Martin Howe

Zero Plus:

The Principles of EU Renegotiation

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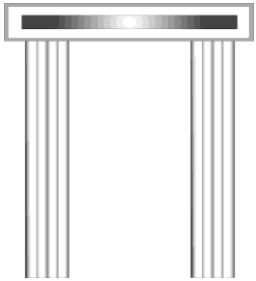

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The Principles of EU Renegotiation

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Introduction:
Renegotiation: Pledge and opportunity

The Referendum Pledge

The Prime Minister has committed himself and the Conservative Party to holding a referendum in 2017 on whether or not the UK should stay in the European Union if he continues as Prime Minister after the 2015 General Election. In the run up to this referendum, the government intends to renegotiate the terms of the UK's membership, preferably as part of a wider process of reform of the European Union. The re-negotiated terms would then be put to a referendum in which the question put would be whether people wish to remain in the EU or leave it.,

Two things are perfectly clear. First, such a referendum will happen if after 2015 there is majority in Parliament which is prepared to vote for holding it. Secondly, if the British people do decide to vote 'no', then the British government will have the power to implement their decision to leave the EU without needing the consent of the EU institutions or the other Member States.

In this way, the situation is quite different from that which prevailed about a possible referendum on the Lisbon Treaty when the present Conservative-led government came to power. By then, the Lisbon Treaty had actually been ratified and had irreversibly amended the previous EU treaties. Even if a referendum had been held on the Lisbon Treaty and the people had decided to reject it, the UK simply had no power unilaterally to unravel the Lisbon amendments and go back to the previous EU treaties, which had ceased to exist in their pre-Lisbon form.

David Cameron as opposition leader had pledged a referendum on the Lisbon Treaty before it was ratified: and if the long delayed ratification process had still been incomplete at the time of the General Election in 2010, then the referendum could and would have been delivered. Unfortunately the last State holding out -- the Czech Republic -- ratified in November 2009 and the Lisbon Treaty entered into force on 1st December of that year. The incoming Conservative-led government was no longer in a

position to hold an effective referendum on the Lisbon Treaty. This does not provide any rational basis for doubting David Cameron's pledge of an in/out referendum to be held in 2017 or the deliverability of that pledge.

Approaching Renegotiation: Two options

But while the in/out referendum part of the policy is clear and is capable of being effectively brought into force, the renegotiation part is both less clear in its content and raises more doubts as to whether a successful and effective renegotiation is capable of being effectively delivered. What is needed are both credible and worthwhile objectives and a negotiating strategy which has a good prospect of achieving them.

There are two possible basic approaches to renegotiation. The first is to start from the vast network of treaty articles, regulations, directives and European Court judgments which at present bind the UK, and try to modify them in order to deal with a series of specific problems. This would entail a series of specific amendments to treaty articles, directives, etc. or at least special carve-outs for the UK from them.

Under this approach, a very long list of problems are potential candidates for inclusion on a renegotiation list. Three of the most important are the free movement of persons, the regulation of financial services, where the eurozone majority now has effective power to impose its will on the City, and EU social and employment laws including the working time directive. There are many other potential candidates for specific reforms or the specific return of powers.

The second possible approach is to start at the other end. Instead of attempting to seek specific changes to the vast existing framework (the so-called EU *acquis*[1]), this second approach starts from looking at where we would stand if we were exercise our right to withdraw under Article 50 of the Lisbon Treaty, and then asking what specific continuing arrangements between the UK and other EU members would be in the mutual interests of the UK and of the other members. This is the 'zero-plus' approach to renegotiation.

[1] A French word indicating the collection of powers which have been acquired by the EU: the concept is loosely translatable as 'what we have, we hold.'

Before returning the content and strategy of renegotiation, I shall look first and in detail at the mechanism for UK withdrawal from the European Union and how it would work out if it were to be implemented.

II
Withdrawal from the EU under the Treaty:
The implications for domestic law

There is a great deal of ignorance, misunderstanding, misinformation and indeed in some quarters outright hysteria about the subject, about how the UK could go about withdrawing from the EU and what would happen if it did. But it is not possible to have any form of rational discussion about the costs and benefits of EU membership without having a clear idea about the alternative of how the UK would operate outside the EU, both vis a vis the world at large and vis a vis the EU. In order to appreciate the likely scenarios, it is necessary to understand the mechanics of the process by which the UK would get from A to B.

The withdrawal process under Article 50, Treaty on European Union (TEU)

First, the actual exit of the UK from the European Union is straightforward in legal terms. The Lisbon Treaty provides a clear and unconditional right for any Member State to withdraw from the EU.

Under Article 50[2] of the Treaty on European Union, inserted by the Treaty of Lisbon, the State concerned notifies the European Council of its intention to withdraw. Negotiations then take place on an agreement covering the arrangements for withdrawal. It is envisaged that the agreement will cover transitional arrangements and the future relationship of the withdrawing State with the EU. That relationship might, for example, consist of a free-trade association agreement.

But Article 50 is clear that, even if an agreement on transitional arrangements and/or future relationship is not reached, the State will cease to be bound by the treaties, and in consequence its EU membership will cease, two years[3] after the date of notification. Thus, it is not possible for the other EU members to block withdrawal or to delay it for longer than the two-year period.

[2] The text of Article 50 is in the Appendix.
[3] Unless extended by *mutual* consent.

Although Article 50 contemplates that the two year period will be used to negotiate an agreement on transitional and continuing arrangements, it does not mandate what form such an agreement will take. There is no guarantee that the terms offered would be palatable or even acceptable to the UK. Therefore, if the UK takes this course, it should be prepared to contemplate a scenario in which it leaves the EU and there is no agreement in place at the end of the two year period. In fact, the UK has a strong hand to negotiate a mutually beneficial free trading relationship, but in order to achieve that objective it would be necessary for it to be prepared to walk away with no agreement if necessary.

In this scenario, the absence of an agreement on the *transitional* (as opposed to continuing) arrangements would be messy but would not be a vast problem. The transitional arrangements would to a large extent be dealt with under domestic law, principally by amendments to the European Communities Act 1972 to deal with the situation.

Of more significance would be the absence of an agreement covering our future trading relationship with the remaining EU. This would mean that trade between us and other EU members would revert to the multilateral WTO framework.[4] In particular, tariffs on trade in goods would be reintroduced.

The other 'freedoms' of the EU single market would also cease to apply, namely free movement of services, capital and persons. In theory, the UK would be free to require the large EU migrant worker population here to return home and EU states could require British citizens to leave, although it seems unlikely that either side would want to turf out established residents.

Because the negotiation and conclusion of an agreement with the EU would be time consuming and the outcome of negotiations might be uncertain up to the last minute of the two year period under Article 50, in practice it would

[4] I have seen it asserted by some that the result of withdrawal from the EU without agreeing a replacement arrangement would be that the UK would automatically return to EFTA membership, since we were an EFTA member before accession in 1973. This is not the case. Free trade between the EFTA states and EU members (including the UK) is now governed by agreements between the EU and EFTA states. The UK could however enter into a free trade agreement with the EFTA states or re-join EFTA without the agreement of the EU.

be necessary for the UK to be getting on with other aspects of the withdrawal process on a unilateral basis.

Amending UK domestic law in preparation for withdrawal

After over 40 years of membership, there is a vast existing body of laws within the UK which either directly stem from the EU, or were passed because of EU obligations, or at least are affected by the EU.

First, there are directly applicable EU laws - EU regulations and parts of the EU treaties - which form part of the internal law of the UK, via the gateway of section 2(1) of the European Communities Act 1972. These would all automatically lapse and cease to be part of the law as from the date of withdrawal. However, in many instances it would not be acceptable to leave a vacuum in the law and it would be necessary to have a new domestic law in place to cover the subject matter.[5]

Secondly, there are many Acts of Parliament which implement EU directives or other obligations. These would need to be repealed, kept or amended on a case by case basis -- it would not be possible to deal with them with a single global rule.

Thirdly, numerous UK regulations have been made under section 2(2) of the European Communities Act 1972 in order to implement directives. Many of these regulations amend Acts of Parliament under the sweeping 'Henry VIII' powers of section 2(2) which authorise wide ranging changes to be made to the law including the amendment of Acts of Parliament by ministerial regulations. These regulations could not just be allowed to lapse automatically on exit. It would be necessary to go through them and decide to revoke, keep or amend them case by case.

The exercise of reviewing all these three categories of EU laws and deciding what if anything to put in their place would be a substantial exercise and would have to be carried out rapidly. The best solution would be simply to press into service the existing regulation-making power under section 2(2)

[5] For example, it would not be acceptable to have a vacuum in the law on the licensing of medicines when the UK ceases to be covered by Regulation (EC) No 726/2004 'on Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.'

of the 1972 Act and extend it so that it can be used to allow existing Acts and regulations which implement EU obligations to be repealed in an orderly way or replaced as appropriate with or without changes after exit.

Thus, these sweeping 'Henry VIII' powers, which have been used so effectively and extensively to implement the incoming tide of EU law, would be used rapidly to unravel EU law. The advantage of using this existing well oiled machinery would be that there is an existing system for making these regulations by the appropriate government department or by the devolved legislatures where the regulations fall within the scope of their devolved powers.[6]

There are further changes to UK law which would be essential or at least desirable. The section 2(2) power should also be extended to allow EU laws to be disapplied within the UK in advance of exit if this proves necessary, for example if there were an attempt to impose damaging or discriminatory measures during the two year transition period, or where it is advantageous to dismantle EU laws and regulations before actual exit.

It would be important to clarify the legal position after exit. The ECJ or EU institutions might argue that they should still have power after exit to take decisions or adjudicate on matters which happened before exit, for example by giving judgment after exit on ECJ cases which are still pending at the date of exit. Article 50, unlike withdrawal clauses in some other treaties,[7] does not provide for any continuing right of the ECJ or other institutions to adjudicate on events which happened before withdrawal. It would be wholly unacceptable if this were to occur and so the 1972 Act should be amended to ensure that acts of the EU institutions to adjudicate after withdrawal on events which happened before withdrawal are accorded no legal recognition in the UK.

Since there might well be disagreement over the UK's final years' EU membership subscription (the budget contribution and 'own resources' payments) it would also be prudent to repeal with immediate effect section

[6] It would also be necessary to review areas of competence which would be returned by the EU on exit and decide whether those areas of competence should be exercised by Westminster or (outside England) by the devolved legislatures.

[7] For example, Article 58(2) of the European Convention on Human Rights provides that the Convention continues to apply to states which have withdrawn in relation to acts taking place before withdrawal.

2(3) of the 1972 Act, which provides for the payment of these sums by officials without the authority of Parliament.

The task of amending UK domestic law in preparation for exit is substantial but achievable, given the two year period for the necessary work to be carried out. It should also be viewed positively in terms of what can be achieved when no longer shackled by the vast body of EU obligations to which this country is presently subject.

In the process of review of UK law, priority should be given to reforming or sweeping away EU-based laws which interfere with the competitiveness and efficiency of the UK economy. Obvious candidates for scrapping are the Working Time and Agency Workers' Directives, and sex equality workplace laws should be reformed to reverse some of the stranger ECJ rulings.

Reforming financial services regulation would be priority, in view of the recent torrent of EU regulatory actions many of which are felt to be ill conceived or damaging. Environmental laws should be extensively reformed to eliminate obligations imposed by EU directives which involve high costs with little environmental benefit.

Freed from harmonising directives, significant reforms could be made to intellectual property laws to extend exemptions, to restrict aspects of protection which confer no economic benefits, and to simplify areas of the law which are unnecessarily complex[8] thanks to EU interventions. The EU's insistence that rights owners should be allowed to prevent 'parallel imports' of their own goods from outside the EU could be ended with enormous economic benefits.[9]

Once freed from the CAP, as a net food importing nation, the UK could dismantle the protectionist barriers which keep food prices in the UK higher than world market prices. The UK would regain control over fishing rights

[8] For example, Article 58(2) of the European Convention on Human Rights provides that the Convention continues to apply to states which have withdrawn in relation to acts taking place before withdrawal.

[9] Case C-415/99 *Levi Strauss v Tesco Stores*, where the ECJ ruled that Tesco infringed Levi Strauss's trade mark in the UK by buying genuine Levi Strauss jeans in North America and importing them. The effect of such restrictions is that multinational companies can milk the UK consumer for higher prices than they sell identical goods for in other markets.

off its coast up to international limits, and would need to replace the CFP with a sensible conservation-based national fisheries policy.

The UK would regain control of migration from other EU states. EU citizens who are settled and productively working here should not be put in fear of being sent home, nor would we wish to damage our economy by excluding highly paid or high skilled workers, such as French bankers in the City. But the inflow of low-skilled workers could be restricted, and stronger measures taken against benefit or health tourists. The UK would certainly want to take more robust measures than are now permitted by EU law to exclude or remove persons engaged in criminal activities.

III
EU withdrawal and external implications

International agreements

The UK's external relations now involve many matters where we have arrangements with other EU members, or arrangements with non-EU countries, which are conducted partly or wholly through the EU. For example, in tariff matters, agreements are concluded under the EU's common commercial policy between the EU itself and non-member States. In these cases upon exit the UK would cease to be part of such agreements and would need to re-negotiate any replacement arrangement with the counterparty states concerned.

Many other treaties however fall within areas of 'mixed competence' and are concluded both by the Member States and by the EU. The most important example of this category is the WTO Agreements.[10] Under such treaties, the EU and the Member States are responsible vis a vis non-Member states for matters within their respective competences. But if the EU competence disappears on exit, the UK will automatically take on the treaty rights and obligations across the board. The basic categories of agreements are:

- International agreements where the UK's status is unaffected by EU exit - e.g. UN membership and Security Council membership under the UN Charter, where this would simply continue, but freed of obligations to act in 'solidarity' with EU member states.

- 'Mixed competence' agreements where both the UK and the EU are parties. Under such agreements, the EU is responsible to third states for matters falling within its competence, and the UK is responsible vis a vis third states for matters outside EU competence. Such agreements will continue on exit, and the UK's competence will simply expand when EU competence disappears. The most important agreements in this category are the WTO Agreements including GATT.

[10] The ECJ ruled on the status of the WTO Agreements in Op 3/94 *Re the Uruguay Round Trade Agreements*.

- International agreements with third states where only the EU is party, or where Member States are also parties, but in their capacity as Member States. This category includes agreements with third states under the EU Common Foreign and Security Policy, but also numerous trade and trade related agreements. The UK would cease to be a party to these agreements on EU exit, and so would need to review them and consider whether to enter into replacement arrangements.

The general review of the UK's external relations would identify many instances where upon exit international arrangements would automatically slot into place to replace existing EU arrangements. For example, the UK would cease to part of the European Arrest Warrant system, but the European Convention on Extradition (a Council of Europe Convention covering both all EU and many other non-EU states) would then automatically govern extradition arrangements between the UK and the EU states.

In the field of intellectual property, the UK would remain a member of the European system for centralised examination and granting of patents since this comes under the European Patent Convention which is not an EU treaty. Nor does the UK need to be a member of the EU for British-based rights holders to exercise rights within the EU, since non-discriminatory protection must be given under TRIPs[11] and other international agreements.

Even where there is no automatic replacement, in many cases there are existing international or European regional[12] conventions which cover similar subject matter to EU arrangements. For example, the Lugano Convention on the mutual recognition and enforcement of judgments in civil and commercial matters is open to non-EU states and has similar rules to the Brussels Regulation which applies as between EU members.

In many instances, arrangements which are presently conducted through the EU could be replaced by satisfactory non-EU international arrangements, in which case there is no merit in involving the EU further. The UK needs to sort out its wider international relationships first, before negotiating with the

[11] The Agreement on Trade-Related Aspects of Intellectual Property, one the WTO Agreements.

[12] Particularly the numerous conventions on many subject matters which are open to signature by members of the Council of Europe. Exit from the EU would not affect the UK's membership of the Council of Europe which is a wider body with currently 47 member states.

EU. But where special arrangements with the EU would be of significant benefit, these should be added to the agenda of the negotiations with the EU.

International trade relations

Before turning to the question of trade relations with the EU after exit, it is worth considering trade relations with the wider world. The majority of the UK's exports are now to non-EU countries, and these exports are rising at a faster rate.

The UK was a founder member of the European Free Trade Association (EFTA) until it joined the EEC in 1973 and left EFTA. The free trade relationship between the UK and the EFTA states was preserved, and indeed extended to the rest of the EEC, under agreements between those states and the EEC. There seems no reason why the current EFTA states (Switzerland, Norway, Iceland and Liechtenstein) should not welcome the UK back to EFTA in order to preserve the UK's existing free trade relations with them.

By joining EFTA, not only would the UK secure the continuation of free trade arrangements between itself and the EFTA states, but it would also be able join in with EFTA's free trade arrangements with third countries. There has been much misleading recent propaganda to the effect that it is necessary to be a member of a big trade bloc such as the EU in order to negotiate free trade arrangements with other countries. This however is the reverse of the truth. EFTA has been notably more successful than the EU in negotiating free trade agreements largely because (unlike the EU) it is not hampered by unreasonable protectionist demands from some of its members.[13]

Indeed the difficulties of the EU achieving a worthwhile free trade agreement with the United States are starkly illustrated by the statement to the European Parliament by Jean-Claude Juncker, the incoming Commission President, that he would 'not sacrifice Europe's safety, health, social and data protection standards, or our cultural diversity, on the altar of free trade'.

By contrast, there is every reason to believe that the UK could secure rapid access to a wider range of free trade arrangements with third countries as

[13] Such as the French desire to shield its film industry from international competition.

an EFTA member than is possible for it as an EU member.

Post-exit trade relations with the EU

A key objective of the UK would be to secure continued access for exports to the EU market without tariffs on goods, and without increased non-tariff barriers on goods and services. Any such arrangement would of course be mutual and so provide corresponding benefits for the EU.

The UK's exports of goods to the rest of the EU in 2012 were £150.3bn; however, the EU's goods exports to the UK for the same period were £206.1bn.[14] Although the balance of trade in services is not quite so dramatically one sided, EU exporters would benefit markedly more than UK exporters from continued free trade arrangements. On any rational appraisal of the strength of its bargaining position, the UK ought to be in a position to use our position as the EU's major buyer of export goods to negotiate both continued free trade in goods and continued unhindered access for important service sectors, most notably financial services.

Virtually the whole of the Continent of Europe as well as other states outside it are in free trade relations with the EU. There are many free trading agreements between the EU and other countries, which vary in their structures. Those most mooted as possible models for a UK/EU post membership agreement are the EU's agreements with Norway and Switzerland. In fact, these agreements are radically different from each other.

The European Economic Area members, Norway, Iceland and Liechtenstein, are within the single market[15] for the purposes of the 'four freedoms' and in addition they are required to apply the regulatory aspects of the single market internally as a condition of continued access to the single market.

Switzerland is a member of the European Free Trade Area (as are the EEA states) and in addition has a large number of bilateral agreements with the EU. Apart from providing for the 'four freedoms' of the single market,

[14] Source: HM Revenue & Customs, as analysed by the Trade Policy Research Centre.
[15] Except for agricultural goods and fisheries.

many of these bilateral agreements facilitate access by Swiss goods and services to the EU single market, as well as (obviously) permitting access in the opposite direction. Many of these bilateral agreements effectively flank intra-EU measures. However, the key difference between Switzerland and the EEA states is that Switzerland has a real choice over whether it is in interests to sign up to particular arrangements rather than having them imposed on it across the board.

It is blindingly obvious that Norway's relationship with the EU as part of the EEA should be rejected out of hand as any kind of model for the UK. This is because the EEA states are effectively obliged to implement the burdensome regulatory requirements of the EU single market but have no vote on framing them. To leave the EU to escape from its regulatory strictures and then sign up to that sort of arrangement would be entirely irrational.

By contrast, the Swiss relationship involves the application of the general rules of the EU single market on free movement of goods, services and capital, together with numerous individually negotiated bilateral agreements on subjects including mutual recognition of standards in goods and services and home country certification. Switzerland is landlocked by the EU and conducts a very high proportion of its trade with the EU. The more Atlantic and global stance of the UK suggests that we would not need to negotiate an arrangement with the EU which is as detailed and intense as the Swiss one. Nonetheless the Swiss/EU agreements[16] provide a detailed check list of matters for potential agreement with the EU.

One key question is whether the UK should seek to negotiate a free trade agreement with the EU, or continued membership of the customs union.[17] This seemingly technical question is of great importance.

In a customs union, no formalities need be applied when goods cross internal borders within the union. In a free trade area, goods are checked at the internal borders, and only goods which originate within the free trade area are entitled to proceed tariff free.

[16]Listed (in English) at http://www.europa.admin.ch/themen/00500/index.html?lang=en
[17]Turkey is a member of the EU customs union even though not an EU member.

However, members of a customs union have no freedom to set their own external tariffs, and cannot negotiate separate free trade agreements with countries outside the customs union. In practice if not in theory, a customs union normally entails a requirement to share the revenue derived from external tariffs,[18] and this would be highly disadvantageous to the UK because of its international trade pattern.

After exit, the UK's freedom to negotiate free trade arrangements with other countries independently of the EU would be of great importance, as would its ability to decide upon its own external tariffs.[19] These considerations strongly argue against remaining generally in the EU customs union, but we should consider maintaining a customs union covering certain highly integrated industrial sectors[20] to assist the continued free flow of goods (in both directions, to the UK and EU's mutual benefit) without 'rules of origin' formalities.

The UK should hold its nerve when negotiating these arrangements -- which are of benefit to the EU -- and should not be willing to pay an additional price by making concessions elsewhere. While it would be disadvantageous (for both parties) if such arrangements cannot be negotiated, this should be kept in proportion. If no agreement is reached, the total tariffs payable on UK goods exports assuming the EU's average weighted external tariff would be around £6bn.[21] While trade within the EU may be more heavily weighted to goods which would bear higher tariffs than its external trade, this gives an order of magnitude feel. The total amount is *almost certainly less than the UK's current gross contribution to the UK budget*.

The UK could use its savings from the EU budget and its revenue from levying tariffs on imports into the UK from the EU to reduce taxes on its exporting industries, so mitigating any damaging effects from the imposition of tariffs on exports into the EU from the UK. But it should not come to that.

[18] Because goods will enter and bear tariffs in the ports of one country and will then circulate and be consumed in other countries within the union.

[19] Some commentators have argued convincingly that adhering to the EU's external tariffs imposes a major cost on the UK because the tariffs are borne by consumers in the UK, but the tariffs mainly protect industries in sectors where the UK no longer has much industry of its own: see e.g. Minford, Mahambare and Nowell, '*Should Britain Leave the EU? An Economic Analysis of a Troubled Relationship*', Edward Elgar/IEA 2005.

[20] Such as the car industry.

[21] 4.0% - figure for 2010 (latest available), source: World Bank, Most Favoured Nation Tariff Rate.

With firmness and determination, mutual self interest should lead to concluding a satisfactory agreement with the EU.

IV
Renegotiating the European Single Market

It is said by some that the aim of renegotiation should be to keep the UK within the European single market, but remove ourselves from other parts of the EU treaties. This is to misdiagnose the problem.

The European single market conceptually consists of two elements. The first element is the so-called 'four freedoms': general treaty rules on the free movement of goods, services, capital and persons. The second element is the harmonisation of laws, theoretically in order to remove barriers to trade which arise from divergent national laws. This harmonisation mechanism involves:

1. The adoption of directives and regulations by QMV – 'Qualified Majority Vote' which is based on achieving 60 per cent of weighted votes of member states in favour - and also with the involvement of the European Parliament;

2. Interpretation and enforcement by the European Court of Justice, which pursues a political and integrationist agenda rather than a neutral trade-based interpretation.

The enormous expansion of the harmonisation aspect of the single market under the European Single Act was believed to be in the UK's interests at the time, because it was thought that QMV would be used to impose free trade for British services exports on reluctant and backward Continental countries. Also it was thought that the use of QMV powers against Britain's interests would be blocked by special safeguards which required unanimity in taxation and employment matters. The saga of the working time directive demonstrated the flaw[22] in this approach, as does the present torrent of financial regulation threatening the City.

[22] Since the UK was able to block the Working Time Directive if it had been presented under the appropriate Treaty provision as a measure regulating conditions of employment, the Commission re-categorised it as a health and safety at work measure and re-presented under a different Treaty Article under which it could be passed by QMV in the face of British opposition. The ECJ rejected the UK's legal challenge to this abuse of the Treaty.

The present day reality is that Treaty powers which are in theory provided for the purpose of facilitating cross border trade within the single market are instead being used for the wholesale regulation of national markets by what amounts to EU federal law, often in conjunction with EU federal-type agencies. This is a type of intrusive detailed control of national laws and markets which goes far beyond what is actually envisaged by the text of the EU treaties.[23]

In addition, this type of EU regulation leads to the EU taking effective control of trading relations with non-EU countries, for example by dictating when and in what circumstances businesses located in the UK are allowed to sell financial services to customers in non-EU states and when businesses located outside the EU are allowed (or not allowed which is the normal EU approach) to sell to customers inside the UK. This development goes far beyond what is envisaged by the text of the relevant articles of the treaties, which explicitly relate only to trade between Member States. Again however this expansion of the scope of EU law-making powers beyond what is actually written in the treaties has been enthusiastically promoted by the Commission and endorsed in a series of cases by the ECJ. There seems no prospect of reining this in within the existing Treaty and institutional framework.

The problem with the EU harmonisation mechanism is that it is like being on an upward escalator to ever greater European integration. Even if specific problems were to be tackled by renegotiation, there would still be the continuing torrent of regulations and directives under QMV which cannot be blocked by the UK unless it is able to gather a significant number of allies. And even without new regulations or directives, there is a constant process of expansion of the scope of existing regulations by expansionary and pro-integration judgments of the ECJ.

The consequence of the activist approach of this court is that it is not sufficient merely to prevent new directives or regulations being adopted. The ECJ is quite capable of extending the existing ones without any

[23] For example, Directive 2011/61/EU on Alternative Investment Fund Managers was passed under Article 53(1) of the Treaty on the Functioning of the European Union, which gives power to pass directives 'to make it easier for persons to take up and pursue activities as self-employed persons' in other Member States.

legislative body having agreed to any extension of the relevant text. This is illustrated by the latest startling and very costly ruling from the ECJ in the field of employment law, with its decision that holiday pay must not only include basic salary but also a sum to represent the commissions that the employee did not earn while he was on holiday.[24]

The problem of 'mortmain' in EU laws

There is a further problem with the harmonisation mechanism of the single market. It is extremely difficult to repeal or even alter this mass of regulations and directives once they have been adopted. The UK cannot repeal or alter them unilaterally. In order for them to be repealed or amended, it is necessary for the Commission (which has the sole 'right of initiative') to propose the change, and for a qualified majority of Member States and the European Parliament to vote for it.

Thus there is a large and ever growing mass of legislation which is subject to '*mortmain*' - the 'dead hand' of the EU legislative process. The fact that this mass of legislation cannot be amended to meet the rapidly changing conditions of the world in which we live, and that it is almost impossible to see how a serious and effective programme of rolling back this legislation could ever be effective, are very serious economic problems.

But even more seriously, this legislative mortmain creates a grave and ever growing problem of democratic accountability, and curtails the right and ability of the people to be governed by laws passed by legislators for whom they have voted. If an EU law cannot now be changed, whatever the electorate wants, because a previous British government agreed to it three Parliaments ago, it negates the right of the electorate to get laws changed by choosing representatives who will repeal the laws that they no longer agree with. This is a huge and ever growing political and constitutional cost of the EU legislative system.

But the regulatory harmonising apparatus is not an essential part of a functioning single market. It is quite possible in principle to have the 'freedoms' (in the sense of the general treaty rules against discrimination

[24]Case C-539/12 *Lock v British Gas Trading Ltd* (22 May 2014).

and in favour of facilitating across border trade) without the harmonisation machinery, as demonstrated by a number of association agreements between the EU and other countries. In fact the EU-Switzerland relationship includes bilateral agreements which provide for the 'freedoms' and also include many of the other helpful aspects of the single market, such as certification of compliance with standards, to avoid the need for checking at the border and to allow 'passporting' of services.

V
Renegotiation – The Bottom Line
Chipping away v first principles

Against this background, it can be seen than an approach to renegotiation which involves seeking to adjust specific aspects of our existing relationship with the EU, while leaving the mass of the *acquis* in place, will do little to solve the underlying problems. In addition, each and every specific issue which is raised is likely to give rise to its own difficulties both in securing agreement to it and in implementing any resulting change in durable and effective form.

To take but one example, a reform of EU employment law to reduce the costs of the present EU laws to the British economy, would need an amendment to the EU treaties in order to be permanent and effective. It is hard to see why those Member States who support the EU engaging in this area of legislation would agree to the EU losing its competence in this field, so the treaty amendment would need to be in the form of a special opt-out Protocol relating to the UK like the Maastricht social chapter opt-out, but with extra safeguards in order to prevent circumvention by the use of other treaty Articles to impose measures on the UK as was done with the Working Time Directive.

Such a Treaty amendment would need to be agreed unanimously by the governments of all Member States. Even if agreed by all governments, it would then need to be 'ratified' or 'approved'[25] by all Member States in accordance with their respective constitutional requirements.

The problem with this approach is that there is a strong view in some Member States that these types of social and employment laws are an

[25] Under the 'ordinary' treaty revision procedure in Article 48(2-5) TEU, a treaty amendment must first be agreed by an inter-governmental conference and then be 'ratified' by all Member States in accordance with their respective constitutional requirements. Under the 'simplified' procedure in Article 48(6), the amendment is agreed by the European Council without the need for an IGC, but it does not enter into force until it has been 'approved' by all Member States in accordance with their respective constitutional requirements. Even assuming that the treaty change would fall within the simplified procedure, which is open to doubt, it would still be necessary for it to go through all the hoops as laid down by each national constitution, even if the process is called 'approval' rather than 'ratification.'

integral part of the European single market. France notably believes (across the political spectrum) that it is necessary to protect its high social welfare social model by making sure that employers in other Member States suffer from the same high costs as French employers. However deluded such an approach is in an open global economy where European businesses have to compete with businesses in other parts of the world which are not subject to such burdens, it is a deeply held view and it would be extremely difficult to persuade France or other similarly minded countries to agree to a treaty change.

The alternative but much less satisfactory and permanent approach would be to try to implement a relaxation of employment laws affecting the UK via amendments to the laws themselves rather than by treaty change, for instance by repealing the Working Time Directive and the Agency Workers Directive etc. Theoretically this might be slightly easier than a treaty change because they could be repealed or amended by QMV rather than unanimity. On the other hand, the approval of the European Parliament would be needed to pass the repealing or amending measures, and that approval could well not be forthcoming even if sufficient agreement could be reached at government level.

It can be seen that this one renegotiation issue alone raises formidable difficulties. Each and every other specific issue is likely to raise problems of comparable difficulty, if different in kind. Increased restrictions on the free movement of workers are likely to encounter serious opposition from the East European Member States. Special measures to protect the UK's financial services from the effects of cabaling by the Eurozone states would raise serious difficulties of their own.

The longer the list of specific demands, the longer the list of difficulties which will have to be faced and the larger the coalition of Member States which would be built up in opposition to agreeing to the UK's demands. Even if (hypothetically) all EU governments could somehow be persuaded to accommodate a list of UK demands, the processes of national ratification or approval of the necessary treaty amendments would be likely to take years and could well be derailed by opposition in one or more countries

Indeed, as a practical matter it is very difficult to see how a process involving treaty amendment could be concluded by the time of the referendum in 2017. Would this mean that the British people would be asked to vote on a set of renegotiation proposals which it would be far from certain would actually be implemented if they vote to stay in the EU?

'Zero-plus' approach to renegotiation

A 'zero plus' renegotiation would look at the whole issue from the other end. Rather than starting with the existing mass of the *acquis* and trying to knock bits out of it or to restrain some of the worst pinch points where the *acquis* is threatening to expand and impinge on British interests, this approach would ask that the UK's treaty relationship with the EU should be revised so that the UK is only within certain limited zones of the EU treaties and is outside all the rest.

The EU already has different categories of membership, in the sense that special Protocols to the EU treaties exclude certain states from some aspects of membership or at least modify their obligations in certain areas of policy. The UK and Denmark are excluded from monetary union by special protocols. The UK, Ireland and Denmark are excluded from certain (and differing) aspects of immigration and home affairs policies.

The zero-plus approach involves proposing a special category of EU membership for the UK in which variable geometry is taken further and the UK is subject only to limited aspects of the Treaties which are listed in the Protocol. In principle, it would be desirable for this category of membership to be open to other European states as well: both existing EU Member States who might be more comfortable with a less integrationist approach, and non-Members who would find it easier to adapt to this membership-lite than full membership.

The baseline comparison for this category of membership should be the kind of relationship which the UK would realistically be likely to end up with if it were to invoke Article 50 as explained above. These terms would preserve our trade relations with the EU states and access to the EU single market (as well as EU access to our market in return) but would jettison the regulatory and legal structure of the single market as well as the UK's wholly unnecessary and harmful subjection of its laws and policies to the EU's

control in other policy areas and the whole political superstructure of the EU.

There would be a compelling logic to negotiating such an arrangement: since we could effectively end up with very much that relationship with the EU by invoking our right to withdraw under Article 50, there would be every reason for other Member States to agree to the UK having the effective substance of that relationship but labelled as a form of outer-tier EU membership. And if there is resistance to agreeing it, the fallback is for the UK to press the button under Article 50.

This leads on to a very important point. The UK's most credible card in the renegotiations is that if they are not satisfactorily concluded then the UK will withdraw. This card is not credible if it is seen merely as an empty threat which will never be executed. Therefore, in order to make it more effective, the government needs to begin a public process of contingency planning for what would happen if Article 50 is invoked, involving a review of the changes to UK domestic law and to our international arrangements which would be necessary and appropriate in different policy areas. Such an exercise would both strengthen our hand in the renegotiation process since it would no longer be possible for other Member States to view the prospect of withdrawal as an empty threat, and would serve to provide reassurance to some quarters of the business community who appear to underestimate the extent to which it would be possible to preserve free trading relations with the EU states in the event of exit.

In a 'zero plus' renegotiation, the foundation of the relationship should be the preservation of the general rules on the free movement of goods, services and capital.

Possibly ten years ago I would have argued that the free movement of persons should be preserved, but it is now essential that it is at least modified to give the following:

- Enhanced right to deport criminals and other threats to public order without the need to comply with onerous ECJ interpretations of existing treaties;

- Right not to permit entry at all to citizens of new EU states;

- Right not to recognise as EU citizens individuals who are given citizenship by other member states on an abusive basis (e.g. certain EU countries simply sell passports for money);

- Right to restrict entry to workers who either have a job to come to or who are actively seeking a (legal) job and obtain one within a limited period;

- End to 'benefit tourism' and 'health service tourism'.

But a bigger question is whether a more radical restriction on free movement rights is now needed.

The original EEC introduced free movement in a context where people were intrinsically less mobile and where divergences of income between different parts of the EEC in the founder countries, France, Germany, the Benelux and Italy were comparatively[26] limited.

However the admission of the wave of new East European countries to the EU has led to mass migration on a scale not envisaged when the Treaty of Rome was drafted. This calls into question whether this principle is still appropriate for present day conditions and for the present structure of EU members with the wide disparities in national incomes, coupled with the serious damage being done by the prolonged euro currency crisis to employment particularly in the Southern Member States.

Other aspects of our relationship with the EU

If, as I suggest, we should seek to remove ourselves from the EU collective law making machinery in the case of issues which are directly trade-related, there is even less of a case for continuing to be subject to that machinery in other areas.

It does not follow that there is no merit in continued *cooperation* in many other areas. However, the touchstone should be <u>continued mutual consent</u> to

[26] Clearly there were substantial differences: for example, between Germany and Southern Italy, but not as great as the very wide differences in the EU's present membership.

the arrangements. Structures which force us to be subject to laws to which we have not consented, or to continue to be bound by arrangements which we cannot change or withdraw from, should be shunned.

Given the various possible models of relationships with the EU, I would suggest that the UK's ideal 'category of membership' would have attributes closest to that of Switzerland, but should have a lower level of integration. Switzerland's land borders are 100% surrounded by EU territory and a very high level of its trade is with EU member states; by contrast, the UK has a large and growing proportion of its trade - particularly export trade - with non-EU states.

The case of Switzerland is also important because it highlights the existence of a number of countries with strong links with the EU or the Eurozone but who are not full members of both, including EU countries outside the Eurozone, the EFTA/EEA countries, closely connected with the single market but not EU members, and other countries with free trade relations with the EU who are outside it, the most recent of which is Ukraine.[27]

There is an important further attribute of the different 'category of membership' that the UK might seek - that it should not just be available to the UK but to other countries as well. This membership category would have provisions binding on core EU members and outer tier members in common which require observance of freedom of movement of goods, services and capital, and would also provide a framework for the adoption of multilateral agreements between the inner EU and the outer tier members on other measures.

This would restore balance between the EU/Eurozone core and other European states within the wider European area of free trade. At present the EU very much negotiates individually with the countries with which it has trade arrangements, who feel they are vulnerable to being picked off one by one. A UK which is outside inner core EU membership could effectively act as shop steward for all the European states who are outside the inner core of EU membership in their relationship with the EU. Together, those countries represent a large collective mass economically, and even more if

[27] A useful chart showing the many different categories of relationship within Europe is on http://en.wikipedia.org/wiki/European_Economic_Area

measured in terms of population. Whether the EU likes it or not, the UK could effectively bring together a European 'non-Eurozone group' to act as a counterweight to the Eurozone's centralising tendencies and as a force for wider open trading relationships across the Continent.

VI
Easy to negotiate?

One view (at least within this country) seems to be that the British government can march into a meeting in Brussels with a set of terms for a revised relationship, bang the table, and insist on these terms being accepted, with the aid of some metaphorical gun pointed at the EU's head. That gun might, for example, be a threat to veto future Treaty changes which other EU states want to bring in.

But a veto threat used in order to secure wide ranging and largely unrelated treaty changes to the status of the UK could be a gun which only fires a blank. If Eurozone-only treaty changes were blocked by the UK, in the end the Eurozone countries could achieve very much the same result by entering into a side treaty between themselves which would not involve any need to amend the EU treaties. The Schengen agreement on border controls is a previous example of such a side treaty.

But more fundamentally, such gun-to-the-head type negotiations are not likely to achieve a long lasting stable future relationship. Trade relationships need to be for the mutual benefit of both parties, not imposed by one party on the other. What is needed is not sudden and violent negotiations, but a political process of persuading other EU states that a revised relationship is in their own interests as well as the UK's. We have just completed 40 years of UK membership, and such a long standing relationship cannot be recast overnight.

A ‘zero plus’ renegotiations would aim to secure a larger change in the UK’s relationship with other EU states than an ‘acquis minus’ approach. However, I suggest that it would be a lot easier to negotiate. There is a strong mutual interest in a continuing trade-based relationship, if only because, as pointed out above, the UK is a substantial net purchaser of goods and services from other EU states (i.e. it runs a net trade deficit with them). An ‘acquis minus’ approach risks a series of acrimonious arguments about individual subject areas. France (and other allies) would fight tooth and claw to maintain the principle that high cost workplace regulation should be an integral part of the EU single market.

More importantly, renegotiation is a once in a generation opportunity to make changes in our relationship which solve the severe tensions over self-government and other matters which have arisen within the UK and between the UK and other EU states, and to put the future on a sounder and more harmonious relationship. We should not waste this opportunity. We should negotiate for a sheep rather than a lamb.

Appendix

Article 50 of the Treaty on European Union (inserted by the Lisbon Treaty)

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

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The prime minister has pledged to re-negotiate Britain's relationship with the EU if the Conservatives are returned to power in the 2015 election. It will be a golden opportunity. But what approach should the UK adopt?

In *Zero Plus: The Principles of EU Renegotiation,* Martin Howe QC, the distinguished EU lawyer, explains that there are two options. Britain can either seek a number of piecemeal changes to treaty law. Or it can begin with a clean sheet of priorities, the 'zero plus' option.

Zero plus, which the author recommends, means that Britain must clearly be in a position to withdraw if its priorities are not met. Howe therefore explains what arrangements would need to be made, for domestic matters and international treaties, if the country withdrew from the EU. He also shows how, were Britain to withdraw, it could refashion its relationship with EU member states and others so as to promote national priorities, including greater control of immigration and an end to invasive EU laws and regulations. Without considering in detail how these alternative arrangements would work, it is impossible to fashion a new renegotiated arrangement for EU membership.

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