



BREXIT: LEGALLY EFFECTIVE ALTERNATIVES

By Paul Gallagher



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INTRODUCTION

In his Bloomberg speech¹ Prime Minister Cameron announced that the next Conservative manifesto in 2015 would seek a mandate from the British people for a Conservative government to negotiate a new settlement with Britain's European partners and promised that when they had negotiated a new settlement they would hold a referendum to afford the British people with a very simple in or out choice. The Prime Minister said that to make the changes needed for the long-term future of the euro and to achieve the diverse competitive democratically accountable Europe [which Britain seeks] the best solution would be to have a new Treaty and that his strong preference was to enact these changes for the entire European Union ("EU") and not just for Britain.

In the face of strong opposition from Britain's European partners to Treaty amendments, Britain's position with regard to the legal structure for any changes has modified. Most recently in the Prime Minister's letter of 10 November to the President of the European Council, Mr Tusk, the Prime Minister stated:

"I hope that this letter might provide a clear basis for reaching an agreement that would, of course, need to be legally-binding and irreversible and where necessary have force on the Treaties."

In this letter the Prime Minister identified his renegotiation objectives by reference to four categories namely, Economic Governance, Competitiveness, Sovereignty and Immigration.

In its Fourteenth Report of Session 2015-16 the House of Commons European Scrutiny Committee ("the Committee") examined the UK's renegotiation of EU membership and noted² that the completion of Treaty amendment by the 31 December 2017 deadline for the referendum can be ruled out as impractical. The Committee pointed out that the Lisbon Treaty took almost two years to be ratified and to come into force from the date it was agreed, and concluded that there is no possibility of Treaty amendment before the referendum. The Committee noted that the requirement or otherwise to amend the Treaties would be a key factor in the negotiability of any particular UK renegotiation objective and it therefore took evidence from a broad range of legal experts, which evidence informed their conclusions. As is the norm, the Committee's report is of a very high quality and contains some excellent technical analysis of many of the issues. The primary focus of the report is on the nature and extent of the undoubted legal problems which arise in securing the necessary legally sound concessions. There is somewhat less focus on finding workable solutions to these legal problems, which are capable of providing a legally binding outcome.

¹ Prime Minister's Speech on the future of the European Union delivered at Bloomberg 23 January 2013.

² Paragraph 32

THE NATURE OF THE ISSUES ARISING

In considering legal solutions it is necessary to bear in mind a significant, and somewhat overlooked, feature of Britain's strategy. If, as is expected, the in/out referendum is held this year, it will be held in circumstances in which an extremely significant issue is left undetermined, namely, the terms of Britain's exit from the EU (or the alternatives to EU membership) if the British people should decide to leave.

Article 50 of the Treaty on European Union ("*TEU*") provides that any Member State may decide to withdraw from the EU in accordance with its own constitutional requirements. In such circumstances the EU institutions are required to negotiate and conclude an agreement with that State setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. Article 50(3) provides that the Treaties shall cease to apply in the withdrawing State from the date of entry into force of the withdrawal agreement or failing that two years after the notification of the intention to withdraw unless the European Council in agreement with that State unanimously decide to extend this period. The legal entitlement of Britain to withdraw is therefore not an issue. However, the terms of withdrawal are, and they could be crucial. This is particularly so when many of the arguments advanced by those in favour of withdrawal are premised on a continuing relationship with the EU that would confer on Britain all or many of the advantages of the single market without what are perceived to be all the burdens of regulation associated therewith. Unless this issue is addressed prior to the referendum there will be a clear asymmetry between the degree of legal protection being sought in respect of the concessions required to enable Britain to remain within the EU, and the apparent acceptance of the absence of any legal protection with regard to the terms of the threatened withdrawal, or the alternatives to EU membership.

Presumably what is intended is that if Britain votes for withdrawal, the withdrawal terms will then be negotiated. If this be so, then in addition to the general uncertainty with regard to the future impact on Britain of a withdrawal from the EU, there would be significant additional uncertainty with regard to the substance of the issue on which voters are being asked to make a decision. The precise terms of withdrawal which are ultimately negotiated will determine Britain's future relationship with the EU.

If as appears likely the terms of withdrawal will not be determined by a legally binding agreement by the time of the referendum, this would give rise to very significant legal uncertainty with regard to the protection of Britain's interests in such a scenario. This is, (or at least should be), a relevant and important factor in considering the degree and extent of legal certainty which might be acceptable to Britain in terms of an agreement on the concessions required by it. In simple terms, withdrawal from the EU would almost certainly be permanent. A decision to stay does not preclude a future decision to withdraw if the promised concessions are not delivered. That implicit continuing threat of withdrawal (in the event of non-delivery of the agreed concessions) would have the effect of reinforcing the protection provided by the legal security offered in respect of the concessions made.

It is of course legally possible for Britain, instead of seeking to conclude a withdrawal treaty which determines its relationship with the EU to pursue other options such as attempting, to join the European Economic Area ("*EEA*"), to rejoin the European Free Trade Agreement ("*EFTA*"), to seek an agreement akin to the Swiss/EU arrangement, to negotiate a free trade agreement with the EU or to enter a customs union with the EU similar to that which exists between Turkey and the EU. Britain could also seek to conclude a trade agreement with the EU and in the circumstances rely on the World Trade Organisation ("*WTO*") Rules.³ However the fact that there are possible alternatives to a withdrawal agreement does not reduce the uncertainty with regard to the nature of Britain's future relationship with the EU in the event of a no vote.

The fact that legal protection with regard to withdrawal terms or Britain's new relationship with the EU can only be achieved in the future demonstrates that at the time of the referendum, voters will not have any legal certainty as to the terms of Britain's future relationship with the EU if there is a no vote. If this transpires to be the case it might suggest that for Britain to insist

³ A very informed discussion of UK's alternatives option can be found in "The seven alternatives to EU Membership" by Jean-Claude Piris, Centre for European Reform, January 2016.

on legal certainty with regard to all aspects of the offered concessions unnecessarily impedes a successful outcome to the negotiations because it seeks a possibly unattainable threshold of legal protection for concessions, while accepting a complete absence of legal protection in respect of the alternative of withdrawal. In such circumstances it should be possible to justify an arrangement which would, prior to the referendum, achieve as much legal protection as is possible now within the framework of the existing Treaties, while putting in place a mechanism to deliver additional legal protection in the future. Some of the British demands (if conceded) would appear to require an amendment to the Treaties as opposed to a clarification of what they mean. However it should be recorded that, in the absence of a precise formulation of these demands, this is not certain. Inevitably any requirement for Treaty change has significant implications for the degree of legal protection and certainty that can be obtained prior to the referendum.

The British renegotiation does not involve the same type of legal issues as arose during Ireland's negotiations with the EU prior to a decision being made to hold a second referendum on Lisbon. The legal solutions proposed and accepted by Ireland at that time do however provide a mechanism which offers legal security for some of the British demands. There are, nevertheless, significant differences between the substantive matters of concern to Britain and the matters which previously concerned Ireland. Consequently, the nature of these differences gives rise, in the case of some British demands, to a requirement for additional legal solutions to those utilised by Ireland.

The EU's response to Ireland on the Lisbon issue and its earlier response to Denmark relating to its concerns with aspects of the Maastricht Treaty, underline the fact that solutions can be found to complex legal problems and that the pressing needs of individual countries can exceptionally be accommodated where it is necessary to do so, not only in the interests of those countries, but also in the interests of the EU. Given the challenges facing the EU and the emergence in some Member States of political and social trends with echoes of those which were prevalent in Europe in the 1930s, this is not a propitious time to take any unnecessary gamble with regard to the consequences that would ensue if a Member State of Britain's significance and standing were to leave the EU. Not only are the consequences of a British withdrawal difficult to predict but such a withdrawal would do immense damage to EU ideals and to the shared belief in the progress and benefits delivered by the EU.

At a European level there has been, for some considerable time, a concern about developing a two-speed Europe. This concern proved initially to be a significant factor in the context of Ireland's negotiations following the initial rejection of the Lisbon Treaty. It must however be borne in mind that the EU Treaties (including the Protocols) give explicit recognition to different degrees of cooperation between, and involvement by, Member States in certain specific areas. This is, for example, reflected in the British and Danish Protocols in respect of the euro which recognise that there will be more than one currency within the EU for an indefinite period.⁴ There is also a marked degree of differentiated participation within the Area of Freedom, Security and Justice and this too is reflected in a number of protocols to the Treaties ("*Protocol(s)*").

The Treaties envisage that a Member State may, as a matter of principle, remain permanently outside certain activities or practices pursued within a single institutional framework. The Treaties also provide for enhanced cooperation between Member States in certain areas. This flexibility reflects a recognition of the difficulty which can exist in achieving consensus between Member States with regard to certain aspects of the EU's regulatory competences. This flexibility also constitutes an acknowledgement that there are differences between the Member States over the nature and scope of some aspects of the EU project. The principle of a legal framework in the Treaties which accommodates these differences is therefore clearly established. It is true that the differences so accommodated do not represent what might be regarded as the core principles of the EU. However the ultimate articulation of British demands may demonstrate that those demands can also be accommodated without undermining the core principles.

The existence of this flexibility should not however give rise to an expectation that Britain would succeed in obtaining a special status for the UK through a revision of the EU Treaties. Such a demand would raise fundamental constitutional issues going to the essence of the EU Project and the nature of the EU itself. In legal terms this could of course be effected through an

⁴ Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; Protocol on certain provisions relating to Denmark.

amendment of the Treaties. However in circumstances where other Member States have made it clear that such a fundamental alteration to the nature of the EU Project would not be acceptable I do not consider further in this paper the legal issues that would arise in that scenario.

In considering Britain's demands it is important to proceed on the basis that whatever the merits of the demands judged from the perspective of other Member States, the importance of these demands from a British perspective must be respected. That has been the tradition and practice of the EU, as exemplified in its historic accommodation of Danish and Irish concerns. Such respect is in truth a recognition of the continuing sovereignty of Member States, which sovereignty is explicitly recognised in the TEU. It must of course be emphasised that respect for the demands of Britain (or indeed any other country) does not preclude tough negotiations in relation to those demands. If compromise is of the essence of the European project then, following negotiation, it should be possible to reach a compromise that respects the exigencies of both the EU and the Member State(s) concerned. Approaching British demands from that perspective, it should be possible to provide for the necessary legal reassurance in respect of those demands which can be accommodated within the Treaties, and to provide appropriate legal frameworks to resolve in the future demands which cannot be so accommodated or which require a greater degree of legal protection.

THE USE OF GUARANTEES

Following the rejection of the Lisbon Treaty in the first referendum in 2008, Ireland sought certain guarantees with regard to the meaning and effect of the Lisbon Treaty. Member States, who had just completed their own ratification procedures, did not wish to engage in further ratification procedures and also wished to avoid any impression that Ireland was gaining additional concessions or that their own positions under the Treaty were being adversely affected. The June 2009 European Council resolved these competing considerations in the following manner:

1. The Heads of State or Government adopted a free-standing decision ("the Decision") which was agreed to be legally binding in public international law.
2. The Decision provided legal guarantees that certain matters of concern to the Irish People would be unaffected by the entry into force of the Treaty of Lisbon.
3. The content of the Decision was fully compatible with the Treaty of Lisbon and did not necessitate any re-ratification of that Treaty.
4. It was agreed that at the time of the conclusion of the next accession Treaty, the provisions of the Decision would be set out in a Protocol to be attached in accordance with the respective constitutional requirements of the Member States to the TEU and TFEU.

The guarantees were largely worded in general terms, making clear that they applied to all Member States and it was clearly stated that the Protocol would clarify but not change either the content, or the application, of the Treaty of Lisbon. The Decision was legally binding in public international law. It was subsequently registered in the Treaty section of the United Nations Secretariat in New York after it entered into force. Registration is essential if an international agreement is to be capable of being invoked before organs of the United Nations. The Heads of State or Government further agreed that the Decision would be lodged in Rome with the Italian Government which acts as a depositary of EU Treaties. Ireland was not prepared to accept a Declaration because, unlike Protocols, Declarations are not binding, even though they may be taken into account by the Court of Justice of the European Union ("CJEU") in interpreting the provisions of the Treaties.⁵ The Decision provided the necessary legal protection for Ireland, which protection was gold-plated by the inclusion of the guarantees in the subsequent Protocol.

In theory the CJEU, prior to the incorporation of the contents of the guarantee in a Protocol, could have interpreted the relevant Treaty provisions in a manner inconsistent with the terms of the Decision. However the prospects of its so doing were

⁵ See Article 31(2)(b) of the Vienna Convention of May 23 1969 and *Rottmann v Freistaat Bayern* Case C-135/08 Paragraph. 40.

remote in the extreme. The Treaties and Union competences are explicitly based on the principle of conferral whereby the Member States confer specific powers on the EU and its institutions. When all Member States solemnly and formally agree that the Treaties are not intended to affect a particular right, the CJEU could not as a matter of law ignore such a clear and unambiguous statement in interpreting the Treaties. The CJEU does not generally apply the Vienna Convention to the Treaties. However it is difficult to see how it could ignore Article 31 2(a) of the Vienna Convention, which explicitly provides that any agreement relating to the Treaty, which was made between all parties in connection with the conclusion of the Treaty, forms part of the context for its interpretation, even if the CJEU were to base the rule enshrined in that Article on some principle of EU law rather than on the Convention. Were the CJEU to ignore such a multilateral declaration of the meaning of the Treaties, contained in a legally-binding treaty, it would do immense damage to its own credibility and legitimacy. Furthermore the CJEU, particularly in recent years, has displayed a more practical and sensitive approach in interpreting the Treaties and has recognised the importance of a balanced approach to the respective interests of the Member States and the EU.⁶

Guarantees can therefore be used to provide the necessary legal protection on all matters which involve a clarification of the EU Treaties. Guarantees cannot be used in respect of any matter which might amend or enlarge the Treaties in any way. Even without a subsequent Protocol, guarantees embodied in a free-standing decision of the Heads of State or Government binding in international law are legally secure. They would be irreversible without unanimity and could not be ignored by the CJEU.

TREATY AMENDMENT

It would appear that the other Member States are not prepared, at this point in time, to agree any amendments to the Treaties as part of Britain's renegotiation. The Heads of State or Government cannot enter into a binding promise to amend the Treaties in the future because such a promise is itself a treaty and any amendments can only be done in conformity with Article 48 TEU. Member States cannot, as a matter of EU law, enter into any Treaty binding in international law which conflicts with the provisions of the Treaty.

If a Treaty amendment is required, Article 48(6) provides a simplified revision procedure for amending the provisions of Part III TFEU relating to the internal policies and action of the Union. Part III includes the internal market; free movement of persons; the area of freedom, security and justice; monetary union and the euro; which are areas of concern to Britain. This procedure could therefore accommodate all Treaty changes to the TFEU. Treaty changes in relation to Part III TFEU are very unlikely to require a referendum in Ireland⁷ as the changes would almost certainly not alter the essential scope or objectives of the Treaties.⁸ Treaty changes to the Qualified Majority Voting ("QMV") rules enshrined in Article 16 TEU could not be made through this simplified procedure provided for in Article 48(1). Nevertheless Treaty changes in relation to voting would probably be very limited and specific and could almost certainly be accommodated in a Protocol using the ordinary revision procedure. Again such an amendment would be very unlikely to require a referendum in Ireland.

A DECISION OF THE EUROPEAN COUNCIL

The Committee expressed concerns about the value that could be attached to a decision of the European Council agreeing to legislative change or indeed Treaty amendment in the future. It said that until recently it might have been assumed that an agreement by the European Council would be a secure political commitment but that the use of the European Financial Stability Mechanism ("EFSM") in 2015 for support for Greece, (despite a December 2010 European Council Decision that this Instrument would no longer be available to support Eurozone Member States), undermined that certainty.

I do not believe that the two situations are comparable. It is true that in December 2010 the European Council concluded that the proposed European Stability Mechanism ("ESM") would replace the EFSM and that the latter would remain in force

⁶ Judgement in *Gauweiler & Ors v Deutscher Bundestag* Case C-62/14 on the validity of the European Central Bank's Outright Monetary Transactions Programme

⁷ A definitive view on the necessity for a referendum could only be made in the context of a specific proposal.

⁸ *Crotty -v- an Taoiseach* [1987] IR 713; *Pringle v Ireland* [2013] 3 IR 1

only until June 2013. That undoubtedly was the intention at the time but the financial stability issues and Greece's difficulties lasted much longer than expected. Furthermore the loan provided by the EFSM was a short-term emergency loan repayable in three months from the ESM which in fact funded the third Greek bailout. The decision to use that fund was made by Eurozone Members in the middle of the night without consultation with non-euro Member States. In any event, as the Committee acknowledged, the European Council ultimately made good on its promise because an alternative way was found to guarantee that the non-Eurozone States would not find themselves prejudiced. If anything, therefore, this matter provides reassurance that European Council commitments will be fulfilled.

A commitment by the European Council to effect the necessary legal changes to meet British demands would be of an entirely different order and significance from the decision referred to by the Committee. It would be without precedent for the Member States to renege from such a promise and would be inconsistent with the mutual respect and commitment to co-operation which underlie the Treaties. It is true, as the Committee noted, that a future government in a Member State could take a different view but the likelihood of a such a government renegeing on such a solemn commitment by a previous government must be very small. Furthermore there is a huge incentive for Member States to make good on any such decision. Not to do so would do lasting damage to the confidence and trust in the future workings of the EU and would almost certainly precipitate a British withdrawal - the very consequence the decision was intended to prevent.

Furthermore a decision of the European Council must be distinguished from a free-standing decision of the Heads of State or Government. Such a decision declared to be legally binding in public international law constitutes an international Treaty.

SPECIFIC BRITISH DEMANDS

Economic Governance

In his letter of 10 November to President Tusk, the Prime Minister indicated the following priorities and mechanisms in this category:-

- i. recognition that the EU has more than one currency
- ii. no discrimination or disadvantage against any business on the basis of the currency of the country in which they are based
- iii. protection of the integrity of the single market
- iv. participation by non-euro members in developments such as the Banking Union must be possible, but on a voluntary basis
- v. taxpayers in countries that are not in the euro must not bear the cost for supporting countries in the Eurozone
- vi. financial stability and supervision is a key area of competence both for Eurozone institutions such as the European Central Bank and national institutions such as the Bank of England
- vii. any issues that affect all Member States must be discussed and decided by all Member States

The Prime Minister required that these principles should be legally binding and supported by a safeguard mechanism that ensures the principles are respected and enforced.

With regard to the first two items which relate to the Eurozone and the euro, the Committee concluded that the regulation of the relationship between Eurozone and non-Eurozone Member States is of such importance that it requires the security of Treaty amendment and, in particular, that it was necessary that it be secured in a manner which provides legal certainty, - a double majority system in relation to economic governance. It is to be hoped the British Government will take a different view as to the degree of legal certainty required.

The Treaties already explicitly recognise that the EU has more than one currency. This is recognised in a number of Articles of the TFEU. In particular, Article 140 TFEU and the British and Danish Protocols⁹ are premised on such recognition. The British Protocol specifically provides that the UK shall not be obliged or committed to adopt the euro. All Member States other than the UK and Denmark are legally obliged to join the euro.

While the precise content of what is being sought under the “*No Discrimination Nor Disadvantage*” demand is unclear, it is difficult to envisage how any discrimination against a business on the basis of the currency of the country in which the business is based could be countenanced under the Treaties, particularly when the Treaties recognise and permit the use of non-euro currencies. Such discrimination would infringe core principles of EU law and in particular would be contrary to the general principles of such law. Furthermore Article 21 of the Charter expressly prohibits any discrimination on the grounds of nationality. These issues therefore do not appear to require any Treaty change. However, Britain may insist on some formal change to the Treaties to explicitly recognise that the EU is a multi-currency Union.

It is unclear as to what precise protections are being sought in relation to the integrity of the single market. Given that the single market embodies the core principles of the EU it is unlikely that British demands in this context require any Treaty change. This is particularly so given the commitment in recent European Council Conclusions to strengthening the single market.¹⁰

Participation by non-euro Members in developments such as the Single Supervisory Mechanism (“*SSM*”) and Single Resolution Mechanism (“*SRM*”), which are fundamental structures in the move to full Banking Union, is already possible on a voluntary basis and there is no reason in principle why such participation cannot be accommodated in future legislation. The European Single Rulebook for banking, consisting of the Capital Requirements Directive IV and Capital Requirements Regulation, apply across the entire EU and were decided upon by all Member States. Furthermore Article 141 TFEU provides that if and so long as there are Member States with a derogation from the euro, the European Central Bank (“*ECB*”) shall, as regards those Member States, strengthen cooperation between the national central banks and strengthen the coordination on the monetary policies of the Member States with the aim of ensuring price stability.

There are a number of provisions e.g. Articles 136, 137 and 138 which provide for decisions being made only by euro Member States. These Articles concern matters relating to the proper functioning of economic and monetary union and arrangements for ensuring the euros’ place in the international monetary system. While the aforementioned matters have an indirect impact on non-euro Member States, it is not clear that Britain is seeking a decision-making role in relation to them. Any formal decision-making role would require Treaty change but that could be done through the simplified revision procedure.

The demand that taxpayers in countries that are not in the Euro must not bear the costs of supporting countries in the Eurozone does not appear to be inconsistent with the Treaties. This has already been recognised and is reflected in the ESM.

The demands with regard to financial stability and supervision also appear to involve no Treaty change. The importance of financial stability and supervision is already recognised in the TFEU (and in particular Title VIII) and secondary legislation. Cooperation between the ECB and national institutions, such as the Bank of England, can be provided for by legislation or indeed by Memoranda of Understanding and as mentioned above, Article 141 TFEU implicitly, if not explicitly, requires such cooperation. Furthermore the SRM and SSM which support financial stability and supervision were designed in a manner which accommodates cooperation between all national central banks within the EU.

Again, it is unclear what is comprised in Britain’s demand that any issues that affect all Member States must be discussed and decided by all Member States. As mentioned, Article 136(2) TFEU does however provide that measures relating to the proper functioning of economic and monetary union shall be voted upon only by members of the Council representing Member States whose currency is the euro. Similarly Article 137 of the Protocol on the EuroGroup provides for informal meetings of

⁹ Protocol on certain provisions relating to the United Kingdom of Great Britain and Ireland; Protocol on certain provisions relating to Denmark

¹⁰ See June 2014 European Council Conclusions

ministers of Member States whose currency is the euro. The Protocol provides for the Commission to take part in the meetings and for the ECB to be invited to take part in the meetings. It does not make provision for ministers from non-euro Member States to participate. Article 138 provides that common positions on particular interest for economic and monetary union shall be decided by Euro Members. However there does not seem any reason in principle why non-euro members could not be invited to such meetings as observers or why informal arrangements could not be made to consult those members on issues arising, both before and after such meetings, especially if those meetings and discussions affect other Member States outside the euro.

The existing system of voting is provided for in Article 16 TEU (subject to the Protocol on Transitional Provisions). Any alteration to the QMV structure provided for in the Treaties or any move from a requirement of QMV to unanimity on particular issues would require a Treaty amendment.¹¹ However, it would be possible for the Member States to reach a political agreement which would operate in the interim. There is nothing in the Treaties which prevents Member States agreeing not to vote on a particular matter, notwithstanding the existence of the requisite majority to approve the matter, until consensus is achieved or at least until every effort to obtain such consensus is exhausted. There is precedent for such a political agreement.

In July 1965 when France refused to take part in Council Meetings because of a dispute about the use of majority voting, the Council adopted the so-called “*Luxembourg Compromise*” in which Member States declared that in cases where acts could be adopted by a majority vote on a proposal from the Commission, they would nevertheless, in cases where very important interests of a Member State were concerned, try within a reasonable time limit to find a solution acceptable to all of them. The Luxembourg Compromise did not renounce the principle of majority voting but it did result in a practice whereby almost all Council acts, with the exception of budgetary measures, had to be adopted by unanimous vote. Similarly the so-called “*Ioannina Compromise*” entered into on 1 January 1995 applied when a certain number of Member States, not constituting a blocking minority, indicated their intention to oppose the adoption by the Council of a decision by qualified majority. The Council agreed it would “*do all in its power*” to reach an agreed solution which could be adopted by a majority larger than the required QMV. The Ioannina Compromise could not be adapted to changes made in the voting procedure by the Treaty of Nice. Poland had asked the Intergovernmental Conference (“IGC”) of 2007 to include these arrangements in the Treaties themselves. This request was not acceded to, but it was decided by the IGC that the arrangements would be laid down in a decision to be adopted by the Council. A Protocol was added to the Treaties which provides that the decision cannot be amended or abrogated by the European Council without a preliminary deliberation in the European Council, acting by consensus.¹²

If Britain is not satisfied with an informal procedure, then any legal alteration to the QMV structure provided for in the Treaties would not be lawful. The European Banking Authority operates on the basis of a majority of both euro ins and euro outs but such a voting arrangement in the context of the Treaties would require an amendment to be legally valid. As the QMV procedure is provided for in Article 16 TEU this amendment could not be achieved by the simplified version procedure provided for in Article 48(6). However, a focused and limited Treaty amendment by way of a Protocol could be agreed by the Member States in accordance with the ordinary revision procedure. As mentioned, a future amendment of this nature would not require a referendum in Ireland. In *Crotty* the Supreme Court held that the provisions of the Single European Act providing for a movement from unanimity to QMV on many important matters did not require a referendum. The enormous subsequent expansion in the scope of QMV voting reinforces the conclusion that restrictions on, or additions to, the matters covered by QMV do not materially alter the scope of the existing Treaties.

In respect of most of the matters under the heading of Economic Governance it is, as explained above, unlikely that Treaty change would be required. If this is correct, then there would not appear to be any reason why many British demands could not be met through the use of guarantees and, if necessary, a Protocol when the Treaties are next being amended or within some future time period. There is also scope for informal voting arrangements to meet on an interim basis any British demands on voting arrangements will require Treaty amendment.

¹¹ There are of course provisions in the Treaties which provide for a movement from unanimity to QMV. See for example Article 31(3) TEU
¹²

If Britain insists on some Treaty protection the Centre for European Reform has suggested a solution involving a new Treaty article, stating that nothing the Eurozone does should damage the single market; providing for new procedures to ensure greater transparency in discussions of the EuroGroup so that non-euro countries know what is going on and the creation of an emergency brake so that any non-euro country which believes that an EU law harms the market may ask the European Council to review the matter for a period of up to, say, a year.¹³ This solution would be legally effective.

Competitiveness

The British concern with competitiveness appears in principle to be a concern shared by the EU. The Committee notes¹⁴ that the Commission has long been concerned with this issue and that President Tusk, in his letter of 7 December 2015 to the European Council,¹⁵ assessing the state of play on the negotiations said:

“There is a very strong determination to promote this objective and to fully use the potential of the internal market and all its components. Everybody agrees on the need for further work on better regulation and on lessening the burdens of business while maintaining high standards. The contribution of trade to growth is also very important in this respect, in particular trade agreements with vast growing parts of the world.”

The Committee was undoubtedly correct in concluding that these demands can be achieved through secondary legislation and the Transatlantic Trade and Investment Partnership (“TTIP”). It is highly unlikely that the necessary secondary legislation will be adopted prior to the referendum. The commitment to such secondary legislation could however be made by way of a Decision of the European Council which could create a framework for delivery with set time limits. This would enable the fulfilment of the agreed objectives to be monitored and confirmed. The other Member States would have an enormous incentive to deliver on such commitment.

The importance of this issue to other Member States is reflected in the June 2014 European Council Conclusions¹⁶ which set key priorities for the next five years which include the following priorities relating to competitiveness, namely, to fully exploit the potential of the single market in all its dimensions by completing the internal market in products and services and by completing the digital single market by 2015; to promote a climate of entrepreneurship and job creation; to reinforce the global attractiveness of the EU as a place of production and investment, with a strong and competitive industrial base and a thriving agriculture; and to complete negotiations on international trade agreements, in the spirit of mutual and reciprocal benefit and transparency including TTIP, by 2015. It is true that these priorities have not yet been fully delivered upon but the commitment is clear.

There are also institutional changes that could be introduced without any amendment to the Treaties. Measures could be introduced which improve the functioning of the EU institutions such as the Commission. Much could be done in providing for closer scrutiny of the Commission’s legislative proposals and in providing for a more rigorous regulatory impact assessment of proposed legislative means. Provision could also be made in legislation for reviews of the efficacy of legislation and the inclusion of some set clauses in controversial legislation which would provide that such legislation would no longer continue in force after a period of time, without express renewal by the EU legislator.

Additional security in relation to the fulfilment of British demands could be achieved through their endorsement by the European Parliament, which of course would be part of the legislative process adopting secondary legislation. Ultimately this matter could be addressed by a form of guarantee, as it does not involve a change to the Treaties, but that may not be necessary, having regard to the shared commitment on this issue.

¹³ See Directorate-General for Internal Policies; Policy Department; Citizens Rights and Constitutional Affairs; European Parliament – United Kingdom’s Renegotiation of its Constitutional Relationship with the EU; Agenda Priorities and Risks. p.10.

¹⁴ Paragraph 84 of its Report.

¹⁵ On the issue of a UK in/out referendum

¹⁶ EUCO 79/14 27 June 2014.

Sovereignty

Britain's concern in this context is very much focussed on the concept of “*ever closer union*” provided for in Article 1 TEU. The provision actually refers to “*an ever closer union among the Peoples of Europe in which decisions are taken as openly as possible and as closely as possible to the citizen*”.¹⁷ This concept appeared in the original Treaties. As expressed in Article 1 TEU it explicitly refers to the Member States’ resolution “*to lay the foundations on an ever closer union among the peoples of Europe*” as opposed to among the Member States. In the Solemn Declaration of European Union of June 1983 the then Member States made a commitment to progress towards an “*ever closer Union among the Peoples and Member States of the European Community*.” Ironically the United Kingdom was one of those Member States. This latter wording is not contained in the Treaties which is the relevant text.

Britain's concern relates to the manner in which the commitment embodied in this phrase could impact on Decisions of the CJEU.¹⁸ The CJEU has referred to this concept in the past as an interpretative tool, notwithstanding that the phrase merely sets out an objective and does not impose legal rights and obligations. Essentially the CJEU has resorted to the concept as an aid to construction of the last resort¹⁹ which the court resorts to as a supplementary interpretive rule to give effect to the EU's policies interpreted dynamically in the light of their overall purposive structure. An example of this was the CJEU's resort to the principle in the *Pupino* case with reference to Framework Decisions.²⁰

However, the limited role played by this concept in the court's decision-making is apparent from the fact that the concept has been referred to very infrequently in the courts caselaw. The EU Courts have decided almost 30,000 cases (including opinions) between November 1954 and November 2015 and the term “*ever closer union*” has been referred to in less than 60 cases and many of those relate to issues of institutional transparency of access to official documents.²¹ Even if the concept is considered as having played a larger role in the development of EU law than the number of citations might suggest, the European Council June 2014 Conclusions referred to below are likely to reduce its significance in the future.

The Committee concluded that because the concept is embedded in Article 1 TEU, Treaty amendment would be required for UK disengagement from the concept to be legally robust. I disagree. Its presence in the Treaty does not mean that the issue cannot be addressed by means of a suitable guarantee clarifying the meaning of this concept. That of course depends on whether Britain and the other Member States can agree a meaning consistent with the Treaties. The possibility of such agreement is perhaps facilitated by the fact that the concept refers to ever closer union of Peoples rather than of Member States and by the fact that it does not create rights or obligations.

Any agreement as to its meaning could record the substance of the European Council's June 2014 Conclusions which explicitly state that “*the concept of ever closer union allows for different paths of integration for different countries allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen it any further*.” These Conclusions must be assumed to be consistent with the Treaties. Such an agreement could also clarify that the UK is not bound to sign up to Schengen and does not have to give up its Justice and Home Affairs opt-outs and any other matter of concern, so long as the clarifications do not contradict the Treaties.

In his Bloomberg Speech, the Prime Minister emphasised the importance of national parliaments as the true source of democratic legitimacy and accountability in the EU. It is clear that British demands extend beyond conferring on the UK Houses of Parliament a more significant role in the context of European affairs. According to the Committee, the focus of the British Government's efforts is on achieving a “*Red Card*” system which allows groups of national parliaments acting together

17 This has led some commentators to contend that the phrase is focused on transparency and not further integration.

18 Prime Minister Cameron - House of Commons Debates 21 October 2015 1956

19 The Legal Reasoning of the Court of Justice of the EU – Gunnar Beck p.319

20 C-105/03 criminal proceedings against Maria Pupino relating to framework decisions in the field of judicial and police cooperation in criminal matters.

21 House of Commons Briefing Paper Number 07230 16 November 2015 “Ever Closer Union” in the EU Treaties and Court of Justice Case Law – Vaughne Miller

to stop unwanted legislative proposals. The Committee concluded that creating a robust “*Red Card*” system would entail an amendment of Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality and that is undoubtedly so. The Committee does however recognise that a less radical solution could be put in place by non-legislative means, such as strengthening the subsidiarity reasoned opinion procedure. The Committee suggests that an inter-institutional agreement could require that a legislative proposal attracting sufficient opposition of national parliaments must be withdrawn by the Commission or be blocked by the Council and/or European Parliament. There would appear to be nothing in the Treaties which would preclude such an agreement and there is significant scope for such an agreement having regard to the contents of Protocol 2. Furthermore there is scope for much greater involvement by the national parliaments in matters covered by secondary legislation. Such involvement is already provided for in the SSM and SRM legislation.

Protocol 2 requires that each institution shall ensure constant respect for the principles of subsidiarity and proportionality as laid down in Article 5 TEU which explicitly provides that the limits of EU competences are governed by the principle of conferral. Article 2 of Protocol 2 provides that before proposing legislative acts, the Commission shall consult widely and imposes specific obligations on the Commission to forward its draft legislative acts to national parliaments at the same time as the EU legislature. There is undoubtedly room for very significant improvement both at a domestic and EU level to the operation of these provisions.

If British demands extend to changes to Title II TEU which contains provisions on democratic principles including provisions on the national parliaments, then any such amendments to the TEU would have to be effected through the ordinary revision procedure. It is possible that changes to the role of the national parliaments, depending on the nature and substance of the changes, could require a referendum in Ireland having regard to the specific division of function in the Constitution between the Government and the Oireachtas in the international/EU sphere. Caution, however, needs to be exercised in assessing the consequences for the efficient workings of the EU and its ability to respond to crises if there is a significant shift in power to national parliaments.

Immigration

Britain’s main concern under this heading appears to relate to the draw which its welfare system can exert across Europe.²² In his letter of 10 November 2015 to Mr Tusk, the Prime Minister indicated the following priorities and mechanisms to deliver his objectives in the renegotiation:

1. Free movement should not apply to future new members of the EU until their economies have converged much more closely with existing Member States.
2. There should be a crackdown on the abuse of free movement including tougher and longer entry bans for fraudsters, action against sham marriages and more entry requirements for non-EU spouses of EU migrants.
3. CJEU judgments which have widened the scope of free movement in a way that has made it more difficult to tackle this abuse must be addressed.
4. There should be a reduction on the draw which the welfare system exerts, specifically a four-year delay before those coming to the UK from elsewhere in the EU qualify for in-work benefits or social housing.
5. A ban on sending child benefits overseas.

It is difficult to be categorical with regard to how these demands might be met, given that they are non-specific as to the precise requirements. However this demand does potentially raise very fundamental issues which go to the core of the Treaties. The principle of free movement and the social security rights required to make it meaningful are core EU values. Article 21(3) TFEU provides for the Council adopting measures concerning social security or social protection to enable the objective of free movement to be attained. Article 153(1)(c) TFEU allows the EU in order to achieve the objectives of promoting employment

²² Prime Minister’s Speech on Europe 10 November 2015.

and improved living and working conditions to support and complement the activities of the Member States in the area of “*social security and social protection of workers.*” Article 48 TFEU gives the EU legislature power to adopt such measures in the field of social security as are necessary to facilitate the freedom of movement for employed and self-employed migrant workers and their dependents. Article 79(1) TFEU envisages that the EU will develop a common immigration policy aimed at ensuring among other things, the fair treatment of third-country nationals residing legally in Member States.

These rights are reinforced by the provisions of the Charter of Fundamental Rights (“the Charter”). Article 34 of the Charter provides that the EU recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age and in the case of loss of employment in accordance with the rules laid down by EU Law and national laws and practices. It further provides that everyone residing and moving legally within the EU is entitled to social security benefits and social advantages in accordance with EU law and national laws and practices. This provision is subject to the provisions of Protocol (No. 30) to the Treaty on the Application of the Charter of Fundamental Rights of European Union to Poland and to the United Kingdom. Article 1(2) of that Protocol provides that nothing in Title IV of the Charter creates justiciable rights applicable to Poland and the United Kingdom, except in so far as Poland and the United Kingdom have provided for such rights in their national law. However the Explanations of the Praesidium of the Convention which drafted the Charter²³ note that this provision is based on Articles 153 and 156 TFEU which provisions apply to the UK in any event.

The current EU law regulating social security coordination comprises Regulation 883/2004 (the Basic Regulation) on the coordination of social security systems and Regulation 987/2009 (the Implementing Regulation) laying down the procedure for implementing Regulation 883/2004. Co-ordination of social security systems was originally within Community/EU competence only insofar as it was necessary to provide freedom of movement for workers on the basis of Article 48 TFEU. However it is now more correct to say that it constitutes a major component of the general freedom and fundamental rights of citizens of the EU as provided for in Article 34(2) of the Charter. Every Member State is still free to design its social security system independently. European rules determine however under which country’s system a person should be insured when two or more countries are involved and co-ordinates social security entitlements. Some of Britain’s demands can be achieved by changing its welfare system for everybody including British citizens.

The detailed EU rules on social security co-ordination are founded upon a number of general principles, which must continue to be respected unless the Treaties are changed. First individuals should not suffer a disadvantage in social security terms through exercising the rights of free movement. Member States must respect Treaty provisions and the general principles of EU law when defining conditions for affiliation and entitlement to benefits in domestic legislation. Secondly, eligibility for an amount of benefit is to be assessed only after aggregating all the periods in which entitlement was required under the laws of the various Member States (Article 48(a) TFEU). Thirdly, benefits cannot be terminated because the recipient moves to other Member States. i.e. they must be paid in full regardless of where the recipient happens to be living in the EU (Article 48(b) TFEU). Fourthly, those exercising their EU movement rights as migrants may not be discriminated against, directly or indirectly, on grounds of nationality. They are subject to the same obligations and entitled to the same benefits as nationals of the host State. Fifthly, the burden of paying substantial or long-term benefits, such as old age pensions, must be proportioned pro-rata between the States where the individual has contributed during his working life.²⁴

The scope for addressing Britain’s demands is limited because it will not be possible to alter provisions of social security law based on Treaty provisions, or the general principles of EU law, without Treaty amendment. Secondary legislation can be altered but only to the extent that it does not reflect Treaty obligations or the requirements of the aforesaid general principles.

According to the Commission’s Communication on the Free Movement of EU citizens and their Families,²⁵ on average mobile

²³ As updated by the Praesidium of the European Convention

²⁴ Article 52 Regulation 883/2004

²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic & Social Committee and the Committee of the Regions Brussels 25 11 2013 COM (2013) 837 Final

EU citizens are more likely to be in employment as the nationals of the host country. The Commission says they help the host countries economy to function better because they help to tackle skill shortages and labour market bottlenecks. In most Member States mobile EU citizens are net contributors to the host country's welfare system – they pay more in tax and social security contributions than they receive in benefits. EU mobile citizens also tend to be net contributors to the costs of public services they use in the host Member State and are therefore unlikely to represent a burden on the welfare systems of host Member States. The Commission states that this conclusion is corroborated by data which the Member States submitted to it.

If the Commission Communication reflects the present position then it may be that in reality the alleged problems resulting from free movement and abuses of the welfare system are not as bad as portrayed. However it would appear that the reality in this context is obscured by the perception and the perception in the UK appears to be that this is a major problem. The issue must therefore be addressed but if the facts are confronted rationally it may be that the required remedy is nothing as drastic as some have suggested. Further, there is an incentive for some Member States to support reform. The elaborate system of social protections and incentives developed by Europe's governments will be difficult to sustain not only because of demographic change within countries but also because of the changing nature of work and the constraints imposed by EU requirements for national budget discipline.²⁶

It is however noteworthy that at least some of the British demands focus on abuse and fraud. This is certainly something that can be tackled by secondary legislation, better data sharing and improved enforcement mechanisms and procedures. The concept of abuse of rights is well established in EU law. There is a general principle of EU law that abuse of rights is prohibited.²⁷ The concept of abuse of rights means that rights which derives from fraudulent or abusive conduct, or which use fraudulent or abusive means, will not be enforced. This well recognised concept can, with reference to a particular context, be expanded by secondary legislation which could define what should be considered to be an abuse of rights in particular circumstances. This principle, and improved data sharing and enforcement, provide considerable scope for achieving improvements in this context. It is possible to introduce legislative changes that address British concerns about abuse of free movement, abuse by fraudsters and sham marriages. It would also be possible to address abuses in the welfare system by legislation. It would, however, (having regard to the aforementioned Treaty provisions) be very difficult to lawfully impose a general ban on sending child benefits to children living in other parts of the EU. However the Commission has been considering a revision of EU laws on the coordination of the social security payments and this may provide an opportunity for such amendment on child benefit, but if the focus of this demand is on abuse it should be possible to address it in the manner discussed.

Britain's concerns about the case law of the CJEU expanding social welfare entitlements can be addressed at least in part by a review and narrowing of secondary legislation and an expansion of the concept of abuse of rights. Furthermore it is noteworthy that the CJEU has in recent years demonstrated sensitivity to concerns in this area. In its *Dano* judgment,²⁸ the CJEU allowed a Member State to exclude an EU citizen from social benefits if that person is solely present on its territory to take advantage of that country's social security system. In its more recent *Alimanovic* judgment, the CJEU held that the right of EU citizens and their family members to move and reside freely within the EU must be interpreted as not preventing legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain special non-contributory cash benefits which also constitute social assistance although those benefits are granted to nationals of the Member State concerned who are in the same situation.²⁹ Obviously there can be no guarantee that the recent trend in CJEU case law will continue but the prospects of its so doing can be reinforced by taking the necessary legislative action in relation to abuse of rights. Britain's demands in relation to future new members of the EU can in principle be met by imposing limitations on the exercise of those rights pending convergence of the economies. In 2004 the Accession Treaties made provision for transitional arrangements which allowed the existing Member States to decide whether they would permit free movement of workers (but not self-employed or other categories of EU citizens) based on the "2 + 3 + 2 formula". This scheme obliged the Member States to declare in 2006 and again three years later in May 2009 whether they would open up their labour markets for workers

²⁶ The Welfare State in Europe – Visions for Reform. Bigg, Meshoval & Ribbit September 2015

²⁷ Advocat General Sharpston In Land Baden-Wurttemberg -v- Metin Bozkurt Case C303/08 2010-ECR1 - 13445

²⁸ Case C-333/13 11 November 2014

²⁹ Jobcenter Berlin Neukölln v Alimanovic Case C-67/14

from the Accession States. The restrictions ultimately ended on 30 April 2011. A similar scheme was put in place in respect of workers from Romania and Bulgaria when those States joined the EU on 1 January 2007, and for those workers the restrictions ended on 31 December 2013. Clearly a similar or varied arrangement could be made in the future on the accession of new Member States. In any event, Article 49 TEU gives Britain a veto³⁰ on the joinder of any new Member States and accordingly it has full protection if its demands are not met. Article 49 also provides that the conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails, must be the subject of agreement between the Member States and the Applicant States.

Accordingly, while Member States are under considerable restraints in restricting welfare state services to nationals, there is still considerable scope for dealing with British demands in this area without Treaty amendment. Much will of course depend on the specifics of the demands and whether Britain is prepared to structure demands in a way that does not call into question the fundamental principle of free movement and the core rights/protections arising from the general principles of EU law.

CONCLUSION

There is no doubt that the British demands pose considerable legal problems if they are to be accommodated. Ultimately however I believe that legal structures exist which can provide the necessary legal protection for British demands if the necessary political agreement can be obtained. It would assist a solution if the concessions can, in so far as possible, be framed in general terms so as to apply them to all Member States. This should make them more acceptable to all Member States. It is also important to remember that there can be significant differences between different types of Treaty amendments, not only in terms of the process for effecting an amendment to the Treaties but also in the Member States' ratification processes. The simplified revision procedure is available for Title III TFEU amendments. Furthermore, many (and possibly all) of the necessary amendments are unlikely to require a referendum process in Ireland. As Ireland was the only Member State which was required by its Constitution to hold a referendum on the Lisbon Treaty, it is therefore reasonable to assume that the necessary amendments would not require a referendum in any other Member State in order to be ratified.

³⁰ Every Member State enjoys such a veto.



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