Repatriating EU powers to Member States

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Section IADS

The EU Treaties as amended by the Lisbon Treaty provides for the first time a Treaty base for the return, as well as the increase, of powers. Either would in all likelihood require a Treaty amendment. However, many Eurosceptics believe that the repatriation of EU powers is not possible, while others point to the difficulties the UK would have obtaining the approval of the other 26 Member States to any such Treaty change.

The Conservative Party election manifesto in 2010 stated: "We will work to bring back key powers over legal rights, criminal justice and social and employment legislation to the UK. The Prime Minister, David Cameron, has said that the Government is looking into which elements of the Treaty it intends to repatriate, and has hinted at opportunities to seek repatriation at the time of any forthcoming EU Treaty amendments to settle the eurozone crisis. So far there have been no concrete proposals, but references to tackling the Working Time Directive. The Deputy Prime Minister, Nick Clegg, has been opposed to Conservative proposals, particularly regarding labour law.

In the area of criminal justice the EU Treaties already provide the UK with a mechanism for opting into EU measures or not.

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1 Government and parliamentary views on the repatriation of EU powers

The Conservative Party election manifesto in 2010 stated: "We will work to bring back key powers over legal rights, criminal justice and social and employment legislation to the UK" and:

> A Conservative government will negotiate for three specific guarantees – on the Charter of Fundamental Rights, on criminal justice, and on social and employment legislation – with our European partners to return powers that we believe should reside with the UK, not the EU. We seek a mandate to negotiate the return of these powers from the EU to the UK.

The Government's May 2010 *Programme for Government* and the *Coalition Agreement* emphasised positive engagement in Europe in dealing for example with globalisation and climate change, but at the same time protecting British sovereignty:

> We will ensure that there is no further transfer of sovereignty or powers over the course of the next Parliament. We will examine the balance of the EU's existing competences and will, in particular, work to limit the application of the Working Time Directive in the United Kingdom. [1]

When asked in November 2010 about the Government's proposals to repatriate powers from the EU to the UK and what opportunities to do so were expected over the coming 12 months, the Europe Minister replied that the Government had "begun initial work on the balance of the EU's competences" and would "continue to work to limit the application of the working time directive in the United Kingdom".[2]

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1 Programme for Government and Coalition Agreement, May 2010

2 HC Deb 9 November 2010 c231

The Government has not clarified which policy areas it would like to see repatriated or how it would achieve this, referring only to amending the 'working time directive', which is not so much a matter of repatriation as of renegotiation.

In an exchange in the House of Lords in December 2010, the Foreign Office Minister, Lord Howell of Guildford, did not refute the suggestion that repatriation would be very difficult, just accused the questioner (Lord Pearson of Rannoch) of being negative and said that reforming the competences of the EU was "perfectly possible":

> **Lord Spicer:** Does my noble friend agree that, so long as the acquis is at the centre of the European treaties, it will be impossible to repatriate any powers?
>
> **Lord Howell of Guildford:** My Lords, the acquis obviously embodies an accumulation of powers. We are now in the 21st century and I suppose that we would all wish to see, if I may use a domestic analogy, a bit more localism in the management of our affairs. However, we are reviewing the situation. The work is at a fairly early stage and I cannot make any further detailed comments on that matter now.
>
> **Lord Pearson of Rannoch:** My Lords, will the Minister not come clean and admit that not a comma can be changed in the treaties, nor can the smallest power be repatriated, without the unanimous consent of all 27 member states, and that therefore the repatriation of powers is really not possible?
>
> **Lord Howell of Guildford:** I understand exactly the noble Lord's concern on this, but I think that he is being a bit defeatist. It seems to me that there is a very widespread will throughout the European Union to reform it and indeed, if I may borrow a phrase, to make it fit for purpose in the 21st century. That certainly involves a sensible pattern of competences between the nation member states and the central institutions. Therefore, I think that, by gloomily saying that nothing can happen until everyone agrees, the noble Lord is taking a very negative approach to an area where European reform is perfectly possible.[3]

In January 2011 the Conservative eurosceptic, Zac Goldsmith, asked which powers the Government was seeking to repatriate from the EU to the UK, to which David Lidington replied that the Government had "begun initial work to review the EU's existing competences, to see if they strike the right balance between what should be done at EU level and national level"; they would "look at individual dossiers, such as the application of the working time directive in the UK, as well as the bigger picture", but he added that there would be "no transfer of power or competence from the UK to the EU during the lifespan of this Parliament".[4] On 13 September 2011 the Government's answer was the same as in January: "... the Government are committed to examining the balance of the EU's existing competences and working to limit the application of the working time directive in the United Kingdom". On 8 September George Young told Priti Patel that Parliament had had "extensive debate about the repatriation of powers" during the passage of the European Union Bill and that the he could not yet promise a full debate on this matter again.

At the end of October 2011 Andrew Turner asked the Government which powers had been repatriated from the EU and which powers had been transferred from the UK and other

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3 HL Deb 14 December 2010 c 515
4 HC Deb 17 January 2011 c566W

Member States to the EU since May 2010. David Lidington replied that there had been no changes to the EU Treaties since May 2010 and no transfers of competence. He quoted the Treaty bases that provide for the exercise of Member State and EU competences (see below) and pointed out that the recent amendment of Article 136 of the *Treaty on the Functioning of the European Union* (TFEU) did not affect the UK.[5]

So far there has been no sign of the Government seeking to opt out from the "Social Chapter" (this would require a Treaty change and the Government has ruled out a major Treaty change during the lifetime of this Parliament) or from the Charter of Fundamental Rights (the UK already has a form of exemption from this, negotiated during the Lisbon Treaty process).

The Liberal democrat Deputy Prime Minister, Nick Clegg, has voiced opposition to any attempts at unilateral repatriation, and has said that Conservative moves to repatriate powers would cost jobs and growth in the UK. Open Europe has argued, on the contrary, that "Britain could save almost £9 billion a year and create thousands of new jobs if David Cameron clawed back key powers from Brussels".[6]

Although the Government has hinted at the possibility of securing Treaty repatriations as a condition for ratifying Treaty changes to settle the eurozone crisis, the German Finance Minister, Wolfgang Schäuble, is reported to have indicated that Britain should not be demanding the repatriation of powers from Brussels during the current crisis.[7]

An e-petition submitted by David Leaf, currently with 202 signatures, calls on the Government:

> ... to repatriate powers back to the United Kingdom from the European Union. By the end of 2013, the Government should consult widely on the powers that should be repatriated; then present legislation to Parliament for approval to repatriate powers; and then proceed to negotiate with the EU to bring those powers home or repatriate these powers unilaterally if necessary no later than the end of 2014.

Another e-petition with 66 signatures calls on the Government to "Make Central Eurozone Governance Conditional on Repatriation of Powers".

On 10 November 2011 a new All Party Parliamentary Group for European Reform was set up, chaired jointly by Andrea Leadsom (Conservative) and Thomas Docherty (Labour). Andrea Leadsom said of the APPG:

> Our purpose is to set out and identify priority areas for the repatriation of powers and our challenge is to do this in a way that does not deprive us of access to the single market. The APPG will consider both the 'what' and the 'how'. It is difficult and rather technical work. EU law is impressively complicated, and the extent of 'gold plating' in this country can compound the complexity.[8]

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5 HC Deb 31 October 2011 c 375W

6 *Daily Telegraph* 7 November 2011 and Open Europe, "Repatriating EU social policy: The best choice for jobs and growth?" November 2011

7 See *Guardian* blog 19 October 2011

8 ConservativeHome, 11 November 2011

The group is considering Financial Services at its next meeting.

2 What does 'repatriation' of EU powers or competences mean?

1.1 Repatriation

The 2001 *Laeken Declaration on the Future of the European Union*, which established the Convention that drew up the proposed EU Constitution, mandated Convention members to consider the possibility of "restoring tasks to the Member States":

> Citizens often hold expectations of the European Union that are not always fulfilled. And vice versa ↕ they sometimes have the impression that the Union takes on too much in areas where its involvement is not always essential. Thus the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union. **This can lead both to restoring tasks to the Member States** and to assigning new missions to the Union, or to the extension of existing powers, while constantly bearing in mind the equality of the Member States and their mutual solidarity.

An Open Europe report published in November 2011 on repatriating social policy by Stephen Booth, Mats Persson and Vincenzo Scarpett expressed the wide-ranging interpretation of the word:

> "Repatriation" is a broad term that potentially encompasses varying degrees of action, from returning individual EU laws to the UK level at one end of the scale and regaining power over an entire policy area at the other. In the case of social policy, all would require negotiation with the UK's EU partners.

1.2 Powers and competences

The terms powers and competences are used, often interchangeably, to denote who has the responsibility – the EU, the Member States or both - for making decisions under the EU Treaties. The Member States confer competence on the EU to act and the EU can only act within the bounds of the EU Treaties, as only they provide the EU with the 'competence' to act in a specific area.

Articles 2-6 TFEU set out the categories and areas of EU competence

Exclusive EU competence

Article 2(1) and (2) TFEU state:

> 1. Where the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the member States being able to do so themselves only if so empowered by the Union or for the implementation of acts of the Union.
>
> 2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall exercise their competence again to the extent that the Union has decided to cease exercising its competence.

The areas in which the EU has exclusive competence are:

- Customs union
- Competition rules for the functioning of the internal market
- Monetary policy, for the Member States which have adopted the euro
- Conservation of marine biological resources under the common fisheries policy
- Common commercial policy

The EU has exclusive competence to conclude international agreements where such conclusion is provided for in an EU legislative act, or is necessary to enable the EU to exercise its internal competence. The EU may conclude international agreements, which are binding on the EU and Member States:

- where the Treaties so provide
- where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, an objective referred to in the Treaties
- where it is provided for in a legally binding Union act
- where it is likely to affect common rules or alter their scope.

Shared competence

These are areas of law-making where the exercise of EU competence does not exclude the exercise of legislative powers by Member States, as long as they respect the primacy of EU law and do not enact laws which conflict with existing EC law and principles. The idea that Member States' competence should be restricted once the EU has acted is established in Court of Justice case law. Under the EU treaties, where the EU is given a competence which is not exclusive or supporting, it is shared. The main areas of shared competence are:

- internal market
- social policy, for the aspects defined in this Treaty
- economic, social and territorial cohesion
- agriculture and fisheries, excluding the conservation of marine biological resources
- environment
- consumer protection
- transport
- trans-European networks
- energy
- area of freedom, security and justice
- common safety concerns in public health matters, for the aspects defined in this Treaty.

In these areas Member States have competence to adopt legislation to the extent that the Union has not exercised its competence, so for example, an environment or energy agreement with a third party would be possible, given that the EU does not have exclusive internal competence in this area.

In other areas the EU is restricted to taking action to support, co-ordinate or supplement the action of the Member States. These areas are:

- protection and improvement of human health
- industry
- culture
- tourism
- education, vocational training
- youth and sport
- civil protection

- administrative co-operation.

Protocol on shared competence

A Protocol (25) on the Exercise of Shared Competence states that "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the act of the Union in question and therefore does not cover the whole area".[9] It is, however, still possible for EU measures to cover the whole policy area, subject to shared competence, provided that the EU can do so under the relevant Treaty provisions.

Declaration on the delimitation of competences

Further clarification is provided by a Declaration 18 annexed to the TFEU on "the delimitation of competences", which confirms that "competences not conferred upon the Union in the Treaties remain with the Member States", and continues:

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.

In other words, the Member states can regain their competence to act in areas where EU legislation has been repealed or where there is no EU measure. However, critics view this arrangement as a back door to EU exclusive competence, giving the EU a right of first refusal with regard to competence, while Member States would only be able to do what the Union decided not to do.

2 Can EU powers or competences be repatriated?

There is a view that the EU's *acquis communautaire* is sacrosanct and cannot be amended.[10] The EU Glossary compiled by the European Commission defines the *acquis* as follows:

> The acquis communautaire or Community patrimony is the body of common rights and obligations which bind all the Member States together within the European Union. It is founded principally on the Treaty of Rome and the instruments that supplement it (the Single European Act, the Treaty on European Union etc.), plus the wide range of secondary legislation enacted under them. The acquis communautaire relates mainly to the single market and the four freedoms inherent in it (freedom of movement for goods, persons, capital and services), the common policies which underpin it (agriculture, trade, competition, transport and others) and measures to support the least-favoured regions and categories of the population.
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> The Union has committed itself to maintaining the acquis communautaire in its entirety and developing it further.

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9 Protocol 25, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, OJC 115, 9 May 2008

10 See for example, John Bercow, who said in a debate in 1998 on the *European Communities (Amendment) Bill*: "the doctrines of the occupied field and of the acquis communautaire are established as sacrosanct and not to be challenged. There is no suggestion that anything would be allowed which would override the primacy of those doctrines, which are dear to the heart of every European federalist". HC Deb 19 January 1998 cc691-736.

> Exemptions and derogations from the legal framework constituted by the acquis communautaire are granted only in exceptional circumstances and are limited in scope.

Other terms used to describe the *acquis* are “Community patrimony" or "Community heritage". Article B of the *Treaty on European Union* (the Maastricht Treaty) is believed to have given force to the concept, as it stated that one of the objectives of the Union was “to maintain in full the *acquis communautaire* and build on it ...”. The term itself is ambiguous; it is, as Anna Michalski and Helen Wallace say, “something that everybody has heard about…but nobody knows what it looks like”.[11]

Samuel Brittan, writing in the *Financial Times* on 26 April 2001, said the acquis “does tend to entrench the status quo and place an obstacle in the way of those who would like to repatriate aspects of policy, such as the Common Agricultural Policy, to the national states”.

For candidate states negotiating EU entry, permanent derogation from the *acquis* is not permitted – what would be the point of joining a club unless you accepted all the rules? Temporary derogations and transitional periods may be agreed, with the aim of allowing the new Member State to gradually harmonise its laws with the *acquis* in more problematic sectors. Although existing Member States are obliged to respect the *acquis*, it is a dynamic concept and constantly evolving. Treaty amendment has formed and will continue to form part of the evolution of the EU. It ought to follow that a Treaty amendment to remove a competence from the EU is as much an evolutionary development of the *acquis* as adding a competence – it is just that the former has not really happened yet. Court of Justice judges interpret EU law in the light of Treaty amendment in their rulings, and so the process of change and evolution continues, even though Court of Justice decisions themselves cannot be amended.

2.1 The ‘occupied field doctrine’

Many believe that the doctrine of the “occupied field” prevents the repatriation of powers in areas in which the EU has law-making competence. When this happens, Member States lose their competence in this area, even if the EU has not yet legislated. Thus, if the EU is given the power under the Treaties to take legislative action in a particular area, this inhibits Member States from acting, in case their laws are subsequently found to be incompatible with EU law (pre-emption).[12] The EU’s power to act in that area is therefore guaranteed forever. Under Lisbon this ‘doctrine’ is somewhat relaxed in areas of shared competence. Member States can continue to act to the extent that the EU has not acted and the EU may also cede power back to the Member States. If the EU retreats from an ‘occupied field’, the Member States may then ‘reoccupy’ it.

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[11] “The European Community: The Challenges of Enlargement”, Royal Institute of International Affairs, 1992, p. 35

[12] See F. Jacobs and K. Karst: “[…] the idea [of pre-emption] will be treated as going beyond the principle of the primacy of Community law over Member State law; it will be taken to refer to cases where the Member States are precluded from legislating, not because legislation would conflict with Community law, but because the competence in question is an exclusively Community competence”, “The ‘Federal’ Legal Order: The U.S.A. and Europe Compared – A Judicial Perspective”, *Integration Through Law*, Book 1, p. 237.

2.2 Subsidiarity

The strengthening since Maastricht of the principle of subsidiarity[13] does not amount to a repatriation of EU powers to Member States. Very few Court of Justice cases have dealt directly with the annulment of EU law based on the Maastricht subsidiarity Article. Case C-233/94[14] was the first case to address the question of whether EC legislation should be annulled on the grounds of an alleged violation of the subsidiarity principle. The European Court of Justice rejected all the arguments made by the German Government.

3 Is repatriation realistic?

The EU Treaty as amended by the Lisbon Treaty gave considerably more weight to the principles of subsidiarity and proportionality, and granted for the first time an ability to repatriate competences from the EU to the Member States. The Treaties also for the first time now stipulate areas of exclusive or shared competence in decision-making, making it clearer who has the power to do what. Even where the Union has competence under the Treaties, there is a possibility that that competence may be returned to national authorities if the Member States agree to do so. This is because the Member States confer powers on the EU (Article 7 TFEU). In practice, and for political rather than legal reasons, it might be very difficult to do so.

The Lisbon Treaty Declaration (18) clarified the principle that competences can be repatriated to Member States, particularly on the grounds of subsidiarity or proportionality:

> The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality. The Council may, at the initiative of one or several of its members (representatives of Member States) and in accordance with Article 241 of the Treaty on the Functioning of the European Union, request the Commission to submit proposals for repealing a legislative act. The Conference welcomes the Commission's declaration that it will devote particular attention to these requests.
>
> Equally, the representatives of the governments of the Member States, meeting in an Intergovernmental Conference, in accordance with the ordinary revision procedure provided for in Article 48(2) to (5) of the Treaty on European Union, may decide to amend the Treaties, including either to increase or to reduce the competences conferred on the Union in the said Treaties.[15]

In theory, therefore, EU competence can be returned to the Member States or even to an individual Member State if all the EU Member States so decide. In practice, for political and/or practical reasons it is unlikely that certain competences would be returned to Member States. Where common policies have been established (e.g. the Common Agricultural Policy, the Common Fisheries Policy, the Common Commercial Policy), or where a principle or policy is considered to be fundamental to the functioning of the EU (e.g. the internal market), it is difficult to imagine achieving the unanimous agreement of the Member States to allow repatriation. The eurosceptic Peer, Lord Pearson of Rannoch, raised this point in the Lords Committee stage debate on the *European Union (Amendment) Bill* in May 2008:

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[13] The EU should refrain from action where the goals of that action could be better achieved by the Member States.

[14] The case concerned minimum harmonisation measures for a deposit guarantee scheme.

[15] CIG 15/07 3 December 2007

> Does my noble friend remember that Mr Major said that 25 per cent of all EU legislation was going to be repatriated to member states as a result of his brilliant negotiating skills at Maastricht? The noble Baroness has just confirmed that not one such power has since been returned.
>
> Finally, I put this to the noble Baroness. She says that these powers are conferred by treaty on the European Union by the nation states. If she cannot tell us how those powers are eventually to be returned, and if no powers ever have been returned, does this not confirm that we are dealing with a one-way ratchet? We are dealing with the acquis communautaire. The treaties, the protocol on subsidiarity and all the rest confirm that once a power has been passed, it cannot be given back without unanimity in the Council, which is unrealistic. I do not think that it helps to say that these are merely conferred powers.

Baroness Ashton of Upholland replied:

> The noble Lord is not going to agree with me on this, but he is right to say that you would have powers returned by unanimity, except in some areas of shared competence where, if the EU does not act, qualified majority voting might apply. As we move forward with the European Union of 27 member states, and begin to think about how it is going to operate in the future, one of the interesting points in the treaty is the recognition—whether or not it has been recognised before—that powers could be returned if that were most appropriate.[16]

In its Impact Assessment of the Lisbon Treaty the House of Lords European Union Committee commented:

> 2.30. The ability to repatriate competences (the mirror image of conferral) is included in the Treaties for the first time under the Lisbon Treaty reforms. The Council may, at the initiative of one or more of its members, and in accordance with Article 241 of the TFEU (which allows the Council to request the Commission to initiate proposals), request the Commission to submit proposals for repealing a legislative act. In the Declaration, the IGC "welcomes the Commission's declaration that it will devote particular attention to these requests." The Declaration also points out that the Member States, meeting in an inter-governmental conference9, may decide to amend the Treaties, including by increasing or decreasing the competences conferred on the Union.
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> 2.31. Professor Wallace welcomed these "references to the possibility of proposals to reduce the competences of the Union also being legitimate ideas to put on the table", saying "[t]hat used to be regarded as blasphemy" (Q S164). The European Parliamentary Labour Party said that whether such reductions were necessary or not depended on Member States, "because they [in the Council] are the gatekeepers of what goes into the European domain and what does not … The EU does not determine its own remit—member states do—and the Reform Treaty will not change this" (p S141). Elmar Brok MEP told us that "it is clearly defined [in this Treaty] that the European Union does not have the competence of competences, it is clearly said in this Treaty that every competence the European Union has is given by Member States and can be taken away by the Member States" (Q S339).[17]

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16 HL Deb 12 May 2008 c 833

17 10th Report 2007–08

In an article called "Repatriating powers" from Brussels – an uphill struggle?, Christopher Brown wrote:

> ... if the UK wished to see the law-making powers of the EU institutions reduced, that would require a Treaty amendment. And that, of course, would require the agreement of all 27 Member States. Given that many Member States are likely to be supportive of the current labour law position, it is unrealistic to think that there will be any general narrowing of EU competence in this respect. So the question is whether the UK should be placed in a special position – and here, too, it is unlikely that the UK will get its way, no matter how much horse-trading the UK is willing to engage in. Whilst it appears that there will need to be a Treaty amendment to help deal with the Eurozone crisis, many Member States would be intensely uncomfortable with the idea of allowing the UK to roll back on its current Treaty commitments: if the UK could do it, others would likely wish to do likewise, discarding the bits of EU law which they least liked. And there is the separate question of how radical the Eurozone-related Treaty amendment would be in any event: would the UK have the chutzpah to demand a re-opening of old issues in return for its support for the bailout measures, which are arguably in its interests as much as other Member States'? There is surely a good argument that engaging in political opportunism here would be deleterious to the UK's longer term negotiating position in Europe.[18]

4 How could EU powers be repatriated?

4.1 At EU level

Repatriating EU competences would in all likelihood require Treaty change(s) using the Ordinary Legislative Procedure: an intergovernmental conference, probably preceded by a convention, and national ratification by all 27 Member States. It is not clear whether the Simplified Revision Procedure (SRP) could be used in this scenario. The SRP can only be used for changes to Part 3 of the Treaty on internal policies and Article 48 TEU stipulates that it must not be used to increase the EU's competences. However, it is silent as to whether it could be used to decrease EU competences.

4.2 At UK level

The repatriation of EU law to the UK would not be automatic; UK legislation in the form of an Act or an SI would be needed to repeal or amend UK laws that had implemented EU law in the former EU areas.

The November 2011 Open Europe report on social policy mentioned above sets out how repatriation might be achieved, considering three options: Treaty change, the renegotiation of specific directives and unilateral UK action:

> **i) Repatriating a law does not mean repealing it**
>
> Should the UK Government succeed in repatriating powers, EU-derived laws would not magically disappear overnight, nor would the benefits and costs arising from them. EU Directives (as opposed to EU Regulations) – which comprise the bulk of EU social policy laws – require UK implementing laws in order to take effect and they would therefore remain in force as UK law. In other words, even if the entire body of EU social law were repatriated, it would

[18] Eutopialaw, 2 November 2011

require acts of Parliament to amend or repeal the UK laws that currently implement EU Directives.

This would no doubt give rise to a lively and vibrant debate. The Government and many MPs are likely to want to keep many of these laws, either in their entirety or in part, for example anti-discrimination laws, but they would be free to significantly amend others, such as the WTD – a stated aim of the Coalition agreement.

The crucial point is that both the regulations themselves and the benefits and costs they generate would be under the control of Westminster, empowering MPs and, in turn, voters to influence them.

ii) How would repatriation be achieved?

a) Legally

There are a number of options that the Government could pursue, which we set out in more detail in Section 4, but they can be divided broadly into three categories:

- Repatriation without changes to the EU Treaties but a renegotiation of individual Directives

- Repatriation with EU Treaty changes

- Repatriation through unilateral action by the Government or Parliament

The two first options would be playing 'within the rules', subject to the agreement of other EU countries, while the unilateral 'nuclear' option would have potentially far-reaching and unpredictable political consequences.

b) Politically

It is clear that any attempt to repatriate powers will be a huge challenge, given that this will require agreement from 26 other national governments and that a comprehensive approach will require renegotiation of the EU Treaties. It is also clear that if a UK Government is to successfully repatriate powers, it needs to have leverage with its EU partners and be willing to spend a lot of political capital. In addition, it may have to make other concessions in return.

This does not mean that repatriating powers is an impossible task. Greater eurozone integration may need one or more EU Treaty changes, over which the UK has a veto. This could provide the UK with the opportunity to insert a protocol, potentially on social policy, as part of the wider reshaping of the EU architecture.

However, it will be important to separate short-term eurozone crisis management, a crisis which could have direct economic consequences for the UK if it spirals out of control, from the political settlement that is likely to follow in its wake and which can be spread over years. The former is not suitable for horse-trading, while, just as any other member state, the UK has little choice but to engage and seek to maximise its national interest in the shaping of the latter – particularly in light of the potential formation of a tightly integrated eurozone core.

Regardless, the risk with this strategy is that Germany, France and the other eurozone members push ahead with a eurozone-only treaty, outside the wider

> EU framework, with a similar structure to the original Schengen Treaty. This would strip Britain of its veto and therefore leverage. But even so, Britain potentially has the size and clout to achieve comparable concessions – it is one of the EU's 'Big Three', presides over a big market and is a major net contributor to the EU budget.
>
> The EU often works by consensus, and if a member state – and one of the biggest in particular – sets its mind on a certain task, it is very difficult for the rest of the club to ignore it. No matter what happens, Britain will need to play a long strategic game and prioritise what it really wants to get out of the EU – social policy would be one of many areas to consider. Winning in Europe is rarely achieved through a big bang strategy, but through agenda setting and endless repetition.

4.3 Justice and Home Affairs matters

These areas present a particular scenario with options for the UK to retain responsibility for action without seeking a repatriation of powers.

UK Protocol

Former Title IV of the *Treaty Establishing the European Community* (TEC) was created by the 1997 *Treaty of Amsterdam*. It gave the EU powers to adopt legislation on immigration and asylum, by moving these areas out of the inter-governmental Justice and Home Affairs (JHA) "Third Pillar" into the Community "First Pillar".[19] Immigration and asylum were no longer matters for inter-governmental coordination but became subject to EU decision-making procedures.

Under the *Protocol on the position of the United Kingdom and Ireland*, annexed to the pre-Lisbon *Treaty on European Union* (TEU – the intergovernmental part) and the TEC, the UK did not participate in and was not bound by measures under Title IV TEC unless it exercised its right to opt in. Title VI contained what remained of the Third Pillar, which was subject to unanimity and the right of veto. This was consolidated into Lisbon Title IV TFEU, representing a collapsing of the pillar structure in this area and the general application of Qualified Majority Voting (QMV). The previous TEU category of "framework decisions" disappeared as a result of this transfer.

The Lisbon Treaty removes the 'Third Pillar'

Lisbon creation the *Area of Freedom, Security and Justice* (AFSJ), which is based on the Tampere (1999-04), Hague (2004-09) and Stockholm (2010-14) programmes. It derives from the earlier Title IV TEC (Visas, asylum, immigration and other policies related to free movement of persons) and Title VI TEU (Provisions on police and judicial cooperation in criminal matters) and is now Title V of the *Treaty on the Functioning of the European Union* (TFEU – the former TEC). The AFSJ therefore comprises policies relating to border controls, asylum and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters and police cooperation.

European Court of Justice jurisdiction before the Lisbon Treaty

Before Lisbon there were different jurisdiction rules for measures on immigration, asylum and civil law, compared with criminal law and policing, and both sets of rules were different from the normal rules on the jurisdiction of the European Court of Justice (now just the Court of

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[19] For further background see House of Commons Library standard note SN/HA/1843, *EU Immigration and Asylum Law and Policy*, 27 February 2003

Justice). For immigration, asylum and civil law, the normal jurisdiction of the Court applied, except regarding references from national courts to the ECJ on the validity and interpretation of EU acts (under former Article 234 TEC, now 267 TFEU). In these areas only the final courts could send questions to the ECJ.

With regard to policing and criminal law, Member States had an option of allowing their national courts to send references for preliminary rulings to the ECJ by making a declaration under former Article 35(2) TEU. 17 Member States did so, not including the UK, Ireland, Denmark and some newer States.[20] The ECJ had no automatic jurisdiction over actions brought by the Commission against Member States for alleged breach of EU law in these areas (infringement actions).

Court of Justice jurisdiction since Lisbon

Under Lisbon the Court has normal jurisdiction in all former JHA areas except for a restriction on ruling on national police operations. Member States can no longer opt out of the Court's jurisdiction with regard to references from national courts in the areas of policing and criminal law, and any Member State court or tribunal can send questions to the Court on JHA matters. This also applies to the UK once it has decided to opt into legislation in policing and criminal justice.

The Lisbon Treaty move gave rise to the question of ECJ jurisdiction for measures in policing and criminal justice, where Member States had had the option (outlined above) to opt out of the full jurisdiction of the Court. Under Article 10 of the Lisbon Protocol on transitional issues, the former ECJ jurisdiction over policing and criminal matters is retained for pre-existing measures in these areas for the first five years after the Treaty comes into force – so until December 2014. These measures apply to the ten EU Member States, including the UK and Ireland, which did not allow national courts to make preliminary ruling references to the ECJ. Furthermore, the Commission cannot use its powers under Article 258 TFEU (infringement action) against Member States in these areas for five years after Lisbon. During this five-year period the Court's normal jurisdiction applies once a pre-existing measure is amended, although identifying an amendment might not always be straightforward. The UK and Ireland have an opt-in option to these amendments under their Protocol and Denmark has an opt-out from them under a separate Protocol.

In 2014 the UK can decide not to accept the normal jurisdiction of the Court, in which case all former legislation in the third pillar which has not been amended since Lisbon came into force will no longer apply to the UK. The Council will decide on transitional rules (e.g. the validity of UK-issued EU arrest warrants) and any financial consequences the UK will have to meet. The UK can decide to opt back into any of these measures, but will then have to accept the Court's jurisdiction. This must be approved by the Council or Commission, which must seek the "widest possible measure of participation" of the UK in the AFSJ, while respecting its coherence.

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[20] The following States were the first to accept the Court of Justice's jurisdiction in matters relating to policing and criminal justice: Austria, Belgium, Germany Greece, Luxembourg, the Netherlands, Sweden, Finland, Spain, Portugal, Italy, France, the Czech Republic and Hungary (Hungary and Spain limited this to courts of final appeal). In 2008 Hungary decided to allow all courts to refer and Latvia, Lithuania and Slovenia accepted the jurisdiction of the Court (OJL 70, 14 March 2008 p. 23). Cyprus and Romania accepted jurisdiction in 2010 (see OJL 056, 6 March 2010). The Note to their declarations gives information on the preceding declarations.

The Government has said there will be a vote in both Houses on the 2014 decision on JHA measures adopted before Lisbon and which have not subsequently been amended or repealed. The ESC asked in April 2011 how decisive that vote would be in influencing the Government's decision, to which the Government said that it seemed "completely implausible that a Government could go ahead with a decision to opt in en masse to these if there had been an adverse vote in the House of Commons against them. I do not see how that is politically sustainable for any Government of any political colour".[21]

5 Comment and further reading

- House of Lords European Union Committee, 10th Report 2007–08, "The Treaty of Lisbon: an impact assessment", Vol I: Report, 13 March 2008
- Paul Craig, "Competence: Clarity, Conferral, Containment and Consideration" *European Law Review* 29, 2004, p. 323
- Paul Craig, "The Treaty of Lisbon: Process, architecture and substance", European Law Review, Volume 33 No. 2 April 2008
- Open Europe, Repatriating EU social policy: the best choice for jobs and growth? Stephen Booth, Mats Persson, Vincenzo Scarpetta, November 2011
- Daily Express, Repatriate EU Powers? In your dreams Frederick Forsyth**,** 4 November 2011
- "What powers we should repatriate - and how to do so", Andrew Lilico, Conservative Home blog, 5 November 2011
- See Report from the Commission on Subsidiarity and Proportionality, 18th report on Better Lawmaking covering the year 2010, COM/2011/0344 final

[21] David Lidington, Minutes of Evidence to European Scrutiny Committee, "Opting into international agreements and enhanced Parliamentary scrutiny of opt-in decisions", 27 April 2011