Council of the
European Union

Brussels, 10 September 2015
(OR. en)

11891/15

PE 142
INST 319
JUR 590

NOTE

From:	General Secretariat
To:	Delegations
Subject:	Summary report of the meeting of the Constitutional Affairs Committee (AFCO) of the European Parliament, held in Strasbourg on 3 September 2015

Item 2

Chair announcements

The AFCO chair, Ms HÜBNER (EPP, PL), announced:

- an extraordinary AFCO meeting on 28 September 2015. This is to allow the committee to adopt the report on the European Electoral Law by Ms HÜBNER and Mr LEINEN (S&D, DE), so that it could be tabled for the October II plenary.

- the opinion on the ECON report on "The EU role in the framework of international, financial, monetary and regulatory institutions and bodies" would be considered at the following AFCO meeting, given the absence of Mr RANGEL (EPP, PT), the rapporteur for the opinion.

- The rapporteurship on Relations between the Commission and national parliaments would go to the EPP, and most probably to Mr RANGEL.

- The rapporteurship for the opinion to the JURI report on the Commission report on subsidiarity and proportionality would go to Mr UJAZDOWSKI (ECR, PL)

- There would be no follow-up on the motions for a resolution on abandoning 5-Presidents' report, and on the ECI (the latter issue being addressed in Mr SCHOPFLIN's (EPP, HU) report).

- AFCO's mission to London was confirmed for 16-17 November, while the mission to Athens had to be postponed as a result of a clash with the mission to Washington, which is confirmed.

- AFCO meeting calendar for 2016 was endorsed (see Annex I)

Items 6 and 7

Votes

AFCO adopted interpretations to two EP rules of procedure, namely Rule 130(3) and Rule 191.

The vote relating to the interpretation of Rule 130(3) covers MEPs' written questions. In particular, the rule limits their number to 5 per month, despite allowing "additional questions" to be submitted "by way of exception". This limitation, however, proved to be ineffective, given that the average number of questions per month in 2015 was almost double that of 2014 (1800 compared to 1000 per month). Prior to the vote, Mr CORBETT (S&D, UK), who is a member of the Working Group on the revision of the EP rules of procedure, explained that the situation of written questions had become dramatic, and affected the workability of the system. AFCO therefore voted an interpretation to Rule 130(3) which clarified that:

"*The expression "by way of exception" is to be interpreted as meaning that the additional question concerns a matter of urgency and that the submission of that question cannot wait until the following month. Furthermore the number of questions tabled [as additional questions] must be smaller than the norm of five questions per month.*"

The interpretation to Rule 191 concerned the procedure to vote on a request to suspend or close an EP sitting.

Item 5

Exchange of views on "The renegotiation of the United Kingdom's constitutional relationship with the European Union: agenda risks and implications".

AFCO invited two keynote speakers, Charles GRANT (Director of the Centre for European Reform) and Jean-Claude PIRIS (former Jurisconsult of the Council).

Charles GRANT singled out 10 issues which in his view made it particularly challenging for the "IN"/YES campaign to win the referendum. Jean-Claude PIRIS discussed the various forms of renegotiated membership that Cameron could seek, arguing that calls to change the Treaty would in all likelihood be rejected given the current climate.

The debate was followed by several questions from MEPs, including on the possibility of a two-speed Europe (Ms BRESSO - S&D, IT) and alternatives to Treaty change (Mr CORBETT). A number of members identified any tampering with free movement principles as a red line.

Attached are the draft papers of both speakers. (see Annex II)

Item 9

Exchange of views on the state of play of the Working Group on the general review of the EP rules of procedure

Mr WIELAND (EPP, DE) explained that the Group held its constitutive meeting in January 2015, and that he had been appointed Chair, while Mr CORBETT had been appointed rapporteur. The group was made up of representatives of each political group, namely Mr UJAZDOWSKI (ECR, PL), Mr GOERENS (ALDE, LU), Mr SCHOLZ (GUE/NGL, DE), Mr ANDERSSON (Greens, SV), Ms ADINOLFI (EFDD, IT) and Mr ANNEMANS (ENF, BE).

The group's mandate was "*to identify possible errors, inconsistencies and lacuna as well as provisions that have become obsolete or require an adaptation in the light of the experience of the last years*". So far, the group had met on 12 occasions and the issues that they were discussing included: whether the secret ballot vote on the Commission President should be replaced by an open vote; the election of bodies of the EP; the division of responsibilities between the President, the Bureau and the Quaestors; how political groups are created and the legal effects of this and of their potential dissolution; the different kind of EP reports; the drafting of opinions; how interinstitutional relations are dealt within in trilogues and first reading agreements; how committees received mandates to open negotiations and how the EP could ensure transparency in negotiations without affecting efficiency; the number of own-initiative reports; and the flaws in the automatic "ranking" of MEPs.

The working group is to report to AFCO at the end of its work and on the basis of its recommendations, a draft report would be prepared. The final objective would be for the suggested amendments to enter into force at the latest in January 2017.

Item 11

Next meetings

21 September 2015, 15.00 - 18.30

22 September 2015, 9.00 - 12.30

ANNEX I

Committee on Constitutional Affairs

DRAFT Calendar of AFCO committee meetings for 2016

January
Thursday **14 January**, **09:00 – 12:30** and **15:00 – 18:30**

February
Monday **22 February**, **15:00 – 18:30**
Tuesday **23 February**, **09:00 – 12:30**

March
Monday **14 March**, **15:00 – 18:30**
Tuesday **15 March**, **09:00 – 12:30**

April
Wednesday **20 April**, **09:00 – 12:30** and **15:00 -–18:30**

May
Monday **30 May**, **15:00 – 18:30**

June
Wednesday **15 June**, **09:00 – 12:30** and **15:00 – 18:30**

July
Monday **11 July**, **15:00 – 18:30**
Tuesday **12 July**, **09:00 – 12:30**

September
Monday **05 September**, **15:00 – 18:30**

Thursday **29 September**, **09:00 – 12:30** and **15:00 – 18:30**

October
Wednesday **12 October**, **09:00 – 12:30** and **15:00 – 18:30**

Thursday **20 October**, **09:00 – 12:30** and **15:00 – 18:30**

November
Tuesday **08 November**, **09:00 – 12:30** and **15:00 – 18:30**

Tuesday **29 November**, **09:00 – 12:30** and **15:00 – 18:30**

December
Monday **5 December**, **15:00 – 18:30**

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

Constitutional pathways

The renegotiation of the United Kingdom constitutional relationship with the European Union: agenda, risks and implications

DRAFT

Abstract

With the view of feeding into the debate about the two reports: "Improving the Functioning of the European Union building on the potential of the Lisbon Treaty" and "Possible evolutions and adjustments of the current institutional set-up of the European union", the three contributions that follow discuss the aim of UK government to renegotiate its relationship with the EU which carries a number of constitutional and institutional implications. They include analysis of the "UK reform agenda", challenges and pitfalls in its implementation as well as legal implications for the EU its institutions and Member States .Those are draft documents, representing the points of view of the experts invited are intended to contribute to the exchange of views. An updated analysis will be provided following the exchange of views with the AFCO Committee, reflecting on the issues raised.

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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 September 2015

This document is available on the Internet at:
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Constitutional Pathways

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 before holding 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 issue of 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 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.

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 did to win a referendum. In 1975, the British people knew that other EEC economies were much more successful than their own. That is not the case in 2015. In 1975, the entire establishment – the media, business leaders and most mainstream politicians – called for a Yes vote; the No 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, quite a few senior figures in the establishment, who come across as moderate, will be calling for a No, just as, probably, will be large 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. The complex formula that was agreed on the budget in 1975 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 won a good deal. 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 has a poor reputation. 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.

This paper looks at Cameron's plans and priorities for the renegotiation; considers the many obstacles that could make it hard for the referendum to be won; and concludes by asking what, if anything, those outside the UK could do to help ensure a positive referendum result.

2. THE BRITISH GOVERNMENT'S PLANS AND PRIORITIES

David Cameron would like to complete the renegotiation by the end of 2015, though his officials say that they are relaxed about the process extending into early next year. He has promised a referendum before the end of 2017. The general assumption in Whitehall is that the referendum will be held in 2016, perhaps in September. 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 Cameron's government, the harder it will be for it to win the referendum); 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 in a protocol; and political agreements to change EU laws or introduce new ones. One of the disadvantages 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 absolute minimum time required is perhaps eight months). Anti-EU campaigners will be able argue that large parts of Cameron's package could unravel, for example due to opposition from the European Parliament.

Cameron's priorities for reform fall into four 'baskets':

Reducing the in- and out-of-work benefits available to EU migrants. Of all the subjects covered in the renegotiation, this is the most salient with British public opinion. 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. Some imminent rulings by the European Court of Justice are likely to make it easier for governments to restrict migrants' access to unemployment benefits. Germany and some other governments sympathise with the UK on this issue (although in fact in the UK there is not a huge problem of EU migrants coming to claim jobseekers' allowance).

The problem is that Cameron has decided to focus on in-work benefits, and in particular, tax credits. There is a substantive issue here. Many workers, including EU migrants, receive low salaries that are topped up by the government through tax credits. The EU treaties are clear that on conditions of work, such as tax credits, governments cannot discriminate against EU migrants because of their nationality. Other countries (and Poland especially) will 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 the system for everybody, including British citizens. One idea under discussion in recent months is for the British government to use the introduction of the 'universal credit' – which is due to replace tax credits and other in-work benefits in the coming years – to make important changes to Britain's welfare system. Universal credit could be defined as a residence-based rather than a work-related benefit, which might make it easier to limit its availability to recent arrivals in the UK.

The British government will also try to address the issue of UK child benefit being paid to children living in other parts of Europe, even though their parents are resident in Britain. The numbers of children receiving such payments is relatively small, but this is a political hot potato in Britain. The relevant EU directive is due for revision in the near future, which may present an opportunity for amending the rules on child benefit payments.

One British objective in this area will be relatively easy for Cameron to achieve: limiting the rights of workers from future accession states. He has floated the idea of limiting their right to work in the rest of the EU until the per capita GDP in the country concerned reaches a certain level. Since accession treaties require unanimity, Britain could insist on something along these lines. In any case, several other member-states are quietly urging Cameron to push for this.

Whatever deal Cameron can secure on migration, the rules on benefits and credits are not the main determinant of how many EU migrants head for Britain; much more important is the relative strength of the UK economy and the perception that if offers ample job opportunities. So Cameron will find it hard to argue convincingly that the reforms he has achieved will significantly cut the number of migrants coming to the UK. However, he may be able to argue that his reforms will make the rules on welfare for migrants fairer. There seems no prospect of treaty change in this area.

'Sovereignty'. This means two things for Cameron. One is **giving national parliaments a bigger role** in policing 'subsidiarity', the principle that the EU should only act when strictly

necessary. The current rules allow a 'yellow card procedure', whereby if a third of national parliaments think a Commission proposal breaches subsidiarity, they can issue 'reasoned opinions', club together and raise 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 want a 'red card' system, giving national parliaments a veto; others would be happy to reinforce the yellow card. Federalists, the European Parliament and Germany hate these ideas, since they think that they would make it much harder for the EU to adopt legislation. They argue that the role of national parliaments in EU affairs is to hold their own governments to account. But the UK has allies on this issue, like the Dutch and the Nordics, 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 to decide if they wish to issue a 'reasoned opinion' against a Commission proposal. And there could be an inter-institutional agreement that the Commission would, in normal circumstances, withdraw a proposal after a yellow card was raised. Such changes would not require treaty revision.

The other part of 'sovereignty' is **amending the treaties' commitment to 'ever closer union'.** The presence of these words in the treaties probably has very few practical consequences in terms of EU legislation. But Cameron is determined to fight and win a symbolic battle on this issue. He believes that one reason why the British mistrust the EU is the so-called ratchet effect – the 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, given the attachment of federalist governments (such as Belgium) to 'ever closer union'. Britain's partners are unlikely to agree to change the words in the treaties, but they will probably agree to a form of words, perhaps in a protocol, that reassures the British. The conclusions of the June 2014 European Council, which said that different countries could interpret 'ever closer union' in different ways, will probably form the basis of an agreement.

'Safeguards for the single market'. The British governments believes there is a risk that one day the eurozone countries will form a caucus within the wider EU; and that, since under the Lisbon treaty voting rules that recently came into force they have a qualified majority, that they will act as a bloc in deciding single market laws. 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 British finance minister, is very concerned about the relationship between euro-ins and -outs. British

public opinion is not particularly interested, but among business leaders, senior politicians and top officials, this is the most important dossier in the renegotiation.

Some of the other non-euro countries share Britain's concerns on the ins and outs issue, though less than the British, because many of them assume that in the long run they will join the euro. But Germany has little sympathy for the British position. Some German officials think the UK is merely after a veto for the City of London over financial regulation, which they strongly oppose. They think this because of Cameron's behaviour at the December 2011 EU summit, when he refused to sign the 'fiscal compact' treaty that Germany wanted – because the others would not accept a protocol written by the British Treasury that would have changed voting rules on some aspects of financial regulation.

Some British think-tanks, such as Open Europe, have suggested the extension of the 'double majority' voting principle – whereby a majority of both euro-ins and euro-outs must approve a measure – from banking regulation, where it already applies, into other areas. But Germany is strongly opposed to this principle, 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 fundamental principles of the treaties.

Nevertheless it should be possible for Osborne to gain some reassurances on ins and outs. The German finance ministry seems more sympathetic to his position than other parts of the German government. The Centre for European Reform has suggested a new treaty article, stating that nothing the eurozone does should damage the single market; the granting of observer rights to non-euro countries in the Euro Group; and the creation of an emergency brake that would allow any non-euro country which believes that a eurozone action harms the market to send the matter for review by the European Council, for a limited period of say a year. Such reforms are probably feasible.

A more competitive EU. Many of the priorities of the Juncker Commission happen to fit closely with British priorities, such as extending the single market into the digital economy and energy; creating a capital markets union (so that SMEs can more easily raise money through securities, rather than depending on often unavailable bank finance); negotiating trade-opening agreements with many countries, including Japan and the US; and cutting red tape (Commission Vice President Frans Timmermans has killed about 80 Commission 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.

Cameron's problem with this competitiveness agenda is that most of the changes he wishes to see are already under way. He will need some clever marketing to dress up these

initiatives as a British achievement. British public opinion is not particularly interested in the single market, 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 on the working time directive and on the rules applying to temporary and agency workers. The working time directive (WTD) is a real issue for Britain's National Health Service (because of ECJ rulings on definitions of rest time), but previous British governments – though they found many allies in the Council of Ministers – failed to reform the directive because of opposition in 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 may not be able to achieve much on that directive. There are some indications that Cameron understands that if he pushes too hard against social Europe, he will face problems in the Labour Party and in Britain's trade unions.

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. What follows are ten reasons why those who want Britain to stay in the EU should be concerned.

(i) **The internal dynamics of Conservative Party politics.** 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. Since Cameron became party leader, in 2005, they have learned that, if they badger him on a European issue, he is quite likely to cede ground. One example was the 2011 EU Act, which promised a referendum on the transfer of any further powers to the EU; another was the pledge of an in-or-out referendum that Cameron first made in 2013 (having previously refused to make such a pledge). Hard-line eurosceptics are becoming angry that Cameron's demands for reform appear to be, in their view, insubstantive. Until now they have mostly stayed fairly quiet, since Cameron's wish-list has (at least officially) not been revealed. But at some point this autumn Cameron will have come clean about his negotiating objectives. That will give the quitters an excuse to break cover and attack the prime minister for the modesty of his 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 producing a new and radical demand, 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 for the Yes side.

(ii) **Damage to the British brand.** Many people in Britain do not realise that their country is rather unpopular in parts of Europe. The anti-EU rhetoric of some British politicians – and of the tabloid press – has damaged Britain's soft power. Some of the xenophobic comments about EU migrants in Britain have been particularly harmful. The government's recent refusal to take any of the refugees arriving in Greece and Italy – which the Commission has sought to share out with a quota scheme – has reinforced the image that some hold of Britain being a nasty country (Ireland, like Britain, is not legally obliged to take any refugees, but has nevertheless volunteered to receive some). The internal dynamics of the Conservative Party, as described in the previous paragraph, have the potential to further sully Britain's reputation. The more unpopular the British become, the less willing will be some governments and some people in the EU institutions to help solve Cameron's problems in the renegotiation.

(iii) **The unwillingness of other member-states and EU institutions to help Cameron.** 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. Some of those 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. Over the past decade or so, successive British governments have failed to pay sufficient attention to the needs and concerns of many EU member-states, particularly the smaller ones and those in Central Europe. In recent months David Cameron has sought to rectify this problem, with *tours des capitals*, but rather late in the day. Countries such as Poland, Austria, France and Spain are likely to prove particularly difficult in the renegotiation. The European Parliament, too, has the potential to create difficulties for Cameron. On issues such as more rights for national parliaments, less 'social Europe' and cutting red tape, it is likely to take a fundamentally different viewpoint to that of the British government. It may block some of the legislation that Cameron needs to be passed.

(iv) **A new row about EU migration.** In the referendum campaign, the strongest argument of the No campaign will be very simple: if you want the British people to be able to control their own borders, vote No, since membership is incompatible

with limits on immigration from EU countries. Unfortunately for pro-EU people in the UK, very large numbers of Britons think there are too many migrants, including EU migrants, in their country. Such views are not held only among unskilled and unsuccessful working class voters, but also among many mainstream, moderate and highly-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.

(v) **A worsening of the euro crisis.** 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 in order 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 acrimonious emergency summit, it damages the EU's cause in Britain.

(vi) **A weak campaign to keep the UK in the EU.** There is a danger that the Yes campaign will be seen as top-down and establishment run (although, as already stated, a minority of establishment figures will support the No campaign). If the leading figures in the Yes campaign are industrialists from the Confederation of British Industry, the bosses of foreign banks in the City, retired ambassadors and those with an obvious financial interest in membership (such as farmers and academics), the pro-Europeans may not win over many hearts and minds. The No campaign will make a point of claiming to represent 'the little man' and the common people against the fat cats and the elite; No campaigners will focus on 'bottom-up' organisation through pubs, clubs and small businesses. It is likely that the No campaign or campaigns 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 much less effective than that organised by the nationalists.

(vii) **The No campaign has 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 or the

difference between tariffs and non-tariff barriers. 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 would have no problems exporting to it; the £10 billion net annual cost of membership would be better spent on the National Health Service; and if Britain repatriated powers from the EU, its own law-makers and judges would be solely responsible for British law, making the country more democratic. Pro-EU campaigners should be able to rebut all these arguments, but will find it hard to do so simply.

(viii) **The Labour Party is in turmoil.** 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. A lot of new members have joined, while many others have registered as supporters. Many of these new adherents are far to the left of where the party was under Tony Blair, Gordon Brown and Ed Miliband. And quite a lot of them are increasingly sceptical about the EU. The eurozone's harsh treatment of Alexis Tsipras and his Syriza government – and its 'Germanic' emphasis on austerity – have made the EU much less appealing to the British left. The 600,000 members and registered supporters who are currently choosing a new Labour leader seem likely to elect the Jeremy Corbyn, a man of the hard left. Corbyn himself is ambiguous on the issue of EU membership (though many of his backers are quitters). Whatever his own views, if Corbyn becomes leader, Labour will have little ability to make a positive impact on the referendum campaign. The party will be focused on rifts, splits, plots and potential coups. It will be concentrating on itself rather than on the real world. It will not only do a poor job of mobilising centre-left voters to back EU membership, but may also be seriously divided on the merits of membership, as it was in 1975.

(ix) **Britain's trade unions have become much less pro-EU in the past ten years.** In the 1980s the combination of Jacques Delors and Margaret Thatcher convinced the trade unions, like the Labour Party more broadly, to think that the EU was more good than bad. And trade unionists benefited from specific EU measures, such as the Working Time Directive, rules on maternity and paternity leave, rights for agency workers, provisions on information and consultation, and treaty articles on non-discrimination. But when Tony Blair and Gordon Brown were in power, seeking to diminish the EU's role in labour market regulation, trade unions started to think again about the benefits of membership. And in recent years they have become much more left wing, which has led many trade union leaders to view the EU as a neo-liberal enterprise. The current position of some of the most powerful trade

union leaders on membership is ambiguous; and they say that if Cameron 'repatriates' social powers from the EU, they will campaign for withdrawal.

(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 membership. Nevertheless many of them will stay on the sidelines rather than take a public position in favour; one recent survey of FT-350 companies (all those companies are large) suggested that only 7 per cent would call for a Yes vote. 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 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 No campaigners will remind everyone that some of these car firms urged Britain to join the euro). Some prominent names will back the No campaign, such as retailer Next, equipment-maker JCB and many City fund managers. Large numbers of smaller businesses – which tend to be the ones that are most annoyed by EU regulations – have signed up to the various No campaigns.

4. CONCLUSION: CAN THOSE OUTSIDE THE UK HELP ITS YES CAMPAIGN?

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 appeals 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 particularly foreign.

Some non-European governments could also make a difference. Many British people would listen carefully to what President Obama said. 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 most 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 extremely insubstantial. 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 reassure the UK and other 'outs' without in any way impeding the ability of eurozone countries to integrate further.

On these and other reforms, the Commission and the Parliament can be hugely helpful. If they were seen to be whole-heartedly pro-reform, it would have a positive impact on their image – and that of the EU as a whole – not only in Britain but also in other member-states, too.

Charles Grant, August 2015

CONSTITUTIONAL PATHWAYS: WHICH INSTITUTIONAL AND CONSTITUTIONAL ADJUSTMENTS FOR THE UNITED KINGDOM?

Jean-Claude Piris

In my opinion, there is one, and only one, essential Constitutional question that the EU has to face in relation with the UK's issue, albeit one which could be formulated in different terms:

Would it be imaginable that a State which is not willing to become, or in this specific case, remain, an EU member, could nevertheless be allowed to participate fully in the single market, with the corresponding right to participate in the EU's decision-making in that field?
Alternatively, taking into account the necessity to preserve the decision-making autonomy of the EU, could that State be allowed to become (or to remain) an EU member and to participate fully in the EU's internal market, without however being obliged to share EU's ideals and follow all the other EU's policies?

I tend to give a negative answer to both these questions.

But let'us analyse the specific *"British issue"*.

After more than forty years of EU membership, progressively qualified by important opt outs, the British people will have the choice, in 2016 or 2017, to decide if their Country should stay or not in the EU. The paradox is that this is happening when the UK has achieved most of its European policy's aims: enlarging the EU without a major change in its decision-making system, keeping the full benefits of the internal market despite a number of opt-outs in other major policies, keeping national control on foreign and defence policies, liberalising external trade, having better control of subsidiarity and red tape, getting rid of any federalist symbol, etc...

Before making a proposal to the British people, the British authorities will have to choose one scenario among the three possible for their future relations with the EU.

The first possible scenario would be for the UK to remain an EU member, while being conferred a special status through a revision of the EU Treaties.

In legal terms, the EU Treaties would have to be modified in order to create such a special status. Some, in the UK, think that such a status should allow the UK to participate in the EU internal market ***and*** to participate in the corresponding EU decision-making. The UK

would not be obliged to participate in any other EU policy: agriculture, fisheries, economic and social cohesion, social policy, justice and security, immigration, foreign policy, etc.

First, before giving my opinion on the substance of this scenario, I will make a comment on ***the procedure***. The aim would be to propose the British people to accept, in a referendum, a new status established through a revision of the EU Treaties. Therefore, that revision would have to be ratified by all EU members, either through their Parliament(s) or by referendum, **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 their political authorities to organise such a politically hyper-sensitive procedure **before** knowing if the British people have accepted it, and to achieve it with such a short delay! However, making the British people vote in the referendum, before knowing if the revision of the Treaties will be acceptable by the 27 others, would be very risky. There is no answer to this: the British call that *"a catch 22 question"*.

Second, ***on substance***, the problems involved are very serious. Some observers think that it would be inconceivable that the UK would be treated by the EU like smaller States, like Norway or Switzerland. They think that the EU's interest in keeping the closest links possible with an important State as the UK are such, that the EU will accept to confer on the UK a special ad hoc status, allowing it to remain an EU member State, while it would participate more or less only in the internal market, but not in other EU's policies.

My personal opinion is that this view is based on a misunderstanding of the political situation. I think that the other EU member States, as well as the EU's institutions, would have serious reasons for not accepting such an architecture, which would be a big *"pick and choose" ("l'Europe à la carte")*:

-First, this would affect the EU's decision-making autonomy.
-Second, such a status, if accepted for the UK, would be attractive for others and would open the door to similar requests from third countries, such as Norway or Switzerland, and even perhaps for EU's member States.
-Third, the leverage of the UK is weaker than some think: it sells half its exports to the EU, while the rest of the EU sells only 10% of its exports to the UK. Moreover, half of the EU's trade surplus with the UK is accounted for by only two member States, while a Treaty revision requires the positive vote of the other 25 as well.

This is why I have the strongest doubts about the feasibility of this scenario. It would also be an illusion to think that "the British question" could be cured by an improbable «repatriation of powers» from the EU to all member States, through a revision of the Treaties. This is unnecessary, unrealistic and will never happen on important subjects. In any case, it seems that the UK has renounced that idea, after that the thorough Report it organised on that issue demonstrated that the share of powers between the EU and its members is properly balanced.

The second scenario would be for the UK to withdraw from the EU ("BREXIT").

If a withdrawal of the UK would happen, seven ways would be conceivable for the UK to establish a new relationship with the EU:
1) to negotiate ad hoc arrangements in a withdrawal treaty based on Art. 50 TEU,
2) to join the EEA (and therefore also the EFTA), with Iceland, Liechtenstein and Norway,
3) to join only the EFTA with these States and Switzerland,
4) to follow the Switzerland way of a number of bilateral sectorial agreements with the EU,
5) to conclude a FTA or Association agreement with the EU, like Ukraine or others,
6) to conclude an Association and a Customs Union with the EU, like Turkey, or
7) to simply become a third State vis-à-vis the EU, like China or the USA.

Whatever the option chosen, if it includes the participation of the UK in the EU's internal market, the EU would impose conditions. These conditions would, logically, be similar to those imposed on the EEA EFTA States. They would include the obligation to follow all EU's law on the internal market without a participation in the decision-making in the EP, in the Council and in the Commission. They would also include a financial contribution. This scheme is the objective aimed at by the EU in the 2014 negotiating mandate of an agreement with Switzerland, to which the EU is also asking the acceptance of the role of surveillance and control of the Commission and of the Court of Justice, without a Swiss national being one of their members .

Such a scheme, in turn, would appear politically difficult to accept for the UK.

However, no option could be imagined that could reconcile the economic viability of a deal and its political acceptability for the UK. All options would actually take the UK in one of two directions. The first one would lead the UK to become a kind of a "satellite" of the EU, being obliged to transpose into its law all EU regulations and directives for the single market. The second one would isolate the UK and oblige it to start trade negotiations from scratch, both with the EU and with all countries in the world, without having a strong negociating power. At the same time when this heavy task of international negotiations would have to be launched, Westminster would also have to adopt a number of new laws in order to replace EU norms.

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

While recognising that nobody can predict the results of a referendum on Europe in the UK, this looks like the most reasonable scenario. True, it would imply the adoption of some of the reforms currently suggested by the British political authorities. But, actually, most European leaders would agree that the EU needs some reforms of this kind.

Many things could be done, without changing the Treaties, if supported by a strong political will. This could include substantive policy measures, such as to adopt a calendar in view of completing the internal market, especially in services, and to launch new optional cooperation policies, for example on energy or on industrial cooperation in defence equipment programmes. This could include as well measures aimed at improving

the functioning of the institutions, by streamlining the Commission, and by containing all institutions within the limits of their legal powers according to the Treaties. The European Council has already shown its willingness as regards the British issue, by stating in June 2014 that the concept of an *"ever closer union"* (between the peoples of Europe) allows for different **paths** (not **speeds**) of integration. Some other measures or reforms going in the direction desired by Mr Cameron might be adopted, for example on practical ways to cut red tape, to better respect subsidiarity, to better protect the rights of the non euro EU member States, and to involve national parliaments more in the functioning of the EU.

However, it remains to be seen if this would be politically acceptable for the British Government and for the British people.

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To conclude, my personal opinion is that it is not possible anymore for the EU, with 28 heterogeneous members, to stick to the *"one solution fits all"* motto. Asymmetric integration is unavoidable in a 28 member EU. As shown by the Schengen area, the Eurozone and enhanced cooperation, it allows the EU to accommodate the diversity of needs, interests and wishes of its members, while avoiding stagnation. There should not be any taboo if changes demand a revision of the EU Treaties in the coming years.

However, there must be constitutional limits, which we must think about, such as, according to me :

-1) to exclude some areas from variable geometry: single market, customs union, State aid rules and competitionpolicy;
-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 of the EU, 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 acting 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, external aspects of common policies.

I tend to believe that these limits should be respected in all cases, including in the case of the UK, whatever its specificities. Thus, the UK will have to choose between two ways:
-if it withdraws from the EU, it will have to accept either to cut its links with the internal market, or to be bound by conditions similar to the EEA's,
-if it chooses to remain within the EU, it should abandon the idea to have any special constitutional status.

INVENTING A STATUS OF PARTIAL EU MEMBERSHIP FOR THE UNITED KINGDOM?

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Abstract

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 (end of August 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'.[1] 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';[2] this would amount to a binding commitment to undertake treaty change in the future, a 'post-dated cheque' as it were.[3]

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')[4]; or introducing new restraints on qualified majority voting in the Council when important national interests are at stake;[5] 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

[1] 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.
[2] Statement by the British minister for Europe, as reported in the House of Lords report (see previous note), at p.16.
[3] 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.
[4] 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.
[5] 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.

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.[6]

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.[7] 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 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,[8] 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 the 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.[9] This would surely be unacceptable for the other EU states. Rather, they would be more

[6] See J.C. Piris, '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.'

[7] 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'.

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

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

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.[10] 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.[11] 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.[12]

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.

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 controversial[13] 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

[10] 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.

[11] This can be illustrated by the recent UK opt-out from the system of relocation of migrants. 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.*

[12] 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*.

[13] 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.

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.[14] Despite many misgivings expressed on the home front,[15] 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).[16]

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.

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

[14] Protocol no. 36 on Transitional Provisions, Article 10 (4).
[15] 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).
[16] 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.

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 would 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 EU 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.[17] 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

[17] 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).[18] 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.

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