JHA. The extension of majority voting into this area should make it easier for the EU to define common rules and launch joint initiatives.

For instance, the treaty will allow EU governments to use majority voting on a common visa policy and on common rules for non-EU citizens travelling around the Union. Such common rules could be a step towards an EU migration and asylum policy. This would help to address, for example, the problem of asylum 'shopping', whereby people apply for asylum in several member-states. But even if the EU made rapid progress on immigration rules, all member-states would retain the right to decide the number and type of work-visas they issue, and there will be no EU-wide quotas for job-seeking immigrants. Meanwhile, the UK and Ireland will keep their right to 'opt out' of EU policies on asylum, migration, and police and

judicial co-operation – although they would be free to opt in at a later stage.

The constitutional treaty also allows member-states to take decisions on judicial co-operation in criminal matters by majority vote. This should make it easier for the EU to prevent criminals from exploiting a lack of co-operation between member-states. However, the treaty strictly limits the areas where majority voting can be applied, for example to procedures which govern the admissibility of evidence presented in court. And it adds an 'emergency brake': if a member-state fears that an agreed measure could threaten fundamental aspects of its judicial system, it can use what amounts to a veto (see page 2).

But the treaty also includes a new provision to minimise the risk that one member-state, or a handful, could hold up all co-operation in this key policy area. Under the so-called 'accelerator' clause, a subset of member-states (at least one-third) can agree to proceed with a proposal that is blocked in the Council by the use of the emergency brake. This group does not need to win the approval of the Council beforehand (as is the case for normal enhanced co-operation procedures). The inclusion of both the emergency brake and accelerator makes it highly likely that an *avant-garde* group will choose to move ahead on some criminal issues.

The new treaty also allows EU countries to establish a European public prosecutor, provided all member-states agree. The competences of the new post would be limited to investigating and prosecuting fraud committed with EU funds. The member-states could extend those competences to, for example, the prosecution of serious cross-border crimes, but unanimity would be required for such a decision.

### **The Charter of Fundamental Rights**

The incorporation of the Charter of Fundamental Rights into the treaty has sparked much controversy in the UK. The Charter's critics, which include business organisations as well as eurosceptics, fear that it might lead to large numbers of people claiming new rights in court cases; that the European Court of Justice will overturn the rulings of British courts; that Brussels institutions will gain vastly increased powers to impose legislation; and that the Charter's 'social' rights, such as the right to strike, will bring an end to Britain's liberal economy and labour market. None of these outcomes is likely.

The Charter was drawn up by a special Convention consisting of representatives of national parliaments, the European Parliament, the Commission and the member-states. It was adopted at Nice in December 2000, as a political declaration. It sets out in a single text the whole range of civil, political, economic and social rights that apply to European citizens and everyone else living in the EU. These are drawn from the fundamental rights and freedoms recognised by the

European Convention on Human Rights, the constitutional traditions of the EU member-states, and other international conventions to which the European Union or its member-states subscribe.

For all that, the final version of the Charter contained in the treaty is largely toothless. The British government, with some support from Ireland, the Netherlands, Denmark and Sweden, inserted extra safeguards to ensure that the Charter will not affect domestic laws and practices.

The Charter applies to EU institutions, most notably the Commission, the Council of Ministers and the European Parliament. It binds member-state governments only insofar as they implement EU law. The articles that govern the application of the Charter state clearly that it cannot be interpreted as extending the competences of the EU. Thus the Charter does not create new law-making powers for the Union. Moreover, the Charter explicitly spells out that its rights (except the most fundamental ones, such as the right to life) are guaranteed “in accordance with [...] national laws and practices”. This means in practice that the treaty does not create new rights or entitlements where they do not already exist. EU workers, for example, will only be able to rely on the right to strike to the extent that it already exists in the country in question. Finally, member-states agreed to give binding force to the ‘explanations’ that the Convention added to each Charter provision, which spell out its origins and the limitations of its application.

Although the Charter will make little difference in practice, its inclusion in the treaty is a welcome step. It shows that the 25 EU countries are united in their support for certain common principles and values. The strict limits placed upon the Charter’s application mean it is ultimately more of a political statement than a substantive bill of rights. Both the reference to the explanations and the safeguards included in the Charter will ensure that British industrial relations law remains unaffected.

### Foreign and defence policy

Anti-Europeans warn – and pro-Europeans boast – that the constitutional treaty will give the EU a greater say in foreign and defence policies. The truth is more prosaic. The constitutional treaty proposes some more modest reforms to streamline decision-making. These are helpful but do not amount to a step-change in EU foreign policy.

The main innovation is the creation of an ‘EU minister for foreign affairs’. The new post will result from a merger of two existing posts: that of the Council’s High Representative for foreign policy, currently held by Javier Solana, and that of the commissioner for external relations, now Chris Patten. The aim of this merger is to create a clearer ‘persona’ for the EU on the international stage, and to ensure that the EU better co-ordinates the

two sides of its foreign policy: diplomacy (largely the responsibility of the Council) and foreign aid (managed by the Commission). But EU foreign policy will remain very much in the hands of the member-states, with the European Commission playing a subordinate role. The treaty emphasises that the new ‘foreign minister’ will be an agent of the Council of Ministers, whose meetings on foreign affairs he or she will chair.

Some eurosceptics worry about the treaty’s ‘loyalty clause’, which states that “member-states shall support the Union’s common foreign and security policy actively and unreservedly”. In fact those words are taken from the Maastricht treaty of 1992 and they represent an aspiration rather than an enforceable rule. The key question is: who decides the objectives and provisions of EU foreign policy? The answer remains national governments, taking decisions through the European Council and the Council of Ministers, and nearly always by consensus.

Up to now, the EU has taken all decisions on foreign policy by unanimity. The Amsterdam treaty created the possibility of taking some, very specifically defined decisions – for instance on the appointment of an EU special representative – by a majority vote. Similarly, it allowed member-states to use ‘super qualified majority voting’ (which uses a higher threshold than normal majority voting) for ‘implementation decisions’, but only on the basis of unanimously agreed ‘strategic objectives’. In the new constitutional treaty, such a decision will require the support of 72 per cent of the EU member-states representing 65 per cent of the EU’s population.

The only widening of the scope for majority voting concerns certain proposals from the EU foreign minister. But the minister cannot make such a proposal unless the European Council has first unanimously decided to invite him or her to do so. For example, the European Council, concerned with the deteriorating crisis in Sudan, could ask the minister to come forward with specific proposals on how the EU could help to stop the fighting and aid the refugees. He or she could then suggest the EU provides financial support to the efforts of the African Union to broker a political solution and send ceasefire monitors. The ministers could agree, by unanimity, that the amount of money to be spent and the number of monitors to be sent should be settled by a majority vote.

In short, while EU countries will be able to vote by majority in some tightly circumscribed areas, EU foreign policy will most likely continue to be based on a slow-moving consensus culture. What is more, the constitutional treaty explicitly gives all member-states the right to veto any proposal for self-defined “vital and stated reasons of national policy”.

One potentially significant innovation in the treaty is the creation of an EU ‘external action service’ to support the work of the new foreign minister. The new service will be made up of representatives from

all the bodies involved in EU foreign policy – the Council, the Commission and national diplomatic services. It should give the EU a more coherent external presence. It will seek to provide common analysis of foreign policy problems and thus encourage the development of common policies. And it should reduce the wasteful institutional infighting in Brussels between the Commission and Council bureaucracies. But the new external action service will not give the EU institutions any new powers over foreign policy. As explained above, decision-making remains largely unanimous, which means that the member-states will continue to call the shots.

In defence policy, the constitutional treaty makes it easier for a subset of EU countries to work together more closely on military matters, using a procedure known as ‘structured co-operation’. Those member-states which meet a set of capability-based entry criteria can choose to co-operate more closely – so long as the Council approves this by majority vote. This clause makes a lot of sense. Military capabilities and ambitions vary widely among the member-states. So the EU should rely on a smaller group of the most willing and best-prepared countries to run its more demanding military missions. The defence group will in some respects resemble the eurozone: some countries will stay outside because they choose to and some because they do not fulfil the entry criteria.

The treaty contains a new mutual defence clause that commits all EU governments to come to the aid of any member-state that is “the victim of armed aggression on its territory”. This clause sparked much controversy during the negotiations and has subsequently been watered down and riddled with provisos. The treaty also says that governments are requested to provide the EU with military and civilian capabilities that would help the Union to deal with international crises – but purely on a voluntary basis. The treaty does not establish a standing EU force, never mind a European army.

On balance, the new treaty should enable the EU to play a greater role in world affairs and to be more pro-active. But it will do so only if member-states accept a simple truth: that they need to find the will to act together, pool resources and learn to take risks.

### **Economic policy**

The constitutional treaty will not change radically the EU’s role in economic policy co-ordination. It allows eurozone members to co-operate more closely. But it does not give significant new powers to EU bodies, nor does it remove the veto on such sensitive issues as tax and social security.

The first part of the treaty confirms that economic policy co-ordination remains the responsibility of the member-states, within the boundaries laid down in Part III. Part III, in turn, is almost entirely taken from previous EU treaties, in particular the Maastricht

treaty, which forms the basis of economic and monetary union (EMU).

The differences between the Maastricht treaty and the constitutional treaty are small, although it is not yet clear how EU countries will use the new provisions in the future. The constitutional treaty is the first EU treaty explicitly to mention the euro group, the informal meetings of eurozone finance ministers, although it does not fundamentally change that group’s function. The euro group will continue to meet informally before Ecofin meetings, to discuss and sometimes co-ordinate their views. The treaty also acknowledges the right of the euro group to elect a president for two and a half years rather than relying on six-monthly rotating presidencies as it does now. Since the euro group is an informal body that sets its own rules, it could have done so already. Nevertheless the treaty’s reference to ‘Mr Euro’ makes it more likely that there will be such a person. But it is not clear what ‘Mr Euro’ will do, although the treaty permits ‘Mr Euro’ to represent the eurozone members in international financial organisations, including – in theory – the International Monetary Fund.

While the euro group will remain an informal body, the new treaty marginally extends the scope for co-operation between the eurozone members in Ecofin. Eurozone members can decide to co-ordinate their economic policies more closely – but only within the EU’s existing rules for economic and monetary union. If they wanted to change the framework itself, they would have to use the enhanced co-operation procedures. On certain issues, eurozone members in Ecofin already vote alone while euro-outs have to abstain. These issues include the rules governing the European Central Bank, the euro’s exchange rate policy and the sanctions applied under the stability and growth pact. The new treaty adds the recommendations that Ecofin sends to eurozone members which are in breach of EU rules. It also allows the eurozone members to recommend – using majority voting – whether a non-euro country is ready to join the single currency. Although the final decision will stay with all the member-states, Ecofin would find it very hard to ignore the eurozone members’ vote.

Ongoing squabbles about the stability and growth pact found their way into the constitutional talks. Germany and France, which have been in breach of the pact’s rules for three years, successfully resisted calls from the smaller member-states for tougher enforcement. In the new treaty the Commission gains the right to send ‘early warnings’ directly to governments that are heading for fiscal trouble. But it is still not allowed to address recommendations on how to cut ‘excessive deficits’ directly to governments. Only Ecofin can do so.

The treaty maintains all the existing provisions of the pact, including the seemingly unenforceable sanctions

of the ‘excessive deficit procedure’, and a protocol enshrining the arbitrary 3 per cent of GDP limit on annual budget deficits. EU governments added a vaguely worded declaration, promising to reform the pact in the future. But the fact that such core principles of the pact are included in the new treaty could slow reform efforts.

Some EU governments wanted to use the new treaty to make it easier for the EU to co-ordinate certain aspects of taxation, notably administrative problems and tax fraud that harm the single market. But the British government, supported by Ireland and a number of new member-states, drew a thick ‘red line’ around all tax issues. As a result, unanimity will still be required for all decisions on tax matters.

The Commission and the Council have not gained any new powers to determine member-states’ employment policies. Similarly, the treaty does not give the EU any significant new powers in the area of social policy. The Council of Ministers has long been able to adopt certain minimum standards, especially for health and safety, by a majority vote. But decisions on the key issues of social security and the protection of workers will still require unanimity. The new treaty does allow the EU to use majority voting when it devises rules for workers moving around the EU (one of the single market’s ‘four freedoms’). But at British insistence, this clause now comes with an ‘emergency brake’ (see page 2).

### **Conclusion: What will the Union look like under the treaty?**

Contrary to the claims of eurosceptics, the EU’s new constitutional treaty does not create a European super-state. What it does is confirm that the member-states grant the EU powers to act in certain defined areas of policy.

Eurosceptics point to treaty provisions that assert the primacy of European over national law in certain areas, and provide the EU with a legal personality. Neither of these provisions, however, is a threat to member-states’ sovereignty. The Union’s legal personality is a technical change to allow it to negotiate international agreements more efficiently. At present, the European Community (covering mainly economic areas like trade policy and the single market) has a legal personality, and the Commission negotiates on its behalf. But member-states are increasingly asking the EU to negotiate agreements in other policy areas, such as foreign policy and JHA, where the Union has no legal personality. As a consequence, the EU is forced to conduct such negotiations on an ad hoc legal basis. Endowed with its own legal personality the Union will be able to conclude treaties more easily and speedily.

This does not mean the EU can conclude international agreements against the will of the member-states. Only the Council of Ministers can decide to open and conclude the negotiations. Nor does the treaty allow the EU to supplant any member-state as a member of an international organisation. Thus the EU cannot replace Britain and France on the United Nations Security Council.

Similarly, the article on the primacy of EU law changes nothing substantive. European law has had primacy since an ECJ ruling of 1964, before the UK entered the EU. The clause is necessary to ensure that national legislation conforms with commonly agreed EU rules. The single market could not function without EU law prevailing over national laws that contradict it.

The new treaty makes it clear that the EU is not a state. The Union lacks most of the administrative and coercive powers that characterise sovereign countries. The EU has no army, no police force and no tax collectors. Member-states keep control of the purse strings. The treaty confirms that the EU derives its existence and competences from the member-states and not the other way around. The very first clause in the treaty makes clear that this “constitution establishes the European Union on which member-states confer competences to attain objectives they have in common”.

The member-states, of course, have sovereign powers irrespective of whether the EU exists or not. This fundamental principle lies behind a new treaty clause that, for the first time, provides an explicit exit procedure in case a country wants to leave the Union. Moreover, only the member-states can change the treaty. Hence, the text should correctly be described as a constitutional treaty, a rulebook organising the relationship between member-states, and not as a constitution which governs the relationship between a state and its citizens.

Even if all countries ratify the treaty, the question remains whether the document can serve as the basis for a well-functioning EU “for a generation”, as Convention president Giscard put it. The treaty does something to improve the EU’s efficiency and enhance its legitimacy – so it should help to keep the EU in business over the next decade. It also increases the EU’s flexibility by making it much easier for small groups of EU countries to work together on policy initiatives. The simple fact that some provisions will not take effect until 2014 means that the member-states are unlikely to consider further radical reform anytime soon. However, before a generation has passed, the member-states are highly likely to want to revisit the key issues of the Union’s purpose and legitimacy.

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