

Written Submission to the inquiry into the costs and benefits of EU membership for the UK's foreign policy carried out by the Foreign Affairs Committee

Members of the Committee,

The potential withdrawal of the UK from its commitments to the European Union (“EU”), principally embodied by the Treaty on the Functioning of the European Union (or “Treaty of Rome”) and the Treaty on European Union (or “Maastricht Treaty”), takes place in a context – national, European and global – far removed from that in which the forerunner to today’s EU, the European Coal and Steel Community (“ECSC”), was established by the Schuman Plan in 1951, from that in which the subsequent European Economic Community (“EEC”) was founded in 1957, and indeed from that in which the UK originally joined the bloc in 1973. The Durham miners, whom Herbert Morrison allegedly said would never agree to join the ECSC in 1950,¹ are gone, with the last mine having closed in 1994² and with the North East now having the highest unemployment rate in the UK for the three months ending November 2015.³ The Schuman Plan itself, which Harold Macmillan dismissed as a “plan to have a plan” in the same year,⁴ has long since been supplemented and supplanted, not least by the two Treaties mentioned above, themselves reinforced by copious amounts of secondary legislation. Today’s EU deals with matters not in the least countenanced by the original Plan, including environmental policy (added by the Single European Act in 1987) and Justice and Home Affairs cooperation (originally an innovation of the Maastricht Treaty, but partially transferred to the Treaty of Rome at the Amsterdam Summit of 1996-7 and renamed Freedom, Security and Justice).⁵ Today, these two once-new fields have grown to become (arguably) the two best examples of successful pan-European cooperation in the face of growing pan-European threat.

The Committee, in investigating the foreign policy consequences of a British exit from the EU, will therefore want to take full stock of the present day context in which such an exit would be effected, and indeed has already taken commendable pains to do so. With this humble contribution to the Committee’s work the author merely wishes, if he can, to supply a small amount more of such context, mainly on the legal side of things, in respect of the fifth, sixth and eighth of the present Inquiry’s parameters, viz:

- The extent to which the UK could continue to participate in EU collective action on an ad-hoc basis if it left the EU, and the benefits and drawbacks of such an approach;

¹ MJ Dedman, *The Origins and Development of the European Union 1945-95: A history of European integration* (Routledge, 1996) 65.

² <<http://www.durhamrecordoffice.org.uk/Pages/CoalminingandDurhamcollieries.aspx>> last accessed 30 January 2016.

³ Office for National Statistics, *Regional labour market, January 2016* (Statistical Bulletin, 20 January 2016) Table A (contains public sector information licensed under the Open Government Licence v3.0).

⁴ F Duchene, *Jean Monnet: The First Statesman of Interdependence* (Norton, 1994) 209.

⁵ This transfer process was completed at Lisbon, and, since the entry into force of the Treaty of Lisbon in 2009, these matters have undergone almost complete “communautairisation”.

- The international legal implications of a UK exit from the EU, including the scope and cost of renegotiating the international treaties to which the UK is a signatory as an EU member state (including the likelihood of securing favourable terms in such negotiations), and
- The impact on other EU states and EU institutions of UK withdrawal from the EU.

Bearing in mind that there is a degree of overlap, each of these will be taken in turn.

1. The extent to which the UK could continue to participate in EU collective action on an ad-hoc basis if it left the EU, and the benefits and drawbacks of such an approach

In terms of whether ad hoc opt-ins to EU regimes might be possible, this is not inconceivable. It is obvious, for example, that non-EU Member States such as Norway, Iceland and Lichtenstein can benefit from (and be burdened by) EU rules via their membership of the European Economic Area (“EEA”), although whether the UK would desire such membership following the dissolution of its membership of the EU is debatable, especially given that it would come with considerable expense but no legislative powers whatsoever, and indeed this course of action seems to have already been ruled out by the Prime Minister.⁶ It is equally obvious that non-EU Member States such as Turkey can participate in EU regimes via their Association Agreements with the bloc,⁷ although again such an arrangement might be unpalatable bringing with it, as it does, zero participation in rule-setting. That said, some third countries have at least managed to negotiate for themselves a degree of “freedom” in their agreements with the EU, such as Australia, who famously refused to sign up to a clause pledging her allegiance to EU human rights standards.⁸ It seems at least possible that this precedent could be built upon to reach a milder form of understanding.

Perhaps more creative solutions could be sought. If one considers, for example, the EU legal regime governing the prohibition on leghold traps,⁹ one sees that initially the EU adopted a Regulation, which was not only exclusionary but positively inimical towards non-EU countries, whose fur industries would thenceforth find themselves on the wrong end of costly import bans.

⁶ N Watt and R Mason, “Cameron tells anti-EU campaigners: 'Norway option' won't work for Britain” *The Guardian* (London, 28 October 2015) < <http://www.theguardian.com/politics/2015/oct/28/cameron-to-confront-norway-option-anti-eu-campaigners>> accessed 7 February 2016.

⁷ The Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 [1977] OJ L361/29, and much subsequent secondary legislation.

⁸ This was in relation to a Trade and Co-operation Agreement. See T King, “Human rights in the development policy of the European Community: towards a European world order?” (1997) XXVIII *Netherlands Yearbook of International Law* 51, 97.

⁹ Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards [1991] OJ L308/1.

However, the bloc then reached separate Agreements with Canada, the Russian Federation¹⁰ and the United States¹¹, which provided for a kind of waiver of liability, with regard to non-adherence to the requirements of the Regulation, as long as the Agreement was adhered to. Thus, a quadrilateral arrangement was brokered, on this single issue, without need for the adoption of a more comprehensive agreement on a wider range of subjects. This could perhaps be used as a model.¹² However, what must be noted about this model is that the EU itself remains in the driving seat throughout. The Member States must agree to the possibility of extra-Union negotiations, and then again to the starting of them, which means that the European Commission must ideally have the will to provide for such a possibility in the draft measure concerned. It is also not clear whether the Union would cover the administrative costs of these negotiations, or whether those costs would fall to the third country wishing to “join” the regime.

An extreme example of a post-exit legal arrangement whereby the UK could partake in EU collective action would be something like the European Space Agency, a *sui generis* arrangement (purely intergovernmental, not supranational) taking in not only a wide gamut of EU participant countries, but also one non-EU country in the form of Canada. This perhaps sets a precedent for a kind of “EU plus one” arrangement, on a single topic, although the right to join the arrangement would almost certainly bring with it a financial obligation for the joining party, perhaps quite a hefty one.

2. The international legal implications of a UK exit from the EU, including the scope and cost of renegotiating the international treaties to which the UK is a signatory as an EU member state (including the likelihood of securing favourable terms in such negotiations)

The international legal implications of the UK’s exit from the EU would of course be many, ranging from the obvious to the more subtle. It is clear, for example, that repeal of the European Communities Act 1972 would terminate the direct applicability of all EU regulations. If one takes the total percentage of the UK’s laws deriving from “Brussels” as 7%,¹³ and if one imagines for the sake of argument that half of these are regulations, then that could be 3.5% of existing British law wiped out overnight. Many of these would have international or foreign policy implications. These would include regulations concerning anti-dumping duties, which the

¹⁰ Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation [1998] OJ L42/43.

¹¹ In fact, the United States’ agreement was called merely an “Agreed Minute”, and referenced the Agreement with the other two countries: International Agreement in the form of an Agreed Minute between the European Community and the United States of America on humane trapping standards - Standards for the humane trapping of specified terrestrial and semi- aquatic mammals [1998] OJ L219/26.

¹² This brief description perhaps gives an undue impression of harmonious cooperation between the four parties. In fact, the negotiations had been extremely tense, with the US and Canada seriously considering pursuing a GATT/WTO dispute instead. Princen gives a nice description of the events up to 2002: S Princen, *EU Regulation and Transatlantic Trade* (Kluwer Law International, 2002) 82 et seq.

¹³ This figure is of course hotly contested by political parties. For an interesting discussion, the reader is referred to a podcast of the BBC Radio 4 programme “More or Less”: < <http://www.bbc.co.uk/programmes/b041yf8s>> accessed 10 February 2016. The figure used in the text is the lower of the two mooted in the programme.

UK would presumably have to reimpose on the offending country or countries on its own if it still desired the relevant protection, and regulations imposing so-called “smart sanctions”. With regard to the latter, where these originated with the EU itself, they would again need to be unilaterally reimposed (if desired). However, where these originated with the UN, the UK would be in any event under a duty to implement the sanctions regime concerned pursuant to her obligations under the United Nations Act 1946. However, as the judgment in *A, K, M and G v Her Majesty’s Treasury*¹⁴ shows, the UK courts are prohibited by Article 103 of this Act from subjecting UN Resolutions to scrutiny under any other Treaty, the European Convention on Human Rights for example. From the point of view, then, of the provision of an effective legal remedy and the prevention of miscarriages of justice, certainly where British citizens found themselves targeted, and unless the rights invoked could be located within domestic law as it stands, it would be preferable to maintain the EU level of jurisprudence, as the Court of Justice is not bound by UN rules and is therefore freer than the Supreme Court to provide vital judicial review of the legality – under EU Law – of the sanctions in question.¹⁵

With regard to the potential renegotiation of international treaties to which the UK is a signatory as an EU member state, and the scope and cost thereof, this modest contribution makes no comment as the Committee has already received expert testimony on this point. However, it might be worth noting that to that cost, whatever it may be, should be added the cost of negotiating from scratch twenty seven bilateral extradition treaties with the remaining Member States following the UK’s inevitable abandoning of the European Arrest Warrant (unless an ad hoc arrangement, as discussed above, is reached), following a decision to withdraw from the Union. This is where a more subtle legal implication of Britain’s exit may show itself. This is because the UK courts up to and including the Supreme Court, once set free from the doctrine of direct and indirect effect, will not only no longer be required to follow EU rules in domestic courts, but will also no longer be required to follow the Court of Justice’s *interpretations* of those rules (or such interpretations as it might anticipated that that Court would give). Thus if *Assange v Swedish Prosecution Authority*¹⁶ had arisen after a UK exit and the adoption of a new bilateral extradition treaty with Sweden, it is likely that the Supreme Court would not have included a “prosecutor” within the definition of a “judicial authority”, but would instead have ruled that a “prosecutor” *cannot* be regarded as a “judicial authority”, would have quashed the Swedish arrest warrant, and would have set Mr Assange free. This would certainly have had effects within the realm of UK foreign policy. Put another way, being part of the European Union has broadened the UK’s legal horizons, so to speak, opening British judges up to new ways of looking at old problems. The British have thus become members of wider (legal) interpretative community and this has been (it could be argued) to good effect. However, denied the influence of the Court of Justice’s “teleological” approach to statutory interpretation, British judges will fall back on their traditional approaches, and wide, pro-integration decisions are likely to be replaced by narrow, parochial ones.

¹⁴ [2008] EWCA Civ 1187, [2009] 3 WLR 25.

¹⁵ I am grateful to Dr Joe Stevens for this point. See further J Stevens, xxx.

¹⁶ Supreme Court, 19.6.12.

3. The impact on other EU states and EU institutions of UK withdrawal from the EU

With regard to the UK's trade relations with the other EU Member States in the event of the country's exit from the EU, it is clear that the country would no longer be bound by, for example, the prohibition on quantitative restrictions and measures having equivalent effect imposed by Article 34 TFEU. This means that the Westminster Parliament could ban the pre-watershed television advertising of certain magazines,¹⁷ or the sale by internet of pharmaceuticals,¹⁸ or the use of motorcylcle trailers,¹⁹ or even that a British administrative body could set up rules for the certification of copper fittings,²⁰ without fear of an adverse European Court ruling forcing it to overturn the ban or abrogate the rules. Thus publishers of said magazines, or producers of said pharmaceuticals, or makers of trailers or washers, based in other Member States, would find their trading with the UK hampered or halted without EU legal redress. Protectionism, if such a thing was desired, could quite easily be brought about. Of course the reverse would also be true. Governments or bodies in the other Member States, imposing quotas or bans (or their equivalent) on British goods, could do so with immunity from sanction at EU level. There would thus be a kind of Mutually Assured Obstruction. Depending on the extent to which she truly abandons EU Law, then, Britain's post-withdrawal relationship with the other EU States might come to be characterized as one of mutual mean-spiritedness, mutual snobbery and mutual isolationism. It is true that either side could pursue the other through the World Trade Organisation (the Member State being represented by the EU as a whole) and so in this way it could be argued that the redress or sanction would not be entirely eliminated, merely moved up a level. However, there would be financial implications of this leveling-up, not to mention diplomatic ones.

Turning from so-called negative harmonization to positive harmonization, it is clear, if one looks at something like the CE Mark, that, post-exit, British producers, manufacturers, and indeed anyone working in an industrial or mechanized context, or with hazardous substances, could ignore the European rules (including health and safety and environmental protection rules) the compliance with which ensures entitlement to display the Mark. To take a simplistic example, the manufacturer of a cooling fan could specify whatever aperture size he or she wanted for the grill covering the fan.²¹ Indeed, this may be the type of "red tape" which the Prime Minister wants rid of, to boost competitiveness.²² However, unilaterally abandoning these rules would

¹⁷ This example derived from Joined cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95)* [1997] ECR I-3843, where it was a Swedish ban at issue.

¹⁸ Case C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* [2003] ECR I-14887 (German ban).

¹⁹ Case C-110/05 *Commission of the European Communities v Italian Republic* [2009] ECR I-519 (*Trailers*) (Italian ban).

²⁰ Case C-171/11 *Fra.bo SpA v DVGW* (CJEU, 12 July 2012) (German rules).

²¹ This example derived from M Keay, "Making the right mark: the vexed question of CE and self-certification by equipment manufacturers" (2003) 84(2) *Process engineering* 23.

²² The Prime Minister did not actually use the phrase "red tape" in his letter to Donald Tusk setting out his requests of 10 November 2015, referring instead to "cutting regulation": David Cameron, "A new settlement for the United Kingdom in a reformed European Union" (Letter to Donald Tusk, 10 November 2015) <

only (arguendo) boost competitiveness outside Europe, not within it. For, although once again the UK could exclude goods from other Member States by setting different standards (more or less the opposite of competitiveness), the other Member States would be forced to reject British goods, as the sale of products in Europe which do not carry the CE Mark is illegal. In the former scenario, this forcible shrinking of their market is likely to provoke a negative reaction from manufacturers in other Member States.²³ The impact on other Member States would thus be negative, and Britain's post-exit relationship with these States might come to be characterized as one of animosity. In the latter scenario, it would be British manufacturers facing a shrunken market. However, the impact on other EU States would still be adverse, as they would be denied the benefit of excellent British goods.

In the field of public procurement, the UK would no longer have to put all of its big public contracts out to EU-wide tender, so that, for example, a British firm like Bombardier would be prevented from "losing" a contract like the provision of rolling stock for London's Thameslink network to a German firm like Siemens.²⁴ But again that would cut both ways, and British manufacturers of wind turbines (for example) might themselves "lose" contracts in other EU States wishing to build wind farms. The impacts would be the same as the previous paragraph.

The solution to all of these issues, of course, would be for the UK voluntarily to maintain adherence to the EU's rules, but this would surely call into question the purpose of withdrawal in the first place.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf
> accessed 7 February 2016, 3.

²³ Similar perhaps to that of the Russian farmers in the aftermath of the recent imposition of sanctions on Russia.

²⁴ D Millward, "Bombardier blow as Siemens wins £1.6bn Thameslink deal" *The Telegraph* (London, 13 June 2013) <<http://www.telegraph.co.uk/finance/newsbysector/transport/10119477/Bombardier-blow-as-Siemens-wins-1.6bn-Thameslink-deal.html>> accessed 10 February 2016.