



Foreign &
Commonwealth
Office

Minister for Europe
King Charles Street
London SW1A 2AH

28 January 2016

Sir William Cash MP
Chair
European Union Committee
House of Commons
London
SW1A 0PW

Dear Bill,

The UK Government's renegotiation of EU membership: Parliamentary sovereignty and scrutiny

I attach the Government's response to the Committee's report on Parliamentary sovereignty and scrutiny of the current renegotiation.

I am copying this letter to the Lord Boswell of Aynho, Chair of the House of Lords EU Committee, Crispin Blunt MP, Chair of the House of Commons Foreign Affairs Committee, the Clerks of both Committees, Les Saunders at the Cabinet Office, Laura Young and Faisal Moosa, FCO Departmental Scrutiny Co-ordinator, and Sheila Underwood, FCO Select Committee Liaison Officer

RT HON DAVID LIDINGTON MP

UK Government's renegotiation of EU membership: Parliamentary sovereignty and scrutiny House of Commons European Scrutiny Committee

HM Government response

The Government takes note of the report from the House of Commons European Scrutiny Committee. This paper sets out the Government's response to each of the Committee's conclusions and recommendations addressed to Government. The Committee's text is in bold and the Government's response is in plain text. Paragraph numbers in parentheses refer to the Committee's report.

Committee's conclusions and recommendations

- Engagement with Parliament and others

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)

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 for 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)

Parliament has a legitimate role in influencing the negotiation. It is disappointing that Parliament was not given a 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)

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)

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)**

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)

HM Government response

The Government is committed to keeping Parliament informed of the progress of the renegotiation. Although the Government is unable to provide a running commentary on ongoing and sensitive negotiations, it has been keeping Parliament informed and will continue to do so,

including through regular Ministerial appearances before Parliamentary Committees in both Houses of Parliament.

The Foreign Secretary gave evidence to the European Scrutiny Committee on 17 November 2015 and appeared before the House of Lords European Union Committee on 26 January 2016. The Chancellor of the Exchequer gave evidence to the Treasury Select Committee on 1 December 2015 and the Minister for Europe gives evidence to Committees on a regular basis, most recently on 14 December 2015 before the December European Council. The Minister for Europe responded to a Westminster Hall debate on the UK's renegotiation of its membership of the European Union on 5 January.

The Government also shared the Prime Minister's letter to President Tusk with Parliament, with the Minister for Europe making an oral ministerial statement in the House of Commons on 10 November 2015. The Minister for Europe also responded for the Government in a Westminster Hall debate that day about the EU renegotiation and Devolved Administrations. The renegotiation is regularly raised at Foreign and Commonwealth Office Oral Questions – most recently on 12 January 2016 – and Ministers are answering a large number of written questions on this issue.

The Prime Minister made an oral statement to the House of Commons on 5 January once the House had returned from recess, updating Parliament on the extensive discussion of all four areas of our renegotiation at the December European Council. The Prime Minister informed the House that he had set out the four areas where the UK is seeking significant and far-reaching reforms, that there had been extensive discussion of all four areas and that the Council committed to “work closely together to find mutually satisfactory solutions in all the four areas”.

The Government notes the Committee's comments on engagement with the Devolved Administrations. Foreign policy issues are a reserved matter and relations with the European Union are the responsibility of the Parliament and Government of the United Kingdom. However, the UK Government continues to involve the Devolved Administrations as directly and fully as possible in decision-making on EU matters that touch on devolved areas.

For example, EU reform is a standing agenda item at the Joint Ministerial Committee on Europe, which is chaired by the Minister for Europe or the Foreign Secretary and at which the Devolved Administrations are

represented at Ministerial level. The Foreign Secretary and Minister for Europe also meet regularly with representatives from the Devolved Administrations to discuss this issue and will continue to do so. The Foreign Secretary met the Scottish First Minister in London in September and in Edinburgh in January and the First Minister of Wales in December. The Minister for Europe met the Cabinet Secretary for Culture, Europe and External Affairs from the Scottish Government in November in Edinburgh, and visited Cardiff for discussions with the Welsh Government in December. The Minister for Europe hopes to visit Northern Ireland in the near future.

The Government notes the Committee's recommendation about engagement with the European institutions. Contact with the EU institutions on the renegotiation continues on a frequent basis. Most recently, the Chancellor of the Exchequer met President Juncker on 15 January and the Foreign Secretary met First Vice-President Timmermans on 18 January.

The Government notes the Committee's remarks on the provision of public information before the referendum. The EU Referendum Act 2015 commits the Government to publish information on the outcome of the renegotiation and the Government's opinion on what has been agreed, on rights and obligations arising from EU membership and on alternatives to EU membership. This information must be published at least ten weeks before the referendum is held.

Committee's conclusions and recommendations

- A legally binding and irreversible agreement?

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)

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)

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 the 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)

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)

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 European Parliament, and negotiation of the precise text could reveal differences not covered by a more general commitment. (Paragraph 57)

HM Government response

The Government is fighting hard to fix the aspects of our EU membership that cause so much frustration in the United Kingdom – so we get a better deal for our country and secure our future. In the end, the British people will decide whether we are stronger and better off with our European neighbours as part of the European Union or on our own. That is because we made a promise and kept it – to deliver an in-out referendum.

The Prime Minister has been very clear in his discussions with other leaders that the changes we are seeking must be legally binding and irreversible. On the Committee’s remarks about Treaty change, the Prime Minister’s position remains that some of the reforms we are seeking will

require Treaty change and we must have agreement to such Treaty change before the referendum.

Committee's conclusions and recommendations

- Economic governance

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)

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)

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)

It should be made absolutely clear that any safeguard 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).

HM Government response

The Government has been clear that it is seeking to ensure that, as the Eurozone continues to integrate, the interests of those countries outside the Eurozone are protected and the integrity of the Single Market respected. The Prime Minister set out the principles and protections that we are seeking in his letter to President Tusk on 10 November 2015. As well as making these principles permanent and legally binding, we want to agree a simple safeguard mechanism to ensure that they will be respected and enforced.

On the Committee's remarks about Treaty change, the Prime Minister's position remains that some of the reforms we are seeking will require Treaty change and we must have agreement to such Treaty change before the referendum.

Committee's conclusions and recommendations

- Competitiveness

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)

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)

HM Government response

The Government wants to build on recent progress that the Juncker Commission has made to increase competitiveness, reduce the burden of regulation and stimulate growth. As the Prime Minister's letter to President Tusk explained, the Government would like to see the EU go further. The Government would like to see a cut to the total burden on business and believes in bringing together the different proposals, promises and agreements on the Single Market, on trade and on better

regulation into a clear long-term commitment to boost the competitiveness and productivity of the European Union.

Committee's conclusions and recommendations

- Sovereignty: ever closer union

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)

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 of 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)

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)

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 a 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)**

HM Government response

The Government is seeking to end the UK’s obligation to work towards an ‘ever closer union’ as set out in the Treaty. The Prime Minister’s letter to President Tusk stated that we are seeking legally-binding and irreversible changes that will make clear that this commitment will no longer apply to the United Kingdom. The Government notes the Committee’s comments, and those of the experts it consulted, but believes that ‘ever closer union’ does matter and that it is not purely a symbolic issue – we want the UK to be permanently protected from any further European political integration.

On the Committee’s remarks about Treaty change, the Prime Minister’s position remains that some of the reforms we are seeking will require Treaty change and we must have agreement to such Treaty change before the referendum.

Committee’s conclusions and recommendations

- Sovereignty: national parliaments and sovereignty

The question before the voters will be whether to remain in or 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 the 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)

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 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)

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)

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)

HM Government response

The Government is seeking to take the UK out of ‘ever closer union’ and get more power for national parliaments. As the Prime Minister explained in his letter to President Tusk, he wants to enhance the role of national parliaments and is proposing a new arrangement where groups of national parliaments, acting together, can block unwanted legislative proposals. The Government notes the Committee’s comments about possible thresholds; the precise thresholds of national parliaments required will be a matter for the negotiation.

Committee’s conclusions and recommendations

- Immigration

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 – focussed 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)

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 some Treaty amendment will be necessary in order to make the outcome of the renegotiation “judge-proof”. (Paragraph 145)

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)

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)

HM Government response

The Government is seeking to reduce immigration by cutting the benefits EU migrants get, so we prevent our welfare system acting as a magnet and create a fairer system for people who work here and play by the rules. The Prime Minister’s letter to President Tusk set out that the UK believes in a open economy – but that we have got to be able to cope with all the pressures that free movement can bring, and right now the pressures are too great. The Government has proposed that people coming from the EU must live here and contribute for four years before they qualify for in-work benefits or social housing. As the Prime Minister said in the House on 5 January, the most difficult issues at the December European Councils were around free movement and welfare – but there was a great deal of goodwill and the Council agreed to work closely together to find mutually satisfactory solutions in all the four areas of our renegotiation.

On the Committee's remarks about Treaty change, the Prime Minister's position that some of the reforms we are seeking will require Treaty change has not changed and we must have agreement to such Treaty change before the referendum.