UK Government's plans to renegotiate EU membership

1. The authors are academics at the School of Law, University of Surrey. This evidence is submitted in a personal capacity. Given that a further call for evidence will be made when further details are available about the Government’s negotiations, this submission primarily addresses issues arising from the Europe Minister’s oral evidence presented to the Committee on 16 September 2015.

Introduction

2. At the outset, it should be recalled that the aim of getting a ‘fair deal for the Britain’ from the ongoing renegotiation process is one of the Juncker Commission’s declared priorities.\(^1\) Jean-Claude Juncker’s State of the Union speech, delivered on 9 September, reflected on the ‘strategic importance’ of the outcome of the forthcoming referendum for the Union as a whole,\(^2\) emphasizing that the UK’s membership is better for both the UK and the EU. As President Juncker has observed, continued efforts to modernize the EU and to strengthen its capacity to respond to challenges, are efforts which are in the interests of all 28 Member States.

3. A number of issues raised by Mr Lidington as key issues in the negotiation process already feature in the European Commission’s policy agenda. As such, the Minister has not raised issues that are not already well known and where concerns are not restricted to the UK. In the authors’ view, reform on the main areas addressed by the Minister – at least, to the extent that negotiation is likely to be acceptable to all other Member States - would not constitute a transformation of the UK’s relationship with the EU.

Comments on the terms of reference

4. The terms of reference appear to overlook the recent Balance of Competence review, despite the salience of its outcomes for the current negotiation process.\(^3\) We suggest that a reference to it is included if a further consultation on the UK Government’s plans to renegotiate EU membership is announced by the Committee.

Renegotiation Issues raised by Mr Lidington

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\(^2\) Ibid.

\(^3\) Review of the Balance of Competences (2012-2014); reports available at: [<https://www.gov.uk/guidance/review-of-the-balance-of-competences>].
5. According to the Minister’s oral evidence of 16 September 2015, the areas covered by the renegotiation broadly include: the single market; the Eurozone versus non-Eurozone Member States divide; sovereignty; and free movement and access to benefits. No information was provided on the UK Government’s red lines.

i) The single market

6. The Minister’s points in relation to the single market are predominantly policy-related and chime well with the current policy agenda of the Commission. For instance, the Minister talks about reducing red-tape and exploring new trade agreements. He also elaborates on current policy including competitiveness and job creation. These are points summarised by Juncker in his recent State of the Union address.

7. The further development of the single market, in which all 28 Member States have a stake, is clearly an area of vital importance for the evolution of the EU. This is an area which should be developed through a coherent, wide-ranging and innovative reform agenda, rather than focusing on isolated reforms and compromises in the context of the UK negotiations, and accelerating isolated changes in a sectoral way.

ii) Eurozone vs non-Eurozone Member States divide

8. The Minister does not seem to appreciate the rationale for monetary union. There is scope to refine the relationship of Member States participating in the EMU and those which remain outside it (since they all participate in the single market). However, the Minister’s remarks about integrating economic policy for EU Member States further, while preserving the integrity of the single market, demonstrates a lack of appreciation of the current dynamics in the Eurozone. Furthermore, the Minister makes a series of criticisms which lack any concrete examples of current deficiencies or unfair treatment prejudicing non-Eurozone states.

9. The Minister makes the paradoxical point of an ‘ever-closer union’ which at the same time permits scope for Member States to differentiate. This paradox has become a mainstream narrative, to the extent of being institutionalized by EU officials, such as President Juncker. Having said that, the future of the EMU - in the light of the financial crisis - remains an area of contention and something that merits every Member State being involved in a thorough evaluation and agreement on any future Treaties/Treaty changes, where necessary. This is important for two objectives: First, to refine the relationship between Eurozone and non-Eurozone Member States and second, to improve the overall effectiveness of Eurozone governance.

iii) Sovereignty

10. Sovereignty has always been a contentious issue relating to EU membership for all Member States. On the specific issue of strengthening the role of national parliaments through building on the yellow/orange
card mechanism provided by Lisbon, this Committee has already heard evidence on the Dutch and Danish parliaments’ proposals to which Mr Lidington referred. Whilst legislative reforms to this process would not adjust sovereignty in a constitutional sense, reinforcements to the system could usefully provide enhanced opportunities for the views of national parliaments to influence the legislative process at EU level. This would undoubtedly serve the interests of increasing accountability and drawing decision-making processes closer to citizens. In the meantime, the ‘green card’ initiative – executed for the first time in July 2015 – represented a constructive political engagement between national parliaments and the European Commission. In terms of legislative reforms in this area, it is currently unclear whether, and to what extent (if any), proposals on this issue from The Netherlands, Denmark and other Member States will be taken forward.

11. The Minister does not mention how the European Union Act 2011 is going to play out in the current ‘renegotiation’. Section 18 (Sovereignty Clause) and Sections 2, 3 and 6 (Referendum Locks) are most relevant to the discussion. On the one hand, the ‘Sovereignty Clause’ which provides that EU law has no authority in the UK in its own right confirms the primacy of EU law over domestic norms, which, in the case of the UK, has a statutory origin: The European Communities Act 1972. On the other hand, the Referendum Locks provide for a broad range of situations where a referendum can be held in the UK, inclusive of instances where the Government agrees to change the current Treaties, or certain EU legislative acts pertaining a wholesale transfer of power to the EU. More guidance on the practical effect of the European Union Act 2011 on the relationship between the UK and the EU, as well as its impact upon our courts and the legislature would be beneficial in the current debate. For instance, would a referendum under the European Union Act 2011 morph into a ‘Brexit’ referendum?

12. Finally, the Minister could explore further the UK’s prospects of future recourse to Article 4(2) TEU in respect of national identity, which is akin to national sovereignty. In spite of the availability of the identity clause, the UK has not yet made use of it. The Supreme Court has, however, implicitly qualified certain national provisions as encapsulating part of the country’s constitutional identity. In doing so, the Supreme Court has resorted to a unilateral assessment of which cases are to be considered internal and, therefore, to be decided at home behind closed doors and which cases are to be up for discussion with the CJEU. The above logic

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5 See for example, ESC, 24th Report of Session 2013-14, ‘Reforming the European Scrutiny System in the House of Commons’ HC 109-I.

was recently confirmed in the Supreme Court’s reasoning in the HS2 case.\(^7\)

**iv) Free movement and access to benefits**

13. Free movement does not appear to cause concerns for the Government as long as the person exercising his/her Treaty-based rights to free movement is not an economic burden on the state. Indeed, even the CJEU appears receptive to arguments about the need to maintain the financial equilibrium of the national social security system. In *Dano* (Case C-333/13) and *Alimanovic* (Case C-67/14), the CJEU backtracks somewhat from its previous, more liberal case law. In *Dano*, the CJEU held that Member States may exclude from entitlement to social assistance EU citizens who arrive in their territory without intending to find a job. In *Alimanovic*, the CJEU held that EU citizens who travel to a Member State of which they are not nationals in order to seek employment may be excluded from entitlement to certain social benefits. This apparent trend seems to be in sync with the Government’s view on the matter of free movement viz. access to social benefits.

14. The Prime Minister believes that success in the above four categories will amount to fundamental change in our relationship with the EU. Given the unlikelihood of many (if any) reforms being achieved via Treaty change in the near future, the likelihood of secondary legislation or alternative instruments being used, and the prospects of reforms being made in any event as a result of the Commission’s policy agenda, we suggest that this reform programme – on the basis of the limited information available – is unlikely to constitute the fundamental change the Prime Minister envisages.

**Conclusion**

15. The Government needs to be more transparent about the genuine likelihood of having a Treaty renegotiation as this is not on the horizon in any practical sense prior to the 2017 referendum. In effect, the UK’s power of negotiation to attain reforms that are, in the Prime Minister’s words, ‘legally binding and irreversible’, is relatively limited given the closeness of the referendum date. Past experience demonstrates that renegotiations involving Treaty changes take an extensive length of time because they require unanimous approval by national parliaments. The six year gap between the entries into force of the Treaties of Nice and Lisbon was due to the protracted negotiation processes and delays in Member States approving Lisbon. If pursuing reform via Treaty changes, the UK Government should be upfront about the likelihood of the referendum occurring with the promise of future Treaty changes, rather than delivering them in the near future.

16. On the other hand, the Minister does not exclude the possibility of achieving reforms through secondary legislation. The Government

\(^7\) *R (HS2 Action Alliance Ltd, Buckingham County Council and others) v Secretary of State for Transport* [2014] UKSC 3.
appears open-minded about the range of instruments available and is prepared to take the advice of the EU Institutions about the appropriate instruments. In any event, secondary legislation will be sectoral, only producing relative gains for the UK. Secondary legislation would be inappropriate for achieving the kind of fundamental reforms to the UK-EU relationship which the Government appears to seek.

17. One would imagine the Government should present its ‘deal’ and full details of the results of the renegotiation process well in advance of any referendum, to provide sufficient time for parliamentary debate, Committee scrutiny and informed public debate. An opaque negotiation process, leading to a fait accompli to be presented to parliament and the public is evidently the manner in which the present Government wishes to redefine the UK’s position in the EU. Such a deal would, presumably, not be subject to further changes prior to a referendum without further negotiations with the EU institutions and Member State governments.

18. According to the Minister, ‘it is not unreasonable for the elected government’ to negotiate and then come back to Parliament with a final deal. This appears to negate any input from the Committee or the public influencing the process of renegotiation. As such, the input of parliament and the public in the process would be negated. In our view, this approach is disappointing and marginalizes the role of the public on an issue of central importance to the strategic political and constitutional future of the UK.

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