



## Federal Trust Policy Commentary

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### Constitution or Constitutional Treaty?

The British government has now published the question which, in all likelihood, will be put to the electorate in a referendum some time in 2006. It runs: 'Should the United Kingdom approve the treaty establishing a constitution for the European Union?' The text of the question has been generally welcomed, but it leaves unresolved (probably deliberately) whether the document signed by 25 European heads of government in Rome last October is more accurately described as a 'constitution' or a 'constitutional treaty'. To some, the question may appear a purely theoretical one. The text on which the electorate will vote next year clearly contains important characteristics both of a treaty and of a constitution. Which element predominates might be seen as a matter of marginal personal assessment. But choice of vocabulary is often politically significant, not least in the European debate. The conflict between rival descriptions of the document at issue will play at least a symbolic, and possibly a substantial role in the debate leading up to next year's referendum.

The British government clearly hopes and believes that the British electorate will be more likely to vote for what is described as a 'treaty' rather than a 'constitution'. Its rhetoric has reflected this analysis. Traditionally, British governments have fought shy of describing or even discussing seriously with the electorate the deeper political and constitutional implications of Britain's membership in the European Union. This government may well think that the year before a referendum is not the time to encourage such a potentially

difficult discussion. The electorate is familiar with, and generally undisturbed by the treaty-making role of the British government. It is much less familiar with the idea that the governance of the United Kingdom is profoundly and increasingly affected by British membership of the European Union, and that this European level of governance is sufficiently developed and far-reaching to need codification and refinement in a constitutional document.

Consciously or otherwise, the government is hoping to avoid, or even to pre-empt this second level of discussion over the coming months. Its reiterated use of the term 'treaty' to describe the outcome of last year's Intergovernmental Conference is one part of this general strategy. The strategy is comprehensible, but confronts formidable difficulties. Public discussion of the document in this country has in any case already opted for the shorter and simpler formulation ('European Constitution'). The government's opponents, scenting Ministerial unease, lose no opportunity to present the very existence of a 'European Constitution' as the proof positive of an impending European superstate, a 'country called Europe'. The European Constitution is of course proof of no such thing. But the government needs to make a much better job than it has until now of providing a coherent and politically defensible analysis of the document on which the British electorate will be voting in 2006. All too often, it appears to accept much of the analysis of its opponents about the nature and supposed failings of the European Union. In microcosm, the incipient war of the words about a 'European Constitution' or a 'European

treaty' is an example of this worrying and ultimately self-defeating phenomenon. What should concern those who fervently hope for a 'yes' vote in Britain's European referendum next year is not so much that the government prefers to avoid talk about a 'European Constitution', but rather the tactical and strategic thinking which underlies this deliberate choice of vocabulary.

There exist in this country a number of factual misconceptions about the existing legal and political implications of Britain's membership in the European Union. The long-established 'primacy' of European law over national law is an obvious example of this, and the coming public debate about the European Constitution will usefully serve to clarify the matter. Those arguing for a 'yes' vote will have no choice but to explain and advocate this central plank of the European Union's legal system. This discussion will be an opportunity to provide a death-blow to the widespread, if often unspoken, assumption that Britain can 'pick and choose' between elements of European integration. Wide swathes of public opinion in this country have never internalised the reality of sovereignty-sharing within the European Union. The debate about the primacy of European law over national law should provide a useful corrective to this misunderstanding.

But there are other widespread misconceptions about the European Union, both at an elite and public level in the United Kingdom, which will equally need to be addressed if the government is to have a reasonable chance of winning its referendum next year. They relate to the nature and role of the central European institutions, which are codified and to some extent developed in the European

Constitutional Treaty. Unfortunately, this British government, like the governments which preceded it, seems to share at least in part these misconceptions. Largely because Britain did not participate in the drawing up of the European Union's institutions, its politicians and senior officials have never really reconciled themselves to the leading role of the European Commission, the European Parliament and the European Court of Justice in the Union's governance. At most, they have grudgingly accepted the legitimacy of the Council of Ministers, although even then only on the basis that its work should be conducted as much as possible upon intergovernmental lines rather than in the tradition of the integrative 'Community method'. This underlying analysis is one reason at least why the government today finds itself more comfortable in talking about a 'European treaty' (which is what governments conclude among themselves) rather than a 'European Constitution' (which does not in any sense imply a 'superstate', but certainly does make clear that the European Union is infinitely more than simple intensive co-operation between like-minded governments).

It is an arguable, although in the strictest sense academic proposition that the European Union would have been differently and better structured in its institutions if Britain had participated in the original Treaty of Rome. But Britain did not and the path taken by the process of European integration was essentially that sketched out in the Rome Treaties negotiated between the founding six member states. This process can point to a number of solid successes, most recently exemplified by the eagerness of the now free countries of Eastern Europe to join the Union as soon as possible. Throughout the present European Union, there is little or no appetite substantially to change that institutional structure. This situation is reflected in the European Constitution signed by the heads of state and government last October. It codifies and to a limited extent builds upon the existing institutional structure of the European Union. If it is to be defended and advocated to a possibly sceptical British public, it needs to be described and accepted in its own terms. It is not a document designed in any sense to terminate or even substantially limit the

process of European integration. Some in continental Europe regret that it did not go further in accelerating that process. But no serious argument can be made for the claim that the process will be reversed through the Constitution.

Already there are worrying signs that the British government will attempt to promote the European Constitution next year as a 'Treaty' which tames the European institutions and tilts the Union decisively towards intergovernmentalism. In an eerie echo of Mr. Major's claims ten years ago that the Maastricht Treaty should be commended for 'putting an end to federalism', Mr. Straw tells us that the European Constitution allows national governments and parliaments to get a 'better grip' on the workings of the European Union. In particular support of that proposition, he and the Prime Minister like to point to the newly created position of 'President of the European Council', which will supposedly allow heads of state and government to exert more effectively their political will on the European institutions. It is, however, in the highest degree implausible that this purely administrative post will make even a marginal difference to the way the European Union works. Those who regard as unsatisfactory the way the European Union currently works should not rationally regard it as being greatly improved by the European Constitutional Treaty. The claim that the threatening beast of European integration has somehow been tamed by the European Constitution is a dangerously double-edged one if the government and its supporters in the 'yes' campaign try to pursue it. The risk is that the government's implicit acceptance of Eurosceptic hostility towards the European institutions over the coming months will simply mark another turn of the ratchet towards final British estrangement from the European Union. In the interest of winning a referendum next year, the British government would be much better advised to challenge the near-consensus of British hostility to the central European institutions. The European Constitutional Treaty proceeds on a set of entirely different assumptions to those which underlie such hostility. It will be futile and counter-productive to pretend otherwise. To have a chance of winning the referendum next year, the

government will need to expound and extol the role of the central European institutions in Europe's success story, and not waste its time with the implausible claim that a ball and chain has been put on these institutions by the Constitution.

As is so often the case in the British debate on Europe, the coming months will be rich in paradox. Some at least of those advocating a 'yes' vote for the Constitutional Treaty will be doing so on the eccentric ground that it makes leaving the European Union easier. Among those advocating a 'no' will be both economic liberals and dirigiste left-wingers, neither of whom find the Treaty sufficiently sympathetic to their social models. UKIP will be urging a negative vote as a first step to leaving the European Union. Officially at least, the Conservative Party will argue that a 'no' vote need have no such consequence. Perhaps the supreme irony will derive from the eventual decision of the British government to hold a referendum on a document that it feels happiest describing as a 'treaty'. The British electorate has never been invited before to vote on a treaty. It may be a long time before it is invited to again.

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