The Brussels Agreement

on the

Treaty Establishing a Constitution for Europe

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A "user-friendly" analysis

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Introduction

"A difficult, dry technocratic document". That was the description from Tim Franks, the BBC's Brussels correspondent. No one would disagree with him. The issues dealt with in the Brussels summit certainly confirm that assessment, underlining the mind-numbing, technocratic nature of the enterprise. Here are the heads:

The European Commission
Definition of qualified majority voting
Draft Decision relating to implementation of Article I-24
European Parliament seats
Provisions specific to Member States whose currency is the euro
Coordination of Economic Policy
Declaration on the Stability and Growth Pact
Measures relating to excessive deficits
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Eurojust
Enhanced Cooperation
Economic, Social and Territorial Cohesion, including transport
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Authentic texts and translations
Protocol on the position of the United Kingdom and Ireland on policies in respect of border controls asylum and immigration, judicial cooperation in civil matters and on police cooperation Declaration by Member States

Those who expect a full-blown constitution document will be disappointed. This is not yet available and it will be some days, or even weeks, before the amendments have been integrated and the text approved.

In this context, it would be helpful if people stopped referring to Blair and the other "EU leaders" as having "signed" the constitution. They haven't for precisely the reason indicated above. The summit merely agreed the final round of amendments.

Signing will be a grand ceremonial affair, scheduled for some time later this year. With the hubris for which they have become famous, the "EU leaders" will probably elect Rome for the location.

In the following pages is an analysis of each of the issues agreed at the summit.

The European Commission

Details are set out in Article I-25. This Article starts with a general statement of the role and duties of the Commission – which is not new. However, it is useful to restate it here:

- The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.
- It shall ensure that the Constitution and the measures adopted by the Institutions pursuant thereto are applied.
- It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall implement the budget and manage programmes.
- It shall exercise coordinating, executive and management functions, as laid down in the Constitution.
- With the exception of the common foreign and security policy and other cases provided for in the Constitution, it shall ensure the Union's external representation.
- It shall initiate the Union's annual and multi-annual programming with a view to achieving inter-institutional agreements.

Furthermore, the Commission retains its "right of initiative" so that legislative acts may be adopted only on the basis of a Commission proposal (although there are some exceptions, such as allowing the ECB to make economic proposals).

Before looking at the changes, it is worth stopping here and looking at these roles and duties. By any measure, what is being described here are the duties of a government. This is the definition of a government of the European Union.

Amendments

The key points are as follows:

The Members of the Commission shall be chosen on the ground of their general competence and European commitment and their independence shall be beyond doubt.

The first Commission appointed under the provisions of the Constitution shall consist of one national of each Member State, including its President and the Union Minister for Foreign Affairs who shall be one of its Vice-Presidents.

After this Commission ends, the next one will have a number of commissioners corresponding to two thirds of the number of Member States.

The commissioners are to be selected from nationals of the Member States on the basis of a system of equal rotation between the Member States.

This system has not yet been established but must apply the following principles:

(a) Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as Members of the Commission; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one;

(b) subject to point (a), each successive Commission shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States of the Union.

As before, the commissioners "shall be completely independent", it should neither seek nor take instructions from any government or other institution, body, office or agency. They shall refrain from any action incompatible with their duties or the performance of their tasks.

The Commission, as a body, is responsible to the European Parliament (note, not the member states).

Under the procedures set out in Article III-243, the European Parliament may vote on a censure motion on the Commission. If such a motion is carried, the Members of the Commission shall resign as a body and the Union Minister for Foreign Affairs shall resign from the Commission.

The President of the European Commission

This deals with the selection procedure, as set out Article I-26.

At the outset, the constitution aims to inject a political element into the selection process, requiring that the European Council should "take into account" the elections to the European Parliament. This is behind some of the argument at the moment, with the EPP group in the European parliament demanding that the choice of president should reflect the political stance of the dominant group.

However, as we will find with so many things in the constitution, the wording is vague: what does "take into account" actually mean?

Anyhow, the European Council must have "appropriate consultations" with the parliament – whatever that means – but then it makes its choice by qualified majority voting. This means that the UK – or any other country – can be over-ruled and a candidate to which it objects can be imposed. If the constitution comes in, this is the last time that the UK can actually block a candidate.

Once the European Council has made its choice, the final decision is up to the federal European parliament. It must elect the president by "a majority of its members". If the parliament cannot decide, however – i.e., there is no majority – then the candidate is not appointed. The European Council steps in again and, acting by a qualified majority, has one month to propose another candidate, who then has to be elected by the parliament, as before.

As to the rest of the Commission, the Council (it is not clear here whether the constitution is referring to the European Council or the Council of Ministers) then adopts a list of "other persons" "by common accord with the President-elect" – whatever that means. The Commission is then voted in as a body by the parliament, following which the European Council, again by QMV.

As to resignations, a member of the Commission is required to resign if the President so requests. A slightly different procedure is set out for the Union Minister for Foreign Affairs.

Looking at this while article in the round, what the constitution effectively does is reduce substantially the right of any member state government to select and appoint the president of the Commission, and vest the ultimate choice in the parliament which – by and large – shares the Commission's integrational ambitions. The system now favours, therefore, the appointment of a president dedicated to furthering European integration. In any event, this does not in any way strengthen the powers of the member states.

Qualified Majority Voting

The final agreement is set out in an amended Article I-24. To say that the procedure is mind-bogglingly complex is something of an understatement. The text actually does not make sense but, as far as I can work out, there are two stages:

A qualified majority shall be defined as at least 55 percent of the members of the Council. But…

The majority must comprise at least fifteen member states which must collectively comprise at least 65 percent of the population of the Union (which is actually 60 percent of the member states).

Then, the "blocking minority" must include at least four Council members.

However, just in case you thought you understood this, when the Council is not acting on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority is 72 percent of the members of the Council, representing Member States comprising at least 65 percent of the population of the Union.

Then, there are separate cases, where only some Council members have the right to vote, such as with enhanced co-operation or Eurozone.

In these cases, the percentages are applicable only to Council members which have the right to vote and to the population of the Member States which they represent. The blocking minority will be "the minimum number capable of constituting a blocking minority through the population criterion plus one".

European Parliament seats

Article I-19 (2) refers.

The Article sets out that the EU parliament should be composed of "representatives of the Union's citizens" and limits its size to 750 members.

Crucially, it then requires that "representation… shall be degressively proportional", with a minimum threshold of six MEPs per Member State. No Member State can have more than 96 seats.

This means that Malta, with a population of 380,000, and Luxembourg with 440,000 (approx) will each have six MEPs. On the other hand, the North East Region of England, with a population of 2.5 million, gets three. That is democracy, EU style.

Provisions specific to eurozone members

Here Article III-92 (2) sets out the conditions for new entrants to the euro. Basically, if the Commission proposes that non-members satisfy the conditions for entry, the Council can admit those members as long as a majority of the eurozone members agree, that majority comprising eurozone states with at least three fifths of the population of the eurozone.

Co-ordination of economic policy

Articles I-11 (3) and I-14 (1) refer.

These require, respectively, that the Member States shall co-ordinate their economic and employment policies "within arrangements as determined by Part III", which the Union shall have competence to provide, and that Member States shall co-ordinate their economic policies within the Union.

We then have a situation where the Council shall adopt measures (proposed by the Commission) "in particular broad guidelines for these policies".

These must be taken together with "Part III" and in particular Article III-69 (1) which specifies that the "activities of the Member States and the Union" shall include "...the adoption of an economic policy which is based on the close co-ordination of Member States' economic policies... and on the definition of common objectives".

These Articles, therefore, are of immense importance as they give the Commission direct power to interfere in and dictate the economic management of member states. And, because the voting method is not specified, the "default" applies, as per Article I-22 (3), making proposals subject to QMV.

The Treasury – meaning Gordon Brown - was apparently unhappy about conceding the veto on economic policy but seems to have been convinced that the use of the word "co-ordinate" was so vague as to be "harmless".

If that is truly the view, it grossly underestimates the power and persistence of the Commission. As we all know, if you give it an inch, it will take a kilometre. "Co-ordinate" can be interpreted very widely if there is inclination to do so.

Here, the construction of the wording in Art I-14 is interesting: the Council shall adopt measures "in particular broad guidelines…". While it may focus on those "broad guidelines", it should be noted that the wording does not

confine the Council to them. By any measure, a major power has been ceded to the EU.

The UK is, in effect, obliged to subsume its general economic management to the EU, and pursue the "common objectives" set by the EU. Given the vital nature of economic management, can it be said that any country which is not able to define its own economic policy is truly independent?

Stability and growth pact

This is a particularly contentious area, with the Netherlands and some other small countries wanting the Commission to take a tough line on defaulters – as against France and Germany (as well as Italy) seem intent on ignoring the pact.

The Dutch wanted the controls toughened, but the Irish presidency have "bottled out" and produced merely a rhetoric-filled "declaration" which concludes:

> The Member States look forward to possible proposals of the Commission as well as further contributions of Member States with regard to strengthening and clarifying the implementation of the Stability and Growth Pact. The Member States will take all necessary measures to raise the growth potential of their economies. Improved economic policy co-ordination could support this objective. This Declaration does not prejudge the future debate on the Stability and Growth Pact.

In other words, rien.

Excessive deficits

This one relates to the treatment of member states which stack up excessive deficits. Article III-76 (6) refers, which goes through the usual tedium of requiring the Council, "on a proposal from the Commission" and "having considered any observations which the Member State concerned may wish to make", and "after an overall assessment"… (not exactly user-friendly text is it!)

Anyway, once it's got all that out of the way, what it boils down to is that it can decide whether there is an excessive deficit and give the offender a slap on the wrist, telling it to sort it out…

In Community speak, that reads "it must adopt without undue delay", on a

recommendation from the Commission, "recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a given period".

The recommendations are not made public and – here is the interesting bit - the offender isn't allowed a vote on the Council, which acts under qualified majority voting, using the three-fifths population rule of the voting members.

What this amounts to is the Council setting itself up as a Kangaroo Court, with the Commission as a prosecutor, and then deciding on the sentence by majority vote. That would be the position Britain could find itself in, should it join the euro, being judged – say – by Greece and Italy – and not being allowed to vote. Can you imagine the humiliation?

The multi-annual financial framework

This is one to watch. Translated from Community-speak, this means making financial plans spanning more than one year – not a bad idea in principle, although that's neither here nor there.

The reason to watch this – as set out in Article I-54 – is that it has one of those famous "passarelle" clauses, which enable the European Council to turn a "unanimous" voting requirement into QMV – by a unanimous vote. The significance of this is that it amounts to making treaty changes – or changes which would have required treaty changes, if you catch my drift – without having to have an IGC, signing and that tiresome process of ratification.

Thus, under Article I-54 the Council can lay down a multiannual financial framework, acting unanimously after obtaining the consent of the European Parliament. But, if it feels like it, the European Council "may adopt, by unanimity, a European decision allowing for the Council to act by a qualified majority when setting out the multiannual framework".

The existence of the "passarelle" represents a partial climb-down by the "colleagues" as in an earlier draft the Council could act by QMV, so this is one of the "red lines" that Blair has managed to "protect". For now he has his veto but the colleagues have not gone all the way. They have left the door half open to revisit QMV at another time – when they have a different prime minister, of catch him/her at a moment of weakness.

The trouble with this clause is that our lot keep having to say "no" which puts them on the back foot. But say "yes" once and they've got you. You might say this is a "wobbly veto".

Charter of fundamental rights

This is one of Blair's "red line" issues, where he did not want the Charter to have direct application in British law. His idea was that the principles should apply only to EU laws.

To protect his "red line", the "colleagues" agreed to insert an amendment to the 5th paragraph of the Preamble of Part II, the whole of which is reproduced below with the crucial amendment in bold.

> This Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter **and updated under the responsibility of the Praesidium of the European Convention**.

Clear so far?

And just to make this watertight, they have added a new paragraph 7 to Article II-52: "Scope and interpretation of rights and principles". This reads

> The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.

Then, to nail the lid down, there is the "Declaration for incorporation in the Final Act concerning the explanations relating to the Charter of Fundamental Rights". This reads:

> The Conference takes note of the explanations relating to the Charter of Fundamental Rights prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention, as set out below.

That’s it folks… Blair’s red line. That’s telling them.

Oh, **and by the way**, you know that bit about "even closer union" having been removed from the constitution? Actually, it's still there. See the premable to Part II. The first recital reads: "The peoples of Europe, in creating an ever

closer union among them, are resolved to share a peaceful future based on common values".

Funny thing is I don't ever remember "creating an ever closer union" and I'm not that sure that my values are that common.

More provisions specific to euro members

This is an amendment to Article III-88 (1), which reads as follows:

> In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Constitution, the Council shall, in accordance with the relevant procedure from among those referred to in Articles III-71 and III-76, with the exception of the procedure set out in paragraph 13 thereof, adopt measures specific to those Member States whose currency is the euro.

If you can make sense out of this, you need to lie down. No wonder Blair looked ill when he came out of the summit.

Eurojust

This is a seriously nasty one, which permits the creation of a European Union criminal justice organisation – an FBI equivalent. Amazingly, the bulk of the provisions in the draft constitution (Articles III-171 to 174) were agreed before the summit, including the so-called "emergency brake".

The procedure allows any member of the Council which considers that a "draft European law" would infringe "the fundamental principles of its legal system" to refer the proposal to the European Council.

However, on the basis of "consensus" rather than unanimity, the European Council can send the proposal straight back to the Council, whence it can be approved by QMV. Yet this is supposed to be one of the vetoes that Blair has preserved.

But the only matter before the summit was one addition to Article III-174 (2). This Article permits the making of European laws to "determine Eurojust's structure, operation, field of action and tasks".

The tasks set out in the original version of the constitution were:

> the initiation of criminal investigations, as well as proposing the initiation of prosecutions, conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union; and
>
> the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

To that was added, the "coordination of investigations and prosecutions" which Eurojust is permitted to initiate. This effectively gives Eurojust operational control of both.

But never fear – there is another safeguard, in the form of a "Declaration for incorporation in the Final Act". This reads:

> The Conference considers that the European laws referred to in Article III-174(2) should take into account national rules and practices relating to the initiation of criminal investigations.

There you are, when Eurocops are trampling all over the crime scene, you will be comforted to know that the law under which they operate will "take into account national rules and practices".

Take into account? Red line? Pah!

Enhanced co-operation

This is the federalists' revenge – the provision that allows like-minded states to forge ahead with deeper integration, separately from the less enthusiastic states.

Article III-324 states that it is "enhanced cooperation" is open to all Member States and, once certain conditions are satisfied, authorisation to proceed is granted by the Council acting unanimously. While the Council and Commission are required to encourage maximum participation, unlike the Nice and Amsterdam Treaties, there is no minimum number of countries set for a co-operative project.

In the infamous Article III-328 we then have the mind-boggling statement that:

> “Where a provision of the Constitution which may be applied in the context of enhanced co-operation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article I-43(3), may decide to act by qualified majority.

I am "reliably" informed that this means that the "inner core" of participating

states can run their affairs under QMV, while others invoke unanimity rules. This may be the case, although that is not exactly what the Article says. Put it down to bad drafting and possibly the surfeit of Guinness consumed by the Irish presidency. Nevertheless, this provision does not apply to decisions having military or defence implications.

The upshot of all this, of course, is that we end up with a "multi-speed" Europe with the Europhile claiming that non-participating states will be "left behind" - as if that was a bad thing. Personally, if I saw a group rushing over a cliff to certain destruction, I would be very glad to be left behind.

Economic, territorial and social cohesion (including transport)

Article III-116 refers

You might wonder what such an arcane subject is doing in a "Treaty establishing a constitution for Europe" – and well you might. The answer is simple: pork-barrel politics.

The Article, in the way of things EU, starts off with high-flown phrases, stating:

> In order to promote its overall harmonious development, the Union shall develop and pursue its action leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.

And so it goes on, but the clue as to what the fuss was all about that brought it to the summit lies Article III-56 (2) (c) and an amendment to it. The sub-paragraph is reproduced below, with the amendment in bold.

2. The following shall be compatible with the internal market:

> (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division. **Five years after the entry into force of the Treaty establishing a Constitution for Europe, the Council, acting on a proposal from the Commission, may adopt a European decision repealing the present point**.

With the accession of the former Communist countries, East Germany was looking at a marked reduction in state aid earmarked for reconstruction. Since this is where Schröder gets the electoral support which brought him into power – and keeps him there – the chancellor is dead keen to ensure the money keeps flowing.

Direct support, however, is not permitted under EU law, as "illegal state aid", so Schröder has finagled a provision in the constitution to make it legal. That is an example of the "Alice in Wonderland" world of the EU. When is illegal state aid not illegal? – When Germany stamps it foot.

The French have also got their pound of flesh, getting similar exemptions for their overseas departments, to add to already favoured Spanish islands, while the Germans have also got additional exemptions on transport issues, allowing them to support subsidies in East Germany.

But, clearly, blood has been flowing behind the scenes. Some countries wanted the German concessions struck out, but all they have achieved is a tentative time limit. In five years time, the Council may remove their exemptions. Don't hold your breath.

Energy

This a very contentious area of the constitution, which has led to charges that the EU is intent on getting its hands on British North Sea oil – which it probably is.

So contentious has it been that the UK government has been investing a great deal of political capital in neutralising the offending Article (III-157) so much so that the Commission asked for the emasculated remnant to be removed, believing that it could use its Single Market powers to better effect.

Nevertheless, the Article reappeared in the final batch of Irish presidency amendments, the text of which was approved at the Brussels summit unchanged. Actually, there are two relevant Articles, the first is Article I-13, which sets out “Areas of shared competence”, in which “energy” in included.

The substantive Article, though, remains Article III-157, which sets out the objectives of the Union’s energy policy. In establishing an internal market and with regard for the need to preserve and improve the environment, it aims to:

(a) ensure the functioning of the energy market,
(b) ensure security of energy supply in the Union, and
(c) promote energy efficiency and saving and the development of new and renewable forms of energy.

As always, the objectives are to be achieved through “European laws or framework laws” which, in the general order of things, are passed by the Council and European parliament under the co-decision procedure. Since no

general method of Council voting is specified, the “default” procedure must therefore apply, which means QMV.

This then is another veto given up by Blair, although there are safeguards. Built into the Article (rather than tagged on as a woolly declaration) is the caveat that

> Such laws or framework laws shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply…

And any laws which are “primarily of a fiscal nature” – such as an energy tax - have to be approved unanimously by the Council.

The caveat in the Article is then reinforced by a “woolly declaration” which states that:

> The Conference believes that Article III-157 does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the conditions provided for in Article III-16.

This latter Article refers to steps taken to protect the Single Market in times of war or serious internal or external disturbances.

Generally, the Article is not as bad as it could be, in that it does not overtly permit the EU to take over British oil supplies, but it nevertheless affords it plenty of scope for meddling.

Authentic texts and translations

Article IV-10 new (2) refers

Makes provision for the Treaty to be translated into any other languages as determined by Member States which, "in accordance with their constitutional order, enjoy official status…".

This is a sop to the Irish, who made getting Irish recognised as an official Community language one of their presidency objectives. The "Conference" considers that the possibility of producing official translations of the Treaty in these languages "contributes to fulfilling the objective of respecting the Union's rich cultural and linguistic diversity…".

The UK and Irish positions on border controls, asylum and immigration, judicial co-operation in civil matters and on police co-operation

These are set out in a protocol to the constitution, the difference between that and a "declaration" being that a protocol has legal effect.

In Article 1, both countries state that, subject to Article 3, they will

"not take part in the adoption by the Council of proposed measures pursuant to Section 2 or Section 3 of Chapter IV of Title III of Part III of the Constitution or to Article III-161 insofar as that Article relates to the areas covered by those Sections or to Article III-164 or Article III-176(2)a."

Section 2 relates to "policies on border checks, asylum and immigration" and Section 3 to "judicial co-operation on civil matters".

This is followed by Article 2, which states unequivocally that neither Section 1 or 2 shall apply, nor Arts III-161 (regulations on evaluating the implementation of Union policies) and Art III-164 (regulations on administrative co-operation).

This does look like a pretty watertight defence of Blair's "red line", except for one minor detail… Section 1 still applies which, *inter alia*, requires that member states:

> ..shall frame a common policy on asylum, immigration and border control…".

Er… what red line, Mr Blair?

Postscript

On the final page of the agreement is a "Declaration by member states". This is a "Declaration by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland", noting that

> The Treaty establishing the Constitution applies to Gibraltar as a European territory for whose external relations a Member State is responsible. This shall not imply changes in the respective positions of the Member States concerned.

This is self-explanatory – the Spanish are not having Gibraltar… until Straw works out how to give it away.