



House of Commons

European Scrutiny Committee

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# **UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny**

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**Fourteenth Report of Session 2015–16**





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**Fourteenth Report of Session 2015–16**

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to the report*

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## Summary

By the end of 2017, the UK electorate will be invited to decide whether the UK should remain a member of the EU or leave the EU. Before inviting the electorate to make its choice, the Government is renegotiating the terms of the UK's EU membership.

A process as critical as this should be subject to the most careful scrutiny. Yet we have found the Government's approach to Parliament during the renegotiation so far to be reactive and opaque. The onus has been placed on Parliament to guess when to request information and evidence from the Government and others. We regret this approach on a topic of such national importance. Dialogue between the Government and Parliament needs to improve substantially after the December European Council.

Under Standing Orders, much of our work involves evaluating EU proposals for legal and political importance. In a similar way, we have assessed each of the Government's four areas of renegotiation against its own criteria. We conclude that the negotiation priorities as set out by the Prime Minister will not deliver the legally binding and irreversible agreement leading to reform of the EU nor a fundamental change in the UK's relationship with it envisaged by him.

Given that no Treaty amendments will be made before the referendum, voters are entitled to know the extent to which subsequent Treaty amendment will be required to deliver any new agreement, and how robust and meaningful any guarantees or promises in this respect may be. The Government envisages immediate delivery of the renegotiation outcome by means of an international agreement. It should be clear to the voters that any such agreement would be consistent with the existing EU Treaties only insofar as it is limited to interpreting or supplementing them. It cannot substantively alter the EU Treaties.

Of the four areas under discussion, the most substantial is the relationship between the Eurozone and the non-Eurozone countries, including the UK. Indeed, it is so important that it absolutely requires the security of Treaty amendment to address it.

We do not believe that the goals in the area of competitiveness would fundamentally change the UK's relationship with the EU as they are already being addressed. Delivery of the goals is so dependent on the support of a variety of institutions that any commitment by the Member States alone could not be legally binding or irreversible.

We disagree with the Government's contention that the concept of ever closer union is legally significant. We do not believe it would change—or repatriate—any of the existing EU treaties or laws. Nonetheless, UK disengagement from the concept could be politically significant as it could be used to advocate further opt-outs in future Treaty negotiations or to resist integrationist initiatives. To be robust, such disengagement would require Treaty amendment.

We found little evidence to suggest that the proposals to reduce net migration into the UK from the EU will have a large scale effect on immigration numbers, though they could address public concern about benefits being paid to those who are not entitled to them. Treaty amendment may not be required to deliver all these objectives. Limited

though the proposed changes are, the political and legal challenges of negotiating them—without affecting the rights of UK citizens—are nevertheless formidable.

The timing of any agreement is unclear, although latest indications point to a conclusion in February 2016. This is the first of a possible series of Reports designed to update the House as the renegotiation progresses.

# 1 Introduction

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## The renegotiation commitment and the reasons for this inquiry

1. The Government was elected with a manifesto commitment to hold an 'in/out' referendum on the UK's membership of the European Union, following renegotiation of membership, before the end of 2017. As the Prime Minister stated in the House on 23 March 2015: "In the coming two years, we have the opportunity to reform the EU and fundamentally change Britain's relationship with it."<sup>1</sup> The distinction between "reform" of the EU and a "fundamental change" in the UK's relationship with it was both deliberate and important.
2. The renegotiation and the outcome of the subsequent in/out referendum will have profound and historic implications for UK citizens and the UK Parliament. We therefore considered it essential for us to scrutinise closely the Government's renegotiation of the UK's relationship with the EU, paying particular attention to the legal aspects and to those that relate directly to the powers and role of the UK Parliament. This ties in to our regular work of scrutinising EU proposals for their political and legal importance.

## The progress of negotiations and the Government's demands

3. At the June 2015 European Council, the Prime Minister set out his plans for the referendum. The European Council agreed to return to the matter in December. In the meantime, technical and legal discussions have been taking place.<sup>2</sup>
4. On 10 November 2015—in advance of the December European Council—the Prime Minister wrote to the President of the European Council, Mr Donald Tusk, setting out his priorities for negotiation.<sup>3</sup> This letter was only published under pressure to do so. In it, he put the renegotiation objectives into four categories: economic governance, competitiveness, sovereignty and immigration. The details of each are laid out in the respective chapters of this Report. We also set out the state of play in each area following subsequent discussions with Member States, as summarised by Mr Tusk in his letter on 7 December 2015 to the European Council. Mr Tusk's letter is based on extensive bilateral consultations with Member States and with representatives of the European Parliament.<sup>4</sup>

## Our inquiry

5. We launched our inquiry into the renegotiation on 10 September.<sup>5</sup> We held four oral evidence sessions and received written evidence from a range of witnesses. We are very grateful to all those who contributed to our inquiry.

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1 Hansard, 23 March 2015, [col 1122](#)[Commons Chamber]

2 Q3 [Minister for Europe]

3 The Prime Minister's Office, [Prime Minister's letter to Donald Tusk](#), 10 November 2015

4 [Letter by President Donald Tusk to the European Council on the issue of a UK in/out referendum](#), European Council, 7 December 2015

5 House of Commons European Scrutiny Committee, [Terms of Reference](#), Inquiry into *The UK Government's renegotiation of EU membership: Parliamentary sovereignty and scrutiny*

6. At the outset of our work, we stated that a series of Reports would be produced to update the House as negotiations progress: “It is the Committee’s aim to publish the first of these Reports before the European Council on 17 and 18 December; this Report will focus on the Government’s negotiating objectives, key legal aspects of the renegotiation, and information provided to Parliament.”<sup>6</sup>

7. This Report is structured around our identified priorities. First, we consider the renegotiation process and its scrutiny before looking at the key legal aspects. We go on to examine each of the negotiating objectives in turn, assessing them against the criteria set by the Government: a legally binding and irreversible agreement that leads to reform of the EU and a fundamental change in the UK’s relationship with it.

8. We regard it as important that voters know, in the absence of completed Treaty amendment, the extent to which the outcome of the renegotiations will be definitely legally binding and irreversible.

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6 House of Commons European Scrutiny Committee, [Terms of Reference](#), Inquiry into *The UK Government’s renegotiation of EU membership: Parliamentary sovereignty and scrutiny*

## 2 Engagement with Parliament and others

### Interlocutors

9. The renegotiation will necessarily involve the UK Government engaging with a range of interlocutors at both EU and national level, in addition to affording the UK Parliament a meaningful opportunity for scrutiny, which we explore later. The importance of this engagement for the ultimate implementation of resulting renegotiation reforms, possibly via a range of different legal vehicles, has been recognised by our witnesses.<sup>7</sup>

10. The Government regards engagement with all other 27 Member States as a priority.<sup>8</sup> The Minister for Europe was upbeat about this engagement: “The various Heads of Government have, I think, all made it clear that they want us to stay and they want to find a satisfactory outcome. Different Governments will have different views about their particular priorities and concerns within the area for negotiation that I have set out. I am not betraying any secret to say that Governments in Central Europe, for example, will want to have a detailed conversation with us about free movement and access to welfare. The Danes and the Dutch, as I have already mentioned, are very keen to see more done in terms of extra powers for national Parliaments.”<sup>9</sup> He also indicated that he was not aware of any immediate counter-demands for Treaty reform from other Member States but could not rule that out in the future.<sup>10</sup> The Foreign Secretary said that discussions would not just consist of meetings between the UK, all 27 Member States and the Commission, but also bilateral and smaller group discussions.<sup>11</sup> The Government’s clear expectation was that “conversations” it has with the Member States would remain confidential.<sup>12</sup>

11. Any EU legislative proposals resulting from the renegotiation will likely need European Parliament approval.<sup>13</sup> The Government has recognised the important role of the European Parliament and noted that discussions between the Prime Minister and EP President, Martin Schulz, have been constructive.<sup>14</sup> Whilst acknowledging the importance of the role of the European Parliament in the process,<sup>15</sup> the Foreign Secretary considered that the close working relationship between MEPs and their national governments meant that consultations at a national level could embrace both interlocutors.<sup>16</sup> Mr Charles Grant, Director of the Centre for European Reform, highlighted the potential for divergence of views between national Governments and MEPs on issues such as welfare.<sup>17</sup>

7 Professor Dougan and Dr Gordon ([NQ 0003](#)) para 22

8 [Government Response](#) to the House of Lords European Union Committee Report, ‘The referendum on UK membership of the EU: assessing the reform process’, para 11

9 Q5

10 Q7

11 Q109

12 Q2 [Minister for Europe]

13 House of Lords European Union Committee, Third Report of Session 2015–16, [The referendum on UK membership: assessing the reform process](#), HL Paper 30, para 32

14 [Government Response](#) to the House of Lords European Union Committee Report, ‘The referendum on UK membership of the EU: assessing the reform process’, para 8

15 The question of the extent the EP needs to be involved in the renegotiation has been the subject of press reports that the European Commission is seeking ways to work around the EP in implementing any renegotiation reforms: [Commission looks to side-line Parliament on UK reforms](#): Politico, 26 October 2015

16 Q108

17 Q76

12. The Minister for Europe stated that, although the UK's membership of the EU is a reserved matter, the Devolved Administrations have a clear interest as the renegotiation will touch on devolved policy areas. He indicated that he has undertaken, Government business permitting, to visit each Devolved Administration by the end of 2015, that the Foreign Secretary would be having bilateral meetings with the three Heads of the Devolved Administrations on the renegotiation and it would be on the agenda for all future meetings of the Joint Ministerial Committee on Europe which both UK and devolved Ministers attend.<sup>18</sup>

13. Professor Sionaidh Douglas-Scott, of Queen Mary University of London, considered that a renegotiated settlement between the UK and EU could require a Legislative Consent Motion from the Devolved Administrations if it resulted in changes to domestic law which affect devolved powers, such as—in the case of Scotland—EU migrants' access to welfare benefits.<sup>19</sup> This reflects the Sewel Convention that the UK Government will not normally legislate on a devolved matter, or on any change to the powers of the devolved nations, without the consent of the devolved legislatures.<sup>20</sup>

14. The interest and role of other national parliaments in the process was emphasised by Dr Katarzyna Granat,<sup>21</sup> of Durham Law School, who noted that the Treaty requires national Parliaments to be involved in any revision of the Treaties. In particular, we note the concern of the Irish Parliament about the implications for Ireland, of the UK's future in the EU, both in terms of a change to the UK's membership of the EU and any decision of the UK to leave the EU.<sup>22</sup>

## Parliamentary Scrutiny

15. This Committee and other select committees, in particular Foreign Affairs and Treasury, have already launched inquiries into aspects of the renegotiation, and will want to evaluate the details of the package negotiated by the Government.

16. But the Government is not making this process easy. Although the Government made public its negotiation demands in the November letter, it otherwise considers that, as an elected government, it should have the freedom to conduct the “sensitive” renegotiation in private<sup>23</sup> without all of its “cards turned face up for inspection” by the other parties to the negotiation.<sup>24</sup>

17. The House of Lords EU Committee concluded: “We understand that the sensitivities of the process mean that the Government is unwilling to provide Parliament with a running commentary on the negotiations. Yet the opposite extreme of presenting Parliament with a *fait accompli* is equally undesirable, and could give rise to legitimate concerns about the accountability and transparency of both the process itself, and its outcome. It could also

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18 Q30

19 Professor Douglas Scott ([INQ 0006](#)) para C3

20 The Sewel Convention is set out in the [Memorandum of Understanding](#) between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013, paragraph 14

21 Dr Granat ([INQ 0002](#)) paras 1–4

22 Houses of the Oireachtas, Joint Committee on European Union Affairs, [UK/EU Future Relationship: Implications for Ireland](#), June 2015

23 Qq2, 4 [Minister for Europe] and Foreign and Commonwealth Office ([INQ 0007](#)) para 2. HC Deb, 10 November 2015, [col 223](#) [Commons Chamber]

24 Q109 [Foreign Secretary]

help the Government to be open with Parliament (and also the general public) about the progress of negotiations". It further observed that "the unique circumstances of the reform and referendum process call for an innovative approach."<sup>25</sup> However, the Government has stated that, while it will continue to keep Parliament informed through existing Parliamentary mechanisms,<sup>26</sup> such as providing both written and oral evidence to this and other Committees,<sup>27</sup> it will not provide Parliament with "a running commentary" of the negotiations,<sup>28</sup> nor make any special arrangements for Parliamentary scrutiny of the renegotiation.<sup>29</sup> The Minister for Europe told us that there is enough information already available to us in the public domain<sup>30</sup> in the form of the Prime Minister's speeches and opinion pieces.<sup>31</sup> He continued that he would not be giving a "blow by blow" account of the negotiations to Parliament, thinking it adequate for Parliament to consider "the final offer" in a variety of debates, both on Government time and deploying other Parliamentary mechanisms.<sup>32</sup>

18. This "after the event" model of scrutiny was criticised as "opaque" and appearing "to negate any input from the Committee or the public influencing the process of renegotiation."<sup>33</sup> Moreover, the Government has been unwilling even to provide information which would not reveal its negotiating position, but would provide valuable contextual information (see para 22).

19. Finally, we note the Lords amendments,<sup>34</sup> agreed to by the House of Commons on 8 December 2015, include in the European Union Referendum Bill duties to be imposed on the Government to provide certain information, namely:

- a) a report on the outcomes of the renegotiation agreed with other Member States;
- b) the Government's opinion on what has been agreed;
- c) a report about the rights and obligations that arise under EU law as a result of the UK's membership of the EU; and
- d) a report providing examples of countries who have other, non-membership relationships with the EU.<sup>35</sup>

25 House of Lords European Union Committee, Third Report of Session 2015–16, *The referendum on UK membership: assessing the reform process*, HL Paper 30, paras 44–45.

26 *Government Response* to the House of Lords European Union Committee Report, para 15

27 Foreign and Commonwealth Office (INQ 0007) para 3: the Foreign Secretary and the Permanent Under-Secretary gave evidence to the Foreign Affairs Committee on 9 and 15 September 2015, respectively. The Minister for Europe gave evidence to this Committee on 16 September 2015 and the EU Committee of the House of Lords on 30 June 2015. The Foreign Secretary has agreed to appear before the EU Committee of the House of Lords. The Chancellor of the Exchequer appeared before the House of Lords Economic Affairs Committee on 8 September 2015. The Government is also submitting evidence to the Foreign Affairs Committee's inquiry into the costs and benefits of EU membership.

28 Foreign and Commonwealth Office (INQ 0007) para 2

29 Foreign and Commonwealth Office (INQ 0007) para 5. The Government emphasises that "any documents that are subject to Parliament scrutiny will be deposited in the usual manner".

30 Q14

31 For example, the speeches delivered by the Prime Minister, *Bloomberg*, 23 January 2013 and at *JCB, Staffordshire*, 28 November 2014

32 Q29

33 Dr Theodore Konstadinides and Dr Noreen O'Meara (INQ 0005) paras 17–18

34 *EU Referendum Bill*, [Lords][Bill 72 (2015–16)]

35 HC Deb, 8 December 2015, *cols 912–913* [Commons chamber]. The Lords amendments in question were 5 and 6 (HC Bill 103 (2015–16))



20. The Electoral Commission has indicated:

“It is important for voters to have access to information about the consequences of voting to remain a member of the European Union or leave the European Union, to help ensure they are able to make an informed decision on how to vote. However, any provision in legislation for this should ensure that voters can have confidence in the accuracy and impartiality of the information. There should also be sufficient balance given to the consequences of both a majority vote to remain a member of the European Union and a majority vote to leave the European Union.”<sup>36</sup>

21. **We share the House of Lords’ EU Committee’s concern that presenting Parliament with a ‘fait accompli’ could give rise to legitimate concerns about the accountability and transparency of both the process itself, and its outcome. We consider the approach adopted by the Government to be reactive and opaque. It places the onus on Parliament to guess when to request information and evidence, without information about the progress of the negotiations.**

22. **We asked for an analysis of the reaction from other Member States to the Prime Minister’s letter, with particular reference to immigration and availability of benefits. The Foreign and Commonwealth Office refused our request on the grounds that this fell under the category of “providing a running commentary of the renegotiation”, which the Minister of Europe had said the Government would avoid. We note that Mr Tusk made reference to these matters in his assessment of Member States’ reactions. This episode has served only to reinforce our frustration about the transparency of the process and the lack of meaningful Parliamentary engagement.**

23. **Parliament has a legitimate role in influencing the negotiation. It is disappointing that Parliament was not given the chance to debate the four main “asks” before the Prime Minister sent his letter of 10 November to the President of the European Council. Allowing it to debate only the “final offer” would be unacceptable. We consider it paradoxical that such an approach is being advocated by a Government professing to negotiate for a greater role for national Parliaments at EU level.**

24. **A negotiated settlement could well relate to powers which have been devolved, and so might require a Legislative Consent Motion from the Scottish Parliament and the other devolved assemblies. It is disappointing that none of the Devolved Administrations were consulted about the terms of the Prime Minister’s letter of 10 November. We are not convinced that the Government has yet taken the need for genuine engagement with the Devolved Administrations seriously.**

25. **During the remaining course of the negotiations, we expect the Government to:**

- a) **Provide a detailed update on the outcome of the European Council on 17 and 18 December, first in written form (as the House rises for the Christmas recess on 17 December), as well as a statement by the Prime Minister on the Council on 5 January 2016. This should be followed by regular debates on amendable motions, including some of the outstanding debates we have recommended, for the remainder of the process.**

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36 [Briefing on European Union Referendum Bill](#), House of Lords Report Stage (Day 2) Briefing.



- b) **Respond fully to this Report in the context of the outcome of the December Summit as soon as the House returns after the Christmas recess.**
- c) **Consult and engage meaningfully with the Devolved Administrations, the Commission and the European Parliament.**
- d) **Consider carefully within the context of the negotiations the conclusions and recommendations of this Report and further Reports produced in the course of this inquiry.**

**26. We note the Minister for Europe's commitment in the Commons debate on the EU Referendum Bill of 8 December, that when the Government provides the information envisaged by the Lords amendments (see para 19), it will do so with accuracy and impartiality.**

### 3 A legally binding and irreversible agreement?

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#### The need for Treaty amendment

27. At the beginning of the renegotiation process, the Prime Minister was reported as seeking “irreversible” and “legally binding” guarantees and was committed to “proper, full-on treaty change”.<sup>37</sup> More recently, the Foreign Secretary indicated that “we expect that some of the changes we are seeking will require Treaty change” although “none of our partners welcomes the idea.”<sup>38</sup>

28. This expectation has weakened. In his letter of 10 November,<sup>39</sup> the Prime Minister stated: “I hope that this letter can provide a clear basis for reaching an agreement that would, of course, need to be legally-binding and irreversible—and where necessary have force in the Treaties.” Technical discussions have taken place with the EU institutions, including their legal services.<sup>40</sup> The extent to which amendment of the Treaty is necessary is likely to be a central part of these discussions.

29. Mr Tusk hinted at the complexity of the issue in his letter of 7 December: “We need some more time to sort out the precise drafting on all of these issues, including the exact legal form the final deal will take.”<sup>41</sup>

**30. The requirement or otherwise to amend the Treaty will be a key factor in the negotiability of any particular UK renegotiation objective. We have therefore taken evidence from a broad range of legal experts which have informed our conclusions.**

31. Given the centrality of this issue we took extensive evidence on it from a series of experts, lawyers and academics as well as the Foreign Secretary. This evidence highlighted the difficulty of clearly identifying which of the objectives set out in the Prime Minister’s letter required Treaty amendment and which did not.<sup>42</sup> In part the problem is that the letter is insufficiently precise, and in part due to the problem of legal analysis and interpretation. Our evidence indicated a range of views as to which of the Prime Minister’s negotiating objectives would require Treaty amendment, although there was a general agreement that, if the objectives were achieved, some Treaty amendment would be needed.

#### Commitment to Treaty amendment

32. The completion of Treaty amendment by the 31 December 2017 deadline for the referendum can be ruled out as impractical.<sup>43</sup> The Lisbon Treaty took almost two years to be ratified and come into force from the date it was agreed.<sup>44</sup> The TEU (Treaty on

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37 “[David Cameron accepts EU Treaty change delay](#)” BBC News Online, 26 June 2015

38 HC Deb, 20 October 2015, [col 800](#) [Commons Chamber]

39 The Prime Minister’s Office, [Prime Minister’s letter to Donald Tusk](#), 10 November 2015

40 Q3 [Minister for Europe]

41 [Letter by President Donald Tusk to the European Council on the issue of a UK in/out referendum](#), European Council, 7 December 2015

42 See Chapters 4 to 7 for detailed analysis of each negotiation basket

43 Q119 [Professor Chalmers]

44 It was signed on 13 December 2007 and came into force on 1 December 2009, just over one month after the final Member State ratification.

European Union) includes a simplified revision procedure which could be relevant but even this still requires ratification by Member States, the most difficult time constraint to overcome.<sup>45</sup>

33. The extent to which some Member States would require a referendum in order to ratify Treaty amendment has been outlined by the Government.<sup>46</sup> The Foreign Secretary agreed that “It may be that some countries of the European Union would need to hold referenda.”<sup>47</sup>

34. Therefore, without the possibility of Treaty amendment before the referendum, the question is, what alternative arrangements can be made? The Government is accordingly exploring with Commission legal services and others the possibility of binding legal commitments that will be incorporated into the Treaties at the time of the next available Treaty amendment.

35. There is some precedent for this in the arrangements entered into by Denmark and Ireland in response to the rejection in referenda in Denmark of the Maastricht Treaty and in Ireland of the Lisbon Treaty at the stage when the newly negotiated treaties were being ratified by Member States. The Prime Minister cited these examples as demonstrating that the EU “has a long history of respecting the differences of its many Member States and of working to overcome challenges in a way that works for the whole European Union.”<sup>48</sup>

36. In each case, the essence of the solution was for the “Heads of State and Government, Meeting within the European Council” to adopt Decisions. These are in the nature of short-form international treaties and each was registered with the United Nations.<sup>49</sup> They did not amend the Treaties that had been negotiated but provided clarifications.

37. In the Danish case, this Decision indicated too that Denmark was exercising an opt-out it had already negotiated from the third stage of Economic and Monetary Union and it was followed by its negotiation of further opt-outs that became embodied in a Protocol to the Amsterdam Treaty.<sup>50</sup>

38. In the Irish case, the Decision included a commitment for it to be converted into a Protocol to the EU Treaties at the next accession, which duly happened at the Croatian accession; and it was accompanied by a separate Decision, using existing powers, to retain one Commissioner per Member State.

39. In both cases, the package of which these Decisions formed part was the basis for a further referendum that enabled ratification.

40. The evidence of the Foreign Secretary, supported by Vijay Rangarajan, the Europe Director at the Foreign and Commonwealth Office, was that an international agreement could interpret existing EU Treaties, and make additional commitments, such as in the

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45 Article 48 TEU

46 [Government Response](#) to the House of Lords European Union Committee Report, ‘The referendum on UK membership of the EU: assessing the reform process’, Annex

47 Q105

48 Prime Minister’s Office, [Prime Minister’s letter to Donald Tusk](#), 10 November 2015

49 Q140 [Professor Sir Alan Dashwood]. To be contrasted with European Union or European Community (as it then was) Treaties. He also drew comparison with a Decision of the European Council acting as an EU institution in accordance with the Treaties.

50 Under Article 51 TEU Protocols to the Treaties are to be treated in the same way as the Treaties themselves.

case of the Fiscal Compact;<sup>51</sup> it could also make a promise to amend the Treaties.<sup>52</sup> He concluded that “I would expect, in areas that ultimately required Treaty change, that they would be implemented by a binding international decision, binding in international law, and then brought in to the treaties at a future opening.”<sup>53</sup>

41. The former Director General of the Council Legal Service (M. Jean-Claude Piris), who was a key figure in the Danish and Irish episodes, has analysed the relevant Decisions of the Heads of State and Government, Meeting within the European Council. In his view, they did not involve a promise to change the Treaty but rather clarified the existing Treaty. They were, in fact, “100% in conformity” with the existing Treaty at the date they were approved. He expressed the view that such Decisions could not add something or modify the meaning of the Treaties; and that any promise of Treaty amendment that was legally binding transforms such a promise into a Treaty, which must be done in conformity with Article 48 TEU.<sup>54</sup>

42. Professor Sir Francis Jacobs KCMG QC, President of the Centre of European Law, King's College London, took a similar approach:

“the treaty provides very elaborate and complex provisions for treaty amendment requiring ratification by all member states in accordance with their own constitutional requirements, which in some cases may involve holding national referenda and the like, which may be unpredictable in their outcome. It does seem difficult to accept that, to avoid that difficulty, you can have an agreement or decision in advance that the treaty will be amended, if that were the suggestion, where the agreement or decision involves changing the treaty. In relation to the previous examples for Denmark and Ireland, indeed, it could be said that those were clarifications of the meaning of the treaty as it should be understood at the time, rather than substantive amendments to the treaty. It seems to me that a kind of pre-amendment to the treaty would not be appropriate if it led to changes in the Treaty.”<sup>55</sup>

He therefore saw the optimum solution being to see whether changes envisaged by the renegotiation could be achieved without treaty amendment. In his opinion many of these changes could be achieved in this way.<sup>56</sup>

43. Mr Martin Howe QC put the matter thus:

“The treaty itself provides for its amendment via mechanisms that safeguard the constitutional processes of the individual member states. You cannot therefore have a commitment binding on the states to amend it in advance without going through that process. It seems to me that, at most, you could argue you could create a binding obligation on the governments of member

51 The Treaty on Stability, Coordination and Governance in the Eurozone and Monetary Union signed on 12 March 2012. This is an international agreement, not an EU Treaty.

52 Q102

53 Q106

54 [Meeting of the European Parliament's Committee on Constitutional Affairs](#), 3 September 2015.

55 Q139

56 Q144

states to work towards getting treaty change through their constitutional process but, if they are unable to achieve that, so be it.”<sup>57</sup>

44. Professor Sir Alan Dashwood QC, Emeritus Professor of European Law and Fellow of Sidney Sussex College, Cambridge, indicated that he could envisage using either a Decision of the European Council or a Decision of the Heads of State and Governments meeting within the European Council, both of which are binding, to adopt interpretative text. However, he considered that, in the rather few areas where Treaty amendment may be necessary, “a binding commitment could not properly be made if it purported to have the same effect as treaty change or if it was incompatible with the treaty.” He did, however, envisage that a “solemn statement of intention by the European Council” would be sufficient; it being inconceivable that it would be lightly tossed aside. However, he qualified this and accepted that governments change and “That could mean that the consensus had changed, but there would still be a consensus that would have to be debated within the European Council and a new consensus would have to be reached.”<sup>58</sup>

45. We asked the Foreign Secretary whether an international law agreement such as that deployed in the Danish and Irish cases would be, in practice, irreversible. He accepted that “if a treaty change were presented and repeatedly failed to get through a referendum in a single country, in the end there would have to be some way of resolving the impasse, but in the meantime we would rest on the international law agreement we had between the member states.”<sup>59</sup> Mr Howe also envisaged difficulties arising in the event of a change of government in another Member State or a change in the composition of the national parliament which then felt unable to accept the proposed treaty change.<sup>60</sup>

46. Professor Damian Chalmers, Professor of European Law at the LSE, agreed that it is necessary to follow the procedures of the Treaties in order to amend them, and highlighted the possibility that a new government in a Member State may not feel so bound by the commitments of their predecessors.<sup>61</sup> However he also highlighted the extensive “wiggle-room” available through interpretation.<sup>62</sup>

47. We raised with the Foreign Secretary the role of the Court of Justice in the case of such international agreements. This is particularly relevant to those provisions seeking to clarify the Treaties because the Court would nevertheless remain the ultimate arbiter. His response was that the Court would be required to “take into account” the international agreement, giving it significant weight in the highly political context. He drew comfort from recent examples of the Court’s political sensitivity.<sup>63</sup> Nevertheless he accepted that “we were on a learning curve” given “some of the challenges we have around interpretation and implementation in the past” which required “great care to avoid ambiguity and avoid any scope for backsliding after the agreement has been reached.”<sup>64</sup>

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57 Q139. In this context it can be noted that international law is less stringent than, for example, EU law. The latter has clearer mechanisms for interpretation of (ultimately through its Court of Justice) and more stringent enforcement mechanisms.

58 Qq140–141

59 Q105

60 Q142

61 Q123

62 Q120

63 Q103

64 Q104

48. Until recently it might have been assumed that an agreement by the European Council would be a secure political commitment. However, the use of the European Financial Stability Mechanism for support for Greece, despite a December 2010 European Council decision that this instrument would no longer be available to support Eurozone Member States, undermines that certainty. Even though in this particular case an alternative way was found to guarantee that non-Eurozone states would not find themselves prejudiced, it is therefore a key measure of the success of the Government's negotiation whether such political commitments can be made secure.<sup>65</sup>

49. **The process of ratification of Treaty amendment is unlikely to be completed by other Member States before the referendum takes place. Furthermore, there are substantial difficulties in both (a) an immediately effective interim alternative to Treaty amendment (such as a "Decision of the Heads of State and Government Meeting within the European Council") and (b) a legally binding and irreversible agreement to ratify Treaty amendment sometime in the future. It will be necessary for the Government to set out which elements of the renegotiation package require Treaty amendment.**

50. **Simple clarification or supplementation of the existing Treaties could be achieved by an international agreement. This would be consistent with EU law but its limited nature is not compatible with realisation of "the opportunity to reform the EU and fundamentally change the UK's relationship with it" envisaged by the Prime Minister in his statement to the House of 23 March 2015.**

51. **The deliberate distinction the Prime Minister made between EU reform and fundamental change to the UK's relationship with the EU is important. The latter is a matter of constitutional significance such as to justify in itself the forthcoming referendum. However, this fundamental change is not now on the Government's agenda. Therefore voters faced with the question whether to remain in or leave the EU will not have the choice of remaining in an EU with which the UK's relationship is fundamentally changed.**

## **Commitment to changes to EU secondary legislation**

52. EU secondary legislation comprises Regulations, Directives and Decisions which are adopted by the EU institutions using a power (legal base) found in Treaties themselves. Adoption, amendment or repeal of EU secondary legislation is therefore of lesser significance than amendment of the Treaties.

53. A number of renegotiation outcomes would require changes to EU secondary legislation. This includes much of the competitiveness agenda and some of the immigration agenda.

54. EU secondary legislation can be quicker to put in place than Treaty amendment as it does not require ratification by individual Member States.<sup>66</sup> Professor Chalmers considered that EU secondary legislation could be adopted in time for a referendum.<sup>67</sup> This, however, is dependent on the timing of the referendum, and would depend on the completion of

65 HM Treasury, '[George Osborne's Speech to the BDI in Berlin](#)', 3 November 2015

66 However, most trade agreements are mixed in that they are entered into by both the EU and its Member States acting in their own right. This means that they need to be ratified by those Member States before they can come into force.

67 Q119

the legislative procedures laid down in the Treaty which will involve detailed negotiation. Even if the internal legislative process could be completed in time, however, there will still be some cases, such as trade agreements, where the timetable is likely to be extended by outside factors.

55. Professor Sir Alan Dashwood envisaged that there could be a commitment to amend EU secondary legislation in the form of a binding act of the European Council whilst Mr Howe indicated that even then an issue could arise at the level of translating that into actual detailed legislation which could give scope for a legitimate disagreement as to what precise legislation should be adopted to achieve the general objectives set by the Council.<sup>68</sup>

56. In any event, commitments to take forward secondary EU legislation would have to include the Commission, which has the right of initiative for most EU legislation, and the European Parliament which in most cases is a co-legislator with the Council<sup>69</sup> or must give its consent.<sup>70</sup>

**57. Any secondary EU legislation needed to implement the renegotiation outcome is unlikely to be fully in place before the referendum and, in any case, is unlikely to cover all the areas of renegotiation. Any general commitment to adopt such legislation may prove difficult to deliver in practice as the legislative procedures involve both the Commission and the European Parliament, and negotiation of the precise text could reveal differences not covered by a more general commitment.**

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68 Q146

69 Under the ordinary legislative procedure.

70 Particularly for trade agreements.



## 4 Economic Governance

### The issue

58. The Eurozone currently comprises 19 Member States. Of the remaining nine Member States, only two (Denmark and the United Kingdom) have formally opted not to join the single currency. While the other seven Member States are committed to joining in the future, there is no deadline and they may not join until they have both satisfied the convergence criteria and are willing to do so.<sup>71</sup> Despite the fact that not all EU Member States have adopted the single currency, the Eurozone is governed by the EU Treaties and does not constitute a distinct legal entity.

59. The October 2014 Euro Summit concluded that “closer coordination of economic policies is essential to ensure the smooth functioning of the Economic and Monetary Union (EMU).”<sup>72</sup> It invited the President of the Commission, in close co-operation with the Presidents of the Euro Summit, the Eurogroup and the European Central Bank, to prepare next steps on better governance in the Euro area. The June 2015 Five Presidents’ Report, including the President of the European Parliament, accordingly set out a three stage process to put in place a deep and genuine EMU by 2025.<sup>73</sup> A further step was taken with the publication by the Commission in October of five documents<sup>74</sup> covering a range of matters including suggestions that Eurozone Member States establish National Competitiveness Boards, creation by the Commission of a European Fiscal Board and moves towards Eurozone representation in international financial institutions. As part of our regular scrutiny of EU documents, we have recommended these documents, and the Five Presidents’ Report, for debate on the floor of the House.<sup>75</sup> We have expressed our concern already that the Government has failed to schedule this, and other outstanding, debates.

60. In his Chatham House speech, the Prime Minister emphasised the importance of putting in place Eurozone governance provisions and structures that would secure a successful currency for the long term.<sup>76</sup> He observed, though, that the changes required would have implications for both those inside and outside the Eurozone and that those outside the Eurozone require safeguards “in order to protect the single market and our ability to decide its rules ... and to ensure that we face neither discrimination nor additional costs from the integration of the Eurozone.”<sup>77</sup>

71 European Parliament Research Service, [‘Adopting the Euro: Convergence criteria and state of play’](#), July 2015. Romania has set its own deadline of 2019 to adopt the Euro. The Minister for Europe indicated (Q18): “Sweden is supposed to join the euro one day, but Swedish public opinion seems very firmly set against the prospect. Hungary has now embodied the national currency, the forint, in its constitution, so would need a constitutional change to join the euro. Poland needs a special parliamentary majority or perhaps a referendum to join the euro.”

72 Euro Summit, Brussels, 24 October 2014

73 European Commission, [Completing Europe’s Economic and Monetary Union](#), July 2015

74 Commission Communication on steps towards completing Economic and Monetary Union, [COM\(15\) 600](#); Proposal for a Council Recommendation on the establishment of National Competitiveness Boards within the Euro Area, [COM\(15\) 601](#); Commission Communication on A Roadmap for moving towards a more consistent external representation of the euro area in international fora, [COM\(15\) 602](#); Proposal for a Council Decision laying down measures in view of progressively establishing unified representation of the euro area in the International Monetary Fund, [COM\(15\) 603](#); Commission Decision establishing an independent advisory European Fiscal Board, [C\(15\) 8000](#).

75 First Report HC 342-I (2015–16), [chapter 4](#) (21 July 2015) and Ninth Report HC 342-ix (2015–16), [chapter 2](#) (18 November 2015)

76 Prime Minister’s Office, [‘Prime Minister’s Speech on Europe’](#) 10 November 2015

77 Prime Minister’s Office, [‘Prime Minister’s Speech on Europe’](#) 10 November 2015



61. The Minister for Europe explained that there was a potential for the 19 Eurozone countries to form a caucus within the wider EU of 28 Member States as they could command a qualified majority in the Council of Ministers under newly introduced voting rules.<sup>78</sup> These rules, which require the support of at least 55% of Member States, representing at least 65% of the EU's population, came into effect on 1 November 2014.<sup>79</sup>

62. We heard that there had been no evidence of caucusing yet, and that the interests and views of Eurozone members often diverge.<sup>80</sup> Mr Grant said: "If you look at the different Eurozone countries and their views on the financial transaction tax or many other economic issues, they are at sixes or sevens. They almost never agree on anything."<sup>81</sup>

63. Professor Simon Hix, Harold Laski Professor of Political Science at the LSE, agreed that there was nevertheless a need for some sort of safeguard "against the potential of the Eurozone being able to govern de facto the EU as a whole."<sup>82</sup> He pointed to the meeting of Eurozone employment affairs Ministers, convened by the Luxembourg Presidency on 5 October 2015, as an example of the growing pressure for meetings of Eurozone Ministers beyond Finance Ministers.<sup>83</sup>

64. The need for greater clarity and a stronger legal basis for ensuring fairness to Eurozone and non-Eurozone members alike was reinforced, according to the Minister for Europe and Mr Grant, by the debate surrounding the liability of the UK for any default of a loan to a Eurozone Member State under the European Financial Stability Mechanism (see para 48).<sup>84</sup>

65. In his letter of 10 November to Mr Tusk, the Prime Minister indicated the following priorities and mechanisms:

- Recognition that the EU has more than one currency;
- No discrimination nor disadvantage against any business on the basis of the currency of the country in which they are based;
- Protection of the integrity of the single market;
- Participation by non-euro members in developments such as the banking union must be possible, but on a voluntary basis;
- Tax-payers in countries that are not in the euro must not bear the cost for supporting countries in the Eurozone;
- Financial stability and supervision is a key area of competence both for Eurozone institutions such as the European Central Bank and national institutions, such as the Bank of England; and

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78 HC Deb, 10 November 2015, [col 227](#) [Commons Chamber]

79 Council of the European Union, '[Qualified Majority](#)' accessed 19 November 2015. Under transitional provisions which apply until 31 March 2017 the earlier rules on qualified majority voting can be invoked by a Member State, Article 3 of Protocol 36. See also Decision 2008/857 referred to in para 72.

80 Qq 80 [Mr Grant], 138 [Professor Sir Alan Dashwood]

81 Q81

82 Q80

83 Presidency of the Council of the European Union, '[First informal meeting of Ministers for Employment of the eurozone](#)' accessed 19 November 2015

84 Qq17, 80

- Any issues that affect all Member States must be discussed and decided by all Member States.

He required that these principles should be legally binding and supported by a safeguard mechanism that ensures that the principles are respected and enforced.<sup>85</sup>

66. The Foreign Secretary explained that the Government was “approaching this by looking at a framework of protected areas”, such as the single market, which is generally governed by qualified majority voting. Under such a framework, the interests of the non-Eurozone countries would be “specifically defined and specifically protected.”<sup>86</sup> The result, he said, would be a requirement that certain types of proposals “would have to be agreed between the 19 (Eurozone states) and the nine (non-Eurozone states).”<sup>87</sup> Professor Sir Alan Dashwood recommended a Treaty amendment to give priority to the single market.<sup>88</sup>

**67. The Eurozone is not a legal entity and so the UK and other non-Eurozone Member States are directly affected—through our EU membership—by decisions that are made for Eurozone Member States. There are no certainties about how the Eurozone will integrate further and the extent to which that integration, through qualified majority voting, might affect UK national interests in the wider single market and other EU policies. It is politically and legally right that the Government negotiate to adopt safeguards against the risk that Eurozone Member States could caucus together against the interests of the European Union as a whole. This is a particular risk since the entry into force of revised Council voting arrangements that gives the 19 Eurozone Member States a qualified majority should they all agree.**

## Delivery

68. The extent to which restructuring of the relationship between the Eurozone and the non-Eurozone Member States could be securely protected is a matter of uncertainty. Professor Sir Francis Jacobs pointed out that: the principle that the European Union has more than one currency was already contained to some extent in the Treaty; the principle that there should be no discrimination against a business on the grounds of the currency of its country was already covered by the EU general principle of non-discrimination; and there was already in place a safeguard mechanism in the form of recourse to the Court of Justice. Mr Howe considered that the issue of non-discrimination may be aimed at removing residual doubt arising from a recent decision of the Court of Justice. He also argued that there was also in place some protection for changes made by the Eurozone in the enhanced co-operation procedures of the Treaty.<sup>89</sup>

69. Various measures to protect the interests of non-Eurozone Member States are conceivable. At the highest level would be alteration of the voting rules in the Council, for example by creating a double lock requiring agreement of a majority of both Eurozone and non-Eurozone states. The precedent for this in EU legislation is found in the Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors.<sup>90</sup>

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<sup>85</sup> The Prime Minister's Office, [Prime Minister's letter to Donald Tusk](#), 10 November 2015

<sup>86</sup> Q84

<sup>87</sup> Q85

<sup>88</sup> Q135

<sup>89</sup> Q135

<sup>90</sup> Professor Dougan and Dr Gordon ([INQ 0003](#)) para 21, Q135 [Professor Sir Alan Dashwood]

70. Professor Sir Alan Dashwood considered that if a similar mechanism were to apply at the level of the Council there would have to be Treaty amendment, although a political agreement was not inconceivable.<sup>91</sup> Under such an agreement, he said, a vote on a particular initiative could be deferred—pending further discussions for a certain time—if a majority of non-Eurozone States were opposed. This would be a “benign version of the old Luxembourg compromise”<sup>92</sup>. There is some uncertainty as to whether this exists at present and it has not been expressly invoked for many years.

71. Another alternative would be a mechanism akin to the “emergency brake” as found in Article 48 TFEU (Treaty on the Functioning of the European Union).<sup>93</sup> This may be what the Prime Minister had in mind when he referred to a “safeguard mechanism”. Professor Michael Dougan, Professor of European Law and Dr Michael Gordon, both of Liverpool University, envisaged Treaty amendment being necessary to put in place any veto by one or more Member State.<sup>94</sup>

72. Something less than Treaty amendment has been posited by Professor Steve Peers, Professor of EU Law and Human Rights Law at Essex University.<sup>95</sup> This would entail amending what is currently Council Decision 2008/857 which sets up a temporary mechanism, redolent of the Ioannina compromise, whereby matters for which there is a narrow qualified majority can be escalated to the Council to “do all in its power to reach, within a reasonable time, and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns” raised by a minority of Member States.<sup>96</sup> Professor Peers proposed inserting additional text to address the Eurozone issue.

73. In his letter of 7 December assessing the state of play in the negotiations, Mr Tusk said:

“we could search for an agreement around a set of principles that will ensure the possibility for the euro area to develop further and be efficient while avoiding any kind of discrimination vis-à-vis Member States that are not yet, or, in some cases, will not be part of the euro. We are also looking into the possibility of a mechanism that will support these principles by allowing Member States that are not in the euro the opportunity to raise concerns, and have them heard, if they feel that these principles are not being followed, without this turning into a veto right.”<sup>97</sup>

**74. We consider that the regulation of the relationship between Eurozone and non-Eurozone Member States is of such importance that it requires the security of Treaty**

91 Q135

92 Qq136, 137. In his letter of 2 November 2015 to the Committee, the Minister for Europe confirmed the Government's view that the Luxembourg Compromise remained in place following the entry into force of the Lisbon Treaty. At Q17 he indicated: “It has actually been used on other occasions in recent years. It is fair to say that its use has been less frequent and its status, I think, has been seen as less significant, as the years have gone past.”

93 A Member State which feels that important aspects of its social security system is adversely affected may suspend the progress of EU secondary legislation and refer the matter to the European Council. It must then decide, by consensus, that the matter should proceed or end. If no decision is taken in 4 months the matter is deemed to have ended.

94 Professor Dougan and Dr Gordon (INQ 0003) para 21

95 Professor Steve Peers, ‘[Is it possible to reform the EU without amending the Treaties?](#)’ EU Law Analysis, 22 May 2015

96 The text of the decision is also set out in Declaration 7 to the Lisbon Treaty.

97 [Letter by President Donald Tusk to the European Council on the issue of a UK in/out referendum](#), European Council, 7 December 2015

**amendment. In particular this is necessary to secure, in a manner that provides legal certainty, a double majority system in relation to economic governance.**

**75. We are reinforced in the view that Treaty amendment is necessary by the episode when the European Financial Stability Mechanism (to which non-Eurozone Member States contribute) was used to bail out Greece urgently in the face of an earlier agreement by the Council that this would not be done. In this case, associated guarantees were given that non-Eurozone Member States would not suffer financially, but the precedent is troubling.**

**76. It should be made absolutely clear that any safeguard measure to protect UK national interests must be made available across the broad range of EU legislation and not just for legislation adopted under an internal market or economic and monetary policy legal base.**

## 5 Competitiveness

### The issue

77. The Foreign Secretary told us: “Much of the disappointment in the UK today is that the European Union has appeared, for many people, to be a brake on Britain’s competitiveness, not an accelerator on Britain’s competitiveness.”<sup>98</sup>

78. The Chancellor’s speech in Berlin on 3 November set out the Government’s concern in more detail:

“Europe is losing ground to the rest of the world, and the people who pay the price are our citizens. One fifth of young people in the European Union cannot get a job. US companies can get new products licensed and to market within days, yet it can take weeks or months in Europe. And a decade ago the Commission estimated a total administrative burden to EU businesses of €125 billion a year. Now, progress has been made, but only about a fourth of this cost has been reduced—much more needs to be done. Let’s be clear about what is at stake here. If the EU allows itself to be priced out of the world economy, the next generation will not get jobs, living standards will decline and the Union will lose the popular consent of the people of Europe.”<sup>99</sup>

79. In his letter to Mr Tusk of 10 November, the Prime Minister indicated the following priorities and mechanisms:

- A target to cut the total burden on business; and
- Adoption of a clear long-term commitment to boost the competitiveness and productivity of the European Union, bringing together all of the various proposals, promises and agreements on the Single Market.

80. These, he emphasised, were additional to important measures already put forward by the Commission, including further steps towards a digital single market, proposals for a Capital Markets Union and a new trade strategy.

81. The Foreign Secretary told us that, in addition to regulatory reduction targets, the Government was also advocating options such as: “requesting performance to be measured, ideally independently, against those targets and routinely publishing those. It might be by judging the Commission’s annual work programme against the criterion of the extent to which it improves the competitiveness of European Union economies.”<sup>100</sup>

### Delivery

82. It has not been suggested that any of the competitiveness objectives require Treaty amendment. The Minister for Europe confirmed, for example, that this would not be required to negotiate free trade agreements.<sup>101</sup> Instead, the objectives can be delivered through implementation of existing initiatives. The Government is already pursuing the

98 Q83

99 HM Treasury, [‘George Osborne’s Speech to the BDI in Berlin’](#), 3 November 2015

100 Q86

101 Q3

idea of a target to cut the total burden on business.<sup>102</sup> A clear long-term commitment to boost the competitiveness and productivity of the European Union could easily be made, we believe, as a political declaration of some form.

83. This raises the question of how commitments to take measures to implement the competitiveness agenda can be legally binding. That is particularly so as key elements of the competitiveness agenda such as the digital single market and the Capital Markets Union will require the support of the European Parliament (see Chapter 3). The European Parliament also has a key, though informal, role in implementing another Better Regulation Package.

### Fundamental change?

84. The Commission has long been concerned with competitiveness. Its Lisbon Agenda of 2000 sought to make the EU “the most competitive and dynamic knowledge-based economy in the world” by 2010. The Government’s priorities are all areas of work on which the Commission is currently focused. There are a number of current ongoing initiatives in this area:

- The Commission published its Better Regulation Package in May 2015;<sup>103</sup>
- The Commission’s commitment to trade and investment was reflected in the publication on 15 October of a new trade and investment strategy, which includes a commitment to new trade and investment deals with the US, Japan and China, among others;<sup>104</sup> and
- The European Commission published a fresh Internal Market Strategy on 28 October,<sup>105</sup> which was additional to its published proposals on a Digital Single Market and a Capital Markets Union.

85. In his letter of 7 December assessing the state of play in the negotiations, Mr Tusk said:

“there is a very strong determination to promote this objective and to fully use the potential of the internal market in all its components. Everybody agrees on the need to further work on better regulation and on lessening the burdens on business while maintaining high standards. The contribution of trade to growth is also very important in this respect, in particular trade agreements with fast growing parts of the world.”<sup>106</sup>

86. The Foreign Secretary acknowledged that the priorities under this aspect of the renegotiation consisted largely of work that is already underway with a great deal of support across the Member States and in the Commission: “We are pushing at a half-open door.”<sup>107</sup> There was a need, though, in his view to institutionalise the changes “to

102 HC Deb, 1 July 2015, [col 46WS](#) [Commons written ministerial statement]

103 Commission Communication ‘Better regulation for better results — An EU Agenda’, [COM\(2015\) 215](#)

104 Commission Communication ‘Trade for All — Towards a more responsible trade and investment policy’, [COM\(2015\) 497](#)

105 Commission Communication ‘Upgrading the Single Market: more opportunities for people and business’ [COM\(2015\) 550](#),

106 [Letter by President Donald Tusk to the European Council on the issue of a UK in/out referendum](#), European Council, 7 December 2015

107 Q86

make clear that this is not just the whim of a single Commission; it is a change in direction for the European Union.”<sup>108</sup> He warned that “there are also always bureaucratic instincts to resist any kind of prescription around the way the Commission and its programme operate.”<sup>109</sup>

87. In his reflections on the competitiveness objective within the renegotiation, Mr Grant wrote:

“Cameron’s problem with this competitiveness agenda is that most of the changes he wishes to see are already under way ... Cameron will need some clever marketing to dress up what the Commission is doing as a British achievement.”<sup>110</sup>

88. The Government’s ambitions in this area include progress towards conclusion of the Transatlantic Trade and Investment Partnership (TTIP) with the United States (see para 84 above). We considered the progress of the negotiations in an evidence session with the Minister of State for Trade and Investment (Lord Maude) on 21 October 2015.<sup>111</sup> Our predecessor Committee held evidence sessions on the same topic on 11 June 2014<sup>112</sup> and 26 February 2015<sup>113</sup> with the then Minister of State for Trade and Investment (Lord Livingston).

**89. The Government’s priorities under the competitiveness agenda are closely aligned with the Work programme of the Juncker Commission, which has shown a significant and welcome change in emphasis towards the UK’s agenda on deregulation and competitiveness. The Committee expects this part of the renegotiations to be the easiest in which the Government can meet its aims. While there is merit in giving extra impetus to these efforts, this aspect of the renegotiation cannot be regarded as a fundamental change in the UK’s relationship with the EU.**

**90. Being work in progress and involving, at most, changes to EU secondary legislation, significant parts of this agenda are unlikely to be adopted before the referendum. This gives rise to the problem of uncertainty highlighted in chapter three.**

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108 Q83

109 Q86

110 Charles Grant, [«Cameron’s EU gamble. Five reforms he can win, and ten pitfalls he must avoid»](#), Centre for European Reform, October 2015

111 European Scrutiny Committee, Oral Evidence: The Transatlantic Trade and Investment Partnership Inquiry, [HC 553](#), Wednesday 21 October 2015.

112 European Scrutiny Committee, Oral Evidence: The Transatlantic Trade and Investment Partnership, [HC 292](#), Wednesday 11 June 2014

113 European Scrutiny Committee, Oral Evidence: The Transatlantic Trade and Investment Partnership, [HC 1084](#), Thursday 26 February 2015



## 6 Sovereignty

91. In his letter of 10 November 2015 to Mr Tusk, the Prime Minister set out the following priorities and mechanisms to deliver his objectives in the area of sovereignty:

- End the UK's obligation to work towards an "ever closer union" as set out in the Treaty and to do so in a formal, legally-binding and irreversible way;
- Enhance the role of national parliaments by proposing a new arrangement where groups of national parliaments, acting together, can stop unwanted legislative proposals; and
- Full implementation of the EU's commitments to subsidiarity, with clear proposals to achieve that.<sup>114</sup>

92. In his Bloomberg speech, the Prime Minister said: "It is national parliaments, which are, and will remain, the true source of real democratic legitimacy and accountability in the EU." We will be assessing to what extent this principle is reflected in these renegotiation objectives.<sup>115</sup>

93. We first consider the issue of "ever closer union" before moving on to the linked issues of the role of national parliaments and subsidiarity.

### Ever Closer Union

#### *The issue*

94. The Government wants to secure UK disengagement from "ever closer union"<sup>116</sup> because it regards it as synonymous with increasing political integration.<sup>117</sup> It also considers the concept to be legally significant because, it believes, as the Prime Minister has said, that the Court of Justice uses it to enforce "centralising judgments".<sup>118</sup> In this section we examine the significance of the concept and whether UK disengagement from it will achieve EU reform or a fundamental change in the UK's relationship with it.

95. The phrase "ever closer union" has appeared in the foundation Treaties in one form or another since the original creation of the European Economic Community in 1957. Although it was omitted from the proposed Constitutional Treaty, the phrase was reinserted in the Lisbon Treaty but remains undefined. The Preamble to the TEU records the Member States' resolution to "continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". The Preamble to the TFEU refers

<sup>114</sup> The Prime Minister's Office, [Prime Minister's letter to Donald Tusk](#), 10 November 2015

<sup>115</sup> Prime Minister's Office [Bloomberg speech](#) 23 January 2013

<sup>116</sup> Q87 [Foreign Secretary] The Foreign Secretary was asked to confirm whether UK only disengagement from the concept was sought, as there had been indications prior to the 10 November letter that multilateral reform extending to other Member States was being considered. He responded that "the important thing for us is that we have the United Kingdom opt-out" but he also recognised that closer integration is necessary for Eurozone states and may be desirable for some non-Eurozone states.

<sup>117</sup> HM Treasury, '[George Osborne's Speech to the BDI in Berlin](#)', 3 November 2015. He said that "In the UK, where this is widely interpreted as a commitment to ever-closer political integration, that concept is now supported by a tiny minority of voters." The Foreign Secretary (Q83) told us that UK disengagement from the concept would "send a very crucial message, but it will also inform the European Court of Justice, which has made reference to the commitment to ever closer union historically in its judgments".

<sup>118</sup> HC Deb, 19 October 2015, [col 663](#)



to their resolution “to lay the foundations of an ever closer union among the peoples of Europe”. Article 1 TEU states: “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.” The concept also appears in the first recital of the Charter of Fundamental Rights and is recalled in EU secondary legislation, notably Regulation 1049/2001 on access to EU documents (the EU’s equivalent of the Freedom of Information Act).

96. The Court of Justice has not adjudicated on the meaning of “ever closer union”, but has referred to it on numerous occasions: 53 times since 1999 as at 15 June 2015.<sup>119</sup> The concept was referred to in developing the doctrine of direct effect in the case of Framework Decisions.<sup>120</sup> It has also been referenced in cases concerning access to EU documents legislation<sup>121</sup> and Schengen.<sup>122</sup> Most recently, it was cited in last year’s CJEU Opinion 2/13,<sup>123</sup> which found that the draft agreement for EU accession to the ECHR was incompatible with the EU Treaties.<sup>124</sup>

97. The meaning of the phrase on a political level was addressed in the Conclusions of the European Council held in Brussels on 27 June 2014 which stated that: “The UK raised some concerns related to the future development of the EU. These concerns will need to be addressed. In this context, the European Council noted 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.”<sup>125</sup> This language was repeated by Mr Tusk in his letter of 7 December assessing the state of play of the negotiations.<sup>126</sup>

98. Its legal significance, as asserted by the Government, is questioned by some who regard it as limited, at best.<sup>127</sup> In particular, Professor Chalmers commented: “It is not clear to me (nor to any EU law specialist I know) why such significance is attached to this. I think it is because of a misplaced belief that this phrase has been used by the Court of Justice to interpret EU law in some aggressive manner. However, the Court’s *modus operandi* is quite separate from this provision and it has barely referred to it.”<sup>128</sup> He considered the

119 A House of Commons Briefing Paper of 15 June 2015 lists 53 occurrences since 1999 (opinions and judgments): “Ever Closer Union” in the EU Treaties and Court of Justice case law, Briefing Paper [07230](#). The Government, in response to a Written Question on 3 July 2015, states a figure of 23 since 2005 (judgments, opinions and rulings: HC Deb, 2 July 2015, [col 4003W](#)

120 [C-105/03](#), *Pupino*

121 For example, [C-280/11](#), *Council v Access Info Europe*

122 For example, Joined Cases [C-187/01](#) (*Gözütok*) and [C-385/01](#) (*Brügge*)

123 [Opinion 2/13 of the CJEU](#), 18 December 2014

124 [Opinion 2/13 of the CJEU](#), 18 December 2014, para 167: “These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’”.

125 [Conclusions of the European Council](#), 26-27 June 2014

126 [Letter by President Donald Tusk to the European Council on the issue of a UK in/out referendum](#), European Council, 7 December 2015

127 Professor Dougan and Dr Gordon ([INQ 0003](#)) para 21, Q47 [Mr Green]. 59 [Mr Grant], Professor Douglas-Scott ([INQ 0006](#)) para A3. The latter adds that the references in the Treaties and Charter are simply an aspiration, creating no new competences or powers for the EU and which impose no specific legal obligations on the UK. “Ever closer union” is not “irrefutable evidence” of the EU’s “irreversible propulsion to greater integration or statehood.”

128 Professor Chalmers ([INQ 0004](#)) para 3,

phrase to be largely symbolic and other witnesses agreed with this, some also describing it as aspirational.<sup>129</sup>

99. M. Jean-Claude Piris, whose views are significant because he is a former Legal Counsel of the Council of the EU, reportedly views the formula as too vague to have any legal force and, in any case, considers it applies to peoples and not States.<sup>130</sup> Professor Sir Francis Jacobs stated that he agreed with these views and observed that the phrase sets out an objective and does not impose any legal rights or obligations.<sup>131</sup>

100. On the other hand others do ascribe some legal significance to the concept. Professor Derrick Wyatt QC, Fellow of St Edmund Hall, Oxford has commented recently that: "The aim of 'ever closer union' has probably played a larger role in the thinking of the Court of Justice than appears on the face of the Court's judgments." He added: "The formulation ... has underpinned this approach [of handing down judgments driven by judicial policy rather than reached by a convincing process of legal analysis and reasoning], and cannot be described as solely symbolic."<sup>132</sup> Mr Howe recalled that the reference to the Preamble wording, though not "ever closer union" specifically, was significant in the seminal case of *Van Gend en Loos*<sup>133</sup> in establishing that EU law applied to peoples and not just states.<sup>134</sup>

101. Some argue that the position may be more nuanced: that the concept may not refer to or may not be limited to increasing political integration.<sup>135</sup> When we took oral evidence, Professor Sir Francis Jacobs said that he found it puzzling how the phrase had acquired an integrationist meaning of a union of "states", when the wider expression refers to a "union" of "the peoples of Europe in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". Professor Sir Alan Dashwood agreed, noting that the original intention behind "ever closer union" was to forge a post-World War II union of the peoples of Europe, some of whom were still living with the reality or the threat of Soviet Communist domination.<sup>136</sup> We note how this interpretation of "ever closer union" also reflects Sir John Major's explanation in his post Maastricht statement that the replacement of "federal union" with "ever closer union of the peoples" in the Preamble meant that the Community was putting its citizens "first and foremost."<sup>137</sup>

102. Professor Douglas-Scott agreed that it is misleading to look at the phrase "ever closer union" in isolation, because the wider expression makes it "very clear that the EU has a commitment to devolved and transparent decision-making, and not to a centralising form of control." She noted that the phrase had not prevented the UK obtaining opt-outs from

129 Professor Chalmers ([INQ 0004](#)) para 2. Qq 111 [Professor Chalmers], 128 [Professor Sir Alan Dashwood], 126 [Professor Sir Francis Jacobs], 47 [Mr Green], 59 [Mr Grant] Professor Dougan and Dr Gordon ([INQ 0003](#)). Q130 [Mr Howe]: though he also considered that aspirations or symbols might not be unimportant.

130 [Never closer union](#), The Economist online, 24 October 2015

131 Q126

132 [Is Ever Closer Union just a symbolic phrase with no meaningful application?](#), Open Europe online, blog contribution from Professor Wyatt, dated 15 October 2015

133 Case [26/62](#). This case established the legal principle of Direct Effect: that the Treaties are capable of creating rights for EU citizens which they could enforce directly against States subject to certain conditions: "this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples."

134 Q130 [Mr Howe]

135 Professor Douglas-Scott comments that the phrase does not have a single meaning and is not "irrefutable evidence of the EU's irreversible propulsion towards further integration or statehood": ([INQ 0006](#)) para A3.

136 Qq126 (Professor Sir Francis Jacobs), 128 (Professor Sir Alan Dashwood)

137 HC Deb 18 December 1991, [col 275](#)

EU integration and how the 2014 European Council Conclusions (para 97) allowed for different levels of integration.<sup>138</sup>

## Delivery

103. At the CBI on 9 November, the Prime Minister stated: “For instance, the point about ever closer union, that Britain should be out of ... that will require the treaties to change and what we need to do is to get agreement from the other 27 countries that that’s going to happen.”<sup>139</sup> The Prime Minister did not explicitly refer to Treaty amendment in his letter to Mr Tusk, but instead stated that reform should be achieved in a “formal, legally-binding and irreversible way.”<sup>140</sup>

104. Professor Chalmers acknowledged that amending the phrase in the Treaties would require Treaty amendment, using the ordinary revision procedure requiring ratification by all other 27 Member States and probably would be the “most legally challenging reform to secure.” This is because it is not entirely clear which Member States, other than Eurozone States, would want to be part of further political integration.<sup>141</sup> Mr David Green, the Director of Civitas, and Professor Douglas-Scott also doubted the political achievability of such Treaty change.<sup>142</sup> Professor Douglas-Scott recalled that Martin Schulz, President of the European Parliament, has stated that there was a “more or less unanimous” view among other EU leaders that the Lisbon treaty would not be reopened to accommodate UK demands.<sup>143</sup>

105. Reform on “ever closer union” could be achieved by way of a European Council Decision<sup>144</sup> as in the case of Denmark, according to Professor Douglas-Scott, to be translated into a draft Protocol to be ratified at a later date.<sup>145</sup> She suggested a form of wording and considered that such a mechanism should satisfy the UK demand for “legally binding and “irreversible” change, “given that a Decision of EU Heads of State and Government could only be amended by a further unanimous Decision of the Heads of State and Government.” However, she questioned whether eventual ratification of a Protocol would be politically achievable, particularly if combined with other less “palatable” reforms.<sup>146</sup>

106. As an alternative to immediate Treaty amendment, it has been suggested by M Jean-Claude Piris, Professors Sir Francis Jacobs and Sir Alan Dashwood that UK disengagement from “ever closer union” arguably has already been satisfied by way of the 2014 European Council Conclusions.<sup>147</sup> Professor Sir Francis Jacobs also thought that this could be clarified by reference to the “history, culture and traditions” of the peoples of Europe (Preamble and Article 3(3) TEU) as well as the national identity provision in Article 4(2)

138 Professor Douglas-Scott ([INQ 0006](#)) para A3

139 [CBI Annual Conference Speech 2015](#), Prime Minister, 9 November 2015

140 The Prime Minister’s Office, [Prime Minister’s letter to Donald Tusk](#), 10 November 2015

141 Professor Chalmers ([INQ 0004](#)) para 2

142 Professor Douglas-Scott ([INQ 0006](#)) para A.4, Q47 [Mr Green]: Treaty change would be “terribly difficult”

143 Professor Douglas-Scott ([INQ 0006](#)) para A.4, with reference to Martin Schulz’s statement in June 2015

144 A decision of the EU Heads of State and Government

145 Professor Dougan and Dr Gordon agree that the UK’s objective could be achieved legally either by an intergovernmental declaration or a decision of the European Council. They suggest that it would be a legally redundant and purely political move to go further in seeking any deletion, amendment or exemption of the UK from its “(non-existent) commitments”: Professor Dougan and Dr Gordon ([INQ 0003](#)) para 21

146 Professor Douglas-Scott ([INQ 0006](#)) para A4

147 Qq128 [Professor Sir Alan Dashwood] 126 [Professor Sir Francis Jacobs], Jean-Claude Piris: [Should the UK withdraw from the EU: Legal aspects and effects of possible options](#): Policy paper for the Robert Schuman Foundation, Issue No 355, 5 May 2015, page 12.

TEU.<sup>148</sup> M Jean-Claude Piris agrees that such a clarification could take the form of an additional political Declaration.<sup>149</sup>

107. Whether or not this reform is delivered, the entirety of the phrase relating to “ever closer union” of the “peoples”, as recalled by Professor Sir Francis Jacobs and Professor Sir Alan Dashwood will be relevant.<sup>150</sup> In that context, Professor Douglas-Scott questioned how reform might be achieved without undermining the aspirations for EU democratic accountability to EU citizens, which other Member States may want to protect.<sup>151</sup>

### *Fundamental change?*

108. From a political viewpoint, Professor Hix shared the view of other witnesses that UK disengagement from “ever closer union” would lead to no immediate fundamental change to its relationship with the EU,<sup>152</sup> particularly compared to the critical objective of securing safeguards against Eurozone Member States.<sup>153</sup> He recognised that it could have a more significant longer-term impact: “Going down the pipe, I can see situations where, in big negotiations, Britain will be able to say, ‘We do not sign up to this because we are not signed up to ever-closer union.’ Therefore, if you remove it from the treaty for everybody, it has no impact at all; if you just remove Britain from it, it could have an impact.”<sup>154</sup> He also thought that unilateral reform could lead to UK isolation exemplified by its almost solitary opposition to the nomination of Mr Juncker as Commission President.<sup>155</sup>

109. Mr Grant recognised that there could be a significant combined impact if the UK was successful on both its “ever closer union” objective and that of securing protections against Euro-ins.<sup>156</sup> Mr Howe recognised that while it is difficult to see what direct legal effect a UK disengagement might have, it might have some political importance if deployed in future Treaty negotiations or to help interpret any UK opt out.<sup>157</sup> Mr Howe also suggested to us that the potential for fundamental change would have been far greater had the UK’s aspiration been a multilateral reform, extended to other Member States. He commented: “I concede that the total removal of this from the treaty as regards all member states potentially has a long term effect on the development of the jurisprudence of the court, but when it comes to removing it in respect of the UK only, I really cannot see it having any significant concrete effect, apart from on a political plane.”<sup>158</sup>

110. From a legal perspective, the potential impact of the reform was assessed as minimal by Professor Sir Francis Jacobs when he said that if the phrase did not impose any legal obligations on the UK, it could hardly remove any.<sup>159</sup>

148 Q126. Professor Douglas-Scott agrees: [\(INQ 0006\)](#) para A4

149 [Should the UK withdraw from the EU: Legal aspects and effects of possible options](#): Policy paper for the Robert Schuman Foundation, Issue No 355, 5 May 2015, page 12. Also, [“Legal loopholes for David Cameron on EU treaty, says top lawyer”](#), The Financial Times online, 5 May 2014.

150 Q126 [Professor Sir Francis Jacobs], 128 [Professor Sir Alan Dashwood]

151 Professor Douglas-Scott [\(INQ 0006\)](#) para A.4

152 Q47 [Mr Green], 125, 127 [Mr Howe]

153 Q80 [Professor Hix]

154 Q80

155 Q80

156 Q46

157 Q127

158 Q130

159 Q130

111. However, even assuming more legal significance of “ever closer union”, the impact of reform may depend on how the Court of Justice applies and interprets it. UK disengagement will only be applied for the future by the Court and not retrospectively to the existing EU acquis<sup>160</sup> (of Treaties and legislation).<sup>161</sup> The Prime Minister has indicated that the importance of the concept lies with its influence on the courts.<sup>162</sup> As Professor Chalmers explained, its influence will be severely diminished or unworkable for the Court of Justice if the concept still applies to all the other Member States.<sup>163</sup> He also identified legal risks in “tampering with a phrase which is largely symbolic, namely that it will be replaced by something which will be ascribed legal meaning in ways that are unanticipated at the moment.”<sup>164</sup>

112. It was also pointed out to us by both Professor Chalmers and Professor Douglas-Scott that there are many other potentially integrationist phrases remaining in the Treaties that could be used to promote further political union: “a new stage in the process of European integration”; “further steps to be taken in order to advance European integration”; “solidarity”; and “convergence”.<sup>165</sup>

113. Professor Douglas-Scott questioned what, if any, impact, there might be on UK parliamentary sovereignty: would there be a (re)gain in sovereignty or would the result be a “second class EU membership” which would deprive British citizens of “the benefits of equal treatment and EU citizenship”? She also considered whether national Parliaments might be already adequately protected from EU competence creep by the so-called “national identity provisions, Article 3(3) and Article 4(2) TEU.”<sup>166</sup>

**114. The concept of “ever closer union” as found in the Treaties is more nuanced than a simple aspiration for deeper EU integration as mentioned in the 2014 European Council Conclusions. It also embraces the idea of a closer union of “the peoples of Europe” and, in the TEU, is linked to the aspiration for transparent and local decision-making.**

**115. Some of the experts we consulted said that the concept is of limited legal importance, is largely symbolic and that UK disengagement would fall short of the fundamental change in the existing relationship of the UK to the EU to which the Prime Minister aspires. This is particularly so given that UK disengagement would not, strictly, apply retrospectively to the existing EU acquis of Treaties and legislation. Its importance could be enhanced if combined with a successful outcome on Eurozone safeguards if that could be achieved or if deployed politically in future Treaty negotiations or to help interpret any UK opt-out.**

**116. Given that the concept of “ever closer union” is embedded in Article 1 TEU, Treaty amendment will be required for UK disengagement from the concept to be**

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160 The EU acquis is the accumulated body of EU law and obligations from 1958 to the present day. It comprises all the EU's treaties and laws (directives, regulations, decisions), declarations and resolutions, international agreements and the judgments of the Court of Justice (House of Commons Library Briefing Paper, [SN05944](#))

161 Qq113 [Professor Chalmers], 127 [Professor Sir Francis Jacobs]. Sir Francis considered that the existing acquis would not be affected but that “it would affect the future interpretation, even of past treaty provisions and of past EU legislation”

162 HC Deb, 19 October 2015, [col 663](#) [Commons Chamber]

163 Professor Chalmers ([INQ 0004](#)) para 4

164 Professor Chalmers ([INQ 0004](#)) para 4.

165 Professor Douglas-Scott ([INQ 0006](#)) para A.4

166 Professor Douglas-Scott ([INQ 0006](#)) para A.5



legally robust. Care will need to be taken with drafting<sup>167</sup> to ensure the reform does not undermine other concepts associated with “ever closer union” such as democratic accountability of the EU and citizens’ rights. The scope of the concept, and the fact that it will remain applicable for all or some other Member States, require clear explanation to the electorate.<sup>168</sup>

117. Some of the key considerations in assessing the effect of the UK withdrawing from a commitment to “ever closer union” are as follows:

- a) There is already substantial legal and political recognition that different levels of integration are permissible;
- b) There are other drivers for integration in the Treaties which the Court of Justice and other EU institutions may invoke, should they wish to do so;
- c) The Court, if it were seeking to use the concept as an aid to interpretation of other provisions of the Treaties or EU secondary legislation, would be faced with the problem that—although the Treaty provision or legislation applied to all Member States—the concept of “ever closer union” did not; and
- d) The UK risks being marginalised.

## National Parliaments and Subsidiarity

118. In his January 2013 Bloomberg speech the Prime Minister asserted that “It is national parliaments, which are, and will remain, the true source of democratic legitimacy and accountability in the EU.”<sup>169</sup> That this should be reflected better in the EU law making process is gaining acceptance.<sup>170</sup> Mr Tusk confirmed in his letter of 7 December assessing the state of play in the negotiations that there is “a largely shared view on the importance of the role of national parliaments within the Union as well as strong emphasis on the principle of subsidiarity.”<sup>171</sup>

119. In its Report “Reforming the European Scrutiny System in the House of Commons”, our predecessor Committee recommended that there should be a mechanism whereby the House of Commons can decide that a particular EU proposal should not apply to the UK and also a power to disapply parts of the existing *acquis* (i.e. Treaties and legislation).<sup>172</sup>

167 We note, in this respect, the difficulties that have arisen from the Government’s policy on the application of Protocol 21 (on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice) in the absence of a Title V legal base. It is also relevant to note at this stage that, as part of the renegotiation, the Prime Minister’s letter indicates that the Government intends to ensure that EU institutions “will fully respect the purpose behind the JHA Protocols in any future proposals dealing with Justice and Home Affairs matters, in particular to preserve the UK’s ability to choose to participate”. Q 104 (Foreign Secretary): The Foreign Secretary has recognised the need to learn from experience to make sure that any reform package includes “precise language on interpretation and implementation”.

168 This is to avoid repeating the sort of widespread misunderstanding as to whether the UK and Polish Protocol 30 on the Charter of Fundamental Rights was an opt-out from the Charter or not. Thus, in the case of *R (on the application of AB) v the Secretary of State for the Home Office* [2013] EWHC 3453 (admin) Mostyn J found, to his express surprise that on detailed reading this Protocol that it was not an opt-out and that the Charter applied to the UK.

169 Prime Minister’s Office [Bloomberg speech 23 January 2013](#)

170 Professor Chalmers ([INQ 0004](#)) para 12; Qq61 [Mr Grant], 64 [Mr Green]

171 [Letter by President Donald Tusk to the European Council on the issue of a UK in/out referendum](#), European Council, 7 December 2015

172 European Scrutiny Committee, Twenty-fourth Report of Session 2013–14, [Reforming the European Scrutiny System in the House of Commons](#), HC 109-I, para 170-1

The Government rejected the first on the grounds that it would undermine the UK's negotiating position and the openness of the scrutiny system; and the second on the grounds that it would make the EU's system of common rules unworkable and would violate EU and international law. Nevertheless, it supported stronger powers for the UK Parliament.<sup>173</sup>

120. The Foreign Secretary recently restated that an individual national veto was unrealistic and would not work;<sup>174</sup> and this position was reinforced by the Prime Minister in his Chatham House speech.<sup>175</sup>

121. Professor Dougan and Dr Gordon indicated that “the doctrine of parliamentary sovereignty suggests that such a power—for the unilateral disapplication of EU law in a specified area—exists already as a matter of UK constitutional law, whether it is given formal effect through some explicit mechanism or not (and considerations of *realpolitik* might suggest that there is little to be gained by altering this position).”<sup>176</sup>

122. Mr Grant pointed out that “we already have quite a fragmented EU in practice”.<sup>177</sup> Professor Chalmers, in his written evidence, challenged the Government objections on the grounds that EU law need not be considered as having primacy (in particular over national constitutional law) and that the view that there would be an “implosion of the Union if primacy were revisited is overstated.”<sup>178</sup> He suggested an alternative arrangement whereby a legislative proposal could not be adopted without the consent of two thirds of national parliaments, one third could require the Commission to propose, amend or repeal existing legislation and an individual national parliament would be able to disapply individual acts of EU law.<sup>179</sup>

123. Mr Green concluded that “the only thing worth having is a one-nation veto. Each nation should be able to disallow particular measures”; but could not see the Committee's earlier recommendation being agreed.<sup>180</sup>

124. On the other hand Professor Hix and Mr Grant pointed to the dangers to the single market and the competitiveness agenda of giving a veto to other national parliaments.<sup>181</sup>

125. The focus of the Government's efforts is now on achieving a “red card”, allowing groups of national parliaments, acting together, to stop unwanted legislative proposals. The Foreign Secretary additionally described an arrangement whereby “national parliaments, working collectively, could be involved in nominating areas of legislation for review where we believe powers should be repatriated from Brussels to member states”.<sup>182</sup>

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173 [Government Response](#) to the European Scrutiny Committee, Twenty-fourth Report of Session 2013–14 Reforming the Scrutiny System in the House of Commons, HC 109-1, paras 36-37

174 HC Deb, 20 October 2015, [col 801](#) [Commons Chamber]

175 Prime Minister's Office, '[Prime Minister's Speech on Europe](#)' 10 November 2015

176 Professor Dougan and Dr Gordon ([INQ 0003](#)) para 12

177 Q49

178 Professor Chalmers ([INQ 0004](#)) para 21

179 Professor Chalmers ([INQ 0004](#)) para 12

180 Q64

181 Qq 65–66

182 Q83

126. The precise details, such as the grounds for action, the thresholds and deadlines are yet to be determined.<sup>183</sup> Furthermore it is not clear how a red card mechanism would operate with the existing possibility of a group of Member States proceeding by way of enhanced co-operation.<sup>184</sup>

127. The “red card” proposal was generally seen by several witnesses as potentially helpful in reducing the democratic deficit whilst not necessarily being of fundamental significance.<sup>185</sup>

128. In his letter the Prime Minister also referred to seeking “the EU’s commitments to subsidiarity fully implemented, with clear proposals to achieve that.” The Convention of Scottish Local Authorities (COSLA) stressed the importance of respect for the principle of subsidiarity.<sup>186</sup> Whilst it is not clear precisely what the Government intends to advocate, the experience of our predecessor Committee is that the existing reasoned opinion procedure set out in Protocol 2<sup>187</sup> needs to be considerably strengthened.<sup>188</sup>

129. Whilst it is clear that creating a robust red card system would entail amendment of the relevant Treaty level Protocol;<sup>189</sup> there is also a view that this, and by implication less radical suggestions (such as strengthening the subsidiarity reasoned opinion procedure), could be put in place by non-legislative means. For example, an interinstitutional agreement could require that a legislative proposal attracting sufficient opposition of national parliaments must be withdrawn by the Commission or blocked by the Council and/or the European Parliament.<sup>190</sup>

**130. The question before the voters will be whether to remain in or to leave the EU. There will be those with fixed views one way or another, irrespective of the renegotiation. For the others, the option of remaining in the EU will focus on the adequacy or otherwise of the package negotiated on the basis of the Prime Minister’s letter to Mr Tusk of 10 November. However that letter does not address the question of a fundamental change in the UK’s relationship with the EU, which must be distinguished from reform of the EU because it concerns national sovereignty. We are disturbed that the stark alternative presented to the voter, of staying in or leaving the EU, does not adequately address this issue.**

**131. The Committee recalls that the European Communities Act 1972 (which remains the UK enactment which governs the voluntary acceptance by the UK of the European Union) was based on a preceding White paper highlighting, first, that, “All the countries concerned recognise that an attempt to impose a majority view in a case where one or more members considered their vital interests to be at stake would imperil the very fabric of the Community”; and, second, that in the absence of unanimity in the**

183 The evidence of the Foreign Secretary, supported by Vijay Rangarajan included speculation of a threshold of 55% of national parliaments and a ground of objection being lack of proportionality; Qq91–92

184 Articles 20 TEU and 326–334 TFEU.

185 Qq46–48 [Mr Grant, Mr Green and Professor Hix], 69 [Mr Grant]

186 COSLA ([INQ 0001](#)) paras 5–6

187 On the Application of the Principles of Subsidiarity and Proportionality. This provides that a certain threshold of national parliaments or chambers can force the EU institutions to reconsider a legislative proposal.

188 Thirteenth Report HC 219–xiii (2014–15), [chapter 3](#), 15 October 2014. See also the oral evidence of Professor Chalmers Q111

189 Protocol 2 on the application of the principles subsidiarity and proportionality.

190 Professor Damian Chalmers ([INQ 0004](#)) para 6, Professor Dougan and Dr Gordon ([INQ 0003](#)) para 21, Q63 [Mr Grant]. For the contrary view, Professor Douglas-Scott ([INQ 0006](#)) section B



**Council, “where member states’ vital interests are at stake, it is Community practice to proceed only by unanimity.”<sup>191</sup>**

**132. The Prime Minister correctly asserted in his Bloomberg speech that “It is national parliaments which are and will remain the true source of democratic legitimacy and accountability in the EU.” The red card as it is proposed represents a practical threat to the exercise of UK parliamentary sovereignty as it makes the will of the UK parliament in a particular case subordinate to the differing collective view of a group of parliaments.**

**133. In any event lessons must be learnt from the current subsidiarity reasoned opinion procedure in respect of the yellow card, as with the Commission’s dismissal of concerns about the proposal for a European Public Prosecutor Office, even though the yellow card threshold was passed. Furthermore, any red card procedure must not be limited in its scope to subsidiarity alone and must have thresholds and deadlines that would enable it to become an effective tool.**

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<sup>191</sup> The United Kingdom and the European Communities Cm 4715, July 1971, paras 30 and 70.

## 7 Immigration

### The issue

134. In his Chatham House speech on 10 November, the Prime Minister stated that the UK's population is set to reach over 70 million in the next decades and that the UK is forecast to become the most populous country in the EU by 2050. At the same time, he said, "net migration is running at over 300,000 a year."<sup>192</sup> This, he added, "is not sustainable." He concluded: "ultimately, if we are going to reduce the numbers coming here we need action that gives greater control of migration from the EU." EU migration could, he argued, be reduced by tackling "the draw that our welfare system can exert across Europe."<sup>193</sup>

135. The Prime Minister had set out his stall on how the problem could be tackled in a speech in November 2014. He made various commitments as to how he would reduce immigration from the EU if the Conservative Party were to win the General Election the following May. These he summarised as follows:

"EU migrants should have a job offer before they come here. UK taxpayers will not support them if they don't. And once they're in work, they won't get benefits or social housing from Britain unless they've been here for at least four years."<sup>194</sup>

He also committed to tackling the abuse of free movement, ensuring that EU job seekers could be deported after six months if their job search had been unsuccessful, ending the practice of paying child benefit for children not resident in the UK and restricting the freedom of movement of the nationals of any future new Member States.

136. He was clear in his Chatham House speech that he had already delivered on two of those commitments: "EU migrants will not be able to claim Universal Credit while looking for work. And if those coming from the EU haven't found work within 6 months, they can be required to leave."<sup>195</sup> Our legal witnesses agreed that the latter commitment was well-established under EU law, unless job seekers can prove that they are genuinely looking for a job and have a genuine chance of finding one.<sup>196</sup> Mr Howe noted that it may not, however, be practical.<sup>197</sup> The Foreign Secretary was not able to tell us how many EU citizens had indeed been required to leave.<sup>198</sup>

<sup>192</sup> [The Conservative Party Manifesto for the 2015 General Election](#) promised to deliver 'annual net migration in the tens of thousands, not the hundreds of thousands'. P.29

<sup>193</sup> Prime Minister's Office, '[Prime Minister's Speech on Europe](#)' 10 November 2015

<sup>194</sup> Prime Minister's Office, '[JCB Staffordshire: Prime Minister's speech](#)' 28 November 2014

<sup>195</sup> Professor Steve Peers has argued that the consistency with EU law of the new rules on the access of EEA migrants to Universal Credit is likely to be challenged (Professor Steve Peers, '[EU citizens' access to benefits: the CJEU clarifies the position of former workers](#)', EU Law Analysis, 15 September 2015). Excluding EEA jobseekers from universal credit is based on the assumption that it is classified as "social assistance" under EU law. There is some uncertainty about its classification, however, as there is no direct equivalent to universal credit in other EU Member States. The issue is explored in "Measures to limit migrants' access to benefits", House of Commons Library Briefing Paper [06889](#), 17 June 2015, Chapter 10

<sup>196</sup> Q134 [Professor Sir Alan Dashwood, Mr Howe]. The principle was established in Case [C-292/89, Antonissen](#)

<sup>197</sup> Q134

<sup>198</sup> Q98

137. In his letter of 10 November to Mr Tusk, the Prime Minister indicated the following priorities and mechanisms to deliver his objectives in the renegotiation:

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

138. There is substantial debate around the extent to which the UK benefits system does indeed act as a magnet for EEA migrants. In his Chatham House speech, the Prime Minister explained that, at any one time, around 40% of EEA migrants are supported by the UK benefits system. This was supported by Department for Work and Pensions analysis, albeit with a number of caveats.<sup>199</sup>

139. The Foreign Secretary referred to anecdotal experience suggesting that migrants “are extraordinarily well informed about the different systems operating in different countries and how they will be able to interact with them. They will make calculations about their own net position at the end of the week or the month.” He added that generous in-work benefits available in the UK may offset the attraction of higher wages elsewhere.<sup>200</sup>

140. On the other hand, the Government’s own Migration Advisory Committee had previously concluded, “Although there is much debate around migrants coming to the UK to seek benefits, there is little evidence to support the so-called welfare magnet hypothesis as a migration driver across EU countries.” Rather, migration is driven by economic factors (employment opportunities and wages), network effects (family and friends), UK immigration policy, education and training policy and labour market flexibility.<sup>201</sup>

**141. We note that there is a gap between the Government’s objective of reducing net migration of over 300,000 people per year and the proposals now on the table. There is little evidence to suggest that the proposals—focused on reducing the magnetism of the UK’s benefits system—will fully address the concerns highlighted relating to the levels of net migration, though they could address concerns about the benefits being paid to those who are not entitled to them.**

## Delivery

142. The question of whether the UK renegotiating objectives in the area of immigration require Treaty amendment is difficult. This is in part because the Prime Minister’s letter

<sup>199</sup> Department for Work and Pensions, “Benefit Claims by EEA Nationals”, November 2015

<sup>200</sup> Q94

<sup>201</sup> Migration Advisory Committee ‘Migrants in low-skilled work’ July 2014, p 8.

is not specific as to the precise requirements. There are also difficulties of legal analysis because some rights that would be affected derive directly from the Treaty right of free movement as interpreted by the Court of Justice, but their origin is obscured by the fact that they have been codified in EU secondary legislation.<sup>202</sup> Furthermore, recent Court of Justice judgments indicate a possible change of approach.<sup>203</sup>

143. The example of the proposed four year qualification period for entitlement to in-job benefits illustrates the complexity. Professor Michael Dougan and Dr Michael Gordon consider that this would require Treaty change if it applied only to the UK, but envisaged that domestic legislation only might suffice.<sup>204</sup> Professor Sir Alan Dashwood considered this objective difficult in the light of Article 45 TFEU, although that Article did not cover the whole panoply of welfare rights, and also argued that a shorter period could be provided by EU secondary legislation.<sup>205</sup> Mr Howe described the issue as fiendishly complex and considered it not beyond the bounds of possibility that this objective could be achieved by alterations to the domestic welfare system.<sup>206</sup> Professor Chalmers outlined a system for achieving it by a combination of changes to EU secondary legislation and Declarations by one or more Member States.<sup>207</sup> In oral evidence he did however accept that he was an outlier on this and that “Most academics believe that it does require treaty change.”<sup>208</sup>

144. As a further example, Professor Sir Alan Dashwood argued that changes to EU secondary legislation could address the issue of third country nationals acquiring residence rights by marrying an EU citizen exercising their right of free movement.<sup>209</sup> Mr Howe recalled that this issue arose before the relevant EU secondary legislation was in place, thereby pointing to a need for Treaty change.<sup>210</sup> Professor Chalmers said that this right derived directly from Article 45 TFEU.<sup>211</sup> Professor Dougan and Dr Gordon indicated that “at the very least” this would require changes to relevant EU secondary legislation.<sup>212</sup>

**145. The question of whether Treaty amendment is necessary to implement the UK's renegotiating objectives in the field of immigration is difficult to resolve in the absence of sufficient detail as to the outcome of the renegotiation. Even then, uncertainty may remain in some areas due to the deep involvement of the Court of Justice. That in itself suggests that some Treaty amendment will be necessary in order to make the outcome of the renegotiation “judge-proof”.**

**146. Even if Treaty amendment is not necessary in this area, changes to secondary EU legislation will be. As we outline below, this will be difficult to negotiate and it will be difficult to secure binding commitments to achieve such legislation for the reasons outlined in chapter 3.**

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202 Professor Dougan and Dr Gordon ([INQ 0003](#)) para 20: In respect of the availability of job seeking benefits and the right to deport a jobseeker who has not found a job after 6 months.

203 Case [C-333/13](#), *Dano*; Case [C-67/14](#), *Alimanovic*; Case [C-378/14](#) *Trapkowski*. In para 13 of their written evidence ([INQ 0005](#)) Drs Theodore Konstandinides and Noreen O'Meera state: “In *Dano* (Case C-333/13) and *Alimanovic* (Case C-67/14), the CJEU backtracks somewhat from its previous, more liberal case law.”

204 Professor Dougan and Dr Gordon ([INQ 0003](#)) para 21.

205 Q131

206 Q131

207 Professor Chalmers ([INQ 0004](#)) para 27 ff

208 Q114

209 Q131

210 Q133

211 Q114

212 Professor Dougan and Dr Gordon ([INQ 0003](#)) para 21

## Achievability

147. The German Chancellor, Angela Merkel, has made it clear that—while she wishes to help the UK Government to negotiate the UK's relationship between the UK and the EU—there can be no question of amending the fundamental principles of free movement and non-discrimination.<sup>213</sup> Similarly, the President of the European Commission, Jean-Claude Juncker, stated in his State of the Union speech in September 2015: "I want to ensure we preserve the integrity of all four freedoms of the Single Market".<sup>214</sup>

148. In his letter of 10 November to Mr Tusk, the Prime Minister observed that he had identified wide support among other leaders to crack down on the abuse of free movement. He acknowledged, though, that the proposals pertaining to welfare benefits are difficult issues for some Member States, a point previously made to us by the Minister for Europe.<sup>215</sup> Both Mr Grant and Mr Green concluded that it would be impossible for the Government to negotiate any limits to the access of economically active EEA migrants to in-work benefits due to resistance from other Member States.<sup>216</sup> The exception, said Mr Grant, was child benefit: "Britain has quite a lot of allies in its desire to constrain or limit the child benefit paid to children living overseas if their parents are in the UK."<sup>217</sup>

149. The Foreign Secretary acknowledged the particular difficulties of negotiating the four-year qualifying period for in-work benefits: "I should be honest with the Committee: this is going to be the most difficult issue." He explained that, "politicians in countries which are providing the largest numbers of migrants into the UK have a political challenge in supporting any measures that would appear to disadvantage their own electorate." Amongst older Member States, he said, "this is more an issue of principle about whether it is discriminatory and whether it, therefore, undermines the principle of freedom of movement. It is less a practical issue and more a principle issue."<sup>218</sup>

150. Mr Tusk's assessment of the state of play confirmed the reservations expressed by our witnesses. He considered that this area:

"is the most delicate and will require a substantive political debate at our December meeting. While we see good prospects for agreeing on ways to fight abuses and possibly on some reforms related to the export of child benefits, there is presently no consensus on the request that people coming to Britain from the EU must live there and contribute for four years before they qualify for in-work benefits or social housing. This is certainly an issue where we need to hear more from the British Prime Minister and an open debate among ourselves before proceeding further."<sup>219</sup>

151. Professor Dougan and Dr Gordon noted that if the changes sought were not to amount to discrimination on the grounds of nationality, they would need to be equally applicable to UK citizens. This, they added, "could have considerable side-effects", particularly in the case of restricting access to social housing to those that have lived in an area for at least

213 "EU freedom of movement non-negotiable, says Angela Merkel", Daily Telegraph, 15 October 2015

214 European Commission, 'State of the Union 2015', 9 September 2015

215 Q5

216 Qq 74 [Mr Grant], 75 [Mr Green]

217 Q76

218 Q93. *The Times* reported on 25 November 2015 (p 4) that the four-year qualifying period demand would be dropped.

219 [Letter by President Donald Tusk to the European Council on the issue of a UK in/out referendum](#), European Council, 7 December 2015

four years.<sup>220</sup> Professor Sir Francis Jacobs confirmed that any changes made domestically would need to apply equally to UK and EU citizens.<sup>221</sup>

152. We had suspected that the Government's proposals on free movement would meet particular resistance. It was for this reason that we requested an analysis of the reaction from other Member States to the Prime Minister's letter with particular reference to immigration and availability of benefits. As noted in para 22, our request was refused.

**153. Limited though the promised changes to immigration and the availability of benefits are, the political and legal challenges of negotiating them—with or without affecting the rights of UK citizens—are formidable. Our ability to assess the Government's likely success in its negotiations would be improved by greater access to information available to the Government while the process is underway.**

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<sup>220</sup> Professor Dougan and Dr Gordon ([INQ 0003](#)) para 21

<sup>221</sup> Q132

# Conclusions and recommendations

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## Engagement with Parliament and others

1. We share the House of Lords' EU Committee's concern that presenting Parliament with a 'fait accompli' could give rise to legitimate concerns about the accountability and transparency of both the process itself, and its outcome. We consider the approach adopted by the Government to be reactive and opaque. It places the onus on Parliament to guess when to request information and evidence, without information about the progress of the negotiations. (Paragraph 21)
2. We asked for an analysis of the reaction from other Member States to the Prime Minister's letter, with particular reference to immigration and availability of benefits. The Foreign and Commonwealth Office refused our request on the grounds that this fell under the category of "providing a running commentary of the renegotiation", which the Minister of Europe had said the Government would avoid. We note that Mr Tusk made reference to these matters in his assessment of Member States' reactions. This episode has served only to reinforce our frustration about the transparency of the process and the lack of meaningful Parliamentary engagement. (Paragraph 22)
3. Parliament has a legitimate role in influencing the negotiation. It is disappointing that Parliament was not given the chance to debate the four main "asks" before the Prime Minister sent his letter of 10 November to the President of the European Council. Allowing it to debate only the "final offer" would be unacceptable. We consider it paradoxical that such an approach is being advocated by a Government professing to negotiate for a greater role for national Parliaments at EU level. (Paragraph 23)
4. A negotiated settlement could well relate to powers which have been devolved, and so might require a Legislative Consent Motion from the Scottish Parliament and the other devolved assemblies. It is disappointing that none of the Devolved Administrations were consulted about the terms of the Prime Minister's letter of 10 November. We are not convinced that the Government has yet taken the need for genuine engagement with the Devolved Administrations seriously. (Paragraph 24)
5. During the remaining course of the negotiations, we expect the Government to:
  - a) Provide a detailed update on the outcome of the European Council on 17 and 18 December, first in written form (as the House rises for the Christmas recess on 17 December), as well as a statement by the Prime Minister on the Council on 5 January 2016. This should be followed by regular debates on amendable motions, including some of the outstanding debates we have recommended, for the remainder of the process.
  - b) Respond fully to this Report in the context of the outcome of the December Summit as soon as the House returns after the Christmas recess.
  - c) Consult and engage meaningfully with the Devolved Administrations, the Commission and the European Parliament.



- d) Consider carefully within the context of the negotiations the conclusions and recommendations of this Report and further Reports produced in the course of this inquiry. (Paragraph 25)
6. We note the Minister for Europe's commitment in the Commons debate on the EU Referendum Bill of 8 December, that when the Government provides the information envisaged by the Lords amendments (see para 19), it will do so with accuracy and impartiality. (Paragraph 26)

### The need for Treaty amendment

7. The requirement or otherwise to amend the Treaty will be a key factor in the negotiability of any particular UK renegotiation objective. We have therefore taken evidence from a broad range of legal experts which have informed our conclusions. (Paragraph 30)

### Commitment to Treaty amendment

8. The process of ratification of Treaty amendment is unlikely to be completed by other Member States before the referendum takes place. Furthermore, there are substantial difficulties in both (a) an immediately effective interim alternative to Treaty amendment (such as a "Decision of the Heads of State and Government Meeting within the European Council") and (b) a legally binding and irreversible agreement to ratify Treaty amendment sometime in the future. It will be necessary for the Government to set out which elements of the renegotiation package require Treaty amendment. (Paragraph 49)
9. Simple clarification or supplementation of the existing Treaties could be achieved by an international agreement. This would be consistent with EU law but its limited nature is not compatible with realisation of "the opportunity to reform the EU and fundamentally change the UK's relationship with it" envisaged by the Prime Minister in his statement to the House of 23 March 2015. (Paragraph 50)
10. The deliberate distinction the Prime Minister made between EU reform and fundamental change to the UK's relationship with the EU is important. The latter is a matter of constitutional significance such as to justify in itself the forthcoming referendum. However, this fundamental change is not now on the Government's agenda. Therefore voters faced with the question whether to remain in or leave the EU will not have the choice of remaining in an EU with which the UK's relationship is fundamentally changed. (Paragraph 51)

### Commitment to changes to EU secondary legislation

11. Any secondary EU legislation needed to implement the renegotiation outcome is unlikely to be fully in place before the referendum and, in any case, is unlikely to cover all the areas of renegotiation. Any general commitment to adopt such legislation may prove difficult to deliver in practice as the legislative procedures involve both the Commission and the European Parliament, and negotiation of the



precise text could reveal differences not covered by a more general commitment. (Paragraph 57)

### Economic Governance

12. The Eurozone is not a legal entity and so the UK and other non-Eurozone Member States are directly affected—through our EU membership—by decisions that are made for Eurozone Member States. There are no certainties about how the Eurozone will integrate further and the extent to which that integration, through qualified majority voting, might affect UK national interests in the wider single market and other EU policies. It is politically and legally right that the Government negotiate to adopt safeguards against the risk that Eurozone Member States could caucus together against the interests of the European Union as a whole. This is a particular risk since the entry into force of revised Council voting arrangements that gives the 19 Eurozone Member States a qualified majority should they all agree. (Paragraph 67)
13. We consider that the regulation of the relationship between Eurozone and non-Eurozone Member States is of such importance that it requires the security of Treaty amendment. In particular this is necessary to secure, in a manner that provides legal certainty, a double majority system in relation to economic governance. (Paragraph 74)
14. We are reinforced in the view that Treaty amendment is necessary by the episode when the European Financial Stability Mechanism (to which non-Eurozone Member States contribute) was used to bail out Greece urgently in the face of an earlier agreement by the Council that this would not be done. In this case, associated guarantees were given that non-Eurozone Member States would not suffer financially, but the precedent is troubling. (Paragraph 75)
15. It should be made absolutely clear that any safeguard measure to protect UK national interests must be made available across the broad range of EU legislation and not just for legislation adopted under an internal market or economic and monetary policy legal base. (Paragraph 76)

### Competitiveness

16. The Government's priorities under the competitiveness agenda are closely aligned with the Work programme of the Juncker Commission, which has shown a significant and welcome change in emphasis towards the UK's agenda on deregulation and competitiveness. The Committee expects this part of the renegotiations to be the easiest in which the Government can meet its aims. While there is merit in giving extra impetus to these efforts, this aspect of the renegotiation cannot be regarded as a fundamental change in the UK's relationship with the EU. (Paragraph 89)
17. Being work in progress and involving, at most, changes to EU secondary legislation, significant parts of this agenda are unlikely to be adopted before the referendum. This gives rise to the problem of uncertainty highlighted in chapter three. (Paragraph 90)

### Ever Closer Union

18. The concept of “ever closer union” as found in the Treaties is more nuanced than a simple aspiration for deeper EU integration as mentioned in the 2014 European Council Conclusions. It also embraces the idea of a closer union of “the peoples of Europe” and, in the TEU, is linked to the aspiration for transparent and local decision-making. (Paragraph 114)
19. Some of the experts we consulted said that the concept is of limited legal importance, is largely symbolic and that UK disengagement would fall short of the fundamental change in the existing relationship of the UK to the EU to which the Prime Minister aspires. This is particularly so given that UK disengagement would not, strictly, apply retrospectively to the existing EU acquis of Treaties and legislation. Its importance could be enhanced if combined with a successful outcome on Eurozone safeguards if that could be achieved or if deployed politically in future Treaty negotiations or to help interpret any UK opt-out. (Paragraph 115)
20. Given that the concept of “ever closer union” is embedded in Article 1 TEU, Treaty amendment will be required for UK disengagement from the concept to be legally robust. Care will need to be taken with drafting to ensure the reform does not undermine other concepts associated with “ever closer union” such as democratic accountability of the EU and citizens’ rights. The scope of the concept, and the fact that it will remain applicable for all or some other Member States, require clear explanation to the electorate. (Paragraph 116)
21. Some of the key considerations in assessing the effect of the UK withdrawing from a commitment to “ever closer union” are as follows:
  - a) There is already substantial legal and political recognition that different levels of integration are permissible;
  - b) There are other drivers for integration in the Treaties which the Court of Justice and other EU institutions may invoke, should they wish to do so;
  - c) The Court, if it were seeking to use the concept as an aid to interpretation of other provisions of the Treaties or EU secondary legislation, would be faced with the problem that—although the Treaty provision or legislation applied to all Member States—the concept of “ever closer union” did not; and
  - d) The UK risks being marginalised. (Paragraph 117)

### National Parliaments and Subsidiarity

22. The question before the voters will be whether to remain in or to leave the EU. There will be those with fixed views one way or another, irrespective of the renegotiation. For the others, the option of remaining in the EU will focus on the adequacy or otherwise of the package negotiated on the basis of the Prime Minister’s letter to Mr Tusk of 10 November. However that letter does not address the question of a fundamental change in the UK’s relationship with the EU, which must be distinguished from reform of the EU because it concerns national sovereignty. We

are disturbed that the stark alternative presented to the voter, of staying in or leaving the EU, does not adequately address this issue. (Paragraph 130)

23. The Committee recalls that the European Communities Act 1972 (which remains the UK enactment which governs the voluntary acceptance by the UK of the European Union) was based on a preceding White paper highlighting, first, that, “All the countries concerned recognise that an attempt to impose a majority view in a case where one or more members considered their vital interests to be at stake would imperil the very fabric of the Community”; and, second, that in the absence of unanimity in the Council, “where member states’ vital interests are at stake, it is Community practice to proceed only by unanimity.” (Paragraph 131)
24. The Prime Minister correctly asserted in his Bloomberg speech that “It is national parliaments which are and will remain the true source of democratic legitimacy and accountability in the EU.” The red card as it is proposed represents a practical threat to the exercise of UK parliamentary sovereignty as it makes the will of the UK parliament in a particular case subordinate to the differing collective view of a group of parliaments. (Paragraph 132)
25. In any event lessons must be learnt from the current subsidiarity reasoned opinion procedure in respect of the yellow card, as with the Commission’s dismissal of concerns about the proposal for a European Public Prosecutor Office, even though the yellow card threshold was passed. Furthermore, any red card procedure must not be limited in its scope to subsidiarity alone and must have thresholds and deadlines that would enable it to become an effective tool. (Paragraph 133)

## Immigration

26. We note that there is a gap between the Government’s objective of reducing net migration of over 300,000 people per year and the proposals now on the table. There is little evidence to suggest that the proposals—focused on reducing the magnetism of the UK’s benefits system—will fully address the concerns highlighted relating to the levels of net migration, though they could address concerns about the benefits being paid to those who are not entitled to them. (Paragraph 141)
27. The question of whether Treaty amendment is necessary to implement the UK’s renegotiating objectives in the field of immigration is difficult to resolve in the absence of sufficient detail as to the outcome of the renegotiation. Even then, uncertainty may remain in some areas due to the deep involvement of the Court of Justice. That in itself suggests that some Treaty amendment will be necessary in order to make the outcome of the renegotiation “judge-proof”. (Paragraph 145)
28. Even if Treaty amendment is not necessary in this area, changes to secondary EU legislation will be. As we outline below, this will be difficult to negotiate and it will be difficult to secure binding commitments to achieve such legislation for the reasons outlined in chapter 3. (Paragraph 146)
29. Limited though the promised changes to immigration and the availability of benefits are, the political and legal challenges of negotiating them—with or without affecting the rights of UK citizens—are formidable. Our ability to assess the Government’s

likely success in its negotiations would be improved by greater access to information available to the Government while the process is underway. (Paragraph 153)

# Formal Minutes

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**Wednesday 9 December 2015**

Members present:

Sir William Cash, in the Chair

Geraint Davies	Mr Jacob Rees-Mogg
Richard Drax	Alec Shelbrooke
Peter Grant	Kelly Tolhurst
Damian Green	Mr Andrew Turner
Kate Hoey	Heather Wheeler
Kelvin Hopkins	

Draft Report (*UK Government's Renegotiation of EU Membership: Parliamentary Sovereignty and Scrutiny*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Summary paragraphs 1 and 2 read and agreed to.

Summary paragraph 3 brought up and read as follows:

Under Standing Orders, much of our work involves evaluating EU proposals for legal and political importance. In a similar way, we have assessed each of the Government's four areas of renegotiation against its own criteria. We conclude that the negotiation priorities as set out by the Prime Minister will not deliver the legally binding and irreversible agreement leading to reform of the EU nor a fundamental change in the UK's relationship with it envisaged by him.

Amendment proposed, to leave out from "criteria" to the end of the paragraph.—(Damian Green.)

The Committee divided.

Ayes, 2	Noes, 9
Geraint Davies	Richard Drax
Damian Green	Peter Grant
	Kate Hoey
	Kelvin Hopkins
	Mr Jacob Rees-Mogg
	Alec Shelbrooke
	Kelly Tolhurst
	Mr Andrew Turner
	Heather Wheeler

Question accordingly negatived.

Paragraph agreed to.

Summary paragraph 4 read and agreed to.

Summary paragraph 5 brought up and read, as follows:

Of the four areas under discussion, the most substantial is the relationship between the Eurozone and the non-Eurozone countries, including the UK. Indeed, it is so important that it absolutely requires the security of Treaty amendment to address it.

Amendment proposed, to leave out from “UK” to the end of the paragraph.—(Damian Green.)

The Committee divided.

Ayes, 3	Noes, 8
Geraint Davies	Richard Drax
Damian Green	Peter Grant
Kelly Tolhurst	Kate Hoey
	Kelvin Hopkins
	Mr Jacob Rees-Mogg
	Alec Shelbrooke
	Mr Andrew Turner
	Heather Wheeler

Question accordingly negatived.

Paragraph agreed to.

Summary paragraph 6 brought up and read, as follows:

We do not believe that the goals in the area of competitiveness would either reform the EU or fundamentally change the UK's relationship with it as they are already being addressed. Delivery of the goals is so dependent on the support of a variety of institutions that any commitment by the Member States alone could not be legally binding or irreversible.

An Amendment made.

Another Amendment proposed, to leave out from “addressed” to the end of the paragraph.—(Damian Green.)

The Committee divided.

Ayes, 1

Damian Green

Noes, 10

Geraint Davies

Peter Grant

Kate Hoey

Kelvin Hopkins

Mr Jacob Rees-Mogg

Alec Shelbrooke

Kelly Tolhurst

Mr Andrew Turner

Heather Wheeler

Question accordingly negatived.

Paragraph, as amended, agreed to.

Summary paragraph 7 brought up and read as follows:

We disagree with the Government's contention that the concept of ever closer union is legally significant. Nonetheless, UK disengagement from the concept could be politically significant as it could be used to advocate further opt-outs in future Treaty negotiations or to resist integrationist initiatives. To be robust, such disengagement would require Treaty amendment.

An Amendment made.

Another Amendment proposed, to leave out from "initiatives" to the end of the paragraph.—(Damian Green.)

The Committee divided.

Ayes, 4

Geraint Davies

Peter Grant

Damian Green

Kelly Tolhurst

Noes, 7

Richard Drax

Kate Hoey

Kelvin Hopkins

Mr Jacob Rees-Mogg

Alec Shelbrooke

Mr Andrew Turner

Heather Wheeler

Question accordingly negatived.

Paragraph, as amended, agreed to.

Summary paragraph 8 brought up and read, as follows:

We found little evidence to suggest that the proposals to reduce net migration into the UK from the EU will have a large scale effect on immigration numbers. Treaty amendment may not be required to deliver these objectives. Limited though the proposed changes are, the political and legal challenges of negotiating them — without affecting the rights of UK citizens — are nevertheless formidable.

An Amendment made.

Another Amendment proposed, to leave out the words “limited though the proposed changes are”.—(Damian Green.)

The Committee divided.

Ayes, 3	Noes, 8
Geraint Davies	Richard Drax
Damian Green	Peter Grant
Alec Shelbrooke	Kate Hoey
	Kelvin Hopkins
	Mr Jacob Rees-Mogg
	Kelly Tolhurst
	Mr Andrew Turner
	Heather Wheeler

Question accordingly negatived.

Paragraph, as amended, agreed to.

Paragraph—(The Chair)—brought up and read the first and second time and inserted (now summary paragraph 9).

Paragraph 1 read and agreed to.

Paragraph 2 read, amended and agreed to.

Paragraph 3 read and agreed to.

Paragraph 4 and 5 read, amended and agreed to.

Paragraph 6 read and agreed to.

Paragraph 7 read, amended and agreed to.

Paragraphs 8 to 14 read and agreed to.

Paragraph 15 read, amended and agreed to.

Paragraph 16 read and agreed to.

Paragraphs 17 to 19 read, amended and agreed to.



Paragraphs 20 to 21 read and agreed to.

Paragraph 22 read, amended and agreed to.

Paragraph 23 brought up and read.

Amendment proposed, to leave out from “Council” to the end of the paragraph.—(Damian Green.)

The Committee divided.

Ayes, 1

Damian Green

Noes, 8

Richard Drax

Peter Grant

Kate Hoey

Kelvin Hopkins

Mr Jacob Rees-Mogg

Alec Shelbrooke

Mr Andrew Turner

Heather Wheeler

Question accordingly negatived.

Paragraph agreed to.

Paragraphs 24 and 25 read and agreed to.

Paragraph 26 brought up and read, as follows:

Any provision in the Referendum Bill concerning information to be provided using Government resources should include a requirement to comply with any guidance issued by the Electoral Commission to ensure both the adequacy and the impartiality of such information. It should not extend to the provision of the Government's opinion which will no doubt be conveyed in a number of other ways.

Paragraph disagreed to.

Paragraph (now paragraph 26)—(The Chair)—brought up, read the first and second time, and inserted.

Paragraphs 27 and 28 read and agreed to.

Paragraph (now paragraph 29)—(The Chair)—brought up, read the first and second time, and inserted.

Paragraphs 29 to 42 (now paragraphs 30 to 43) read and agreed to.

Paragraph 43 (now paragraph 44) read, amended and agreed to.

Paragraphs 44 to 48 (now paragraphs 45 to 49) read and agreed to.

Paragraph 49 (now paragraph 50) brought up and read.

Amendment proposed, to leave out from “law” to the end of the paragraph.—(Damian Green.)

The Committee divided.

Ayes, 2	Noes, 7
Damian Green	Richard Drax
Alec Shelbrooke	Peter Grant
	Kate Hoey
	Kelvin Hopkins
	Mr Jacob Rees-Mogg
	Mr Andrew Turner
	Heather Wheeler

Question accordingly negatived.

Paragraph agreed to.

Paragraph 50 (now paragraph 51) brought up and read.

Amendment proposed, to leave out from “referendum.” to the end of the paragraph.—(Damian Green.)

The Committee divided.

Ayes, 1	Noes, 7
Damian Green	Richard Drax
	Peter Grant
	Kate Hoey
	Kelvin Hopkins
	Mr Jacob Rees-Mogg
	Mr Andrew Turner
	Heather Wheeler

Question accordingly negatived.

Paragraph agreed to.

Paragraphs 51 to 55 (now paragraphs 52 to 56) read and agreed to.

Paragraph 56 (now paragraph 57) read, amended and agreed to.

Paragraphs 57 to 65 (now paragraphs 58 to 66) read and agreed to.

Paragraph 66 (now paragraph 67) read, amended and agreed to.

Paragraphs 67 to 71 (now paragraphs 68 to 72) read and agreed to.

Paragraph (now paragraph 73)—(The Chair)—brought up, read the first and second time, and inserted.

Paragraph 72 (now paragraph 74) brought up and read.

Amendment proposed, to leave out from “such” to the end of the paragraph and insert “great importance in these negotiations that the Government must be able to show a binding commitment from other Member States to a fair solution for non-Euro members”.—(Damian Green.)

The Committee divided.

Ayes, 2	Noes, 7
Peter Grant	Richard Drax
Damian Green	Kate Hoey
	Kelvin Hopkins
	Mr Jacob Rees-Mogg
	Alec Shelbrooke
	Mr Andrew Turner
	Heather Wheeler

Question accordingly negatived.

Paragraph agreed to.

Motion made, and Question put, That Paragraph 73 (now paragraph 75) stand part of the Report.

The Committee divided:

Ayes, 2	Noes, 6
Peter Grant	Richard Drax
Damian Green	Kate Hoey
	Kelvin Hopkins
	Mr Jacob Rees-Mogg
	Mr Andrew Turner
	Heather Wheeler

Question accordingly negatived.

Paragraph agreed to.

Paragraph 74 (now paragraph 76) read, amended and agreed to.

Paragraphs 75 to 80 (now paragraphs 77 to 82) read and agreed to.

Paragraphs 81 and 82 (now paragraphs 83 and 84) read, amended and agreed to.

Paragraph (now paragraph 85)—(The Chair)—brought up, read the first and second time, and inserted.

Paragraphs 83 to 85 (now paragraphs 86 to 88) read and agreed to.

Paragraphs 86 to 88 (now paragraphs 89 to 91) read, amended and agreed to.

Paragraph (now paragraph 92)—(The Chair)—brought up, read the first and second time, and inserted.

Paragraphs 88 to 92 (now paragraphs 93 to 96) read and agreed to.

Paragraph 93 (now paragraph 97) read, amended and agreed to.

Paragraphs 94 to 104 (now paragraphs 98 to 108) read and agreed to.

Paragraph 105 (now paragraph 109) read, amended and agreed to.

Paragraphs 106 to 110 (now paragraphs 110 to 114) read and agreed to.

Paragraph 111 (now paragraph 115) read, amended and agreed to.

Paragraph 112 (now paragraph 116) read and agreed to.

Paragraphs 113 and 114 (now paragraphs 117 and 118) read, amended and agreed to.

Paragraphs 115 to 125 (now paragraphs 119 to 129) read and agreed to.

Paragraph 126 (now paragraph 130) brought up and read.

Amendment proposed, to leave out from “November” to the end of the paragraph.—  
(Damian Green.)

The Committee divided.

Ayes, 1

Damian Green

Noes, 7

Richard Drax

Peter Grant

Kate Hoey

Kelvin Hopkins

Mr Jacob Rees-Mogg

Mr Andrew Turner

Heather Wheeler

Question accordingly negatived.

Paragraph amended and agreed to.

Paragraph 127 (now paragraph 131) read, amended and agreed to.

Motion made, and Question put, That Paragraph 128 (now paragraph 132) stand part of the Report.

The Committee divided:

Ayes, 1	Noes, 8
Damian Green	Richard Drax
	Peter Grant
	Kate Hoey
	Kelvin Hopkins
	Mr Jacob Rees-Mogg
	Alec Shelbrooke
	Mr Andrew Turner
	Heather Wheeler

Question accordingly negatived.

Paragraph agreed to.

Paragraph 129 (now paragraph 133) read, amended and agreed to.

Paragraphs 130 to 136 (now paragraphs 134 to 140) read and agreed to.

Paragraph 137 (now paragraph 141) read, amended and agreed to.

Paragraphs 138 to 140 (now paragraphs 142 to 144) read and agreed to.

Paragraph 141 (now paragraph 145) brought up and read.

Amendment proposed, to leave out from “Justice.” to the end of the paragraph.—(Damian Green.)

The Committee divided.

Ayes, 1

Damian Green

Noes, 8

Richard Drax

Peter Grant

Kate Hoey

Kelvin Hopkins

Mr Jacob Rees-Mogg

Alec Shelbrooke

Mr Andrew Turner

Heather Wheeler

Question accordingly negatived.

Paragraph amended and agreed to.

Paragraphs 142 to 145 (now paragraphs 146 to 149) read and agreed to.

Paragraph (now paragraph 150)—(The Chair)—brought up, read the first and second time, and inserted.

Paragraphs 147 to 148 (now paragraphs 151 to 153) agreed to.

*Resolved*, That the Report be the Fourteenth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 16 December at 1.45 pm.]

# Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the Committee's inquiry page at [www.parliament.uk/escom](http://www.parliament.uk/escom).

## Wednesday 16 September 2015

*Question number*

**Rt Hon Mr David Lidington MP**, Minister for Europe and **Vijay Rangarajan**, Europe Director, Foreign and Commonwealth Office

[Q1–45](#)

## Wednesday 4 November 2015

**Charles Grant**, Director, Centre for European Reform, **David Green**, Director, Civitas, and **Professor Simon Hix**, Director of Political Science and Political Economy Group, London School of Economics

[Q46–82](#)

## Tuesday 17 November 2015

**Rt Hon Philip Hammond MP**, Secretary of State and **Vijay Rangarajan**, Europe Director, Foreign and Commonwealth Office

[Q83–110](#)

## Wednesday 18 November 2015

**Professor Damian Chalmers**, European Union Law, London School of Economics

[Q111–123](#)

**Professor Sir Alan Dashwood QC**, Emeritus Professor of European Law and Fellow of Sidney Sussex College, Cambridge, **Martin Howe QC**, and **Professor Sir Francis Jacobs KCMG QC**, President of the King's College London Centre for European Law

[Q124–146](#)

## Published written evidence

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The following written evidence was received and can be viewed on the Committee's inquiry page of the Committee's website. ref numbers are generated by the evidence processing system and so may not be complete.

- 1 Convention of Scottish Local Authorities (COSLA) ([ref0001](#))
- 2 Dr Theodore Konstadinides and Dr Noreen O'Meara ([ref0005](#))
- 3 Dr Katarzyna Granat ([ref0002](#))
- 4 Foreign and Commonwealth Office ([ref0007](#))
- 5 Professor Michael Dougan and Dr Michael Gordon ([ref0003](#))
- 6 Professor Damian Chalmers ([ref0004](#))
- 7 Professor Sionaidh Douglas-Scott ([ref0006](#))
- 8 Wilfred Aspinall ([ref0008](#))



# List of Reports from the Committee during the current Parliament

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All publications from the Committee are available on the Committee's website at [www.parliament.uk/escom](http://www.parliament.uk/escom)

## Session 2015–16

First Report	Documents considered by the Committee on 21 July 2015	HC 342-i
Second Report	Commission Communication: European Agenda on Migration and associated documents	HC 342-ii
Third Report	Documents considered by the Committee on 9 September 2015	HC 342-iii
Fourth Report	Documents considered by the Committee on 16 September 2015	HC 342-iv
Fifth Report	Documents considered by the Committee on 14 October 2015	HC 342-v
Sixth Report	Documents considered by the Committee on 21 October 2015	HC 342-vi
Seventh Report	Documents considered by the Committee on 28 October 2015	HC 342-vii
Eighth Report	Documents considered by the Committee on 4 November 2015	HC 342-viii
Ninth Report	Documents considered by the Committee on 18 November 2015	HC 342-ix
Tenth Report	Documents considered by the Committee on 25 November 2015	HC 342-x
Eleventh Report	Documents considered by the Committee on 2 December 2015	HC 342-xi
Twelfth Report	Cross-border law enforcement cooperation—UK participation in Prüm	HC 342-xii
Thirteenth Report	Documents by considered by the Committee on 9 December 2015	HC 342-xiii