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The ‘Hokey Cokey’ Approach to EU Membership: Legal options for the UK and EU

Paul James Cardwell

Abstract

This contribution analyses the potential legal outcomes to meeting the UK’s demands in advance of the referendum and what they might mean for EU integration should the UK vote to remain in the Union. It argues that there is unlikely to be a ‘quick fix’ to meet the demands since there is no obvious legal mechanism which can satisfy the demands in either substance or the proposed time-frame, as supported earlier in the debate.

Key words

Brexit, European integration, subsidiarity, EU legal order.

1. Introduction

The question to be put to the UK electorate, ‘Do you wish for the UK to remain a member of the European Union?’ (European Union Referendum Act 2015) on 23 June 2016 leaves open the additional question of what form a relationship would take in the event of a ‘remain’ vote. The referendum has been premised on the renegotiation of the relationship between the UK and the EU, as was the stated objective of Prime Minister David Cameron in his Bloomberg speech in 2013, which launched the referendum process. The manifesto commitment of the Conservative Party before the May 2015 general election was to bring forward renegotiation proposals as soon as possible, though these were only finally revealed in a letter to Council President Donald Tusk on 10 November 2015 (Cameron 2015a) and a speech at Chatham House on the same day (Cameron 2015b). The agreement reached by the European Council on 19 February 2016 on a new settlement for the UK in the EU set the wheels in motion for a June referendum. However, translating this agreement into the legal order of the Union is far from settled.

The negotiating situation the UK and the EU have found themselves in is unprecedented. A large-scale revision of the Treaties in the past has been conducted through the convening of an Intergovernmental Conference. Minor treaties which introduce changes (such as the accession of a new Member State) have been the result of agreement amongst the Member States, though not always without controversy at the domestic ratification stage. The UK already enjoys a more differentiated relationship with the EU than all other Member States; including a permanent opt out from the euro, the Schengen area, aspects of Justice

and Home Affairs, the Charter of Fundamental Rights and of course, the budget rebate agreed in the 1980s. Any further changes, as well as opening the opportunity for other states to join with their demands for exceptional treatment, suggest that the single, unitary legal order of the EU is severely under pressure. In short, even with an agreement on a new settlement for the UK in the EU, we are still largely in the dark about what the consequences will be for the relationship between the UK and the EU and for the EU's own legal order if the UK decides to remain a Member State.

This contribution analyses the legal outcomes in meeting the UK's demands in advance of the referendum and what they might mean for EU integration should the UK vote to remain in the Union (Butler et. al 2016). This article argues that there is unlikely to be a 'quick fix' to meet the demands since there is no obvious legal mechanism which can satisfy the demands in either substance or the proposed time-frame, as supported earlier in the debate (Lazowski 2016). If the UK votes to remain a Member State, then the practice of differentiated integration in the EU is likely to be (further) constitutionalized.

2. The UK demands and the 'new settlement'

Cameron's letter states that the concerns of the British people 'really boil down to one word: flexibility' (Cameron 2015a). By this, it seems that he means the EU should be able to accommodate flexibility in the process of integration and ability to operate with the 'speed and flexibility of a network, not cumbersome rigidity of a bloc' (Cameron 2013). Does he also mean flexibility in terms of how these should be accommodated? This does not appear to be the case: the letter of demands makes repeated references to 'formal' and 'legally binding principles' as a means of ensuring that the demands for a reformed relationship are met, rather than by informal, political agreement(s) (Cameron 2015a), potentially seen by other EU Member States (Oliver 2016). He has since underlined the nature of the decision take by the European Council as 'legally binding', though what this precisely has been disputed by some of his own Ministers. This lack of flexibility is likely to have important implications for both finding an appropriate means to do so within the EU's legal order and his ability to gain agreement amongst the Member States. But summarizing the demands as opposition to the EU as a 'bloc' speaks to a tension over some of the ways in which the EU has developed as an integration process, including the enforcement of EU law in the Member States. For this reason, the demands cannot merely be seen as technical means of securing 'opt outs' from particular policies, but must be seen in the much bigger, constitutional picture.

The renegotiation strategy adopted by the UK government relied on four main demands (Jensen and Snaith 2016). First, the 'integrity of the Single Market' needs protecting to ensure the rights of non-euro Member States in law and policy-making. Second, emphasis should be placed on cutting red-tape and the

'burden' on business and work towards the EU's commitment to 'free flow of capital, goods and services' as a means of boosting competitiveness. Third, the UK's sovereignty needs to be protected, including by ending the obligation to the 'ever closer union' and greater commitments to subsidiarity. Fourth, EU migration to the UK needs to be reduced by cracking down on 'abuse' and the entitlement to benefits and social welfare by imposing greater waiting periods for EU citizens (Cameron 2015a).

The demands are diverse and cut across different areas of EU activity. As such, the legal responses are unlikely to be easily captured in one instrument or mechanism. The diversity is evident in the language used as part of the demands which are not crystallized around one type of mechanism, such as an 'opt out'. Indeed, one of the demands – on competitiveness – actually calls for more integration around three of the four freedoms (capital, goods and services) whilst scaling back on the free movement of workers. Rather, they might conceivably be achieved in the following ways: a change to existing Treaty provisions by adding or altering provisions which do or do not specifically refer to the UK; an agreement which does not amend the Treaty at present but which would be incorporated into future Treaty revisions; the adoptions of a legislative programme (based on, but separate to the Treaty arrangements); or changes to current EU legislation adopted pursuant to existing Treaty articles. This diversity has a strong impact on the type of legal mechanisms able to satisfy them. It should also be borne in mind that some of the demands relate to the direction the EU should take in the future, and therefore cannot be satisfied by any single agreement or disposition.

3. The 'ever closer union'

The clearest demand for a particular Treaty provision to *not* apply to the UK is that of the 'ever closer Union'. These words appear twice in the TEU, in the preamble and Article 1 TEU, the relevant part of which reads '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'. Given that this is a fundamental part of the EU's *raison d'être*, it is difficult to see how an 'ever closer Union (for all but one of the Member States)' is in any way practical unless this goal is removed from the Treaty entirely, which is highly unlikely. The provision encapsulates the spirit and purpose of the Treaty (which was, of course, signed and ratified by all Member States) as an integration process. But the principle has also provided the Court of Justice of the European Union (CJEU) with a means to resolve disputes before it when faced with a binary choice between a more and a less integrationist position. It is no doubt this aspect which has caused some consternation in the same way that the CJEU is accused of 'widening the scope' of EU law in the immigration part of the demands. This demand is difficult to reconcile with the recent dicta of the CJEU in its Opinion 2/13 on the

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 ... in a 'process of creating an ever closer union among the peoples of Europe' (Opinion 2/13 of the CJEU, 18 December 2014, para 167)

That said, the 'ever closer union' has not generally been interpreted as meaning that the EU has – or should have – unlimited competence to harmonize, since this is evident from the text of the rest of the Treaty. There are many areas of activity where harmonization has not fully progressed, as Cameron implies in his call for further integration of the single market and some areas where there is little or no integration. However, key to the success of integration so far has been the development of legal principles around the 'new legal order' of the EU and the concept of this legal order being essentially singular, enabling coherence to flow from the CJEU to the national courts in the interpretation and effective enforcement of EU law (Cardwell and Hervey 2015). The single legal order may be at risk if such a general principle of EU law does not apply to the UK. Would it mean thus that in CJEU cases involving the UK, an argument could be raised that the purpose of a certain measure cannot be seen in the light of the purpose of the Treaty and should therefore not apply? This would mean potentially different responses to cases involving another Member State. The answer to this question is unclear but the CJEU would no doubt look to other instances within the Treaty which reflect its nature as creating and furthering an integration process. Just as Cameron calls for competitiveness to be wired 'into the DNA of the whole European Union', it is contended here that the 'ever closer union' is the inspiration behind the whole integration process, whether or not those words actually appear in the Treaty or not (as is the case for direct effect, for example).

How could this issue be resolved? It seems that either a change to the Treaty by removing Article 1 TEU and the mention of the 'ever closer union' from the preamble is unlikely in the short-term. The agreement adopted at the European Council recognises that the UK 'is not committed to further political integration into the European Union' and that the 'substance of this will be incorporated into the Treaties at the time of their next revision' (European Council 2016). Altering the wording, such as to an '.. ever closer union in the fields which the Member States have agreed' might be possible, though it already appears to be substantively covered by the competence provisions which follow shortly after (Article 5 TEU). Alternatively, a protocol could be added to the Treaty which reaffirms that the 'ever closer union' does not apply in all contexts. This could be either specific to the UK (joined by any other like-minded Member States) or a more general formulation. Or perhaps it could be defined more negatively, such as 'Nothing in the Treaties shall commit the UK to...'. This latter example might be similar to Protocol No. 35 annexed to the Treaties, ('nothing in the Treaties... shall affect the application in Ireland of Article 40.3.3 of the

Constitution of Ireland’, which concerns abortion) though in a much less specific way. According to Article 51 TEU, ‘The Protocols and Annexes to the Treaties shall form an integral part thereof’. Furthermore, the addition or amendments of protocols would require ‘the full Treaty amendment process’ (Peers 2015). Declarations, of which there are 65 annexed to the Treaties post-Lisbon (Łazowski 2016) (with 5 by the UK acting alone or with another Member States) could be used with the same wording and would not require the Treaty amendment process, whilst ‘formal’ would fall short of a requirement to be legally binding. Any kind of Treaty change or addition Protocol would seem to meet Cameron’s demand for a change in ‘formal, legally-binding and irreversible way’ but will be subject to a Treaty-revision procedure at some point in the future. This in itself is likely to be highly contentious.

4. Subsidiarity

Subsidiarity is found in the Treaty in Article 5(3) TEU:

the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Cameron’s letter calls for the EU’s commitments to subsidiarity to be ‘fully implemented’. But what does this mean? The principle – introduced explicitly by the Treaty of Maastricht in 1992 – is a notoriously slippery concept to define in the absence of a fully-fledged constitution for the EU (Davies 2006). What is meant by its ‘implementation’ is even trickier, with the potential exception of the greater role proposed for national parliaments. Protocol no. 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaties, is to be read in conjunction with Art 5(3) for draft legislative acts and concerns the processes the Commission must go through to ensure compliance with subsidiarity. It essentially rests on an evaluation of whether the EU should or should not act in any given area of shared competence via a ‘comparative efficiency’ test (Schütze 2012: 178). Subsidiarity is largely a subjective and vaguely defined principle. Although it has generated much academic commentary since Maastricht, clarity provided by the judiciary is not forthcoming since there have been relatively few opportunities for the CJEU to consider subsidiarity in detail. The Court’s subsidiarity review has been characterized as ‘light’ (Craig and De Búrca 2015: 100) and ‘rather underwhelming’ (Horsley 2011: 269). The UK attempted, under the previous majority Conservative government, to challenge the Working Time directive on the grounds of subsidiarity – a judgment which the UK lost but of which the text has had a structuring effect on the judicial vision of subsidiarity ever since (Schütze 2012: 182). It is no coincidence that this particular

directive – often cited by opponents of EU membership as an example of the institutions overstepping the mark, has provided the impetus for the demand to ‘implement’ subsidiarity more fully, despite it not being a familiar concept in the UK legal system.

It is difficult to imagine how the Treaties provision or the existing Protocol could be revised to accommodate this particular UK demand. Given that the demand emphasizes implementation, it may not be the wording itself but rather an elaboration of the understanding of what should be done at EU level and what should not. This might be on a policy-by-policy basis or by an even more elaborate process-based policy than is provided by the current Protocol no. 2. At the same time, it is inconceivable that the UK would be arguing for the Court of Justice to have greater responsibility for implementing and defining the parameters of subsidiarity-based review.

The most obvious institutional means to secure greater subsidiarity in practice is via the role of national parliaments. This is, curiously, listed separately within the demands on sovereignty in Cameron’s letter even though the main institutional innovation relating to subsidiarity within the Treaty of Lisbon was the creation of the ‘yellow’ and ‘orange’ card procedures for national parliaments. Member States’ national parliaments’ having a greater role is difficult to argue against ‘losers of integration’ (see, for example, Auel and Höing 2014). It is too early to tell whether these procedures are effective or not, since the yellow card has only been used twice and the orange card not at all (European Commission 2015; Fabbrini and Granat 2013). As noted in analysis of the Treaty of Lisbon (Craig 2010: 186), the question of whether national parliaments could use this principle by successfully bringing Article 263 of the Treaty on the Functioning of the European Union (TFEU) actions (judicial review) or submitting reasoned opinions to the Commission as to why subsidiarity was infringed is an interesting possibility. With this in mind, it is still too early to conclude whether these important innovations at Lisbon have proved worthwhile or not. It is not clear, moreover, whether the ‘clear proposals’ called for on the implementation of subsidiarity principles concern more than national parliaments but other actors too, such as citizens, or whether this is an attempt to clear up the ‘conceptual contours’ (Schütze 2012: 178) of the principle. The European Council agreement places the emphasis on national parliaments to issue reasoned opinions on legislative drafts, which (if they account for more than 55% of the votes allocated to national Parliaments) will trigger a discussion in the Council. It will then be for the Council to decide whether to discontinue the measure (European Council 2016). No amendment to the Treaty on this point is therefore suggested or included in the European Council agreement.

5. Conclusion: differentiated integration and the ‘unity’ of the legal order

British Exit from the EU: Legal and Political Implications

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If the above demands are eventually woven into the Treaty arrangements in some way, in the result of a vote for remaining in the EU, then there is potentially a fundamental shift in both UK-EU relations and even in the legal order of the EU itself. Whether or not any changes apply to all Member States or the UK alone, it would be very difficult to argue against the position that the EU is increasingly a ‘multispeed’ project or a Europe of ‘variable geometry’. It would seem likely that other Member States, even those who have not in the past sought exceptional treatment, would be likely to do so on the basis of national preoccupations. This has strong implications for our understanding of the legal order of the EU which is based around the single legal order. Legal analysis based on the idea of the EU as a single legal system cannot explain integration processes with variable integration, though neither can the EU’s variable legal order be treated on an entirely ‘intergovernmental’ basis (and hence closer to ‘classic’ international law). The role of both the CJEU and national courts in enforcing EU law and hence ensuring the effectiveness of the legal system would face great challenges in a legal system which would essentially be decentralized or pluralistic (De Búrca and Weiler 2011; Shaw et al. 2011). Whilst it might be argued that this is already the case, we find in the UK’s demands exceptions to some of the basis, constitutional provisions of EU law which is highly suggestive of a significant shift.

In the event of a remain vote, the appetite for enacting major changes to the Treaty amongst the Member States seems less and less likely. More pressing problems facing the EU (such as the refugee and euro ‘crises’) contribute to the fear amongst most other Member States and the EU institutions to embark up full-scale treaty negotiation. It is also highly likely that many Member States – especially those with government’s facing electoral pressure from the extremes of the political spectrum – will be tempted to bargain for special treatment too. However, that is not to say that the process of attempting to unpick key constitutional aspects of the Treaty will not be attempted in the future, either by the UK or others, thus inevitably resulting in that the legal system of the EU being faced with the need to consistently adapt to change.

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