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CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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**United Kingdom's
Renegotiation of its
Constitutional Relationship
with the EU:
Agenda, Priorities and Risks**

AFCO



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CONSTITUTIONAL AFFAIRS

United Kingdom's Renegotiation of its Constitutional Relationship with the EU: Agenda, Priorities and Risks

STUDY

Abstract

This paper contains three contributions which are intended to feed into the discussion in the AFCO committee about the UK government's renegotiation of its constitutional relationships with the EU. First paper by Charles Grant looks at the UK agenda in the renegotiation process and analyses its historical and political context, the focal points of the UK government's demands and possible pitfalls in the negotiation process. Jean-Claude Piris explores the variety of legal solutions to accommodate such demands both inside and outside current EU treaty framework. In the last contribution, Bruno de Witte discusses the options of new form of constitutional association laying down a legal framework for a "partial membership" for the UK.

This study was commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the AFCO Committee

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LINGUISTIC VERSIONS

Original: EN

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Policy Departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny.

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European Parliament, manuscript completed in December 2015.
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This document is available on the Internet at:
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THE BRITISH RENEGOTIATION: PRIORITIES AND RISKS FOR THE GOVERNMENT (*Charles Grant*)

1. INTRODUCTION: HAROLD WILSON, DAVID CAMERON AND RENEGOTIATION

The parallels between the British renegotiations of 1974-75 and that currently underway are striking. Harold Wilson narrowly won the February 1974 general election, having promised to improve the terms of Britain's membership of the European Economic Community and then hold an in-or-out referendum. He had made that promise as a means of holding the Labour Party together, since it was badly divided over the EEC, which Britain had joined in 1973. After a second general election in October 1974, which gave Wilson a stronger position in Parliament, the Labour government began to negotiate in earnest with the other eight member-states. In March 1975 Wilson announced that he had achieved a most of his negotiating objectives. He and a majority of his ministers then campaigned for staying in the EEC, while a minority of them fought on the other side. In May 1975, 67 per cent of the British people voted to stay in the EEC.¹

Once again, a British prime minister has resorted to a referendum as a method for holding his party together – though David Cameron, like Wilson before him, will be able to argue that he is serving the national interest by resolving a difficult issue, of fundamental importance to Britain, for a generation. Once again, a British prime minister is trying to secure a better deal for his country from the other member-states. Once again, that prime minister will – without any doubt – announce that he has won a good deal and campaign for continued membership.

The big difference, however, is that Cameron will find it much harder than Wilson to win his referendum. In 1975, the British people knew that other EEC economies were much more successful than their own. But in 2015 the UK economy is growing faster than most of the others in the EU. In 1975, the entire establishment – the media, business leaders and most mainstream politicians – urged the British people to stay in; the anti-EU campaign was led by extremists of left and right like Enoch Powell, Michael Foot, Tony Benn and Ian Paisley. In 2015, though many politicians and business leaders support membership, plenty of senior figures who come across as moderate will be calling for a No, as will be, probably, significant parts of the media.

Britain's negotiating priorities have of course changed over 40 years. Last time the most contentious issues were Britain's payments into the EU budget, and access to European markets for New Zealand farm goods. In 1975, the complex formula that was agreed on the budget ended up giving the UK no benefit whatsoever, though New Zealand farmers were happy with what Wilson had won for them. Britain also won reassurances on issues such as the steel industry and regional policy. The substance of Britain's relationship with the EU was scarcely affected by the renegotiation. But people believed Wilson when he said that he had improved the terms of membership. In 1975, Britain was a deferential country, in which many people were willing to follow what their leaders told them. Today's Britain is much less deferential and its establishment is mistrusted. If Cameron claims that he has transformed the nature of Britain's relationship with the EU, he will be subjected to much more rigorous scrutiny than Wilson faced in 1975.

¹ Stephen Wall, 'Official History of Britain and the European Community, Vol II, From Rejection to Referendum, 1963-75', Routledge 2014.

This paper examines Cameron's plans and priorities for the renegotiation, and predicts the reforms he is likely to achieve in five key areas; it considers ten obstacles that could prevent Cameron from winning the referendum; and it concludes by asking what, if anything, those outside the UK can do to help ensure a positive result.

2. THE BRITISH GOVERNMENT'S PLANS AND PRIORITIES

The British government would like to complete most of the renegotiation by the end of 2015, though its officials admit that the process could spill over into early next year. In Brussels, some senior officials reckon that it will take a long time to persuade the 27 member-states to support a deal, and that negotiations may therefore continue until the spring or even the summer of 2016. Cameron has promised a referendum before the end of 2017 and many Whitehall officials assume that the referendum will be held in the autumn of 2016. The case for an early referendum is that in 2017 France and Germany will be distracted by general elections; that in the UK, governments tend to be unpopular mid-term (the more unpopular is Cameron's government, the less likely he is to win the referendum); that deferring the date creates uncertainty for businesses, which may therefore hold back from investing; and that a long renegotiation is unlikely to lead to a better outcome than a relatively short one.

The reform package that Cameron wins is likely to consist of a number of different instruments: decisions of the European Council; promises of future treaty change, perhaps in the form of a protocol; political agreements to modify existing EU laws or introduce new ones; and new laws in the UK to change its welfare system.²

Cameron will want to be able to argue that the package is legally watertight. However, the disadvantage of an early referendum is that proposed legislative changes will not have taken effect before the voting happens; it usually takes more than a year for an EU law to be passed (the shortest time possible is around eight months). Anti-EU campaigners will assert that large parts of Cameron's package could unravel, for example due to opposition from the European Parliament.

British negotiators, knowing that decisions of the European Council and promises of future treaty change do not require the Parliament's approval, may try to maximise the use of those instruments. Those in favour of Brexit will claim that promises of treaty change from Britain's EU partners are not to be trusted. But Cameron will point to the promises of treaty change that EU leaders made after the Danes rejected the Maastricht treaty in 1992, and after the Irish voted No to the Lisbon treaty in 2008; both promises were fulfilled.

Cameron's demands fall into five broad areas:

- 1) Making the EU more competitive.** Many of the priorities of the current European Commission, led by President Jean-Claude Juncker, fit closely with British ideas on how the EU should be made more competitive. Juncker and his colleagues are seeking to extend the single market into the digital economy and energy; create a capital markets union (so that companies can more easily raise money through EU-wide capital markets, while becoming less dependent on bank lending); negotiate trade-opening agreements with many countries, including Japan and the US; and cut red tape (Commission Vice President Frans Timmermans has killed off

² Jean-Claude Piris, an eminent authority on EU law, argues that promises of future treaty change will not work if they contradict the existing treaties. See his paper 'Constitutional pathways: which institutional and constitutional adjustments for the United Kingdom?' submitted to the European Parliament constitutional affairs committee in October 2015. I believe that a protocol consisting of promises to change the treaties could satisfy his conditions.

about 80 proposals for legislation and is now looking at repealing existing laws that are redundant). One discordant note is that the Commission is reluctant to liberalise European services markets – a big British priority, given the strength of British services companies – partly because of German opposition.

Most EU governments will be happy to sign up to more single market, more trade agreements and less red tape. Cameron's problem with this competitiveness agenda is that most of the changes he wishes to see are already under way (many British citizens have no idea that the Commission is broadly following a British-driven agenda of economic liberalism, which is one of the reasons why so many French people dislike the Commission). Cameron will need some clever marketing to dress up what the Commission is doing as a British achievement. The EU should consider coming up with something like the 'white book' which in 1986 set out the measures required to create a single market. The Commission could write a new white book, listing the steps required to create a more effective, better-regulated single market, and the European Council could adopt it. British public opinion is not particularly interested in these competitiveness issues, but business leaders and Conservative politicians are.

One uncertainty about Cameron's stance is the extent to which he will try to attack 'social Europe'. His backbenchers would like him to roll back the EU's social agenda, for example the directives covering working time and rights for agency workers. British workers are allowed to opt out of the Working Time Directive (WTD) but it remains a big issue for the National Health Service, because some of its workers are not opted out and because the European Court of Justice has defined rest time in ways that are costly.³ Previous British governments tried to reform this directive and found many allies in the Council of Ministers – but failed because of opposition from the European Parliament. There is no reason to believe that the current Parliament would be much more open to changing the WTD than its predecessors, so Cameron would be well advised not to make a priority of this directive. There are some signs that he understands that if he pushes too hard against social Europe, he may deter Britain's trade unions from campaigning to stay in the EU.

- 2) Reducing the benefits available to EU migrants.** The Conservative manifesto for last May's general election promised to deny EU migrants benefits, unless they had lived in the UK for four years. It also promised to stop the payment of child benefit and child tax credit to migrants' children who live elsewhere in the EU. Of all the subjects covered in the renegotiation, this is the most salient with British public opinion. It is also the subject that causes most anxiety among Cameron's officials. At the time of writing, they cannot see how the prime minister's demands can be reconciled with the EU's treaties and what is acceptable to Britain's partners. They complain about the – as they see it – unhelpful attitude of the Central and Southern European governments, many of whose citizens have gone to work in the UK.

Concerning out-of-work benefits, British officials believe they can achieve change, though much of it will come through reforming UK rules rather than through EU legislation. Two recent rulings by the European Court of Justice – in the *Dano* and *Alimanovic* cases – make it easier for governments to restrict EU migrants' access to unemployment benefits and other forms of support. And in a third case that is still current, an ECJ advocate-general has supported the UK position – in a case brought by the Commission – that the government should be able to apply a residency test to EU migrants claiming a variety of social benefits. The advocate-general said that

³ Katinka Barysch, 'The working time directive: what's the fuss about?', CER policy brief, April 2013.

although this amounted to indirect discrimination against non-British Europeans, it could be justified by the UK's need to protect its fiscal position (the ECJ usually but not always follows the views of advocates-general). The ECJ seems to be developing a doctrine that EU migrants should not be able to claim unemployment benefits in a host country unless they have paid into a contributory system.

Meanwhile, Germany and some governments sympathise with the UK in its efforts to restrict out-of-work benefits to EU migrants. (However, the UK's 'problem' with EU migrants claiming jobseekers' allowance is in fact limited: in 2014 only 4 per cent of claimants of job-seekers' allowance were EU migrants – some 65,000 – though they made up more than 5 per cent of the workforce.⁴)

Cameron's difficulty is that he has made a particular priority of limiting the in-work benefits available to EU migrants, such as tax credits and housing benefit. He has done so because many workers, including EU migrants, receive low salaries that are topped up by the government through such benefits. The EU treaties and existing jurisprudence are clear that on conditions of work, such as tax credits, governments cannot discriminate against EU migrants because of their nationality. Poland and many other member-states would never agree to change the treaties on this fundamental principle.

If the UK wants to reduce the tax credits flowing to immigrants, it will need to change its welfare system for everybody, including British citizens – but even that may not suffice if the result is indirect discrimination. In some respects, the government's plan to introduce 'universal credit' – a streamlining of the benefits system which will replace working tax credit, child tax credit, housing benefit, jobseekers' allowance and other benefits with a single credit – could help. Universal credit could be defined as a residence-based rather than a work-related benefit, so that those claiming it – whether British or from other members-states – would have to live in the UK for a certain number of years in order to qualify.

But there are two problems. First, the government would have to accept that British residents returning from overseas would not be able to claim the credit until they had lived in the UK for a certain period. It would also probably have to deny the credit to young UK-based Britons, until they had worked for several years. But the government has not yet ceded the point, since some of its ministers are reluctant to hit British citizens. Second, some people might claim that the residence qualification was indirectly discriminatory, since most non-British Europeans would find still it much harder to claim the credit than the average Briton, and they might therefore take the government to the courts (and ultimately to the ECJ). But although the ECJ has on occasion permitted indirect discrimination, its jurisprudence suggests that it may not want to do so where in-work benefits are concerned. Britain could not be sure of winning such a case in the ECJ unless the EU treaties were modified. But there is no prospect of other member-states unanimously agreeing to change the relevant clauses on discrimination.

The British government will also find it difficult, though perhaps not impossible, to curb payments of child benefit to children living in other parts of Europe. The number of children receiving such payments from the UK is relatively small (about 20,000), but parts of the British media have made these payments a politically sensitive issue. EU laws on the co-ordination of social security payments are due for

⁴ For a detailed analysis of the numbers of EU migrants claiming UK benefits, see Chapter 4 of 'The Economic Consequences of Leaving the EU: the final report of the CER commission on the UK and the EU single market', CER report, June 2014.

revision in the near future, which may present an opportunity for amending the rules on child benefit. The Commission has been thinking about how the system could be revised. Several North European governments share Britain's desire to limit these payments; Central European states do not. In public, Cameron now talks of lowering, rather than ending these payments, which might facilitate a deal. However, changing the rules would require EU legislation, which would need to pass through a potentially hostile European Parliament.

At various times Cameron has floated another objective which, if he pursues it, should be achievable. He has suggested that people from future accession states should not be able to work in the rest of the EU until the per capita GDP of their country reaches a certain level (say, 70 per cent of the EU average). Since accession treaties require unanimity, Britain could insist on something along these lines, damaging though it would be to its reputation in the Balkans. In any case, several other member-states would be happy to see Cameron push for this principle.

Whatever deal Cameron can secure on migration, the rules on benefits and tax credits are not the main determinant of how many European migrants head for Britain; much more important is the relative strength of the UK economy and the many job opportunities that it creates. So Cameron will find it hard to argue convincingly that the reforms he has achieved will significantly cut the number of immigrants to the UK. However, he may be able to argue that his reforms will make the rules on welfare for migrants fairer.

3) Giving national parliaments a bigger role in policing 'subsidiarity', the principle that the EU should only act when strictly necessary. The Lisbon treaty established a 'yellow card procedure', whereby if a national parliament thinks a Commission proposal breaches subsidiarity, it can issue a 'reasoned opinion'; if as many as a third of national parliaments do so, that constitutes a yellow card. The Commission must then think again and either withdraw the measure or justify why it will not do so. The national parliaments have twice raised a yellow card in this way; on the first occasion the Commission withdrew the draft law and on the second it did not.

The UK wants to strengthen this procedure: some figures in the British government would like a 'red card' system, giving national parliaments a veto; other ministers would be happy to reinforce the yellow card. The European Parliament, Germany and many federalists dislike these ideas, fearing that they would make it harder for the EU to adopt legislation. They also argue that the role of national parliaments in EU affairs is to hold their own governments to account rather than to meddle in EU legislation, for which, they believe, the European Parliament ensures democratic legitimacy (unfortunately, many national parliaments, including Britain's House of Commons, do a poor job of holding their government to account on EU business⁵). But the UK has allies on this issue, including the Dutch and the Hungarians, and most EU governments seem willing to countenance a stronger yellow card procedure.

For example, national parliaments could be given longer than the current eight weeks in which to issue a reasoned opinion; they would then have more time to talk to other parliaments about whether to launch a yellow card procedure. And there could be an inter-institutional agreement that the Commission would, in normal circumstances, withdraw a proposal after a yellow card was raised; the Commission

⁵ Agata Gostynska, 'A ten-point plan to strengthen Westminster's oversight of EU policy', CER policy brief, May 2015.

could undertake to explain itself before the European Council if it wished to maintain the proposal. Another possible change would be to allow national parliaments to raise a yellow card when they considered that a Commission measure had breached 'proportionality' (the treaties' principle that a proposal should not exceed what is necessary to achieve the objectives set out in the EU treaties). The EU could also encourage the idea of a 'green card', whereby national parliaments would club together to ask the Commission to come up with a draft law; Britain's House of Lords EU committee has pioneered this idea, recently working with 15 other parliaments to encourage the Commission to legislate on food waste. None of these changes need require treaty revision, if the Commission is co-operative.⁶

- 4) Amending the treaties' commitment to 'ever closer union'.** The presence of these words in the preamble to the Treaty on European Union has had virtually no practical consequences in terms of EU legislation.⁷ But Cameron is determined to fight and win a symbolic battle on these words. He believes that one reason why the British mistrust the EU is the so-called ratchet effect – European integration appears to be a one-way process by which the EU accumulates ever more powers but never loses them. Ever closer union is a symbol of the ratchet effect. This issue may generate much heat in the renegotiation, given the attachment of federalist countries like Belgium to ever closer union.

Britain's partners are unlikely to agree to change the words in the treaties, but they will probably accept a form of words, perhaps in a protocol, that reassures the British. The conclusions of the June 2014 European Council may provide the basis for an agreement. These said 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 any further." British officials say these words go in the right direction but do not suffice. Foreign Secretary Philip Hammond has urged the other member-states to accept that the EU is a 'multi-currency union'. That phrase will be too provocative for some, who cherish the treaties' statement that the euro is the currency of the EU. Very clever drafting might be able to give Cameron a symbolic victory that is acceptable to integrationists.

- 5) Ensuring a fair relationship between the single market and the eurozone.**

The British government worries that the 19 euro countries may form a caucus within the wider EU. They could act as a bloc in deciding single market laws, since under the Lisbon treaty voting rules that recently came into force, they have a qualified majority. The UK wants to stop the eurozone acting in ways that could damage the market. And it wants to make sure that EU financial rules do not harm the City of London.

George Osborne, the Chancellor of the Exchequer, is very concerned about the relationship between euro ins and outs. He and British officials worry that in the long term, as the eurozone integrates, its members are more likely to adopt similar policies – and to put the interests of the single currency ahead of those of the single market. British public opinion may not be particularly interested in this issue, but

⁶ Some of these ideas are discussed in Jean-Claude Piris's paper 'Constitutional Pathways:

Which Institutional and Constitutional adjustments for the United Kingdom?' submitted to the European Parliament constitutional affairs committee in October 2015.

⁷ The complete phrase is: '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'.

among top bankers, politicians and officials, it matters more than any other dossier in the renegotiation.

The response of the euro countries is that they disagree strongly on many economic policies and so are unlikely to caucus. But the British point to the example of last July's emergency eurozone summit: in the middle of the night, in order to provide a bridging loan to Greece, the eurozone countries tapped an obscure EU bail-out fund, the European Financial Stability Mechanism. They did so without consulting the euro outs – who contribute to the fund – and despite an earlier European Council decision that the fund should not be used for eurozone bail-outs. In the end, Britain and other euro outs received guarantees that they would not lose out financially. But the episode reinforced British fears of eurozone caucusing.⁸ It also worried the Danes and the Swedes. However, most non-euro countries are less worried than the British about the relationship between the ins and the outs. This is because they think that in the long run they may join the euro, and because they do not have a City of London to fret about.

Some of the most senior German officials have little sympathy for the British position. They think the UK's real game is to win a veto for the City of London on financial regulation, which they would strongly oppose. They think this because of Cameron's conduct at the December 2011 EU summit, when he refused to sign the 'fiscal compact' treaty that Germany wanted. He refused because the others would not accept a protocol written by the British Treasury – which had not been shown to other EU governments before the summit – that would have changed voting rules on some aspects of financial regulation. German officials are still bitter about this episode.

Open Europe, a moderately eurosceptic think-tank, has suggested that extending the 'double majority' voting principle could provide Britain with safeguards against eurozone caucusing.⁹ In 2012 the EU decided to apply this principle, which Open Europe had helped to develop, to the European Banking Authority: a majority of both euro ins and euro outs must approve decisions. But Germany is hostile to applying double majority voting elsewhere since, as more countries joined the euro, it would evolve towards a British veto over single market measures. German officials argue that to give Britain such a privileged position would be contrary to the treaties' fundamental principles, such as the equality of the member-states.

Belgium is strongly against the idea of giving non-euro countries safeguards against the risk of eurozone caucusing. But despite the opposition of some member-states, Osborne should be able to gain several safeguards on the ins and outs question. The German finance ministry seems more sympathetic to his position than other departments in Berlin. The Centre for European Reform has suggested a new treaty article, stating that nothing the eurozone does should damage the single market; new procedures to ensure greater transparency in discussions of the Euro Group (the meetings of eurozone finance ministers), 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

⁸ Charles Grant, 'Could eurozone integration damage the single market?', CER Bulletin August/September 2015.

⁹ Open Europe blogspot, 'Double majority: the way to avoid the EU becoming a political extension of the euro', July 2013. It is not evident that double majority voting would often help the UK: some of its allies, like Ireland and the Netherlands, are in the euro, while several countries outside the currency, like Poland, have very different views.

review the matter, for a period of up to, say, a year. Such reforms are probably feasible.¹⁰

Could some of these changes lead towards the emergence of a two-tier or two-speed Europe? It is possible that the negotiations on 'ever closer union' and those on 'safeguards for the single market' could coalesce into a review of the overall structure of the Union. At the moment the treaties make virtually no distinction between countries in the euro and those outside. Legally, all member-states bar Denmark and the UK are obliged to join the single currency. In practice, however, a few countries not in the euro, including Sweden, have no intention of giving up their currencies, while most of the other 'outs' are at least a decade away from joining.

As already stated, many EU countries balk at the British proposal for a 'multi-currency union'. However, an embryonic British-Italian initiative seeks to use the reinterpretation of the wording of ever closer union to create the concept of a two-circle EU: the inner core of euro countries would be committed to ever closer union; the outer rim would be freed of that commitment. The advantage of such a scheme could be that, without altering much of substance, it could reassure the British that they would not be dragged by a ratchet effect into an ever more integrated EU. The difficulty with this idea is that it grates against the prevalent ideology of the Brussels institutions – that all the member-states, bar Britain and Denmark, will become ever-more integrated. And, of course, several of the countries not yet in the euro are quite prepared to sign up for greater integration and pooling of sovereignty; they would not want to be seen as part of a 'second division' led by the British. But despite the difficulties, this concept has the potential to provide some sort of vision for the future of the EU that is acceptable to both the British and the integrationists.

3. TEN POTENTIAL PITFALLS

In 2016 or 2017, the risks of the referendum on EU membership being lost are much higher than they were in 1975. There are at least ten reasons why those who want Britain to stay in the EU should be very concerned.

- (i) **David Cameron's deal will not impress many people.** If the previous section is correct in predicting what Cameron is likely to obtain from Britain's partners, his reforms are unlikely to excite many voters. An enhanced yellow card procedure will not incite millions to march down Whitehall in support of the EU. Nor will new words on ever closer union, safeguards for the single market, reductions in Brussels red tape or curbs on the benefits that EU migrants can claim.

There seems a real danger that Cameron will over-play the importance of his deal. He may do so in an attempt to convince as many eurosceptics as possible to support the In campaign. But if Cameron does claim that he has transformed the nature of the EU, rigorous scrutiny from the eurosceptic press could well expose his achievement as something less than historic. He has hitherto been reluctant to sing the praises of the EU per se, perhaps out of concern not to alienate Conservative eurosceptics (though it was notable that in the House of Commons on October 19th his tone on the EU was somewhat positive). If he wants to win the referendum he will need to convince the British that their country benefits from EU membership. He should not waste too much energy claiming that he has fundamentally changed the nature of the beast. Such claims would not be plausible.

¹⁰ Stephen Booth, Raoul Ruparel and Vincenzo Scarpetta, 'Safeguarding the rights of non-eurozone states in a multi-currency EU', Open Europe, September 2015.

- (ii) **The internal dynamics of Conservative Party politics could push Cameron to demand the unobtainable and so derail the renegotiation.** The depth of the passion and hostility that some Conservative politicians feel towards the EU cannot be under-estimated. They care more about this issue than other, including the unity of their party and their kingdom.¹¹ Since Cameron became party leader, in 2005, the eurosceptics have learned that, if they badger him on a European issue, he is quite likely to cede ground. He took the Conservatives out of the European Peoples' Party, the most influential political grouping in the EU, in order to placate them. Then he gave them the 2011 EU Act, which promised a referendum on the transfer of any further powers to the EU. And in 2013 he pledged an in-or-out referendum, having previously ruled one out. Then there was the review of EU competences, a civil service-led exercise in 2012-14 that led to the publication of 32 reports on the EU's powers in specific areas, evaluating their costs and benefits to Britain; the conclusions – that most of the things the EU did were broadly in Britain's interests – upset the eurosceptics, leading 10 Downing St to bury, rather than to publicise the reports.

This autumn, Cameron has ceded ground to the eurosceptics again and again – accepting that the machinery of the British government should not promote EU membership, that the Conservative Party itself should not take sides in the referendum campaign and that – following advice from the Electoral Commission – the referendum question should be changed to one less favourable to the In campaign. The question has changed from "Should the United Kingdom remain a member of the European Union", which required a Yes or No answer, to 'Should the United Kingdom remain a member of the European Union or leave the European Union?'

Hard-line eurosceptics are becoming highly critical of Cameron for making demands on EU reform that they consider too modest or insubstantial. Until now most of them have stayed fairly quiet, since Cameron's wish-list has (at least officially) not been revealed. But Cameron is now preparing to reveal his negotiating objectives in a letter to Donald Tusk, the President of the European Council. When he does so the quitters will have an excuse to break cover and attack the prime minister for his lack of ambition. They will push him hard to raise the stakes, for example by demanding a restoration of the 'social opt out' that then Prime Minister John Major won in 1991; or by insisting on quotas on the numbers of migrants from EU countries. If Cameron did suddenly try to placate the eurosceptics – for the sake of Conservative Party unity – at the last stage of the renegotiation, by 'pulling a rabbit out of a hat' and placing a radical new demand on the table, his partners would probably rebuff him. Then Cameron would be seen to have failed. It would then be very hard for him to claim that he had won a good deal and fight an effective campaign to keep Britain in.

- (iii) **The British brand is damaged, which weakens David Cameron's hand.** Many people in Britain do not realise that their country is thoroughly unpopular amongst many of Europe's politicians and top officials. The anti-EU rhetoric of some British politicians – and of the tabloid press – has damaged Britain's soft power. The internal dynamics of the Conservative Party, as described above, have the potential to further sully Britain's reputation. The more unpopular the British become, the less

¹¹ Some Conservatives are not particularly bothered that Brexit would be quite likely to trigger Scotland's departure from the UK. If the UK overall voted to leave the EU, but a majority of Scots had favoured staying in, the Scottish National Party would have a good reason to hold a second referendum on independence. The nationalists would be more likely to persuade the Scots to back independence on the second attempt.

willing will be some governments and people in EU institutions to help solve Cameron's problems in the renegotiation.

Some of the xenophobic comments about EU migrants in recent years have been particularly harmful, particularly in the Central European countries whence they come. The government's response to the recent refugee crisis has strengthened negative views of Britain. While Germany has said that it expects to take about a million asylum-seekers in 2015, Cameron has said that Britain will take only 20,000 Syrian refugees, over five years (and only those from camps near Syria, rather than refugees already in the EU). He has refused to join the EU scheme for relocating refugees that have arrived in Greece and Italy; an opt-out allows Britain to spurn the scheme, but Ireland and Denmark, which also have an opt-out, are taking part to show solidarity with their partners. Cameron's argument that taking refugees already in the EU would only encourage more to come is, in itself, rational; but his unwillingness to help EU partners in need has been diplomatically damaging. The Italians feel particularly bruised: they are very keen to work with the British to help them stay in the EU but do not understand why the British will give nothing in return.

In September, Foreign Secretary Philip Hammond said that the refugee crisis – and the insistence of some Schengen countries that border controls be reintroduced – would help other member-states to understand Britain's reluctance to accept large numbers of EU migrants. He was wrong and his comment caused offence. Other member-states consider intra-EU migration a very different subject to that of refugees and economic migrants arriving in Europe from outside. The British response to the refugee crisis has reinforced the views of some that Britain is a nasty country. (Not many people outside Britain are aware that it is spending more money on aiding Syrians in camps than any other member-state.)

(iv) The other member-states and EU institutions may be less willing to help Cameron than the British imagine. Many British observers over-estimate the willingness of EU governments to do 'whatever it takes' to keep the UK in the EU. They note that Angela Merkel is the most influential EU leader and assume that she can fix David Cameron's key demands by browbeating others to follow her lead. Of course, the German chancellor is influential, but she is no dictator and the views of other governments matter hugely. In any case, her lack of firmness on the refugee crisis – and her several changes of direction – have dented her popularity in Germany, and also eroded some of her authority within the EU. A weaker Merkel has less political capital to expend on helping the British.

Some EU governments find Britain's uncompromising Atlanticism, deregulatory fervour, antipathy to migration and hostility to institutional integration – plus the fact that it keeps on insisting on special treatment – extremely unpalatable. When the Central European states joined the EU, many of them regarded the UK as a good friend. But over the past decade or so, successive British governments have failed to pay sufficient attention to their needs and concerns – and to those of other smaller member-states, too. In recent months, David Cameron and senior ministers have sought to rectify this problem, with *tours des capitals*, but rather late in the day. Countries such as Austria, Belgium, France and Poland are likely to prove particularly difficult in the renegotiation.

When Cameron won the May general election, many other European leaders expected him to come out fighting on Europe, and to show that he was serious about shifting British public opinion towards remaining in the EU. But he has disappointed them, refusing to praise the EU, on the grounds that if they think he

will back membership come what may, other governments will be less likely to accept his demands. But those governments worry that if he waits till he strikes a deal before he states the EU's virtues, it may be too late: by then, anti-EU campaigners will have had the battlefield to themselves and steered public opinion towards withdrawal. This view is shared by some pro-EU ministers within the Conservative government. Britain's EU partners are correct in saying that, since the election, the British debate on the EU has been somewhat one-sided: the eurosceptics have made a lot of noise and not many people have argued back. To some other EU governments, Cameron seems much more interested in keeping his party together than in making the case for the EU. They say that only when he does the latter will they be sure that he is serious about keeping Britain in; and only then will they be willing to make the concessions that Cameron needs. So far he has not done what they want. He presumably thinks that, in the last resort, the other governments will be so appalled at the prospect of Brexit that they will give him what he wants.

Not only governments but also the European Parliament has the potential to create problems for Cameron. On issues such as more rights for national parliaments, less 'social Europe' and cutting red tape, it may well take a fundamentally different viewpoint to that of the British government. It could easily block some of the legislation that stems from Cameron's reform package.

- (v) **Rows on migration or a deterioration of the refugee crisis would be bad for the EU's image.** In the referendum campaign, the strongest argument of the quitters will be very simple: if the British people want to be able to control their own borders, they must leave the EU, since membership is incompatible with controlling the numbers coming from other member-states. Unfortunately for the In campaign, very large numbers of Britons think there are too many immigrants, including those from the EU. Such views are not held only among unskilled and unsuccessful working class voters, but also among many mainstream, middle-class and educated Britons. So if fresh statistics emerged during the referendum campaign, showing a surge of EU immigration; or if there was a new crisis over refugees entering Britain via the Channel Tunnel (even though that would have nothing to do with EU rules), the result could be a more poisonous debate, re-energised out-campaigners and pro-EU organisations placed on the defensive.

This autumn, the refugee crisis has been manna from heaven for Out campaigners. It has made the EU look out of control, incompetent, reactive and acrimonious. This is probably the main reason why the opinion polls have shifted towards Brexit in recent months. Few pundits or politicians have bothered to explain that, even if the EU did not exist, there would still be a refugee crisis – but that, without central institutions and mechanisms to facilitate co-operation, it would be even harder to deal with. The same applies to the problem of would-be immigrants congregating at Calais.

- (vi) **A worsening of the euro crisis would damage the EU's reputation.** The past six years of the euro crisis have been appalling PR for the EU in Britain. Of course, the eurozone is not the same as the EU. But the British people perceive the two as more or less the same; after all, the same leaders and institutions run both of them. British voters see that the eurozone's problems have been poorly managed and that they have provoked venomous arguments. The high levels of unemployment in some eurozone countries give succour to those in the UK who argue that it should leave the EU to avoid "being shackled to a corpse" (in the words of UKIP MP Douglas

Carswell). Every time the euro crisis returns and there is another bad-tempered emergency summit, it damages the EU's cause in Britain.

The renewed problems in Greece, in the summer of 2015, had a particularly negative impact on the way that British leftists view the EU. Wolfgang Schäuble, the German finance minister, seemed to succeed in imposing a particularly harsh 'Thatcherite' brand of austerity on Greece, at considerable human cost. His attempt to force Greece out of the euro in July – though unsuccessful – gave the EU and its dominant country a brutal image.

Though Greece won a third bail-out package in August its travails, and those of the other euro countries, are far from over. It is true that the eurozone has achieved modest growth in 2015. But there are some ill omens: the euro countries are over-dependent on export markets where growth is slowing, their domestic demand remains weak and in some of them debt levels remain dangerously high.¹² Without reforms of eurozone governance there are likely to be more eurozone crises.¹³

(vii) The strength and resources of the In and Out campaigns are unbalanced. At the time of writing the Out groups are more numerous (the biggest two are Vote Leave and leave.eu) and have considerably more money and people than the In organisations. There is a risk that the main In campaign, Britain Stronger in Europe, will be portrayed as top-down and establishment-run (although, as already stated, a minority of establishment figures will support the Out campaign). If it concentrates on wheeling out industrialists from the Confederation of British Industry, bosses from foreign banks in the City, retired ambassadors and those with an obvious financial interest in membership, such as farmers and academics, it may not win over many hearts and minds. The launch event for Britain Stronger in Europe on October 12th suggested that it recognises the danger: although the opening speech was given by a middle-aged man in a grey suit (Lord Rose, the chairman), he was followed by a panel of five people, of whom three were women and four were youngish.

Nevertheless, the Out campaigns will make a point of claiming to represent 'the little man' and the common people against the fat cats and the elite; their campaigners will focus on 'bottom-up' organisation through pubs, clubs and small businesses. The Out campaigns have many millionaires willing to finance them, while Britain Stronger in Europe has just one. It seems quite likely that the No groups will have more energy, dynamism and money than the Yes campaign. A similar difference was evident during the September 2014 Scottish referendum campaign: although those in favour of preserving the union ultimately won, their top-down establishment campaign was less effective than that organised by the nationalists.

(viii) The Out campaigns have strong arguments that are hard to counter in simple terms. Most of the arguments for staying in the EU are complicated, economic, numerical and quite hard to explain – concerning, for example, foreign direct investment, free trade agreements with other parts of the world, the difference between tariffs and non-tariff barriers and the ability to shape the rules of global governance. Many of the arguments for leaving are beguilingly simple: if Britain wants to control its own borders, it has to quit the EU; other countries that are not in the EU are free to trade with it, so a Britain that left the club could easily export to Europe; the £11 billion net annual cost of membership would be better

¹² Simon Tilford, 'Will the eurozone reap what it has sown?' CER bulletin, October-November 2015.

¹³ Charles Grant, 'Troubled euro needs a softer Germany', Chatham House, The World Today, October-November 2015.

spent on the National Health Service; and if Britain left the EU, so that its legislators and judges were exclusively British, the country would be more democratic. Pro-EU campaigners should be able to rebut all these arguments, but will find it hard to do so in simple and convincing ways.

Pro-EU campaigners believe that they have the facts on their side, and that if only they can – despite hostility from much of the media – get them across to the British people, they will win. But many experts on polling and elections reckon that in this referendum campaign – as with the recent one in Scotland – the facts will become close to irrelevant; many people will choose to get their information from the social media they follow rather than, say, the BBC, and they will believe what they want to believe.

(ix) The Labour Party is in turmoil and the trade unions have become less sympathetic to the EU. Since the late 1980s, the Labour Party has been broadly in favour of EU membership, excepting its far-left fringes. It has been the Conservatives who have been riven over Europe. But the unexpected and resounding May 2015 election defeat has had an extraordinary effect on the Labour Party. About 150,000 new members have joined the party, many of them far to the left of where the party was under Tony Blair, Gordon Brown and Ed Miliband. And some of them are sceptical about the EU – in part, as already mentioned, because of the eurozone's harsh treatment of Greek Prime Minister Alexis Tsipras and his Syriza government. In September 2015, the members (plus the registered and affiliated supporters) chose Jeremy Corbyn, a man of the hard left, as Labour's new leader. Corbyn himself is ambiguous on the issue of EU membership, though some of those backing him are unambiguous quitters. Soon after he became leader, moderates in the shadow cabinet forced Corbyn to agree that the Labour Party would support EU membership in the referendum.

But a Corbyn-led Labour party is unlikely to make a significantly positive impact on the referendum campaign. For the next few years, many senior figures in the party will be focused on rifts, splits, plots and potential coups. Labour will be concentrating on itself rather than on the wider world. It may well do a poor job of mobilising centre-left voters to back the EU. And it may turn out to be more divided on the merits of membership than appeared possible at the time of the May general election.

Meanwhile, Britain's trade unions have become much less pro-EU over the past ten years. In the 1980s, the combination of Jacques Delors at the head of the Commission and Margaret Thatcher in Downing St convinced the trade unions, like the Labour Party more broadly, that the EU was more good than bad. And trade unionists benefited from specific EU measures, such as the rules on working time and paid holiday, maternity and paternity leave, rights for agency workers and provisions on information and consultation, as well as treaty articles on non-discrimination.

On taking office Tony Blair and Gordon Brown revoked the opt-out from EU social policy that John Major had secured at Maastricht in 1991. But later on they sought to diminish the EU's role in labour market regulation, which led some British trade unions to question the benefits of membership. And in recent years, as the unions have moved to the left, some of their leaders have started to view the EU mainly as a neo-liberal enterprise. The current position of some key union leaders on membership is ambiguous; and they say that if Cameron 'repatriates' social powers from the EU, they will campaign for withdrawal. In the end, most trade unions will probably be weakly in favour of membership.

- (x) **Britain's business leaders will give much less vocal support to the EU than they did in 1975.** The majority of big businesses in Britain favour EU membership. Nevertheless many of them will stay on the sidelines rather than take a public position of support. In July 2015, a poll of the companies represented in the FTSE 350 index found that only 7 per cent would speak out for an In vote, though two-thirds thought that Brexit would damage their business. This is because chairmen and CEOs fear the reaction of stakeholders who are opposed to membership – such as suppliers, customers and non-executive directors. There is also a particular fear of being attacked by Out campaigners in the social media.

Those who will speak out include the leading international banks in the City (though it is questionable whether their comments are helpful, given their poor reputation) and foreign car firms that have invested in the UK (though Out campaigners will remind everyone that some of these car firms urged Britain to join the euro). Some prominent names are backing Out campaigns, including those associated with retailers Dixons, Next and Foyles, manufacturers Dyson, JCB and Reebok, and City firms such as Lloyds Bank and Odey Asset Management. Large numbers of smaller businesses – which tend to be the ones most annoyed by EU regulations – have signed up to the various Out campaigns.

4. CONCLUSION: CAN THOSE OUTSIDE THE UK HELP TO KEEP IT IN THE EU?

The business of fighting and winning a referendum campaign is the responsibility of Britain's pro-Europeans. Nevertheless those outside the UK can help, in certain ways, to influence the result.

Direct appeals to British voters by EU prime ministers, or leaders of EU institutions, might not have much effect. Such interventions could be viewed as self-interested. But there may be exceptions. Angela Merkel has quite a good reputation in Britain and her comments would be listened to. The British tend to look up to, and respect, the Nordic countries and the Dutch, and could be influenced by the words of their leaders. The Irish could be particularly influential, not only because Britain and Ireland are so intimately connected economically, socially and in terms of security, but also because the British do not view the Irish as really foreign.

Some non-EU governments could also make a difference. If Norway's leaders said in public what they say in private – that their situation is uncomfortable, given that they have to swallow most EU rules without having a vote on them – some Britons would listen. They would also pay attention to the words of President Barack Obama, who has already said that he hopes that Britain remains in the EU. The same would apply to the leaders of Canada, Australia and New Zealand (they spoke out in favour of British membership in 1975 and will probably do so again). Foreign companies that invest in the UK, whether from continental Europe or elsewhere, would certainly be listened to on the question of EU membership.

As far as other EU governments are concerned, they can be most helpful by showing flexibility on at least some of Cameron's reform priorities. There is a real danger that the eurosceptics will expose his package of EU reforms as largely insubstantial. One view widely held in Brussels is that the contents of Cameron's deal do not really matter, since nobody will take it very seriously and the referendum will be about In or Out. But in fact the details matter a lot, because of the impact that Cameron's deal will have on the Conservative Party.

As was evident to those who attended the October 2015 Conservative Party conference in Manchester, a majority of Tory MPs have not yet made up their mind on whether to support In or Out. These MPs are genuinely open-minded and will be swayed by the prime minister's arguments and by whether they think the deal has changed the EU for the better (and also, of course, by the prospect of promotion under Cameron and Osborne). The more reforms that Cameron can persuade his partners to sign up to, the easier it will be for him to convince uncertain MPs and party members to back In. And if a large part of the Conservative Party ends up supporting the prime minister, it will influence the way the media handles and reports on the referendum campaign – and that in turn will affect voters who are themselves uninterested in the details of the deal.

Cameron will need a couple of issues on which he can show that real changes have been made. Given the realities of Britain's political debate, he will need something on the issue of migrants' rights to claim benefits. Clever minds should be able to find ways of crafting reforms that do not threaten the fundamental EU principles of free movement and non-discrimination, but still allow the British government to say that rules on benefits have become fairer.

The other issue where it is important that Cameron gets something – for elite and business opinion, more than for the general public – is safeguards for the single market against the risk of eurozone caucusing. Some Britons genuinely worry that, with the euro now so central to the EU's ambitions, the countries left outside the single currency will become second class. It should be possible to come up with some reforms that protect the position of the UK and other 'outs', without impeding the ability of eurozone countries to integrate further. Indeed, a new institutional framework, distinguishing between euro ins and outs, could help to keep everyone happy.

CONSTITUTIONAL PATHWAYS: WHICH INSTITUTIONAL AND CONSTITUTIONAL ADJUSTMENTS FOR THE UNITED KINGDOM? (*Jean-Claude Piris*)

As I said during the 3rd September meeting of AFCO, there are different possible scenarios for the EU-UK negotiations which should take place before the referendum in the UK. Taking into account the discussion in the Committee, I will look at their chances of success and at the constitutional problems that they might raise for the EU, as well as at the best way to go cautiously towards a "BRIT-IN", rather than towards a "BR-EXIT".

I will just make a preliminary observation: nobody in the EU, either the Government of a member State, or an EU institution, has refused a negotiation with the UK. A negotiation will therefore take place. The EU is waiting for Mr Cameron to present his views on what his government wants in order to call a referendum with some chance of success. According to the strategy of negotiation which will be chosen by the British Prime Minister, different scenarios will be possible.

1. THREE SCENARIOS "SPECIAL STATUS", "REPATRIATION" OR "TWEAKING EU TREATIES"

The **first scenario** for the British Government would be to request a special status for the UK, to be established through a revision of the EU Treaties.

Some (like Professor Bruno de Witte, in his written submission to AFCO) hope or suggest that such a status could allow the UK to participate in the EU internal market *and* to participate in the corresponding EU decision-making. For them, it would be inconceivable to treat the UK like "smaller" States, such as Norway or Switzerland. They stress that the EU's interests will be to keep the closest links possible with an important State such as the UK. Thus, the EU should accept to confer on the UK a special status, allowing it to remain a "partial" EU member, participating in the internal market, without being obliged to participate in other major EU policies (agriculture, fisheries, Structural Funds, social policy, justice and security, immigration, foreign policy, etc...). Actually, this was the first idea of the British Government, when it believed that the eurozone would push to open a procedure to change the EU Treaties in order to strengthen the constitutional basis of the eurozone.

Legally, it is worth stressing that such an "arrangement" would be outside the scope of Article 50 TEU on the withdrawal of a member State. It would clearly be within the scope of Article 48 on the revision of the Treaties.

What would the feasibility of such a possible request be?

First, I will make a comment on the procedure, and more particularly on the calendar.

The aim would be to propose to the British people to accept, in a referendum, a new status established through a revision of the EU Treaties. Such a revision, if approved, would have to be ratified by all EU members, either through their Parliament(s) or by referendum. Logically, this should be done **before** the British referendum. However, everyone knows the hostility of the leaders of a number of member States to any change of the Treaties in the current period. Thus, one may wonder how it would be possible to convince them to organise within a short delay such a politically sensitive procedure, and to that even **before** knowing if the British people will accept it. However, making the British people vote

in the referendum, before knowing if the revision of the Treaties will be acceptable to the other 27, would be extremely risky politically. One has to admit that there is no answer to this: the British call that "*a catch 22 question*".

Second, on substance, the problems that such a request would raise are of a fundamental constitutional nature for the EU.

First, one might take into account the fact that opening an Article 48 procedure would probably lead to other requests to change the Treaties, in particular in order to improve the constitutional basis and the functioning of the eurozone. Second, I do think that the 27 other member States, as well as the EU's institutions, would not accept such the proposal to give such a status to the UK. This would be a major "*pick and choose*" ("*l'Europe à la carte*"). I think this will simply be unacceptable, for at least two reasons:

- i. it would fundamentally affect the EU's decision-making autonomy;
- ii. if accepted for the UK, such a status would be attractive for others and would open the door to requests from them, such as Iceland, Liechtenstein, Norway or Switzerland, and even perhaps from some EU member States.

Thus, I think that this first scenario has no chance of success at all. Most member States would probably oppose the opening of the procedure foreseen in Article 48 TEU. This is a decision which requires at least a simple majority in the European Council (Article 48(3)TEU).

The **second scenario** would be for the UK to try and negotiate a "*repatriation of powers*" from the EU to all member States, through a revision of the EU Treaties.

On **the procedure (calendar and legal basis)**, I have exactly the same observations as explained above for the first scenario.

Politically, it looks unrealistic. Actually, issues which have often been mentioned as possible candidates for such a "*repatriation of powers*" would affect either some fundamental EU principles (free movement of persons, equality between EU citizens), or very delicate and sensitive political issues (social policy, protection of workers, Structural Funds). My opinion is that an agreement of the 28 member States on opening a procedure to change the Treaties such issues is unthinkable.

On substance, this would be unnecessary, as it seems that even the UK has now abandoned that idea. This is because of the thorough Report (3000 pages) organised by the British Government on that issue (see the CEPS Publication "*Britain's Future in Europe: Reform, Renegotiation, Repatriation or Secession?*", edited by Michael Emerson, 2015). This Report demonstrated that the current share of powers between the EU and its member States is properly balanced.

The **third scenario** would be for the UK to stay an EU member State, while obtaining changes in the EU Treaties, which would either make them more precise in some aspects, this being valid for all member States, or which would confer opt-outs on the UK.

Among these changes, as they may be desired in London, one could mention the following four issues:

- i. changing the concept of "*ever closer union*" (or exempting the UK from this concept?);
- ii. protecting the rights of the "*euro-outs*", and particularly preventing the adoption of decisions on a qualified majority in the Council which would violate their rights and

interests (by giving the *"euro-outs"* a kind of right of veto on any legislative act aiming at *"euro-ins"* only ?);

- iii. conferring new powers on national Parliaments in order to ensure a better respect of the principle of subsidiarity by EU legislation (by giving a qualified number of them a right of veto on any EU legislation: *"red cards"* instead of *"yellow cards"* ?);
- iv. modifying the rules on equality between EU citizens moving to another member State (by allowing a discrimination at the detriment of new comers for some social benefits, for example for a transitional period of four years ?).

Again, observations made above on the procedure (calendar and legal base) for the two first scenarios are equally valid for this third one.

2. SUBSTANTIVE ANALYSIS

On substance, I personally think that **the first three issues** would deserve, when the day will come, a discussion about a possible improvement of the current Treaty provisions:

- i. First, there have been quite a number of misunderstandings on the meaning of the formulation *"the process of creating an ever closer union among the peoples of Europe"*. Some, and this is even the predominant interpretation in the British public opinion, have interpreted this formulation as meaning that the European Union aims at merging the member States together into a centralised State.

Actually, as you know, this is not the case. The Treaties mention the aim of deepening the solidarity and to continue the process of creating an ever closer union among **"the peoples of Europe"**. Moreover, the Treaties stress that this should be done, as concerns the member States, *"while respecting their history, their culture and their traditions"* (sixth paragraph of the TEU Preamble, see also Article 3 (3, 6th sub paragraph) TEU), as well as *"the national identities, inherent to their fundamental structures, political and constitutional"* of the member States, and *"their essential State functions"* (Article 4 (2) TEU).

This misunderstanding is nevertheless a major problem with the public opinion and with the British press, which would deserve a clarification.

- ii. Second, the further strengthening of the eurozone, which is necessary to its very survival, and will thus continue in the future, will make it opportune to consider a stronger legal protection of the rights of the remaining non-euro States.
- iii. Third, the institutions need the help of national Parliaments to better respect the principle of subsidiarity, which is a political concept. Moreover, the democratic legitimacy of the EU and of its legislation, despite the existence and work of the European Parliament, need to be improved.
- iv. As to **the fourth issue**, which is about modifying the rules governing equality between EU citizens moving from their State of origin to another member State, I do think that this would affect a basic constitutional issue and should not be considered.

3. CONTEXT OF TREATY CHANGE

However, the present question is to know if it would be possible to change the Treaties NOW.

The chances of success of such a change would be, according to me, close to zero, even for the three first issues. Actually, any attempt to change the EU Treaties would (rightly) open the debate on the necessity to improve the constitutional basis of the eurozone. As the economic and the political situations do not (yet) allow this issue to be opened, any attempt to revise the Treaties in the short term would probably be rejected by a majority of member States. A number of the member States do not want to open this politically sensitive question NOW, especially while the Greek crisis is not yet forgotten and that the migrant crisis has done a lot of harm to the image of the EU.

Waiting for a better political (and economic) climate, one could perhaps try to treat the first three issues referred to above through solemn political texts, though not legally binding. I think that it would be important to have texts as solemn as possible. On the *"ever closer union of peoples"*, for example, this could be done on the basis of what was already mentioned in the Conclusions of the June 2014 European Council. This could probably be done without any legal or political damage. I will come back to this, as well as to the other two issues.

4. PROMISE OF A "FUTURE" TREATY CHANGE

Are there means to by-pass this obstacle by making "promises" to change the EU Treaties in the future?

On this, Charles Grant has made a suggestion. He has the same political judgment as mine about the political impossibility to get a successful Treaty revision in the short term. In order to by-pass this obstacle, he suggests that the EU and the UK accept **"promises of future Treaty change"**. He already presented this idea in the Financial Times on 11th of June this year. But a "promise" is a political declaration of intent of the current actors: it has no legal value and could not legally commit future actors (Governments or Parliaments). This is why Professor Steve Peers, as quoted by Bruno de Witte, made the same suggestion, but while trying to by-pass this problem by transforming the "promise" into a legally binding commitment¹⁴.

The problem with this idea is precisely that point: making it a "promise" legally binding would actually transform it into the equivalent of an actual Treaty change: only the date of entry into force would remain to be decided. Such a Treaty change could not, therefore, be adopted in violation of the procedure set out in Article 48 TEU as well as of requirements of the national Constitutions of the member States.

The 1992 Decision *"on Denmark and the EU"* and the 2009 Decision *"on Ireland"* have been wrongly mentioned as being precedents of such an illegal "trick". This is not true. I happened to know both Decisions extremely well, because I was actively participating in their drafting in my former capacity. They are indeed texts which have a legal value, but they contain no "promise" to change the Treaties. They just clarify the meaning of already existing Treaty provisions. The absolute and sine qua non condition to use such legal texts is that they must be **100% in conformity with the Treaties** as drafted at the time of their adoption. The paper of Professor Peers does not provide any demonstration at all on

such a conformity. On the contrary, a number of Sections of his draft Protocol are obviously in contradiction with the EU Treaties, as they would aim at adding or at modifying them (see Sections A, C, partly D, partly E, F if accompanied by commitments).

This principle has been recalled by the Court of Justice of the EU in its 2nd March 2010 judgment C-135/08 Rottmann, in paragraph 40: one may illuminate the meaning of an existing provision of the Treaty, or clarify it. This means that it could not modify it, including by adding anything of substance. The texts of 1992 and 2009 did not add anything to the EU Treaties, nor change their meaning. This is the reason why the European Council could indicate, in its 2009 Conclusions, that the Decision on Ireland could later be transformed into a Protocol to the Treaties. This was possible only at the strict condition that that Decision was 100% in conformity with the Treaties as they were in force at that time. Otherwise, this would have constituted a violation of Article 48 TEU (on the procedure for the revision of the Treaties), as well as a violation of the Constitutions of all member States, which, according to Article 48, have to be respected in such a case.

Admitting that any revision of the EU Treaties could be done in "a two-stages procedure" would effectively violate the rights of national Parliaments. The first stage would already constitute a legally binding decision, which would thus "by-pass" the constitutional powers of national Parliaments, as it cannot be adopted by the sole Executive Power.

Thus, the above suggestions would not be feasible, as they would actually imply changes to the EU Treaties.

5. FOURTH SCENARIO "SIGNIFICANT POLITICAL MEASURES" WITHOUT TREATY CHANGE

The **fourth and last scenario** would be for the UK, "with a little help from its friends", to stay an EU member, without changing the EU Treaties, but while obtaining the adoption of significant political measures and of credible reforms improving the functioning and policies of the EU

While recognising that nobody can predict the results of a referendum on Europe in the UK¹⁴, this looks to me as being the most reasonable scenario. True, it would imply the adoption of some of the reforms currently suggested by the British political authorities. But, actually, many European leaders would agree that the EU would benefit from some institutional reforms and new political measures. This could help the EU improve its image;

Such measures could include, for example:

- 1) The adoption of a calendar in view of completing the internal market in services.** This would be particularly important for the UK, given the share of services in its economy.
- 2) The launching of optional cooperation policies**, for instance on energy or on industrial cooperation in defence equipment programmes.
- 3) The approval of measures aimed at encouraging improvement in the functioning of the institutions**, in particular by streamlining the Commission, as this institution has already begun to do.

¹⁴ Professor Steve Peers: *"The Pro-European case for a renegotiation of and referendum on the UK's membership of the EU"*, EU Law Analysis, 28 May 2014.

¹⁵ As stressed by Charles Grant and others, such as Denis MacShane in his book *"BREXIT: How Britain Will Leave Europe"* (Tauris Ed, 2014).

4) On "ever closer union": The European Council has already shown its willingness on this issue, by stating in June 2014 that this concept of an *"ever closer union among the peoples of Europe"* allows for different paths (not speeds) of integration. This could be officially recorded in a formal text, for example a Solemn Declaration of the Heads of State or Government of the member States.

5) Approving *better means to cut red tape*: There is no simple legal option available to avoid red tape. This cannot be decided once and for all in a legal text. It is day-to-day work. Non legal mechanisms might however be suggested, such as:

- i. A more thorough and closer scrutiny of the Commission's legislative proposals should be exercised by *national* authorities.
- ii. Seriously improving the current Impact Assessment system, which could be conferred on an autonomous agency and could serve all three legislative institutions, the Parliament, the Council and the Commission.
- iii. Developing performance indicators.
- iv. Assessing the actual effects of some EU Regulations or Directives after a few years of implementation.
- v. Providing for a "sunset clause" for some laws, which would no longer be in force after a few years, unless their duration was expressly renewed by the EU legislator.

6) Better respecting subsidiarity, by facilitating the involvement of national Parliaments (NP) in this task:

On the principle of subsidiarity, according to which decisions must be taken as closely as possible to the citizen, see Article 1, second sub-paragraph, Article 5(3) of the Treaty on European Union (TEU), as well as Protocol n°1 *"On the role of National Parliaments in the EU"* and Protocol n°2 *"On the Application of the Principles of Subsidiarity and Proportionality"*. These are important new provisions, added by the Lisbon Treaty.

But their implementation has been rather disappointing. Depending on the domain concerned, either one third or one quarter of NP may, based on control of subsidiarity, oblige the Commission to review a legislative proposal. This has rarely been used. Too short delays are imposed on NP, their cooperation is not organised in an optimal way and their opinions are only consultative.

This might be improved in practice, without changing the Treaties:

- i. by offering practical facilities to NP (secretariat, translation or interpretation services);
- ii. by interpreting and applying with flexibility the very short delays that NP have been given to react;
- iii. by inviting the Commission to agree on a political commitment that, as a matter of principle, it ought to follow their conclusions, and that, if an exception might be required, the Commission would accept to discuss and justify it in the European Council.

7) Better protecting the rights of the non-euro member States:

In the medium term, the eurozone should and will probably integrate further, either through an EU Treaty revision, or through a *"Eurozone Treaty"*, outside the EU Treaties but linked to them and to the EU institutions. In such a case, non eurozone EU members fear

that the eurozone members might take advantage of their voting power in the Council to adopt decisions having a negative impact on the euro-outs, especially concerning the single market. In order to reassure them, it is not possible to change the voting rules in the Council, which are Treaty provisions¹⁶. However, the eurozone members and some other EU members (the so-called "pre-in" eurozone members), could state that any future "eurozone treaty" would confirm the legal obligations of the eurozone members, under the control of the EU Court of justice:

- i. to guarantee the rights of non eurozone countries, including on the integrity of the single market,
- ii. to respect the «*acquis communautaire*» and the exclusive and exercised powers of the EU under the Treaties,
- iii. to respect the legal primacy of both the EU Treaties and the EU's law over the eurozone treaty and acts,
- iv. to accept to ensure openness of their activities, and
- v. to give the right to participate in their meetings for those of the EU member States willing to join the euro within a given delay.

6. WHAT ABOUT THE BREXIT SCENARIO ?

Of course, it remains to be seen if this fourth scenario would be politically acceptable for the British Government and for the British people. But, frankly speaking, what would the alternative be ?

...BREXIT?

The UK's Government would undoubtedly have reflected on that scenario. It must have realized that this would be negative for British economic and political interests. The seven possible options¹⁷ after a withdrawal would be the following:

- 1) According to a first option, the establishment of a new structured relationship between the EU and the UK would be provided for in a withdrawal treaty (concluded on the basis of Article 50 TEU¹⁸), which would establish custom-made arrangements.

¹⁶ See the legally wrong suggestions made recently by the think-tank "Open Europe" at <http://openeurope.org.uk/intelligence/britain-and-the-eu/safeguarding-non-eurozone-states-rights-is-key-to-new-eu-settlement-heres-how-to-do-it/>, which are clearly tending to modify the EU Treaties, while pretending they are not. They are based on a wrong interpretation of both the "Ioannina Decision" (1994) and of the "Ioannina-bis Decision" (2009): see Jean-Claude PIRIS, *"The Lisbon Treaty"* (Cambridge University Press, 2012), at pages 222-225 (pm: a simple majority in the Council is at any time able to request to proceed to a vote in the Council, according to the QMV as defined in the Treaty. Both Decisions of 1994 (article 6) and 2009 (article 11(1)) make it clear that the Rules of Procedure of the Council must always be respected. See also the sole article of Protocol n°9, which means that a consensus in the European Council would be necessary in order to change this rule of the Rules of Procedure of the Council).

¹⁷ For an analysis of these seven options:

- Jean-Claude PIRIS, *"Si le Royaume-Uni quittait l'Union européenne: Aspects juridiques et conséquences des différentes options possibles"*, Robert Schuman Foundation, Policy paper 355, 4th May 2015 (exists also in English);
- Jean-Claude PIRIS: *"Which Options would be available for the United-Kingdom in case of a Withdrawal from the European Union?"* in the book *"Britain Alone?"*, to be published by Wolters Kluwer at the end of 2015 or at the beginning of 2016.

¹⁸ It should be stressed that the EU Treaty provides for a specific procedure to negotiate and conclude such a withdrawal agreement:

- first, a consensus in the European Council will be necessary to get "guidelines"(Article 50(2, first sentence) TEU),
- second, qualified majority voting in the Council will be enough to adopt the whole content of the Agreement (Article 50(2, second and third sentences TEU), without the exceptions in favour of unanimity provided for other agreements by Article 218(8) TFEU,
- third, the consent of the European Parliament will be necessary.

- 2) The second option would be for the UK to try and join Iceland, the Liechtenstein and Norway as a Member of the European Economic Area (EEA).
- 3) The third option would be for the UK to try and become a Member of the European Free Trade Agreement (EFTA).
- 4) The fourth option for the UK would be to try and follow the current 'Switzerland way' of concluding a number of sectoral agreements with the EU.
- 5) The fifth option would be for the UK to try and negotiate a free trade agreement or an association agreement with the EU, like the EU has concluded with many countries.
- 6) The sixth option would be for the UK to try and negotiate a customs union with the EU, along the lines of the existing Association Agreement between Turkey and the EU.
- 7) Finally, the seventh option would be that, in case no agreement were to be found on any of the six options mentioned above, the UK would simply become a third State vis-à-vis the EU, as from the date of its withdrawal, in a similar way as the United States, China or other countries.

Actually, all of these seven possible options would lead the UK in one of two equally difficult directions. Grossly speaking, following the first one (of the "EEA" or "Switzerland" kind), the UK would become a kind of a "satellite" of the EU, obliged to transpose into its law all EU regulations and directives for the single market. Following the second one (of the type "USA" or "China"), the UK would isolate itself and be obliged to start trade negotiations from scratch, both with the EU and with all countries in the world, while its negotiating power would not be as strong as some think.

Actually, a withdrawal of the UK from the EU should, in order to avoid serious problems and uncertainties, be accompanied by the establishment of a new comprehensive and structured relationship with the EU, through the conclusion of an international bilateral agreement, especially on trade relations. The absence of such an agreement would have negative effects, especially for the UK's economy, but also, to a lesser degree, for the rest of the EU.

But such an aim would be difficult to reach. The British Government will have a lot of urgent work. At the same time, the consequences of BREXIT would necessitate new domestic legislations and regulations to be adopted in the UK. On top of that, the UK will have to launch important negotiations with the EU in other domains than trade, especially to try and protect individuals and economic operators from a brutal change of their rights and duties. That would even be an urgent necessity, as the following will demonstrate.

What would happen, after a BREXIT, in other areas than external trade ?

From a Governmental point of view, starting from the date of its withdrawal from the EU, the UK would be liberated from its legal obligation to implement EU law. This would concern EU regulations, directives, decisions, international treaties and other EU norms governing the internal market and the four freedoms (free movement of goods, persons, services and capital). It would also concern existing EU law for all other EU policies, such as agriculture and fisheries, security and justice, transport, competition, taxation, social,

To be noted also that it would be legally impossible to conclude a withdrawal agreement **after** the date of entry into force of a withdrawal. After that date, the ex-member State would have become a third State, and an agreement with the EU should thus be concluded on the "normal" basis of Articles 217-218 TFEU, and not any more on the basis of Article 50 TEU.

consumer protection, trans-european networks, economic and territorial cohesion, research, environment, energy, civil protection, common commercial policy, development cooperation with third countries, humanitarian aid, etc. By the same token, the remaining twenty seven member States would naturally not be bound anymore to respect EU law vis-à-vis the UK.

In most areas for which the UK would cease to apply EU law as the result of the withdrawal, Westminster would have to adopt new national laws. For example, this would be the case for legislation on competition, on the protection of consumers and of the environment, on agriculture and fisheries policies, etc. That would raise difficult domestic political questions and would be time consuming. As all EU **Regulations** would probably be abrogated at the date of the UK's withdrawal, this would require the swift adoption of new legislation. A review of all national legislation adopted for the application of EU **Directives** would have to be made, in order to choose: either to abrogate them, or to keep them unchanged, or to modify them.

From the citizens point of view, one has to remember that, at least according to the press, there are more than two million British nationals, benefiting currently from the EU citizenship, who live and sometimes work in other EU member States, and about the same number of other EU citizens, nationals of the other twenty seven EU member States, living and working in the UK.

First, in the absence of any agreement between the UK and the EU, it would not be legally possible to build a theory according to which "*acquired rights*" would remain valid for the UK nationals, who, despite having lost their EU citizenship, would nevertheless keep its advantages for ever¹⁹. Article 20 TFEU is clear. There is no provision in the EU Treaties which could be used to support the existence of "*acquired rights*" in that case. By the way, this would also lead to absurd consequences, as this would include the right of movement from and to all EU member States, as well as the right to vote and to be a candidate in the European Parliament.

Thus, beginning with the date of entry into effect of the withdrawal, public authorities, economic operators and natural and legal persons of both the UK and the EU member States would have to adapt to a new legal situation.

Some EU laws would continue to apply to British nationals, because these laws grant nationals of third countries certain rights and benefits. This is the case for the right of residence or the right to work: there are EU Directives on family reunification, on long term residents, on students, etc.

As for the economic operators and individuals from EU member States who are established or permanent residents in the UK (and vice versa), they would no longer be EU citizens in an EU State and will therefore lose some benefits. Those who had a right to permanent residence could keep it, as a right derived from the European Convention on Human Rights. They could continue to exercise their rights, but their rights would be based on their particular contracts and on applicable local law. Those who had not a right to permanent residence, and especially the unemployed, could, in theory, be forced to leave, according to applicable national rules on immigration. This would likely lead to difficult human situations

¹⁹ A contrario, see Jochen Herbst "*Observations on the Right to Withdrawal from the EU: Who are the 'Masters of the Treaties'?*", German Law Journal (6:2001), at page 1755. The reasoning of the author is (wrongly according to me) based on a single sentence in the judgment of the ECJ Case C-26/62, the famous Van Gend and Loos judgment, which was not at all (obviously in a 1963 judgment!) concerning this question, but stating that Community law was a new legal order of international law which concerned not only the States but also their nationals, and that this law was becoming part of their "*legal heritage*" (I would add "*as long as they remain EU citizens, ie nationals of a member State of the EU*" !).

and to legal disputes. Therefore, it is most probable that solutions, at least ad interim, would be looked for rapidly. Any agreement would have to be based on classic international law and in particular on reciprocity. The 27 EU member States, bound together by EU law, would not have the power to negotiate unilaterally with the UK. This means that possible agreements will have to be concluded by the UK with the EU as such. Thus, all rights obtained in favour of British citizens residing in the 27 member States will have to be granted to nationals of these Twenty Seven residing in the UK.

Moreover, EU citizens coming to the UK for a long period, in order to study or work, or to join their family could be requested (at least those coming from some member States) to have a visa, and to meet financial and accommodation requirements. The same would then be the case for British nationals going to all EU member States, because the EU will play as an entity. Some EU member States could even require language requirements (i.e. to be able to speak the language of the country of destination). As it has been stressed: "The price will be the loss of innumerable business, educational and cultural opportunities as movement from Europe becomes more difficult and likely increased difficulties for UK citizens who may no longer take for granted their own privileged access to Europe for work, education, holidays or retirement".

The situation of some individuals could rapidly become difficult. In the medium term, it could get worse. This could of course be changed through appropriate agreements, including on transitional measures applicable for a certain duration and in specific situations.

7. CONCLUSION

To conclude, my personal opinion is that:

First, there should be no taboo if a revision of the EU Treaties appeared possible and necessary. But one must recognize that any Treaty change would be politically very difficult in the short term. Actually, launching such a change on a given issue would lead to consider the issue of strengthening the constitutional basis of the eurozone. But the current political climate would not be conducive to a serene and rapid solution on this issue, while the UK Government needs a quick answer. Moreover, "legally binding promises" on such an issue are a non-starter.

Second, it is no longer possible for the EU, with 28 heterogeneous members, to stick to the "*one solution fits all*" motto which prevailed in the past. Asymmetric integration is unavoidable in a 28 member EU. As shown by the Schengen area and the eurozone (enhanced cooperation does not appear so successful), it allows the EU to accommodate the diversity of needs, interests and wishes of its members, while avoiding stagnation.

However, **there must be constitutional limits to flexibility**, which the EU institutions must think about, such as, according to me :

- 1) to exclude some areas from variable geometry: single market, customs union, State aid rules, competition policy;
- 2) to keep intact the autonomy of the EU decision-making in these areas: while third countries might be allowed to benefit from the single market, they should not be interfering in its decision-making;
- 3) to keep the distinctive features of EU law: primacy, direct effect, uniform interpretation, absence of reciprocity;

- 4) to keep the Court of Justice and the Commission in their full composition in any case of differentiation or enhanced cooperation;
- 5) to preserve the unity of the EU as one single actor in the world: trade policy, foreign policy, defence policy.

These limits should be respected in all cases, including for the UK.

Thus, there are two successive alternatives for the UK :

1) First Alternative: BREXIT:

- if withdrawing from the EU, the UK will have to accept either to cut its links with the internal market, or to be bound by the EEA's conditions;
- it should abandon the idea to be "half-in/half out", by having a special constitutional status of "partial membership".

2) Second Alternative: BRITIN:

- if it wants a rapid conclusion of its negotiations with the EU, the UK must accept that they will not include any EU Treaty change;
- if it chooses to insist on some EU Treaty change, it should abandon the hope to conclude quickly these negotiations.

PARTIAL EU MEMBERSHIP – WHICH LEGAL OPTIONS AND SCENARIOS? (*Bruno de Witte*)

It is not clear, at this stage, whether the 'new settlement' of the UK's relationship with the European Union, which the British government seeks to achieve, would require changes in the existing European Treaties or not. A new settlement *without* Treaty change would be much easier to achieve. If, however, Treaty change *is* needed, a model must be found which can offer a stable basis for continued UK membership whilst being acceptable also to all the other 27 states, since Treaty changes must be approved by all. One such model, explored in this note, is that of *partial membership for the United Kingdom*.

This model is the reverse of the so-called 'Norway model' (sometimes called associate membership): the UK would remain *inside* the EU but with a more separate status than now, rather than trying to re-connect with the EU after leaving it. The partial membership model would consist in consolidating and possibly extending the existing opt-out regimes of the UK, in return for a more consistent definition of the conditions of UK participation in EU decision-making, including for example an end to the opt-out/opt-in mechanism currently applicable in the field of migration and asylum, or a redefined role for MEPs elected in the United Kingdom.

1. THE TREATY REVISION HYPOTHESIS

At this time (October 2015), it is still unclear which legal scenario will unfold in the search for a 'new settlement' of the relations between the UK and the rest of the European Union. It is possible that an agreement to modify some pieces of secondary EU law (for example, in the field of free movement of persons), coupled with a solemn European Council declaration, will be enough to satisfy the British government. This would be the easiest and preferable solution.

Yet, most statements so far from the Prime Minister and the Conservative party seem to require a more entrenched form of 'new settlement' involving some measure of *treaty change* and, thus, a renegotiation of primary EU law to accommodate some of the UK government's wishes. For the purpose of this note, I have assumed that this more ambitious and difficult scenario will unfold, i.e. that an immediate or future amendment of the EU's founding Treaties will be needed to convince the British government that it should recommend a Yes vote for continued British membership of the European Union.

When asked to confirm that no actual treaty change could be achieved before the referendum takes place, given the lengthy and hazardous ratification procedures that treaty amendment involves, Prime Minister Cameron replied that 'what matters when it comes to changing the treaties is making sure that there is agreement on the substance of the changes that we seek'.²⁰ A fully-fledged signed and ratified treaty text would not be necessary. It might be enough for the European Council to adopt 'draft clauses to be enacted in a treaty in due course';²¹ this would amount to a binding commitment to undertake treaty change in the future, a 'post-dated cheque' as it were.²²

²⁰ See House of Lords, European Union Committee, 3rd report of Session 2015-16, *The referendum on UK membership of the EU: assessing the reform process*, 28 July 2015, p. 15.

²¹ Statement by the British minister for Europe, as reported in the House of Lords report (see previous note), at p.16.

²² On the feasibility of such a scenario, see S. Peers, 'A legally binding commitment to Treaty change; is it humanly possible?', EU Law Analysis blog, 26 June 2015.

Still, whether the agreement will consist of a formal treaty amendment document or of a more informal set of draft clauses, the question arises how such a prospective treaty reform should look like in order to accommodate the British wish for a 'new settlement', whilst being acceptable enough for the 27 other member states, whose governments would also have to gain parliamentary (and possibly popular) approval for that treaty reform.

I assume that the other 27 states would not find a consensus on an overall weakening of the European institutional framework, which would result for example from: introducing a legislative veto for national parliaments (the so-called 'red card')²³; or introducing new restraints on qualified majority voting in the Council when important national interests are at stake;²⁴ or transforming the European Union into an *à la carte* regime, whereby each state is free to pick-and-choose whether or not it wants to participate in particular policies or legislative acts. Rather, what might be more acceptable for the other member states is a *special status* for the United Kingdom, which would leave intact the existing level of integration for the other states. Such a special status already exists, of course, given the numerous opt-out mechanisms currently applying to the UK in relation to monetary union, border controls, migration and criminal justice, to name only the main fields.

New flexible arrangements for the UK should go beyond the present situation and offer a further loosening of the bounds between the UK and the European Union. One such model of 'variable geometry', to be explored in the following pages, is that of a new *partial membership status* for the UK.

2. PARTIAL MEMBERSHIP STATUS

So far, much of the public discussion has focused on the possibility for the UK to become an 'associate member' of the EU *after* exiting from the EU, and the current relationship between Norway or Switzerland and the EU have often been cited as precedents or models in this respect. The Norway and Swiss models are, however, deeply unattractive for the United Kingdom, as the country would then be excluded from EU decision-making but still have to follow the lead of the EU legislator in the internal market and related matters. In fact, none of the post-exit options of association with the EU seem to be at all attractive for the UK.²⁵

The mirror option of the 'Norway scenario' is for the UK to remain *inside* the EU but with a more separate status than before; we will call this a *partial membership status*.²⁶ Indeed, continued membership, albeit on different terms from now, would have clear advantages for the UK. Its government would continue to be fully involved in general EU decision-making for constitutional matters such as treaty revisions and accessions of new members, as well as in all the policy domains in which it would continue to participate, in particular for the internal market, international trade and foreign policy. Partial membership would also

²³ See discussion of this option in *Reforming the EU: UK Plans, Proposals and Prospects*, House of Commons Library note SN/IA/7138 of 16 March 2015, at 16 ff.

²⁴ See, in this sense, the hypothetical new 'Protocol on voting in the Council of the European Union' drafted by S. Peers, 'A legally binding commitment to Treaty change; is it humanly possible?', EU Law Analysis blog, 26 June 2015.

²⁵ See J.C. Pirié, 'Si le Royaume-Uni quittait l'Union européenne : Aspects juridiques et conséquences des différentes options possibles', *Fondation Robert Schuman - Questions d'Europe*, no. 355, 4 May 2015, at pp. 5-10, and his conclusion at p.11 : 'aucune des sept options entre lesquelles il serait possible de choisir au cas où le Royaume-Uni déciderait de se retirer de l'Union européenne ne serait satisfaisante.' See also, in the same sense, the discussion of the alternatives to membership by A. Lazowski, 'Withdrawal from the European Union and Alternatives to Membership', *European Law Review* (2012) 523, and by D. Buchan, 'Outsiders on the inside. Swiss and Norwegian lessons for the UK', *Centre for European Reform*, September 2012.

²⁶ One could also use the term 'associate membership', but since the latter term is often used to describe the post-exit linkages that could be built between the UK and the EU, I prefer to use here the alternative term of 'partial membership'.

be easier to bring about than exit followed by associate membership where everything must be renegotiated.

The new partial membership status would essentially consist in a (i) codification and extension of the UK's current opt-outs, combined with (ii) a simpler and more coherent structure of EU decision-making in those areas. The current bits-and-pieces of special status for the UK could be assembled in one Treaty chapter (or, better still, in a single comprehensive 'UK Protocol') listing all the policy areas in which the UK does not participate. The list could include new domains such as employment policy,²⁷ or the structural funds.

This could be accompanied by a special procedure allowing the UK to 'climb back in', by renouncing to an opt-out in one or more policy domains, for example after new elections. This could be done by a simple qualified majority decision of the Council, adopted on request by the UK government. This simplified procedure would apply only to terminating an opt-out and not to creating new ones.

3. WHAT'S IN IT FOR OTHER COUNTRIES?

In the 'Blueprint for reform of the European Union' by Open Europe, the eurosceptic think tank, it is suggested that flexibility should mean that the UK (and other states) should be 'free to opt in or out of common measures' in all policy domains except the single market.²⁸ This would surely be unacceptable for the other EU states. Rather, they would be more inclined to accept an 'either in or out' system, whereby the UK's participation follows the broad policy domains described in the chapters of the Treaties; in those areas where the UK chooses to be a participant, there should be no subsequent possibility for opting out from single measures. A complete freedom to opt in or out from specific measures would be disruptive of the institutional functioning of the Union and of the spirit of solidarity among its members.

Indeed, the currently existing opt-out/opt-in mechanism in the field of migration and asylum is a permanent source of frustration for the other member states and for the EU institutions. It gives to the UK government an opportunity to decide on an ad-hoc basis whether or not to participate in EU decisions in this field, and to take that decision when the decision-making process has already started.²⁹ Thus the UK government can first try to influence the content of the decision and then still 'jump ship' at the very end of the process. It creates ill-feeling among the other states, as they perceive the UK's position to be inspired by purely selfish interests to the detriment of intra-EU solidarity.³⁰ It also creates a number of legal problems, such as those arising if the UK decides to opt in to a piece of EU legislation but later opts out from an amendment to that legislation.³¹

A future partial membership status could simplify the situation by removing this possibility for opt-ins for single policy measures. The UK's opt-outs should rather relate to entire pre-defined policy areas without the possibility of 'picking and choosing' agreeable measures within those policy areas. For the rest of the European Union, the removal of the 'have your cake and eat it' position which the UK currently has could be seen as a positive result of the reform negotiation.

²⁷ 'PM "seeking EU employment law opt out', *Financial Times* 11 July 2015.

²⁸ Open Europe, *A blueprint for reform of the European Union*, June 2015, p. 2.

²⁹ See Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, Article 3.

³⁰ This can be illustrated by the recent UK opt-out from the system of relocation of refugees. See House of Lords, European Union Committee, 2nd Report of Session 2015-16, *The United Kingdom opt-in to the proposed Council Decision on the relocation of migrants within the EU*.

³¹ On this question, see House of Lords, European Union Committee, 7th Report of Session 2008-09, *The United Kingdom opt-in: problems with amendment and codification*.

4. REPEALING EXISTING OBLIGATIONS UNDER EU LAW?

The new partial membership regime could also specify to what extent the *acquis* in the new opt-out fields would continue to be binding on the UK. For example, if the UK were to obtain a new opt-out in the domain of social and employment policy, could this also include a British exemption from existing EU legislation in this domain, such as the controversial³² working time directive?

A precedent in this sense occurred on 1 December 2014: from that day, the United Kingdom was no longer bound by a long list of existing EU legal measures in the field of police cooperation and criminal law that had been adopted prior to December 2009, and that had been binding for that country until December 2014. Until that day, differentiated integration had always happened for the future: new EU policies (in the case of opt-outs), or new individual measures (in the case of enhanced cooperation) are adopted by, and for, less than all the Member States, leading to a differentiated set of legal obligations *for the future*. The UK's 'block opt-out' for the third pillar worked *for the past* in that it released the UK from obligations under EU law which it had accepted earlier on.

This unprecedented fact had its roots in the Lisbon Treaty. In the text of that treaty, and as a price for its acceptance that the Community method would be extended to criminal justice and police cooperation, the United Kingdom obtained not only a right to opt-out from future post-Lisbon measures in this domain, but also a right to unilaterally pull out from *existing* pre-Lisbon instruments by which the UK was bound. The latter right had to be exercised in relation to *all* existing third pillar instruments taken together, hence the commonly used expression of a *block opt-out*. It was not to be exercised immediately upon the entry into force of the Lisbon Treaty, but 'at the latest six months before the expiry of the transitional period' of five years.³³

Despite many misgivings expressed on the home front,³⁴ the UK government decided to make use of the block opt-out option and duly notified the Council of this on 24 July 2013, well before the expiry of the transitional period. On 27 November 2014 (four days before its expiry), the Council adopted a decision setting out the 'consequential and transitional arrangements' deriving from the UK's pull-out, but immediately after, on 1 December 2014 (on the fifth anniversary of the Lisbon Treaty), both the Commission and the Council adopted Decisions allowing the *re-entry* of the UK to a selected number of pre-Lisbon third pillar measures (35 all together, including the European arrest warrant, Europol and Eurojust).³⁵

Something similar could be envisaged in case the UK obtains new opt-outs. If, for example, a new opt-out were agreed for social and employment policy, it would not make much sense to maintain the UK's existing obligation to apply the working time directive, if, at the same time, it could opt-out from future amendments to that directive adopted by the Union's legislator.

³² See the *Review of the Balance of Competences between the United Kingdom and the European Union – Social and Employment Policy*, Summer 2014, at p. 60.

³³ Protocol no. 36 on Transitional Provisions, Article 10 (4).

³⁴ See in particular the Report of the European Union Committee of the House of Lords, *EU police and criminal justice measures: The UK's 2014 opt-out decision* (2012-13, HL 159).

³⁵ See respectively OJ L 343/11, L 345/1 and L 345/6. For a short discussion of what happened, legally speaking, on those days of November and December 2014, see S. Peers, 'The UK opts back in to the European Arrest Warrant – and other EU criminal law', *EU Law Analysis* blog, 2 December 2014.

5. INSTITUTIONAL IMPLICATIONS OF PARTIAL MEMBERSHIP

The creation of a new status of partial membership should, arguably, also have consequences for the institutional operation of the European Union beyond the current mechanism of non-participation in Council voting. If agreement is reached that the UK should not participate in EU law-making in a large number of domains, the question would inevitably arise whether it would still be democratically legitimate, and politically acceptable, to allow MEPs elected in the UK to participate in European Parliament votes in those same domains. The European Parliament itself has so far resisted all calls for a differentiation of the participation rights of its members, especially in the context of the adoption of specific legislation for the euro area countries. It could well be argued, though, that the constitutional recognition of a special category of partial membership should have consequences for the position of the MEPs elected in the 'partial member state'.

A further institutional consequence could be a revision of the UK's contribution to the EU budget. If partial membership would entail an opt-out from 'expensive' policy domains (say, the structural funds or agricultural policy or a future European Monetary Fund), it would seem appropriate to reflect this in the calculation of the UK's share of the national budget contributions.

6. LIMITS OF THE SPECIAL STATUS: THE NO-GO AREAS

In the context of the 'new settlement' negotiations, some of the possible objectives of the UK government are simply unacceptable for the other member states. One such flashpoint (that was mooted by the British Prime Minister at a given time) was that of limiting the numbers of EU citizens from particular EU countries to be allowed entry and residence in the UK. Such a quota regime would only be possible after a revision of the Treaty chapters on free movement of persons and on citizenship, but a treaty amendment of this nature was decidedly rejected by all other governments and seems no longer to be on the agenda of negotiations. More generally, the Treaty provisions on free movement and citizenship would seem to be a 'no-go area' for treaty reform, which does not exclude, of course, more limited modifications of secondary EU legislation relating to the rights of EU citizens.

The internal market is, equally, not an area for which the other member states are likely to accept new derogations or opt-outs for the UK. This may seem like a hypothetical issue, given the repeated statements by the UK government that it likes the single market, and would like to develop market integration even further especially as regards services. And yet, we have seen during the past years that internal market measures have often given rise to controversy and opposition from the side of the UK government, leading it in some cases to challenge the validity of such legislation before the Court of Justice.³⁶

Internal market law is, therefore, a rather ambiguous policy area: the Conservative party's commitment to the single market is a commitment to a largely deregulated market and does not include support for many of the measures based on Article 114 TFEU or other internal market legal bases, which aim to *regulate* the market in order to protect consumers, workers or non-market values such as the environment, health or cultural diversity. However, it seems quite impossible to make a principled legal distinction, in the text of the Treaties, between 'good' internal market legislation (which enhances the operation of market mechanisms) and 'bad' internal market law (which regulates the

³⁶ See most recently Case C-270/12, *United Kingdom v European Parliament and Council*, judgment of 22 January 2014 ('ESMA' or 'short selling' case).

market in the name of public policy interests). Therefore, internal market law also seems to be a no-go area in the context of a new partial membership status of the UK.

What is equally out of bounds is the possibility for the British parliament to 'derogate' from unwelcome EU legislation and thereby to deny the primacy of EU law over national law. Such a unilateral parliamentary opt-out power has been advocated by some circles in Britain (though not by the government itself).³⁷ This would breach a fundamental characteristic of the EU legal order which ensures the uniform application of EU policies in the legal orders of its member states and distinguishes EU law from looser forms of international cooperation. A UK-only derogation from the primacy of EU law would therefore seem to be incompatible with membership of the EU, even a partial one.

7. A STATUS RESERVED FOR THE UK ONLY

The scheme discussed in this note is of a partial membership status *for the United Kingdom only*. It is not a general partial membership status which could be chosen also by other existing or future member states of the EU. This is an important condition for making this reform workable. Indeed, if other member states were also allowed to claim a partial membership status, they would probably select other opt-out domains than those of the UK. A multiplication of partial memberships would lead to a patchwork of legal commitments that would be unsustainable.

The creation of a partial membership for the UK is, in fact, an available option only on the condition that it is limited to the UK and is not extended to any other member state of the EU. Existing opt-outs for countries like Denmark and Ireland can of course be preserved, but no further moves to an *à la carte* membership should be contemplated. This presupposes the recognition that – at least in this respect – not all member states are equal, and that the need to 'keep Britain in' justifies exceptional efforts which should not be made in order to convince other countries of the benefits of their continued membership of the Union.

³⁷ See *Reforming the EU: UK Plans, Proposals and Prospects*, House of Commons Library note SN/IA/7138 of 16 March 2015, at p.19.

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PHOTO CREDIT: iStock International Inc.



ISBN 978-92-823-8569-2 (paper)
ISBN 978-92-823-8568-5 (pdf)

doi: 10.2861/942791 (paper)
doi: 10.2861/699639 (pdf)