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Renegotiation by the United Kingdom of its constitutional relationship with the European Union: Issues related to Sovereignty

STUDY FOR THE AFCO COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

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its constitutional relationship with the
European Union: Issues related to
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STUDY

Abstract

A key point of the United Kingdom's renegotiation agreement with the European Union is sovereignty. Historically, the British have been particularly sensitive about this issue. Following the demands of Prime Minister Cameron, five different issues have been tackled: "ever closer union", subsidiarity, the role of the national parliaments, the British opt-out on matters relating to the Area of Freedom, Security and Justice and the issue of national security. They all have different scope and consequences that are analysed in detail.

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To contact the Policy Department for Citizens' Rights and Constitutional Affairs or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

Research Administrator Responsible

Petr NOVAK
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

AUTHORS

Francisco ALDECOA LUZÁRRAGA
Mercedes GUINEA LLORENTE
FUNDACIÓN ALTERNATIVAS

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LIST OF ABBREVIATIONS

- AFSJ** Area of Freedom, Security and Justice
- CFSP** Common Foreign and Security Policy
- CJEU** Court of Justice of the European Union
- EFTA** European Free Trade Association
- EMU** Economic and Monetary Union
- EU** European Union
- ICG** Intergovernmental conference
- JHA** Justice and Home Affairs
- OEEC** Organisation for European Economic Cooperation
- OJ** Official Journal of the European Union
- TEU** Treaty on European Union
- TFEU** Treaty on the Functioning of the European Union
- TSCG** Treaty on Stability, Coordination and Governance
- UKIP** United Kingdom Independence Party

EXECUTIVE SUMMARY

Background

On 19th February 2016, the United Kingdom and the other 27 Member States reached an agreement on a new settlement for the United Kingdom within the European Union (EU). The European partners responded to the demands of Prime Minister David Cameron with a series of concessions that seek to tip the balance of the popular vote in the referendum of 23rd June in favour of remaining in the EU.

Aim

The aim of this analysis is to provide an in-depth study of the causes and results of the constitutional negotiation with the United Kingdom in one of its four areas, concerning sovereignty. Sovereignty is a key point of the negotiation as a whole, as it steers us to the issue of the discussion over the EU model and project from the British perspective. That is why it is fundamental to examine the idea of international cooperation that the British advocate for the EU and the goals and interests that they believe that it should promote. That leads us to conclude that the United Kingdom has a preference for a limited integration model that promotes the "Europe of States", which the British have strived to develop in every one of the constitutional gatherings to revise the Treaties.

The current process of renegotiation of the terms of participation is the result of the confluence of two types of factors: some European and others particular to British domestic politics. The growing deepening of the Eurozone and the gradual marginalisation of the United Kingdom in European politics account for the British Government's desire to reach a settlement that affords them a better position. From the domestic point of view, Cameron's leadership in his party and the need to sideline the Eurosceptic possibilities of UKIP prompted him to make it a central point of his political programme to revise the United Kingdom's membership conditions in the EU and call a referendum so that the British people could express their opinion on their desire to remain in a reformed EU or not.

The political process of renegotiation began in 2013 with a double agenda: reform an EU that, in the British view, has major failings and revise the terms of British participation in it. One of the most important elements of the British demand was the return of EU powers to the Member States, a demand that would be dropped as a result of the exercise to review the competences, which showed that in every case the current division benefited the Member States.

On 10th November 2015, Prime Minister Cameron sent a letter to European Council President Tusk with the formal renegotiation agenda. The section on sovereignty covers five areas: the United Kingdom's participation in "an ever closer union", fuller implementation of the subsidiarity principle, the creation of a new "red card" procedure in the hands of the national parliaments, the ratification of British opt-outs in the Area of Freedom, Security and Justice and the reiteration of the sole responsibility of the States on matters of national security.

After a short negotiation process, on 19th February 2016, the Heads of State or Government, *within the European Council*, adopted a Decision on a new settlement for the United Kingdom within the EU. This International Law Decision is legally-binding only on the Member States, has an interpretative purpose with regard to the current Treaties and will only come into force if the United Kingdom announces that it is staying in the EU.

In the section on sovereignty, the United Kingdom obtained recognition that it is not committed to further political integration and it was agreed that this provision would be incorporated into the Treaties at the time of their next revision. The assertion seeks to

reassure the British, who are always suspicious of the construction of a federal super-State. However, it represents no real change in the United Kingdom's legal status, given that according to the current Treaties neither it nor any other Member State has the legal obligation to integrate politically. Moreover, it states that under no circumstances can the goal of "an ever closer union" be used to justify an expansion of competences or an extensive interpretation of them. Thirdly, the expression "an ever closer union" is interpreted to accommodate flexibility, in such a way as to allow the Member States to progress at different speeds and, in the future, if the Treaties were reformed, they could even consider different goals in integration.

On the subject of the subsidiarity principle, a guarantee that the EU does not exercise competences improperly, the Decision contains nothing new worth mentioning: it limits itself to reproducing the content of the Treaties, the role of the national parliaments in their control and a political commitment to more fully implement this principle. The Decision includes as an annex a Declaration of the Commission on a subsidiarity implementation mechanism, where the institution states its intention to review the correct implementation of this principle retroactively with regard to the existing legislation.

In the face of Cameron's broad demand for new roles for the national parliaments, the Decision maintains their contribution to the control of the subsidiarity principle, as provided for under Protocol No 2. It extends the period for reception of opinions to 12 weeks and creates a new "red card" procedure that will suspend consideration in the Council if the negative opinions from the national parliaments amount to 55%. This procedure raises possible points of friction with the Treaties, which are analysed.

The demands concerning the opt-outs on the Area of Freedom, Security and Justice (AFSJ) and the assertion of sole responsibility for national security correspond to past conflicts with the institutions that the British Government wishes to avoid in the future. In the case of the AFSJ, it has obtained a new legal commitment from the Member States: if a draft decision could fall within the scope of two legal bases, it will be possible to split the proposal into two acts in order to facilitate this country's choice. Finally, concerning national security, the Decision responds to British concern by reiterating what is laid down in Article 4 (2) of the TEU, in the sense that it is the sole responsibility of the State, for which reason intervention by the institutions is excluded from this area.

1. INTRODUCTION

On 19th February 2016, the United Kingdom and the remaining 27 Heads of State or Government reached a political agreement on “a new settlement” for this State as a member of the European Union (EU)¹. The Decision brought to a close the European phase of the renegotiation of its constitutional relationship, an initiative that Prime Minister David Cameron had launched in January 2013. The agreement opens the domestic phase, in which, on the basis of this new agreement, the British electorate is invited to express its opinion on whether to remain a member of the EU, in a referendum scheduled for 23rd June 2016.

In this study we intend to analyse and assess the result of the European agreement on the new settlement for membership in one of its four areas, Section C of the Decision, relating to “sovereignty”. Despite appearing in third place, this is the chief Section of the entire negotiation, given that it relates to the essence of the United Kingdom’s participation in the process of European integration. In fact, examining the elements around which the settlement has been discussed and negotiated amounts to focusing on the way that the current Government of the United Kingdom understands what its membership in relation to the EU should be. Indeed, the main argument of those in favour of leaving the EU is the recovery of the country’s lost sovereignty².

Discussing and demanding (British) “sovereignty” already implies taking a political and ideological stance against the project and current model of the EU, which is rejected or at least questioned. It implies suggesting in a “defensive” manner that the EU in some way limits and attacks the national sovereignty and “independence” of the United Kingdom. It is certainly a very different point of view to the one taken by other States that believe that “sovereignty” is shared voluntarily in order to obtain gains and pursue a common good that, in a world of interdependencies, are far beyond reach on one’s own. Once, it was peace and stability in the European continent; today it is having a voice in the international society of globalisation to ensure security, prosperity and well-being.

The point of view that this report will take is that of the European Union, endeavouring to establish whether the new elements of the relationship agreed on 19th February do indeed allow one to speak of a “new settlement” for the United Kingdom. We will tackle our analysis from the viewpoint of international relations, combining political science and legal tools. In the examination of the “sovereignty” area, we will specifically study the consequences that each element of the agreement has for the current EU model and for the project. In the first instance, we will assess the compatibility of each of the concessions with the current framework of the Treaties in force. From the second point of view, we will examine the consequences in the light of the future development of European integration.

To do so, we will first present some brief political and methodological points that will allow us to establish the parameters of our study. Second, we will analyse the United Kingdom’s membership of the European Community/Union with the aim of putting the current debate

¹ European Council, *Conclusions of the Presidency*, Brussels, 18-19 February 2016, Annex I, (EUCO 1/16). The extract of the conclusions relating to the United Kingdom and Annex I were subsequently published in Section C, Notices from the Institutions, of the Official Journal. See: “European Council. A new settlement for the United Kingdom within the European Union”, *OJ*, C 691, 23.02.2016, p. 1.

² See the manifesto of one of the main leaders of the movement to leave the EU: to recover the sovereignty that the British people have lost as a result of the federal evolution of the EU. Boris Johnson, “There is only one way to get the change we want - vote to leave the EU”, *The Telegraph*, 22 February 2016 (<http://www.telegraph.co.uk/news/newstoppers/eureferendum/12167643/Boris-Johnson-there-is-only-one-way-to-get-the-change-we-want-vote-to-leave-the-EU.html>).

over “sovereignty” into context and understanding its causes and expressions. Next, we will trace the current political process of renegotiation since its launch by David Cameron in January 2013, paying attention to how the demands with regard to sovereignty have developed. It is necessary to state from the outset that this has been one of the least controversial areas and that, except for “ever closer union”, it has barely undergone any changes since the proposal by European Council President Donald Tusk. Then we will study the European Council agreement of February 2016, in both its political and legal aspects. In this respect, the study of the legal nature of the Decision by the Heads of State or Government is particularly important, in that it will allow us to anticipate its institutional consequences.

The second part of the report will be a detailed study of each of the five elements that make up Cameron’s demands on matters of sovereignty and on which the European Council has spoken. These are: “an even closer union”, that is to say, the future development of the EU; subsidiarity; the role of national parliaments; the British exception with regard to the Area of Freedom, Security and Justice (AFSJ) and the issue of national security. In each of them we will analyse the Prime Minister’s explicit request, the position of the main Member States, the negotiation and its outcome. The reasons for the demand from the British viewpoint will also be studied and the impact that the result may have both on the current model of the EU constitutionalised in the Treaties and on the integration project, that is to say, the chances of its future development, will be analysed. In the final part of our study we will try to answer whether a new settlement for the United Kingdom really has been negotiated and we will consider the political consequences that the agreement has and may have for the EU in the future.

2. THE PROCESS OF RENEGOTIATION BY THE UNITED KINGDOM: POLITICAL CONSIDERATIONS

The EU is currently facing a difficult, though not unprecedented, situation: the renegotiation of the membership status of one of its Member States, the United Kingdom. As a result of intense domestic debate and the rise of Europhobic parties and Eurosceptic tendencies within his own party too, Prime Minister David Cameron took office for a second term as head of the government with the promise to hold a referendum no later than 2017, after having renegotiated the United Kingdom's status in the EU with the rest of the Members.

The British request comes at a time of severe and complex turbulence for the EU, which is faced with assorted crises. The economy has not yet grown sufficiently to dispel the spectre of a new recession. The social tension caused by the economic crisis has triggered public disaffection toward the traditional institutions and the rise of extremist political parties on both the right and the left of the political spectrum, which complicate the governability of the Member States and, indirectly, of Europe. The avalanche of refugees caused by the varied and complex conflicts on the southern and eastern shores of the Mediterranean has led to unprecedented tension among Member States, to a subordination of European commitments on human rights matters to the interests of state and to the reintroduction of border controls within the European area. Likewise, the EU is powerless in the face of major conflicts in its immediate vicinity that it is trying to stabilise, from the war in Ukraine to the one in Syria, not forgetting the fragile state of Libya. Nor can we forget the priority that must be given to the fight against Islamist-based terrorism, which threatens a significant number of Member States.

Against this difficult backdrop, the British Government's renegotiation agenda opens another area of concern and tension for the project of European integration. It is an issue that needs to be solved as quickly as possible, at least at European level, so that the common institutions can focus on the search for solutions to the many other problems they face. There is no doubt that the context and the desire to reach a swift agreement have favoured the British position and aspirations. From the outset, the leaders of the other 27 Member States and of the EU's institutions showed a firm political will to try to reach an agreement that satisfied the British demands. As President Tusk underscored, nothing less than "the unity of the European Union"³ is at stake.

The different leaders, both individually and within the European Council, have said on several occasions that they do not want the United Kingdom to leave the EU, in the belief it is a member that is fundamental to its strength as an international player. This has determined their willingness to negotiate a better response to British concerns in the EU and has also contributed to a swift solution. However, they are aware of the risks involved too, since not even an agreement that fully satisfies the Prime Minister's demands is any guarantee of a positive result in the referendum.

The issue of the United Kingdom's place within the EU is not new or related to the current circumstances, rather it dates back a long way and, in our view, as we will see in the following section, is down to structural differences in the conception of the nature and ultimate purpose of the European integration project. The United Kingdom is the only State that, in the past, has already renegotiated its membership conditions and staged a

³ Donald TUSK, *Letter to the Members of the European Council on his proposal for a new settlement for the United Kingdom within the European Union*, Brussels, 2nd February 2016, (Press Release 23/16).

referendum on the new agreement reached with the then European Community, in 1975. It is, then, pertinent to ask why, in the past and at present, this State is the only one of the Twenty-Eight that has not found its place within the European structure when it is also one of those that has been most successful in shaping the current state of European integration.

We agree with a good number of analysts in that the EU at present is more similar than one could have thought to the model that the British have traditionally advocated, although they have had to accept the supranational model⁴. There has been enlargement to more than three times the number of members that it had when they joined. The constitutional consolidation of the Eurozone to guarantee the sustainability of the Economic and Monetary Union (EMU) has triggered an increase in flexibility and growing differences among the Member States⁵. The priority goal of this EU, which is facing mounting difficulties in emerging from the crisis, is to recover competitiveness by any means in order to reinforce and consolidate sustainable growth and increase employment⁶. From an internal point of view, there is a commitment to the consolidation and refinement of the Internal Market, placing special emphasis on the development of the Digital Market and on starting a Capital Markets Union. From an external point of view, priority is being given to an external policy committed to negotiation and the signing of ambitious free trade agreements, after having accepted the deepening in foreign policy. In its new programme, the European Commission has also taken the line that excessive European regulation is liable to reduce the competitiveness of companies and other economic players and considers it a priority to review the entire legislation and repeal everything that proves superfluous and too exhaustive⁷.

The existence of a dense “community of interests” and the spirit of fair competition inspire the Member States as a whole, which have now done everything in their power to keep the United Kingdom in the EU. However, there is a sense that there is a limit to the concessions to this Member State, as there are many points of concern. The first and most important is striking the difficult balance of satisfying the British demands without undermining the foundations of the European project of political integration. The first limit on the renegotiation, then, comprises the principles enshrined in the current Treaties and which

⁴ Foreign Secretary Hammond himself would tell the Committee in charge of European control in the House of Commons: *“The truth is that the arguments about Europe are being won: the argument that Europe needs to focus less on social mechanisms and more on being competitive, creating jobs, looking outwards to open markets and more trade; that Europe needs to be more accountable; that there needs to be less regulation from Brussels; that more powers need to be exercised by the member states, fewer be exercised from Brussels. These arguments, which a few years ago were characterised as slightly strange British arguments, are now mainstream in many countries of the European Union, including countries that have traditionally been regarded as euro federalist”*. House of Commons – European Scrutiny Committee, *Oral evidence: UK Government’s renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny: follow up*, 10 February 2016, (HC 818), p. 11.

⁵ We have studied elsewhere the effects that the crisis has had on the increase in differentiated integration within the EU: Mercedes Guinea Llorente, “Efectos de la crisis en el modelo político europeo: más integración pero diferenciada”, in: Francisco Aldecoa Luzárraga y Carlos R. Fernández Liesa (Dirs.), *Gobernanza y reforma internacional tras la crisis financiera y económica: el papel de la Unión Europea*, Madrid, Marcial Pons, 2014, pp. 87-128.

⁶ See the political programme of the current European Commission, under President Juncker. Jean-Claude Juncker, *“A New Start for Europe: My Agenda for Growth, Jobs, Fairness and Democratic Change”*. *Political Guidelines for the Next European Commission*, Strasbourg, 15 July 2014.

⁷ In this respect, Juncker gave his First Vice-President the task of securing a “Better Regulation”, justified by that fact that, “Respect for the principles of subsidiarity, proportionality and better regulation will be at the core of the work of the new Commission. We will concentrate our efforts on those areas where only joint action at European level can deliver the desired results. When we act, we will always look for the most efficient and least burdensome approach. Beyond these areas, we should leave action to the Member States where they are more legitimate and better equipped to give effective policy responses at national, regional or local level”. Jean-Claude Juncker, *Mission Letter to Frans Timmermans, First Vice-President, in charge of Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights*, Brussels, 1st November 2014.

define the integration model and relations among States, States and institutions and citizens.

Secondly, from the outset there was acknowledgement of the need to further the already existing "British exceptionalism" in the name of a flexibility that would allow an even more differentiated integration for this State. However, there is the sense that there is a limit to that differentiation too, since both the risk of violating the principle of equality among all the Member States (and citizens) and the establishment of an "à la carte" integration model, where each State chooses in which policies it wishes to participate, are to be avoided. Most of the Member States and the European Parliament itself believe that an "à la carte" Europe entails a risk of an unravelling and subsequent dilution of European integration.

Third, and no less important, is the fear of the threat of setting a precedent, which is so significant in the political and constitutional practice of the EU. It is undesirable that the threat of Brexit might open the door to pressure from other States to secure a special status for them too, or membership conditions that better adapt to certain circumstances or wishes. There is the risk that other States may raise a renegotiation of their conditions when faced with tensions derived from fulfilling their membership obligations. However, we must take into account that very few other States have the same structural power as the United Kingdom and are capable, therefore, of swaying the rest of the States and the institutions to consider their request. Even so, the explanations that institutions and States may have to provide in order not to accept the demands of other Member States, in view of the principle of equality, will be politically complicated and awkward.

Finally, we also have to take into account the concern over maintaining the political stability and dynamism of the EU. The British renegotiation has had and is having a not negligible cost on the EU as a whole, a cost that States and institutions have accepted in their desire to cooperate with the Prime Minister. In exchange it seems fair to seek the commitment from the United Kingdom to respect its duty of loyal cooperation. In our view, the guarantee of political stability should be sought through an explicit commitment from the United Kingdom not to raise the issue again in a reasonable period of time. The EU's dynamism should be safeguarded through another explicit commitment from the British Government not to veto future initiatives by other Member States on matters relating to deeper integration⁸.

⁸ In this respect, in the renegotiation of the Maastricht Treaty in Edinburgh, so that the Danish Government could repeat the referendum, in exchange for the opt-out from participation in the future defence policy, the Danish Government was required to give an explicit commitment not to prevent the other Member States from developing their cooperation in this area. See: Art. 5 of Protocol No 22, on the Position of Denmark.

3. THE UNITED KINGDOM AND THE EUROPEAN UNION: POLITICAL PROJECT AND SOVEREIGNTY

The academics who have studied the United Kingdom's position and participation in the EU all agree that since joining it has been a difficult and uncomfortable member (an "awkward partner")⁹ and an unwilling participant in the integration process (a "reluctant European")¹⁰. Even though, from the outset, the British have been one of the most reluctant States with regard to the integration process, they are also one of the most observant of their commitments, topping the list of States that best fulfil their obligations under Community Law¹¹. Within British politics, the issue of the relationship with Europe is undoubtedly the most controversial and complex and exerts an influence that affects the very idea of the United Kingdom as a political system and as a society¹². The causes are to be found in the United Kingdom's historical experience, which is different to that of the continent, its model of pure parliamentarism, its imperial past, and its values and political conceptions.

In the context of international relations, these causes account for a classic notion of state and sovereignty that could well be described as realist. Transferred to international organisation, the preferred model of the British is one of intergovernmental cooperation, averse to the supranational model that implies giving up sovereignty. The preference for an intergovernmental EU of independent States has been a constant feature of the United Kingdom's European policy under all its governments¹³. This clash of two models of international organisation already occurred at the earliest stage of European integration, the Hague Congress of 1948, between the "unionists", with the British at the core, and the "federalists", who were numerous among the French, Belgians, Italians and Dutch¹⁴. As we know, the "unionists" would ultimately prevail and the initial plans of creating a "European parliamentary assembly" would be left aside temporarily¹⁵. The resulting organisation, the Council of Europe, created by the Treaty of London of 1949, would follow the classic intergovernmental organisation model, with powers that did not exceed political coordination.

The traditional pragmatism of the British character, however, has led them, case by case, to accept occasional limitations of their sovereignty and to participate in international organisation, always after careful evaluation of the cost-benefit ratio. That logic leads them to give precedence to cooperation structures where they obtain a clear advantage and they can also exercise clear leadership, as they rest on hegemonic positions. This means that traditionally they have tended to prefer international cooperation in matters of security and on issues of trade, the latter logic in line with their tradition as an open and commercial

⁹ Stephen George, *An Awkward Partner: Britain in the European Community*, Oxford, Oxford University Press, 1998.

¹⁰ Alistair Jones, *Britain and the European Union*, Edinburgh, Edinburgh University Press, 2007.

¹¹ Araceli Mangas Martín, "Los dilemas del Reino Unido y de la UE: ¿salir o cambiar la Unión?", *Documento de Trabajo del Real Instituto Elcano*, DT 3/2016, 25 de febrero de 2016, p. 20.

¹² For an analysis of the development of the relationship with Europe from a British perspective, see: David Gowland, Arthur Turner, and Alex Wright, *Britain and European Integration since 1945: On the Sidelines*, London, Routledge, 2009.

¹³ David Allen, "The United Kingdom: A Europeanized Government in a non-Europeanized Polity", in: Simon Bulmer and Christian Lequesne (Eds.), *The Member States of the European Union*, Oxford, Oxford University Press, 2005, p. 120.

¹⁴ Antonio Truyol y Serra, *La Integración Europea. Vol. I. Génesis y desarrollo de la Comunidad Europea (1951-1979)*, Madrid, Tecnos, 1999, p. 40.

¹⁵ Charles Zorgbibe, *Histoire de la construction européenne*, Paris, PUF, 1997, p. 20.

economy. The appeal that the European project will hold for the British will be as an instrument that allows the defence of their national interests: prosperity and security¹⁶.

Dinan pinpoints three phases in the United Kingdom's relationship with the EU: initial lack of interest; involvement in the long process of accession, commitment in the reform of the community budget and the launch of the single market; and disillusionment, from the moment that the EU consolidated towards a supranational model, above all with the introduction of the EMU¹⁷. The United Kingdom did not take part in the European Communities from the start because it did not want to: they declined to accept Minister Schuman's invitation from the outset because of the political implications of the new project, whose model they did not share¹⁸. At that time, the British were pursuing the creation of a free-trade zone within an Atlantic Community that was compatible with its leadership within the Commonwealth. That is why from 1955 they tried to realise the project around the transformation of the Organisation for European Economic Cooperation, which was created in 1948 to administer the Marshall Plan. The refusal of France and Germany and their determination to continue moving down the supranational path with the Treaties of Rome of 1957 put paid to the initiative. The British reaction was the creation, under its preferred model of intergovernmental cooperation, of the European Free Trade Association (EFTA), bringing together seven European states, where the United Kingdom had a predominant position but which lacked political cohesion.

On 9 August 1961, with the formal request for accession, the British position changed towards European integration under Prime Minister Harold Macmillan. This dramatic shift in British foreign policy was the result of the recognition of a new international context that was bringing about a loss of power on a global scale and, above all, the loss of markets. Realising that neither the Commonwealth nor the special relationship with the United States or the EFTA were enough to secure its prominence in a world dominated by superpowers, the British Government came to the conclusion that only through the union of European Communities could it maintain international influence¹⁹.

The process of accession was truly tortuous: the negotiations begun in 1961 were twice interrupted by the explicit veto of French President General de Gaulle. Only his replacement by Pompidou in 1969 allowed the resumption of accession talks, which were also extremely complicated on account of the economic interests in dispute²⁰. However, they ended in the agreement with Heath's Conservative Government and the signing of accession on 22 January 1972²¹. Formally, De Gaulle was an obstacle to British accession, yet paradoxically, with the imposition of the Luxembourg consensus, which required unanimity for all decisions, it would move the European Community closer to the intergovernmental model preferred by the British. Its "Europe of States", opposed to the supranational idea, was very close to the United Kingdom's idea and would end up facilitating it finding a place in the European Community²².

¹⁶ In this respect, the most "Eurosceptic" of British leaders, Margaret Thatcher, argued: "The European Community is a practical means by which Europe can ensure the future prosperity and security of its people in a world in which there are many other powerful nations and groups of nations". Margaret Thatcher, Prime Minister of the United Kingdom, *Speech to the College of Europe ("The Bruges Speech")*, 20 September 1988.

¹⁷ Desmond Dinan, "A Special Case. The United Kingdom and the European Union", in: Desmond Dinan (Ed.), *Origins and Evolution of the European Union*, Oxford, Oxford University Press, 2014, pp. 305-326.

¹⁸ Antonio Truyol y Serra, *La Integración Europea...*, op. cit., p. 68.

¹⁹ *White Paper "The United Kingdom and the European Communities"*, presented to Parliament by the Prime Minister by command of Her Majesty, London, Her Majesty's Stationery Office, July 1971, par. 30.

²⁰ Charles Zorgbibe, *Histoire de la construction européenne*, op. cit., pp. 97-102.

²¹ *Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community*, 22 January 1972, OJ L 73, 27.3.1972, pp. 5-204.

²² Antonio Truyol y Serra, *La Integración Europea...*, op. cit., p. 73.

Unlike the Irish and the Danes, the United Kingdom did not hold a referendum to ratify accession. Shortly after joining, in a precedent of the current situation, Harold Wilson's new Labour government would raise a renegotiation of the accession conditions and the subsequent staging of a referendum in which Britons would be asked about their desire to remain in the EU or not. It revealed the division existing between and within the political forces, a division that has remained to this day. From the point of view of the Community, what came to be called the "British mortgage" paralysed community development for over a year²³. The community agreement on issues such as the Common Agricultural Policy, less involvement of this State in the budget and a framework of privileged relations with the Commonwealth would mean that the first referendum in British history, held on 6 June 1975, had a positive outcome²⁴. However, in its White Paper the government made its position on the community model clear: in its view, its sole and prime asset was the Common Market; it rejected future plans to take things further, such as the EMU, and stressed the need to preserve the essential power of the British Parliament over all the legislation to be applied in the United Kingdom²⁵.

In the process of change and deepening beginning in 1979 with the election of the European Parliament by direct universal suffrage and which would be embodied in the revisions of the Treaties, this country has always been characterised by taking the most minimalist position. Meeting after meeting, whether it was governed by Conservatives or Labour, it has tried to check progress on deepening, champion new spheres of European action being subject to intergovernmental cooperation and introduce principles and mechanisms that reinforce the power and the supervision of the States over the activity of the common institutions. Generally speaking, it has promoted its model quite successfully, given the strength and negotiating skills of this Member State. In a necessarily brief and simplistic overview, we can see how, at each constitutional revision, the United Kingdom has had considerable success in ensuring that a good part of its proposals were accepted, if we bear in mind that while it managed to draw the support of other Member States it has always been in a clearly minority position in its defence of an exclusively commercial Europe and the preponderance of the States.

In the 1980s, the necessary deepening of the Community could only be tackled after paying what could be considered a second crippling "mortgage": yielding to the demands of Prime Minister Margaret Thatcher in the European Council of Fontainebleau in 1984, with the concession of the "British cheque". Despite Thatcher's alignment with the goal of the Internal Market proposed by Commission President Delors at the European Council of Milan in June 1985, London would vote against the calling of an Intergovernmental Conference (IGC). At this IGC, London battled for the smallest extension possible of the qualified majority, for no progress on political and monetary cooperation aspects and for leaving European Political Cooperation in the intergovernmental sphere and outside the Community²⁶. It finally chose a constructive position so as not to jeopardise the Internal Market initiative for 1992 that was so dear to it. There is no doubt that the biggest accommodation in its view was the qualified majority, which meant renouncing the protection of the sovereignty of the state and the intergovernmental principle of Luxembourg. It was only accepted after coming to terms with the fact that it was imperative for the adoption of the necessary legislation to set in motion the Internal Market.

²³ Ibid, p. 112.

²⁴ A total of 67.2% of voters came out in favour, while 32.8% voted "no".

²⁵ *White Paper "Membership of the European Community: Report on Renegotiation"*, presented to Parliament by the Prime Minister by command of Her Majesty, London, Her Majesty's Stationery Office, 1975.

²⁶ Andrew Moravcsik, "Negotiating the Single European Act: national interests and conventional statecraft in the European Community", *International Organization*, vol. 45, no. 1, 1991, pp. 19-56.

The negotiation that would lead to the Maastricht Treaty, prompted by the historical acceleration of changes for Europe and the world and called in June 1990, was especially tortuous for the British Government²⁷. The divisions within the Conservative Party on the United Kingdom's position would end up causing the departure of Prime Minister Thatcher, who was opposed to any transfer of sovereignty, and her replacement by the more pragmatic and pro-European John Major. Her "red lines" on political integration would threaten the global agreement on the new Treaty to the end. The required consensus between highly conflicting positions explains many of the characteristics of the EU of Maastricht. The British Government managed to block the mention of the "federal vocation" of the European Union and obtain the introduction of the principle of subsidiarity in the exercise of powers into the Treaty. The door was opened to differentiated integration through the exceptions granted to the United Kingdom in the EMU and in the social area and it was decided that the new powers with regard to High Politics, Common Foreign and Security Policy (CFSP) and matters of Justice and Home Affairs (JHA) would be confined to pillars of an intergovernmental nature²⁸.

In the implementation of Maastricht, the British Presidency in 1992 played an unquestionably prominent role in the Edinburgh agreement with the Danish Government, which would allow it to put ratification to a referendum again²⁹. That meeting was also used by the British Government to launch the implementation of the new principle of subsidiarity, which even implied the revision by the Commission of legislation already in force³⁰.

The IGC of 1996 was long and its results were fairly unambitious. This was down to a certain fatigue after Maastricht, but also because elections in some of the main Member States, such as France and the United Kingdom, paralysed a good part of the negotiation. The British position would change substantially from the initial one under Major's Conservative government to the final one of Labour's pragmatic Blair³¹. The final agreement of June 1997 would include some of the priorities of Labour's political programme, such as the end of the British exception on matters of Social Protocol and the new section on employment, also backed by France³². However, Labour's interest in the development of a social dimension in the EU did not alter the British stance on supranationality: the new area of employment would not be managed under the community method, but under the "open method of coordination", a new formula of intergovernmental action³³.

The communitisation of the Area of Freedom, Security and Justice (AFSJ), which the British did not want, would be agreed at the price of new exceptions for the United Kingdom, which, on the one hand, would allow it to keep controls at its borders and, on the other, to

²⁷ Anthony Forster, *Britain and the Maastricht negotiations*, New York, St. Martin's Press, 1999.

²⁸ Francisco Aldecoa Luzárraga, *La Integración Europea...*, pp. 157-159.

²⁹ Deirdre Curtin and Ronald Van Ooik, "Denmark and the Edinburgh Summit: Maastricht without Tears", in: David O'Keefe and Patrick M. Twomey, *Legal Issues of the Maastricht Treaty*, London, Wiley Chancery Law, 1994, pp. 349-365.

³⁰ European Council, *Conclusions of the Presidency*, Edinburgh, 11-12 December 1992, Part A, (SN 456/1/92 REV1), par. 5-6;

³¹ The position of Major's government can be found in: *White Paper on the 1996 Intergovernmental Conference. Volume II: Summary of positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference*, Luxembourg, European Parliament, 1996, pp. 157-164.

³² Francisco Aldecoa Luzárraga, *La Integración Europea...*, pp. 220-222.

³³ This new method would also be promoted by the United Kingdom, with the support of Portugal and Spain, for the so-called Lisbon Agenda that, adopted in 2000, sought to promote the competitiveness of the European economy. On this method of intergovernmental coordination and its problems in terms of effectiveness, see: Jacques TOULEMONDE, "Una evaluación del Método Abierto de Coordinación de la Políticas de los Estados miembros de la UE", *Gestión y análisis de políticas públicas*, nº 4, 2010.

choose, case by case, the specific legislative measures in which it wished to take part³⁴. In Amsterdam too it fought hard to safeguard intergovernmental management and control over the CFSP and the development of defence, which it largely achieved, vetoing, for instance, the innovation of reinforced cooperation in these areas and the EU having legal personality.

The almost exclusive goal of the Nice IGC was institutional reform to prepare the EU for enlargement. This was on the agenda of the British Government, which since the 1990s had championed the need to incorporate the States that in Central and Eastern Europe were striving to become democracies³⁵. In a negotiation marked by a power struggle, the British would align with the group of major States and champion the maintenance of the sovereignty of States, as shown by the alliance with Spain to maintain the Ioannina Compromise. They would also try to check attempts to shift a good number of decisions to a qualified majority. However, they were not capable of forming sufficient opposition to the key federalist advance of the Treaty of Nice, Declaration 23 on the future reform of the EU, which opened up a process of global reform on a different basis.

In parallel with the IGC of Nice, the Convention that drafted the Charter of Fundamental Rights was developed, a new method of reform that added representatives of governments, representatives of the national parliaments and of the common institutions³⁶. Within it, along with Ireland and Sweden, the United Kingdom would form part of the group of States with a more defensive position, demanding that it only have the value of a political declaration. Particularly significant would be the battle of the government representative Goldsmith against the inclusion of social rights in the catalogue, a battle that he lost, although in exchange he obtained a victory in the regulation of the right to private property³⁷. Given the deliberative dynamics developed within it, the British representatives could not veto the content that did not meet their interests. However, at the Nice European Council of 2000 that had to adopt it, the United Kingdom successfully opposed it having binding legal value³⁸. The European institutions at the meeting could only solemnly proclaim it as a Declaration with political effects.

In the debate on the future of Europe that same year, Blair would try to counteract the new federalist spirit driven from Germany and France with the defence of a future for Europe focused on the nation-state³⁹. The improvements that he proposed for the major reform that the EU was heading towards were the adoption of a declaration of principles of a political nature that would define what powers were European and which ones were national and the need to create a second chamber in the European Parliament, made up of representatives of the national parliaments, who would be in charge of monitoring the application of the declaration and of the democratic supervision of the CFSP.

³⁴ The Treaty of Amsterdam of 1997, then, determined the adoption of current Protocols 19, 20 and 21. See their current wording, following their adaptation to the Treaty of Lisbon: *Protocol on the Schengen acquis integrated into the framework of the EU* (Protocol 19); *Protocol on the application of certain aspects of Article 26 of the TFEU to the United Kingdom and to Ireland*, (Protocol 20) and *Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice* (Protocol 21).

³⁵ In a speech to the European Parliament, Queen Elizabeth II would say: "In Europe, the new democracies look increasingly to the European Community. We must not disappoint them". Queen Elizabeth II, *Speech to the European Parliament*, 12 May 1992.

³⁶ Gráinne de Búrca, "The Drafting of the European Union Charting of Fundamental Rights", *European Law Review*, no. 26, 2001, pp. 126-138.

³⁷ Mercedes Guinea Llorente, *La Convención Europea: la génesis del Tratado de Lisboa*, Madrid, Congreso de los Diputados, 2011, pp. 153 y 174.

³⁸ European Council, *Conclusions of the Presidency*, Nice, 7-10 December 2000, par. 5.

³⁹ Tony Blair, "Europe's Political Future", *Speech to the Polish Stock Exchange*, Warsaw, 6 October 2000.

For the European Convention that had to negotiate the major reform to adapt the EU to enlargement, the United Kingdom championed the participation of the representatives of the candidate States and that its mandate should be limited to the approval of a political declaration⁴⁰. The British Government's participation in the Convention, between 2002 and 2003, underwent a transformation: initially, it played an active and constructive role with the intention of promoting a more efficient EU in keeping with its model; by the end, it had shifted to a defensive position and focused on blocking all those initiatives that overstepped its "red lines"⁴¹. Many of the British preferences for reinforcing a Europe of States and restricting the possibilities of the development of what in their eyes is a super State prospered in the Convention's text. They managed to veto any reference to a federal development, keep the CFSP and new developments in defence matters under the intergovernmental method; they secured a new role for the national parliaments in the control of subsidiarity and the maintenance of unanimity on issues of interest to the United Kingdom. They also obtained the acceptance of the reversibility of the integration process with the withdrawal clause and the stipulation that future reforms of the Treaties could bring about both a subsequent transfer of powers and their renationalisation. It would secure further concessions in the arduous IGC that ended up adopting the Constitutional Treaty, particularly limiting the scope of qualified majority voting and the "emergency brake" in the sphere of the Area of Freedom, Security and Justice to defend vital interests of a State⁴².

In the IGC of 2007, which saw the rescue of the European Constitution as the Treaty of Lisbon, the United Kingdom, in alliance with other States such as the Netherlands or the Czech Republic, found a fresh occasion to draw its "red lines"⁴³. It would achieve new goals, such as the dropping of the constitutional form and its symbols, the disappearance of the definition of the EU as a union of States and citizens, the removal of the principle of primacy and the exclusion of the Charter of Fundamental Rights in the Treaties. It also won a new opt-out that limited the possibility of British legislation and practices being examined in the light of the Charter of Fundamental Rights and the incorporation of a new section that reiterated that national security is the sole responsibility of the Member States⁴⁴. Among the transitional provisions, it also won the right to choose not to apply the measures on matters of police and judicial cooperation adopted before the Treaty of Lisbon took effect and to choose on an individual basis in which measures it wished to take part⁴⁵.

In conclusion, we can see how, since joining, the British have championed the model of a Europe of States. Despite the sustained integration seen since the Single European Act, time and again this Member State has managed to defend its model of limited integration with considerable success, although it has had to accept major advances in supranational deepening since Maastricht.

⁴⁰ Mercedes Guinea Llorente, *La Convención Europea...*, p. 195.

⁴¹ Anand Menon, *Leading from behind: Britain and the European Constitutional Treaty*, Paris, Notre Europe, 2004.

⁴² Mercedes Guinea Llorente, *La Convención Europea...*, p. 256.

⁴³ Francisco Aldecoa Luzárraga y Mercedes Guinea Llorente, *La Europa que viene: el Tratado de Lisboa*, Madrid, Marcial Pons, 2010, 2ª ed., pp. 48-53.

⁴⁴ *Protocol No 30, on the application of the Charter of Fundamental Rights of the European Union to the United Kingdom and Poland.*

⁴⁵ Art. 10.4 and 5 of *Protocol No 36, on transitional provisions.*

4. THE POLITICAL PROCESS OF THE RENEGOTIATION OF THE UNITED KINGDOM'S STATUS WITHIN THE EUROPEAN UNION

The United Kingdom as a Member State is a singular case with regard to European integration. It has undergone a partial Europeanisation – only among the ruling elite and its officials – while the main political parties face internal divisions over the issue of their relationship with the EU and the population is one of the least favourable to the EU⁴⁶. Paradoxically, the fact that it is one of the most successful states at transferring its national preferences to the EU model has not had the effect of reconciling its population with the European ideal.

One might ask what factors prompted Prime Minister David Cameron, at the head of a coalition government of Conservatives and Liberal Democrats, to consider the need to open a renegotiation process with the EU in January 2013⁴⁷. In our view, there were two factors: one of a European nature and the other, domestic. On a European level, there had been a gradual and unstoppable marginalisation of this Member State in European politics and at the heart of the collective decision-making process. While the United Kingdom remains one of the main States in terms of population and wealth, its weight and influence have been progressively depleted by the fact that it is not a member of the EMU and does not participate in other spheres of integration, such as Schengen⁴⁸. As a result of the crisis, since 2010 the Eurozone has deepened and developed significantly, which has shifted the centre of political decision-taking to informal institutions such as the Eurogroup and the Euro Summit, in which the non-Euro States do not take part. This generates major frustration for these States, which have no choice but to accept the collateral consequences of the decisions in which they have no say⁴⁹.

This marginalisation would be crudely demonstrated in December 2012, when the British veto of the Fiscal Compact was averted by means of a Treaty of an international nature, outside EU law⁵⁰. For the first time, the maximalist States did not enter into a negotiation with the United Kingdom in order to integrate British preferences into a consensual agreement and took the unprecedented decision to step outside the framework of the Treaties to avoid its veto. In June 2014, there was painful confirmation, also for the first time, that the United Kingdom was not capable of vetoing the appointment of a President of the Commission. Cameron had opposed Juncker because of his federalist ideology and because he believed that his acceptance reinforced the influence of the European Parliament in the EU and the supranational component⁵¹. The rest of the European Council decided to avoid confrontation with the Parliament and put forward Juncker as the candidate by qualified majority in accordance with Article 17.7 of the TEU⁵².

⁴⁶ David Allen, "The United Kingdom: A *Europeanized* Government in a *non-Europeanized* Polity", *op. cit.*, p. 119.

⁴⁷ David Cameron, Prime Minister, *Speech on Britain in the European Union*, Bloomberg, 23 January 2013.

⁴⁸ Desmond Dinan, "A Special Case. The United Kingdom and the European Union", *op. cit.*, p. 307.

⁴⁹ Mercedes Guinea Llorente, "Efectos de la crisis en el modelo político europeo...", *op. cit.*, p. 114.

⁵⁰ Treaty on Stability, Coordination and Governance, 2 February 2013. On this Treaty and its peculiar characteristics, see: Paul Craig, "The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism", *European Law Review*, vol. 27, n° 3, 2012, pp. 231-248.

⁵¹ In the Spitzenkandidaten operation for the European elections of 2014, which sought to reinforce the democratic nature of the Commission, Juncker was the candidate for the Presidency of the Commission of the European People's Party, which won the elections.

⁵² European Council, *Conclusions of the Presidency*, Brussels, 26-27 June 2014, (EUCO 79/14), par. 25. However, those same conclusions would also echo Cameron's rejection of the Parliament imposing its candidate by fait accompli. Paragraph 27 states: "The UK raised some concerns related to the future development of the EU. These concerns will need to be addressed. (...) Once the new European Commission is effectively in place, the European

On the domestic front, the Eurozone crisis would trigger an increase in Euroscepticism among the media and the public and the rise of populist voices defending British sovereignty and an anti-immigration line⁵³. There had been a certain discontent among the political class and public opinion ever since the ratification of the Treaty of Lisbon, which was considered to be an excessive surrender of sovereignty⁵⁴. Incited by the Eurosceptic media, the Eurozone crisis was perceived among the public as the cause of the tough recession that the United Kingdom too was going through. As in the rest of the EU, the hesitant and largely ineffective management of the crisis by the European Council sent negative perceptions of the EU soaring among the British. Against this backdrop, one understands why in October 2011 the British Parliament debated a motion – the result of a popular petition signed by over 100,000 people – on the need to call a referendum on whether the United Kingdom should stay in or leave the EU⁵⁵.

The European issue had long been a controversial factor within the Conservative Party, which during the lengthy period in opposition had seen a revival of anti-EU opinions. Evidence of this shift toward Euroscepticism was Cameron's decision in 2009 to take his party out of the European People's Party (EPP) Group in the European Parliament, which has contributed to marginalise him and his party within the EU⁵⁶. The Conservatives were left on the side-lines of the core of parliamentary decision-taking, unable now, with their stance, to tone down the position of the biggest parliamentary group in the chamber. The move also excludes Cameron from the influential European People's Party meetings prior to the European Councils, at a time when the institution is dominated by the EPP.

The rise in popularity of the Eurosceptic narrative would encourage the emergence of a new party, the United Kingdom Independence Party (UKIP), threatening the Conservatives' hegemony on the right of the political spectrum. Cameron's initial intention of opening a renegotiation and staging a referendum was reinforced by UKIP's victory in the elections to the European Parliament in June 2014⁵⁷. In the domestic parliamentary elections of May 2015, it became a priority to neutralise UKIP's anti-EU rhetoric, adopting some of its arguments, and avert its mass entry into the British Parliament. From a tactical point of view and in terms of domestic politics, Cameron's renegotiation was a resounding success, in that he won an absolute majority and ensured that UKIP's representation in the Commons was merely token⁵⁸.

The approach of the British renegotiation had a precedent in the coalition agreement between the Conservatives and the Liberal Democrats of 2010 that with regard to the EU established the need to find "the right balance between constructive engagement with the EU to deal with the issues that affect us all, and protecting our national sovereignty"⁵⁹. They pledged that there would be no more transfers of competences to the EU during the term of office; that any new transfer of powers would be conditional on the holding of a

Council will consider the process for the appointment of the President of the European Commission for the future, respecting the European Treaties".

⁵³ Desmond Dinan, "A Special Case. The United Kingdom and the European Union", *op. cit.*, p. 307; for a detailed study of how the economic crisis influences the deepening of Euroscepticism, see: David Baker and Pauline Schnapper, *Britain and the crisis of the EU*, Basingstoke, Palgrave-Macmillan, 2015.

⁵⁴ Roger Little, *The risk of Brexit. Britain and Europe in 2015*, London, Rowman and Littlefield, 2015, p. 9.

⁵⁵ Desmond Dinan, "A Special Case. The United Kingdom and the European Union", *op. cit.*, p. 234.

⁵⁶ After leaving the EPP, they founded another Group, the European Conservatives and Reformists, along with other right-wing parties mostly from the Eastern countries. Their goal, according to their own website, is to develop a "Euro-realist programme", that is to say, an EU that facilitates collaboration among the States to find solutions to current problems and challenges.

⁵⁷ In June 2014, UKIP won the European elections with a total of 24 MEPs, followed by the Labour Party, with 20. Cameron's Conservative Party would only come third, with 19.

⁵⁸ Cameron's Conservative Party finally won 330 seats out of total of 650. UKIP won just one seat.

⁵⁹ HM Government, *The Coalition: our programme for government*, 20 May 2010, p. 19.

referendum and to take stock of the competences exercised by the EU⁶⁰. In adherence to the programme, the European Union Act of 2011 was passed, hugely reinforcing national powers against the EU⁶¹. It stipulates, first, the need for a referendum to approve all future transfers of competences to the EU and other reforms of the Treaties. Following the doctrine of parliamentary sovereignty, it also lays down that the European regulations directly applicable in the United Kingdom should be so by virtue of an act of the British Parliament.

The specific renegotiation project would come from George Osborne, the Chancellor of the Exchequer, as part of his government's strategy to approach the management of the crisis⁶². In view of the need to justify to his party support for the Eurozone measures to prevent the breakup of the single currency, he sponsored the idea of renegotiation. In order to ensure that the EMU was viable in the long term, it was essential to negotiate a new Treaty that established a more democratically controlled fiscal federation around the Eurozone. As the United Kingdom is not nor is it set to be part of the Euro, within the framework of that negotiation it could renegotiate a new settlement with looser ties to the EU. He argued that a two-level Europe would inevitably emerge from the crisis and that the United Kingdom was destined to remain in the outer circle, organised around the goal of the Internal Market.

On 23 January 2013, a few weeks after the failed veto of the Fiscal Compact, David Cameron delivered a speech at the Bloomberg Agency, in which he set out his intention to renegotiate the British status with the EU and put the outcome to a referendum⁶³. The Fiscal Compact, on the one hand, was a key element of the consolidation that the Eurozone was carrying out. On the other, it projected a worrying image of the loss British influence in Europe. It was advisable to react to secure a privileged position in that outer circle. In the speech, Cameron began by analysing the challenges facing the EU and the United Kingdom and which needed addressing: the Eurozone crisis, competitiveness and the need to recover public support. He proposed reforming the EU around five principles as the way to achieve a better place for the British within the European project. The first reform principle was competitiveness, which had to be sought through the development and efficiency of the Internal Market and reducing the bureaucracy of the EU. The second principle was flexibility, to ensure finding a comfortable place for the diverse goals of the Member States in the EU, particularly the British rejection of political integration. The third principle, in his view, was that it was necessary to proceed to the devolution of EU competences to the Member States. The fourth was democratic accountability through a bigger and more significant role for the national parliaments, since they were "the true source of real democratic legitimacy and accountability in the EU"⁶⁴. Finally, the fifth principle was fairness, by which any agreement adopted within the Eurozone had to be fair both for the Euro states and for those that do not take part in the EMU.

Months before the Bloomberg speech, in July 2012, the coalition government had decided to begin the review of competences to which it had committed in its Programme for

⁶⁰ This coalition programme maintained the position that the Conservative Party had championed during the previous Labour government: the need to put a brake on the transfer of competences to the European institutions and put the ratification of the Treaty of Lisbon to a referendum.

⁶¹ UK Parliament, *European Union Act 2011*, 19 July 2011. For an analysis of the effects of this legislation, see: Eleni Frantziou, "Your Power to Veto EU Changes? Implications of the referendum of the European Union Act 2011", *UCL Policy Briefing*, October 2014.

⁶² Roger Liddle, *The risk of Brexit...*, *op. cit.*, pp. 9-10.

⁶³ David Cameron, Prime Minister, *Speech on Britain in the European Union*, Bloomberg, 23 January 2013.

⁶⁴ *Ibid.*

Government⁶⁵. This exercise, which lasted two years, was meant to analyse, sector by sector, all the areas of European action, examine all the activity of the EU institutions and determine how it affected the United Kingdom. It was done with remarkable ambition and rigour, since a large number of interested parties were interviewed: British and European political players, interest groups, NGOs, civil society organisations, think tanks, academic experts, and so on. It was the most ambitious and comprehensive study even conducted on the workings and activities of the EU⁶⁶.

The final result was condensed into 32 separate reports. A global assessment report was deliberately not approved, as influencing the United Kingdom's future policy was excluded. The website where the reports are published does include some overall reflections from the Foreign Secretary: the need for improved implementation of the principles of subsidiarity and proportionality; the need to improve the democratic accountability of European action; recognition of British success at influencing the European agenda; the need for less and better regulation; the need to protect the interests of the non-Euro States as the EMU deepens; the importance of the EU focusing on those issues where it provides added value; and the need to further develop the Internal Market⁶⁷. The House of Lords severely criticised the absence of a global report, to which the government had previously committed, as well as the lack of dissemination of its results, which meant that it had no impact on the public debate⁶⁸.

The most important result of the exercise was the one that was not stated: that in no case did the review demonstrate that the exercise of competences by the EU was improper and did not provide the United Kingdom with benefits. The review, therefore, did not challenge the current division of competences established in the Treaty. Although at no point did the British Government echo this conclusion, the examination did have some effects: when in 2015 the renegotiation agenda was formally set out, the demand for the devolution of competences had disappeared.

In 2014, the Prime Minister published an article in *The Telegraph* newspaper in which he spelled out his renegotiation and reform project – should he be re-elected – for an EU that, in his view, was not working as well as it should. His fundamental goals were: "Powers flowing away from Brussels, not always to it. National parliaments able to work together to block unwanted European legislation. Businesses liberated from red tape and benefiting from the strength of the EU's own market – the biggest and wealthiest on the planet – to open up greater free trade with North America and Asia. Our police forces and justice systems able to protect British citizens, unencumbered by unnecessary interference from the European institutions, including the ECHR. Free movement to take up work, not free benefits. Support for the continued enlargement of the EU to new members but with new mechanisms in place to prevent vast migrations across the Continent. And dealing properly with the concept of "ever closer union"⁶⁹.

His manifesto for the 2015 elections included a pledge to negotiate a new status for the United Kingdom in the EU that would then be put to a referendum to be held before the end

⁶⁵ HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union*, July 2012, (CM8415).

⁶⁶ Even when the British Government declined to make conclusions so as not to influence the future definition of the United Kingdom's European policy, a group of experts did indeed do so: Michael Emerson (Ed.), *Britain's Future in Europe. Reform, renegotiation, repatriation or secession?*, London, Rowman and Littlefield, 2015.

⁶⁷ The reports are published on the following website: <https://www.gov.uk/guidance/review-of-the-balance-of-competences>

⁶⁸ House of Lords, EU Committee, *The Review of the Balance of Competences between the United Kingdom and the European Union*, Committee Report no. 12, 17 March 2015, párrs. 55 y 64.

⁶⁹ David Cameron, "The EU is not working and we will change it", *The Telegraph*, 15 March 2014.

of 2017⁷⁰. Once re-elected in May 2015, this time with an absolute majority, the Prime Minister was quick to set about implementing his plans for the EU. After the summer, he began a round of informal consultations with the main European leaders, conveying to them his concerns and sounding out his chances of success. On 10 November 2015, the first formal phase of negotiations at European headquarters began with the letter that Prime Minister Cameron sent to President of the European Council Donald Tusk, with his government's formal request for renegotiation⁷¹. In it he listed his chief concerns and the specific negotiation demands and called for them to be accommodated through "flexibility". The specific negotiation proposals were grouped into four areas: economic governance, competitiveness, sovereignty and immigration. He made it clear that the agreement had to be legally binding and irreversible and, where necessary, have force in the Treaties. If he achieved a satisfactory result for his requests, he vowed to campaign to keep the United Kingdom inside the EU.

The four areas have very different causes, scope and meaning. The first three had been present throughout the previous debate, from 2013, while the issue of immigration did not appear until 2014. This issue is a result of the economic and social crisis and the anti-immigration sentiment that has emerged in major sectors of the population, a rhetoric that UKIP adopted and used to its advantage. Among the other three issues, economic governance responds to a clear national interest in not being displaced from the EU's political core and from the Eurozone's political decision-making centre and in ensuring that the new regulations adopted within it do not penalise the British economic sector. The second request – on competitiveness – responds to the British conception of what the goal of integration should be: a market that works efficiently. The issue entitled "sovereignty" includes two types of concerns that had been tackled separately in the Bloomberg speech: on the one hand, resistance to taking part in future political integration and, on the other, the need to reinforce the EU's democratic accountability, with greater participation of the national parliaments. "Sovereignty" – also of an emotional nature – tries to secure for the United Kingdom a form of participation that does not deepen the federal dimension that it rejects and reinforces the "Europe of States". This agenda can also be divided into another two central points, taking into account their main interested parties: economic governance and competitiveness, for the City and business; and sovereignty and immigration, which tries to please the public, from a more emotional viewpoint

On the basis of that document, President Tusk began a round of bilateral negotiations on a technical level with the "sherpas" of the Heads of State or Government of the Twenty-Eight. It became clear what the different players and the roles performed in this negotiation of a constitutional nature would be. The negotiation would be intergovernmental, among the Heads of State or Government as the main decision makers, with their President acting as mediator. The European Commission took on both a political role in the negotiation and offered technical support through its "expertise" – to do so, Juncker set up a Task Force, dependent on the Secretariat General and Vice-President Timmermans and led by the United Kingdom's Jonathan Faull, in order to facilitate contacts with the British⁷². The European Parliament was also brought in from the outset, participating in both the technical consultations, represented by officials, and in the negotiations, through the MEPs. In the technical talks, it was represented by three MEPs, one for each of the main political groups

⁷⁰ Conservatives, *The Conservative Party Manifesto*, London, 2015, p. 72.

⁷¹ David Cameron, "A New Settlement for the United Kingdom in a reformed European Union", *Letter to Mr. Donald Tusk, President of the European Council*, London, 10 November 2015.

⁷² European Commission, *Minutes of the 2132nd meeting of the Commission held in Brussels (Berlaymont) on Wednesday 24 June 2015*, (PV(2015) 2132 final), p. 11.

and, on a political level, through direct dialogue with its President, Martin Schulz⁷³. The reasons for incorporating the European Parliament, with a role similar to that of observer, were of two types. First, political and democratic legitimacy: today it is unthinkable to marginalise the representatives of the people from any negotiation of a constitutional scope. Second, there was also a practical reason: to guarantee the viability of the reform, since in order to implement the decisions taken, be it through the modification of secondary legislation or the revision of the Treaties, it is essential to take into account the European Parliament, which has to give its approval.

On 7 December 2015, President Tusk sent a letter to all the members of the European Council, in which he reported on the outcome of the first round of consultations with a view to preparing the political discussion that would take place at the European Council meeting that same month⁷⁴. He announced that with regard to the content there was a basis for agreement in the first three areas, but that the one relating to free movement and social benefits was the most delicate and where there was still no consensus. He also stressed that more time was needed to approve the precise wording and decide the final legal form that the agreement would take. He said that the goal of the negotiation was "to find solutions that will meet the expectations of the British Prime Minister, while cementing the foundations on which the EU is based". It is a desirable goal but one that seems difficult to reconcile: satisfying British concerns and consolidating the EU model at the same time.

The first debate at a political level took place at the European Council meeting of December 2015, where the Heads of State and Government agreed to work closely to find satisfactory solutions for all parties in an extraordinary meeting of the European Council called for 18th and 19th February 2016⁷⁵. The technical negotiations steered by Tusk at "sherpa" level continued after Christmas, as did bilateral consultations with some of the main European leaders. The British Prime Minister, meanwhile, also undertook intense bilateral diplomacy with the national leaders and institutions. These consultations made enough progress for President Tusk to be in a position to present a formal negotiation proposal on 2 February⁷⁶.

The proposal was preceded by a letter in which Tusk outlined the key elements, pointed out the consensuses already reached and underscored those aspects that were still pending further discussion⁷⁷. His proposal consisted of a draft Decision of the Heads of State or Government, meeting within the European Council, which showed that the path that would be taken to tackle the British issue would be the one that had already been used in the resolution of the problems generated by the negative referendums in Denmark and Ireland. The possibility of starting a formal revision of the Treaties was therefore ruled out. It was not something that the majority of the States wanted and, in any case, it was going to hinder a swift resolution of this issue, which was needed in order to be able to hold the referendum before 2017. The draft Decision was accompanied by five draft Declarations by the Heads of State or Government, or the institutions, which expanded on different aspects of the agreement and ensured their implementation.

⁷³ The three representatives appointed by the European Parliament are: Elmar Brok, for the European People's Party Group; Roberto Gualtieri, for the Progressive Alliance of Socialists and Democrats Group and Guy Verhofstadt, for the Alliance of Liberals and Democrats for Europe Group.

⁷⁴ Donald Tusk, *Letter to the European Council on the issue of a UK in/out referendum*, Brussels, 7 December 2015, (898/15).

⁷⁵ European Council, *Conclusions of the Presidency*, Brussels, 17-18 December 2015, (EUCO 28/15), par. 20.

⁷⁶ European Council, *Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union*, Brussels, 2 February 2016, (EUCO 4/16).

⁷⁷ Donald Tusk, *Letter to the Members of the European Council on his proposal for a new settlement for the United Kingdom within the European Union*, Brussels, 2 February 2016, (Press Release 23/16).

The initiative of the President of the European Council was welcomed by the Government of the United Kingdom and by the other governments and, generally speaking, by the institutions too. The President of the Commission said that both his institution and he himself had worked closely with President Tusk and Prime Minister Cameron on the drafting of the proposal, for which reason it had his full backing⁷⁸. President Schulz, however, was considerably more critical a few days later, in a speech at the London School of Economics⁷⁹. In an exercise of frankness, he began by stating that "the British often test our patience and good will with their continuous demands". He backed an agreement that allowed the United Kingdom to remain in the EU, in the belief that it was the best option for a better and stronger EU, but warned that "proposals which cater to narrow self-interests, risk undermining the common good, or would set dangerous precedents for a Europe à la carte will meet with resistance from the European Parliament". He avoided making a general assessment of Tusk's proposal, stating that it was being studied in detail, but he took a stance against two of its most controversial elements: the multi-currency Union and the debate on social benefits that runs the risk of affecting the fundamental principle of non-discrimination among EU citizens.

Tusk's proposal would serve as the basis for the final phase of the technical negotiations and the final political round, which took place within the European Council on 18th and 19th February 2016. In an agonizing marathon, the Summit secured a global agreement on the night of 19th February, adopting the orientation of the proposal in substance, though with some isolated modifications.

⁷⁸ Jean-Claude Juncker (President of the European Commission), *Speech to the European Parliament on the Preparation of the European Council meeting of 18 and 19 February 2016*, Brussels, 3 February 2016 (SPEECH 16/227).

⁷⁹ Martin Schultz, President of the European Parliament, *Britain and the EU: a view from the European Parliament*, London, London School of Economics European Institute, 5 February 2016.

5. THE EUROPEAN COUNCIL OF 18 AND 19 FEBRUARY 2016: DECISION OF THE HEADS OF STATE AND GOVERNMENT, MEETING WITHIN THE EUROPEAN COUNCIL, CONCERNING A NEW SETTLEMENT FOR THE UNITED KINGDOM WITHIN THE EUROPEAN UNION

The European Council of 18th and 19th February marked the culmination of three months of intense negotiations between Cameron and the other 27 leaders, with the Presidents of the European Council and the Commission acting as mediators. The political results of the British renegotiation are presented in Annex I of the Conclusions of the European Council in the form of a *Decision by the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the EU*⁸⁰. That general Decision, which tackles the four categories of Cameron's demands, is accompanied by a series of Declarations, by the Heads of State or Government themselves or the common institutions, referring to specific aspects of the agreement. These are:

- a Declaration containing a draft Council Decision on specific provisions relating to the effective management of the banking union and of the consequences of further integration of the euro area which will be adopted on the day the Decision referred to in point (a) takes effect (Annex II);
- a Declaration of the European Council on competitiveness (Annex III);
- a Declaration of the Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism (Annex IV);
- a Declaration of the European Commission on the indexation of child benefits exported to a Member State other than that where the worker resides (Annex V);
- a Declaration of the Commission on the safeguard mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government (Annex VI);
- a Declaration of the Commission on issues related to the abuse of the right of free movement of persons (Annex VII).

In its Conclusions, the European Council itself states that the Decision gives a legal guarantee to the British concerns; is fully compatible with the Treaties; is legally binding and may only be amended or appealed by common accord; and will take effect on the date that the United Kingdom formally expresses its desire to remain within the EU, by means of a message to the Secretary-General of the Council⁸¹. It also states that if the result of the referendum displayed the British people's decision to leave the EU, the Decision and the set of Declarations accompanying it would cease to exist. This last specification was not even implicitly contained in Tusk's proposal. It is the result of a request by the Belgian Government, which is possibly the one that took the most staunchly federalist stance in the negotiation. The intention here is to close the renegotiation issue for good and for this agreement to be final. Therefore, should the referendum be negative, that argument could not be used by the British Government to renegotiate a more favourable settlement. There is a dual goal here: on the one hand, to ensure that the issue of the British renegotiation

⁸⁰ European Council, *Conclusions of the Presidency*, Brussels, 18-19 February 2016, Annex I, (EUCO 1/16).

⁸¹ *Ibid.* p. 2.

does not drag on forever; on the other, to undermine a position that backs the “no”, saying in that way a truly favourable settlement with the EU can then be negotiated.

Prime Minister Cameron was satisfied with the agreement on a new relationship with the EU, so, based on those new conditions, the Government of the United Kingdom would recommend the British vote in favour of remaining in the EU⁸². In his view, with this settlement the United Kingdom can have “the best of both worlds”: “We will be in the parts of Europe that work for us – influencing the decisions that affect us, in the driving seat of the world’s biggest market and with the ability to take action to keep our people safe. But we will be out of the parts of Europe that do not work for us. So as well as being out of ever closer union, we will never join the euro and never be part of Eurozone bailouts or the passport-free no borders area”⁸³. The official position of the government as such is to recommend the positive vote in the referendum that has been set for 23rd June 2016, although Cameron has given the members of his Cabinet the freedom to decide, in a personal capacity, whether they campaign for the “yes” vote or the “no”.

The President of the Commission, meanwhile, gave his full political support to the agreement reached between the twenty-seven States and the United Kingdom: in his view, the country has got all that it could get and the twenty-seven have given all that they could give⁸⁴. Juncker described the agreement as fair, balanced and respectful of the EU’s major principles, while it takes into account the concerns, desires and suggestions of the United Kingdom. He promised that his institution would begin work to approve the regulations the moment that the British voted to stay.

5.1. The agreement with the United Kingdom: scope and content

The settlement with the United Kingdom is the subject of a Decision by the Heads of State or Government, *meeting within the European Council*, that is to say, it is not a Decision of the European Council as an institution of the EU⁸⁵. In this case, the Heads of State or Government act as mere representatives of their governments meeting as an International Conference and, therefore, outside the framework of the EU regulated by its Treaties. They act as “masters of the Treaties”, empowered as such to tackle systemic issues and revise the Treaties.

This legal instrument is atypical and outside Community Law, although its use is not unprecedented, as it has been employed on two other occasions, related to the status of certain Member States. These were the cases of the renegotiations of Denmark and Ireland, prompted by the negative referendums on the Treaties of Maastricht and Lisbon, respectively⁸⁶. It is no coincidence that the first case of the use of this type of decision, the Danish solution of 1992, should have been down to the initiative and mediation of the British Presidency at the time. We find a connection here that is difficult to ignore.

⁸² HM Government, *The best of both worlds: the United Kingdom's special status in a reformed European Union*, London, February 2016.

⁸³ *Ibid*, p. 5.

⁸⁴ Jean-Claude Juncker, President of the European Commission, *Speech to the European Parliament on the Conclusions of the European Council meeting of 18 and 19 February 2016*, Brussels, 24 February 2016 (SPEECH 16/400).

⁸⁵ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*

⁸⁶ See, respectively: “Decision of the Heads of State and Government, meeting within the European Council, on certain problems raised by Denmark on the Treaty on European Union”, *European Council, Conclusions of the Presidency*, Edinburgh, 11-12 December 1992, Part B, Annex 1, (SN 456/1/92 REV1); “Decision of the Heads of State and Government of the 27 Member States of the European Union, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon”, *European Council, Conclusions of the Presidency*, Brussels, 18-19 June 2009, Annex 1, (11225/2/09 REV2).

The negotiation is of a constitutional nature and, therefore, belongs to constitutional politics. This is defined as the processes of creation or transformation of the higher level of laws and rules of a political system⁸⁷. The content of the agreement is formally compatible with the Treaties, according to the European Council. It would appear, therefore, that it neither *creates* nor *transforms*. However, in a political sense it has the intention and purpose of addressing the rules of the game relative to the United Kingdom's status within the EU, *transforming them*. It explicitly says so in its title: "*Decision... concerning a new settlement*". It is necessary to analyse the content of that Decision in detail to see whether it actually serves that purpose.

The first political reading is that a direct revision of the Treaties, in accordance with the various possibilities of Article 48 of the TEU, was ruled out, which significantly reduces the time frame, the political players in the negotiation and the need for ratification of the new agreement on the part of all the Member States. It is appropriate to ask whether the Member States, as "master of the Treaties", can decide to sidestep the channels of Article 48 and revise the EU's constitutional framework by other means. There is a variety of opinions on this among European doctrine. A minority of international jurists champion the international origin of the Treaties and, therefore, that the unanimous agreement of the signatory States would suffice to modify them, in accordance with the rules of *jus cogens*⁸⁸. The majority believe that the States are obliged to observe the procedure of Article 48, since they have voluntarily agreed to a limitation of their sovereignty and therefore have to respect the framework laid down⁸⁹. The latter group use as their main argument the judgments of the Court of Justice itself, which has stated on several occasions that the Member States cannot turn to other channels to revise the Treaties, the only channel possible being the one established by the Treaties themselves⁹⁰. Therefore, the scope of this Decision, in order to respect EU Law, must be fully compatible with the Treaties. Should it exceed this limit, it could find that the Court of Justice declared its non-application because it entails an improper revision of the Treaties.

Since that innovative Decision on Denmark, European legal doctrine has analysed the implications and consequences of this type of legal instrument in depth, providing relevant conclusions⁹¹. The fact that it is not adopted by the European Council means, firstly, that the President of the Commission is not among the subjects of the Decision and, therefore, it is not legally binding on his institution. This makes some sense and it is consistent if we bear in mind that both the European Council and the President of the Commission, as *constituted* institutions, are obliged to act within the framework of the Treaties and within the framework of their respective competences. The Decisions that we are dealing with, in that they address issues of a constitutional nature, the status of a Member State, and are not provided for in the Treaty, break both conditions.

⁸⁷ Dario Castiglione, "Constitutional politics in the European Union", in: Dario Castiglione *et alia* (Eds.), *Constitutional Politics in the European Union. The Convention Moment and its Aftermath*, Basingstoke, Palgrave-Macmillan, 2007, pp. 11-25, p. 12.

⁸⁸ Marguerite Deliege-Sequaris, "Révisions des Traités européens en dehors des procédures prévues", *Cahiers de Droit européen*, no.1, 1980, pp. 539-552.

⁸⁹ Roland Bieber, "Les limites matérielles et formelles à la révision des traités établissant la Communauté européenne", *Revue du Marché commun et de l'Union européenne*, no 367, 1993, pp. 343-350.

⁹⁰ Court of Justice Judgment *Gabrielle Defrenne / SABENA*, of 8 April 1976, (as. 43/75); Opinion 2/94, of 28 March 1996, on Accession by the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁹¹ Deirdre Curtin and Ronald Van Ooik, "Denmark and the Edinburgh Summit: Maastricht without Tears", *op. cit.*; David Howarth, "The Compromise on Denmark and the Treaty on European Union: A Legal and Political Analysis", *op. cit.*

In the two previous precedents, that of Denmark and that of Ireland, opting for a Decision of the Heads of State and Government to accommodate citizens' concerns and allowing ratification in the second instance, amounted to a flat refusal to reopen the negotiation of the Treaty and avoided fresh ratification on the part of the other Member States. This also applies to this Decision, which in accordance with Paragraph 2 of Section E, will take effect on the date the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain a member of the European Union⁹².

According to what has been agreed, the taking effect of that Decision will involve the need to adopt secondary legislation and modify existing legislation, procedures that the Commission has already pledged to undertake. In two specific cases, moreover, it is explicitly stipulated that the commitments reached will be incorporated into the Treaties at the time of their next revision, following the procedures established in the Treaty. They are the agreements on matters of economic governance and the opt-out relating to the application of the references to an ever closer union⁹³. Given that none of the decisions adopted in those two areas clashes with the current Treaties, their incorporation is not strictly necessary. That provision responds to an explicit request from Cameron, who wishes to solemnise the commitments before the British public. It is, then, a purely symbolic issue⁹⁴. Foreign Secretary Hammond himself has the same opinion: he says that the International Law Decision would suffice, but that their inclusion in Primary Law "would be neater and tidier"⁹⁵.

It is not known when and how they will be included in Original Law. In the two previous cases, the matter was resolved through the incorporation of a Protocol at a later date⁹⁶. The formula of a Protocol addressed exclusively to the United Kingdom would be sufficient for the matter of the opt-out on "an ever closer union". In the case of the provisions concerning economic governance, it would be more appropriate to incorporate them into the main body of the Treaty, in that they are aimed at all the Member States and, primarily, they regulate the relationship between the Eurozone and the Members who do not belong to the euro. That revision, in any case, should follow the regular revision procedure provided for in Article 48, Paragraphs 2 and 5, since "closer union" is not regulated by Part III of the Treaty. In any case, we have to say that the revision of Original Law is not as a simple and predictable procedure as one might think, given that there are other players involved as well as the governments, such as the national parliaments or the European Parliament, which can produce a different result to the one initially anticipated⁹⁷.

In line with Cameron's political programme, the British decision will be substantiated through the direct vote of the people in a referendum, which is still a ratification of the new membership conditions on the part of that State. Should the result of the vote be negative and the United Kingdom decide to leave the EU, this Decision would not take effect as it

⁹² "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 9.

⁹³ *Ibid.*, p. 5 y p. 6.

⁹⁴ Eva-Maria Poptcheva and David Eatock, *The UK's 'new settlement' in the European Union. Renegotiation and referendum*, European Parliamentary Research Service, February 2016 (PE 577.983), p. 21.

⁹⁵ House of Commons – European Scrutiny Committee, *Oral evidence: UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny: follow up*, 10 February 2016, (HC 818), p. 4.

⁹⁶ In the case of Denmark the Protocol was added on the occasion of the Amsterdam revision; in the case of Ireland, it was more recent, in 2012. See: *Protocol on the concerns of the Irish people on the Treaty of Lisbon*, Brussels, 13 June 2012

⁹⁷ It is worth recalling that at the last minute in the renegotiation of the Treaty of Lisbon, in order to remove the Czech veto, it was agreed to allow this State to benefit from the same opt-out as the British and the Poles on the application of the Charter of Fundamental Rights, regulated in Protocol No 30. However, in the negotiation of the Treaty of Accession of Croatia, when its constitutionalisation was tackled, the European Parliament opposed incorporating the modification into the Treaty. The conflict could only be averted by the Czech Government dropping its aim.

would no longer make sense. Inasmuch as the procedures for reforming the Treaty have been avoided, the new agreement does not have to be ratified by the rest of the Member States or approved by the European Parliament to take effect. This is only a problem if any of the measures involve a modification of the Treaties.

The Decision on Denmark stated in its Preamble that it only applies to Denmark and not to other existing Member States or those that might join. In the case of the United Kingdom, there is no such restriction, which means that it addresses all the Member States and they accept both the interpretations provided and the new commitments and procedures that it contains. The institutions other than the European Council or Council are a different matter, given that they are not part of the Decision and this is not Community Law. In our view, this limitation is overcome through the annexed Declarations, both from the European Council and the Commission, in that as European institutions they undertake commitments of a political nature.

The limitation on the Danish Decision as to who it affects can also be understood as pursuing the intention of it not being able to be used as a precedent and opening the way to other present or future Member States also requesting opt-outs. The absence of a similar provision in the case of the United Kingdom can only be lamented, given that there is nothing to stop other States brandishing this Decision to seek the renegotiation of their status. In any case, it is necessary to point out that the Decision only establishes a new measure exclusively for the United Kingdom, not granted by the Treaties. This is the case of "ever close union", where in Section C, subsection 1 it states that the United Kingdom is not committed to "further political integration into the European Union".

In the Danish case, Denmark was required by the other Member States to give guarantees of full and faithful cooperation⁹⁸. In this respect, both in the Preamble and in the body of the Decision this country firmly vows not to obstruct closer cooperation by the rest of the Member States in adherence to the goals of the Treaty. A similar clause should be included in the case of the Decision on the United Kingdom, in which, even if it is not interested in the deepening of the EU, it formally pledges not to oppose the development of integration. That commitment appears in the Decision, applying to all non-Euro Member States, only with regard to the deepening of the EMU, in Section A⁹⁹. It is regrettable that a general provision has not been included when it comes to political deepening in the Sovereignty section, concerning the extension of the political commitment not to obstruct any decision on future deepening.

Finally, we might ask whether the content of the agreement lives up to its title of "a new settlement for the United Kingdom". Analysing the various sections, one can conclude that it addresses the United Kingdom's concerns, but that most of its content seeks to reform the EU in the direction of such concerns, as Cameron initially intended. So, in the case of Economic Governance, the new procedures benefit not just the United Kingdom, but all the States in the same situation. The Competitiveness section aims to change the political action of the EU and the Immigration section creates procedures that, under special

⁹⁸ In the Preamble it stresses that "*noting that Denmark does not intend to make use of the following provisions in such a way as to prevent closer cooperation and action among Member States compatible with the Treaty and within the framework of the Union and its objectives*" and in the part on defence it states that it will not obstruct the development of closer cooperation among the Member States. See: "Decision of the Heads of State and Government, meeting within the European Council, on certain problems raised by Denmark on the Treaty on European Union", *op. cit.*, pp. 52 and 54.

⁹⁹ The second paragraph of Section A states: "*It is acknowledged that Member States not participating in the further deepening of the economic and monetary union will not create obstacles to but facilitate such further deepening while this process will, conversely, respect the rights and competences of the non-participating Member States*".

circumstances, make it possible to restrict certain social benefits, but they apply to any Member State that is under those special circumstances. Finally, only the Sovereignty area addresses the United Kingdom's arrangements and not in their entirety either. It will apply only to the opt-out on closer union and the implementation of the Protocols relating to the AFSJ. In conclusion, rather than agreeing to a new settlement for the United Kingdom, the Decision reforms certain aspects of the functioning of the EU to accommodate the British concerns.

5.2. Decision by the Heads of State and Government within the European Council: legal nature and effects

The legal formula chosen to gather the agreement on the United Kingdom's new settlement within the EU is of the highest importance as it has fundamental consequences relative to its scope, its compulsory nature and its meaning. A Decision by the Heads of State or Government within the European Council is not an instrument of EU Law, in the sense laid down in Article 288 of the TEU. Doctrine agrees that such a Decision belongs to the sphere of International Law¹⁰⁰. The same argument was championed by its then promoter, the British Government. John Major, the Prime Minister at the time, believed that the Decision on Denmark would constitute "an agreement in the sense of Article 31 of the Vienna Convention on the Law of Treaties"¹⁰¹. That article refers to the interpretation of Treaties and, following its wording, these decisions would constitute a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (paragraph 3a). According to doctrine, these decisions have a legal nature and are International Treaties concluded in a simplified manner, or "executive agreements"¹⁰². They fall within the category of "Decisions of the Representatives" that do not require ratification¹⁰³.

In these Decisions, the Heads of State or Government act as signatories of the Treaties and, through this instrument, decide to agree on the interpretation of the collective will expressed in an earlier Treaty. This line of thought is fully reflected in the wording of the Decision on the United Kingdom, whose Preamble begins by stating: "The Heads of State or Government..., whose Governments are signatories of the Treaties"¹⁰⁴. In this case, therefore, the signatories of the Treaties agree to interpret the scope and application of the Treaties relative to the United Kingdom.

Moreover, in De Witte's view, the deliberate choice of a term that reflects agreement – "have agreed on", instead of "adopt"¹⁰⁵ – confirms its nature as an international treaty¹⁰⁶. The Preamble of the Decision, in principle, follows this interpretative purpose by adding that its intention is to "clarify" and "be taken into consideration as being an instrument for the interpretation of the Treaties". However, the paragraph goes on to state that it also has

¹⁰⁰ Bruno De Witte, "Treaty Revision Procedures after Lisbon", in: Andrea Biondi, Piet Eeckhout and Stefanie Ripley (Ed.), *EU Law after Lisbon*, Oxford, Oxford University Press, 2012, pp. 107-127, 116-117; Deirdre Curtin and Ronald Van Ooik, "Denmark and the Edinburgh Summit...", *op. cit.*, p. 355.

¹⁰¹ Prime Minister's written response, quoted by Ware and Miller, "The Maastricht Debate: Clarifications, 'Opt-Outs' and Amendments", *House of Commons Research Paper*, no. 93/3, 12 January 1993, p. 3

¹⁰² Bruno De Witte, "Treaty Revision Procedures after Lisbon", *op. cit.*, pp. 116-117; Deirdre Curtin and Ronald Van Ooik, "Denmark and the Edinburgh Summit...", *op. cit.*, p. 355.

¹⁰³ Bruno De Witte, "Chamaleonic Member States: Differentiation by Means of Partial and Parallel International Agreements", in: Bruno De Witte, Dominik Hanff, and Ellen Vos, *The Many Faces of Differentiation in EU Law*, Antwerpen, Intersentia, 2001, pp. 231-268, 258.

¹⁰⁴ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 3.

¹⁰⁵ *Ibid.*, p. 4.

¹⁰⁶ Bruno De Witte, "Chamaleonic Member States...", *op. cit.*, p. 258.

the intention of reaching agreements on matters such as the role of the national parliaments, the management of Banking Union and the consequences of further integration in the Eurozone¹⁰⁷. This wording on the purpose of the text makes it impossible to defend the idea that this Decision only has an interpretative nature; rather, where it adds new procedures or agreements on these three matters, it means to have legal effects, even when they must observe the rules laid down in the Treaties.

The fact that it is an International Law Decision means that the rules of EU Law regarding the approval of decisions, their legal effects, their application and judicial review do not apply. Therefore, we have to take into consideration the rules of International Law, which take precedence over the will of the parties. Ratifying this nature, this Decision was deposited with the United Nations Secretariat by the British ambassador on 24th February 2016, as was done in the case of the two precedents¹⁰⁸.

The European Council itself states that this Decision is legally binding and may be amended or repealed only by common accord of the Heads of State or Government¹⁰⁹. The parties also declare that its validity is deferred to the future and conditional on the United Kingdom formally announcing its desire to remain a member of the EU. We have to highlight the special feature that the Decision and the other instruments "will cease to exist" if the result of the referendum is withdrawal from the EU. There is something that catches our eye about this provision: a legal instrument that has not taken effect will cease to exist if the referendum proves negative, although it will take effect not in the event of the referendum being positive, but with the formal announcement by the British Government confirming that it is to stay. In our view, this gap between the times when it takes legal effect and it ceasing to exist is because, in the event of a negative referendum, the wording has sought to prevent the British Government from not formally announcing it and trying to renegotiate the content of the agreement again. In this way, it becomes a final and irreversible settlement, as Cameron requested, which the British can only take or leave, but not renegotiate ad infinitum.

This type of Decision is complementary Law to EU Law and is limited in that it cannot alter the obligations of the Member States laid down by the Treaties¹¹⁰. In this respect, the European Council itself was careful to declare the compatibility of the Decision on the United Kingdom with the Treaties. One might ask what consideration a legal instrument of this nature has received in the eyes of the Court of Justice, the final authority responsible for declaring compatibility with EU Law. In the Rottman case, this high court said that the Decision on Denmark had to be taken into consideration as an instrument of interpretation of the Treaty¹¹¹. Therefore, provided that it does not enter into conflict with the letter of the Treaty, we have sufficient reason to believe that the Court of Justice will respect the content of the settlement with the United Kingdom as another instrument that will help it clarify the content of the Treaties. The Council Legal Service reinforces that opinion, by stating that this International Law Decision will have to be taken into account by the Court of Justice in all its future decisions¹¹².

¹⁰⁷ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 3.

¹⁰⁸ Eva-Maria Poptcheva and David Eatock, *The UK's 'new settlement' in the EU...*, *op. cit.*, p. 21.

¹⁰⁹ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 2.

¹¹⁰ Deirdre Curtin and Ronald Van Ooik, "Denmark and the Edinburgh Summit...", *op. cit.*, p. 355.

¹¹¹ *Judgment of the Court of Justice (Grand Chamber) of 2 March 2010, Rottman Case, (As. C 135/08)*, párr. 40.

¹¹² Council Legal Service, *Opinion on the Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union (doc. EUCO 4/16) - Form, legal nature, legal effects and conformity with the EU Treaties*, 8 February 2016, (EUCO 15/16, Limite, JUR 64), p. 5.

As a rule of International Law that it is, the Decision affects the contracting parties, the Member States. Even if it is legally binding, we have to take into account that some of the provisions do not depend entirely and totally on the will of the governments. While they have committed to incorporating the substance of the provisions on economic governance and on the opt-out regarding "ever closer union" into the Treaty, the revision of the Treaties does not depend on their will alone. There are other players involved, such as the Convention or the European Parliament and, moreover, it requires ratification by all the Member States.

Likewise when it prompts action from the community institutions, as far as it exceeds its dimension as an interpretive instrument, adherence cannot be imposed. Hence, the institutions themselves – European Council (including the President of the Commission), Council and Commission – have agreed to include Declarations in which they politically commit to the actions contained in the Decision. The Declarations are not legally binding, so one might ask what could happen if one of the institutions opposed complying with one of the Decision's provisions. The United Kingdom, another State or other institutions could not demand compliance before the Court of Justice as it is not a rule of EU Law nor is the Court's competence to examine adherence included in its text¹¹³.

¹¹³ In contrast, it is worth mentioning that the Treaty on Stability, Coordination and Governance, also an instrument of International Law, in Article 8, recognises the competence of the Court of Justice to verify compliance of the obligations by the party States and to state its opinion on any controversy related to the aim of the Treaty.

6. THE "SOVEREIGNTY" SECTION: AN ASSESSMENT FROM THE POINT OF VIEW OF ITS IMPLICATIONS FOR THE POLITICAL MODEL AND THE POLITICAL PROCESS OF EUROPEAN INTEGRATION

In the light of the previous reflections, we will now proceed to analyse Section C of the Decision, on "Sovereignty"¹¹⁴. Prime Minister Cameron said in his letter that "questions of sovereignty have been central to the debate about the European Union in Britain for many years"¹¹⁵. In this section, he asked for the European Council to address his concerns and respond to them on five issues: the United Kingdom's commitment to "an ever closer union", the application of the sovereignty principle, a reinforced role for the national parliaments, the British opt-outs in the AFSJ and a guarantee that national security is the sole responsibility of the States.

British sensitiveness about sovereignty has certainly determined its lack of enthusiasm for the European integration project from the outset. This is down to both British history and political philosophy and its preference for international cooperation based on the sovereignty of the state and the intergovernmental method. It has been a constant feature repeated in the foreign policy of successive British Governments that they pursue the model of a "Europe of States", rejecting the idea of the federalisation of Europe and even feeling uncomfortable with expressions of supranationality.

At the current stage of European integration, the issue of sovereignty is more a symbolic and emotional argument than a real one. With its demands on sovereignty, the government is trying to win the favour of the British public, arguing that the results of the renegotiation will ensure that the United Kingdom will no longer be exposed to the centralising action of the EU. However, the review of competences provided a very different picture: the finding that the British population benefits from the action of the common institutions. If in January 2013 Prime Minister Cameron categorically stated that "power must be able to flow back to member states, not just away from them"¹¹⁶, in 2015, following the review of competences, devolution or repatriation disappeared from the agenda. It is reprehensible that the British Government did not enlighten the public about the result of this review, declaring that the EU does not pose a threat to British sovereignty, but boosts its capacities as a Member State to guarantee security and prosperity for its citizens.

The only demands that involve a substantial change compared with the current status are the end of the British political commitment to future integration – which is more political than legal – and a reinforced role for the national parliaments, while the requests on matters of subsidiarity, the Area of Freedom, Security and Justice and national security only insist on observing and applying what is stipulated in the Treaties. The dropping of the aim to recover competences is something that undoubtedly eased the conflict and meant that the negotiation was not too controversial, although the inclusion in the Treaty of the British opt-out on political integration and the concept of "ever close union" was under discussion to the end. In the end, the British obtained the commitment to its future inclusion in the Treaty in exchange for a concession that, in our view, could not be more positive, which is the removal of the interpretation of the expression "ever closer union among the peoples of Europe".

¹¹⁴ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, pp. 6-7.

¹¹⁵ David Cameron, Prime Minister, "A New Settlement for the United Kingdom in a reformed European Union", *op.cit.*

¹¹⁶ David Cameron, Prime Minister, *Speech on Britain in the European Union*, Bloomberg, 23 January 2013.

6.1. "An ever closer union among the peoples of Europe": a new opt-out for the United Kingdom in the future Political Union

In his letter of 10th November, Prime Minister Cameron asked for an end to the United Kingdom's obligation to work towards an "ever closer union" and demanded that this commitment be made "in a formal, legally-binding and irreversible way"¹¹⁷. The British Government told its Parliament that it would only settle for a revision of the Treaty, even if it were in an indirect and delayed way¹¹⁸. It would accept incorporation of this new opt-out into the Treaties at a later date, at the time of the next revision. In order to understand the reason for this concern it is necessary to look at the context: at the time of the start of the debate the measures adopted to save the EMU had created the growing perception among the British that there would be an imminent deepening of the EU in which they had no wish to take part.

This feature of the renegotiation is central to Osborne's strategy of presenting the management of the crisis as the perfect time to negotiate a new settlement for the United Kingdom that allows it to stay at the loosest level of the EU¹¹⁹. The timetables have not kept in step: for British domestic reasons, the renegotiation comes before the deepening of the Treaties for the federalisation of the Eurozone, for which there is still no date. According to that logic, the deepening of the Eurozone will inevitably entail some form of political integration, in which there is no desire to take part, on the basis of the "Europe of States" model that they champion. At the present time, obtaining the opt-out on the obligation to continue the construction of a closer union means, with a view to that future renegotiation, obtaining the right to remain at the loosest level of integration.

The "ever closer union" issue is long-windedly tackled in subsection 1 of Section C of the Decision, which is consistent with the importance that the British Government places on the matter¹²⁰. It has three clearly differentiated elements that we will tackle separately: the British opt-out, an interpretation of the expression to prevent an erosion of national competences by the EU and, finally, an interpretation of the phrase "ever closer union" regarding the project of integration. Before that, we will analyse the nature and scope of this expression.

6.1.1. "Ever closer union" in the Treaties: political obligation or legal obligation?

The "ever closer union" clause dates from the Treaties of Rome of 1957. The Preambles of the TEU, the TFEU and the Charter of Fundamental Rights all include recitals with this expression, with very similar wording in all three cases, stating the political will of the States, through these Treaties, to contribute to the establishment of that "ever closer union among the peoples of Europe"¹²¹. Preambles do not have legal value, only political and

¹¹⁷ David Cameron, Prime Minister, "A New Settlement for the United Kingdom in a reformed European Union", *op. cit.*, p. 3.

¹¹⁸ House of Lords – European Union Committee, *The referendum on UK membership of the EU: assessing the reform process*, (3rd Report of Session 2015-16), 28 July 2015 ((HL Paper 30), para. 94.

¹¹⁹ Roger Liddle, *The risk of Brexit...*, *op. cit.*, pp. 9-10.

¹²⁰ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 6.

¹²¹ The Preamble of the TEU declares "RESOLVED to continue the process of creating an ever closer union among the peoples of Europe". For its part, the TFEU states "DETERMINED to lay the foundations of an ever closer union among the peoples of Europe." The Charter of Fundamental Rights states: "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values". We might add that the same expression is found in the Preamble of the Accession Treaty of Denmark, Ireland and the United Kingdom: "Determined in the spirit of those Treaties to construct an ever closer union among the peoples of Europe on the foundations already laid".

declarative value of the will of the parties as far as the purpose of the Treaty is concerned. That is why they have been used by the Court of Justice as an interpretative element to establish the will of the Member States to be linked with the Treaty in question¹²².

Its inclusion embraces the ideal of European integration – constant since the Schuman Declaration – of a gradual, phased construction of a united Europe¹²³. It is, then, an expression that gathers the spirit that has inspired the European project since its inception. In the words of Duff, the expression gives the unfinished process of construction of a united Europe “a sense of purpose and direction”¹²⁴. The same phrase is also included in Article 1(2) of the TEU, but with a very different scope and meaning: it is limited to stating that the Treaty marks another stage in that “closer union among the peoples of Europe”. Its purpose, therefore, is to link the TEU to that process of construction of a united Europe started 40 years ago. The Court of Justice has believed that the Member States are committed to a process of creating an ever closer union¹²⁵. Opinions are divided on whether the concept of an “ever closer union” entails a commitment of a political nature or of a legal nature. Our view, following the majority doctrine, among which are eminent jurists such as Piris or Chalmers, is that the literal meaning of Article 1(2) does not entail specific legal obligations for the member States¹²⁶.

The United Kingdom Government’s view is that the expression “ever closer union” is synonymous with growing political integration¹²⁷. Yet it is necessary to clarify that the expression “an ever closer union” has been a legally and politically vague concept – and deliberately so – from the outset and still is today¹²⁸. In 1999, the process of debate began within the EU on the Future of Europe, a discussion among political leaders and civil society on the purpose and nature of the EU’s final destination¹²⁹. Both that debate and the work of the European Convention showed that there was no consensus on what the final form of that closer union had to be. Some championed a Federal Union, others favoured an intergovernmental one; a third group wanted a model that mixed both, like the current one. It was established that nor did people see the need to crystallise a commitment of such magnitude in legally-binding texts. It was decided, therefore, to maintain the pragmatism that had prevailed until then, not to fix the nature or the final destination of integration beforehand and contribute to a gradual definition of that union among the peoples of Europe through the successive revisions of the Treaties.

¹²² In this respect, we can mention the Pupino case, where the Court of Justice bases on the desire of the States to build an ever closer union among the peoples its obligation to cooperate loyally so that the EU carries out its mission through compliance with its obligations to put EU Law into effect. *Judgment of the Court of Justice (Grand Chamber) of 16 June 2005, Pupino Case, (As. C 105/03), par. 36 and 41.*

¹²³ It is worth recalling that the Schuman Declaration stated that the future European Coal and Steel Community was the first step in the creation of the “European Federation”.

¹²⁴ Andrew Duff, “Britain’s special status in Europe: A comprehensive assessment of the UK-EU deal and its consequences”, *Policy Network Paper*, March 2016, p. 5.

¹²⁵ The Court states that: “*These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’.*” *Opinion of the Court (Full Court) of 18 December 2014, on accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, (Op. 2/13), para. 167.*

¹²⁶ House of Lords – European Union Committee, *The referendum on UK membership of the EU...*, *op. cit.*, para. 99.

¹²⁷ House of Commons, European Scrutiny Committee, *UK Government’s renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny, Fourteenth Report of Session 2015-16*, 9 December 2015, (HC458), para. 94.

¹²⁸ Despite the fact that the Court of Justice has referred to “closer union” on numerous occasions, it has never stated an opinion on its meaning.

¹²⁹ Simon Serfaty, *The European Finality Debate and Its National Dimensions*, Washington, Center for Strategic and International Studies, 2003.

6.1.2. An opt-out for the United Kingdom on political integration.

The Section on Sovereignty begins with the statement: "It is recognised that the United Kingdom, in the light of the specific situation that it has under the Treaties, is not committed to further political integration into the European Union"¹³⁰. Cameron, then, got a response to British sensitiveness on the subject of participation in a Europe of a federal nature that might threaten its independence and unique character. He also got the commitment that this provision would be incorporated into the Treaties at the time of their next revision, as a new exception granted to the British and which joined the others that it already enjoys¹³¹. It remains to be seen whether this incorporation into the Treaties finally happens and in what terms it is worded, which will be key to its scope and effects, and in whose approval the European Parliament will have a decisive role.

From a legal point of view, both the recognition of this new exception and its future inclusion in the Treaties are unnecessary, given that neither the United Kingdom nor any other Member State have any legal obligation to integrate politically, according to the Treaty. The TEU, as we have just seen, does not contain any legal obligation for the Member States to the development of an "ever closer union". And nowhere does it state that the ever closer union involves *political integration*. As for this last term, we have to make the same warning as we did with "closer union": it is also a politically and legally vague concept. At the present time, there is no European project, not even the Five Presidents' Report, that states what commitments and institutions will comprise political integration, when it happens¹³².

The purpose of the Decision on this point is of a political and symbolic nature and even if it apparently provides for a new opt-out for the United Kingdom, it is not really the case, as it cannot be considered an opt-out if there is no prior obligation. In the future, once it is incorporated into the Treaty, it will have the effect of freeing the United Kingdom from participating in future revisions of the Treaty that pave the way toward Political Union. Hix even thinks that this opt-out may be a disadvantage, since excluding it from the negotiation marginalises it and stops it from being able to have an influence on future decisions¹³³. In a certain way, it anticipates the United Kingdom's right (and determination) to remain on the loosest level of integration once the Eurozone deepens. In our view, this provision has to be compared with the first two paragraphs of Section A, on "Economic Governance", which declare the necessary deepening that the EMU has to undertake, the voluntary nature of adopting those deepening measures for non-euro members and the commitment of these States not to create obstacles to further integration.

¹³⁰ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 6.

¹³¹ The Preamble of the Decision recalls the opt-outs granted to the United Kingdom by the Treaties: non-participation in the Euro (Protocol No 15); not to participate in Schengen (Protocol No 19); to maintain border controls on persons (Protocol No 20); to choose, case by case, whether or not to participate in measures in the Area of Freedom, Security and Justice (Protocol No 21); and exclusion from the application by the European Court and national courts of the Charter of Fundamental Rights of the EU to the norms and practices of the United Kingdom (Protocol No 30).

¹³² One might recall how the Treaty of Maastricht was negotiated and approved within the IGCs, one of them on *Political Union*. At that time, the term covered such varied topics as the creation of the EU, citizenship, subsidiarity, institutional reform or intergovernmental cooperation in the areas of foreign policy and justice and home affairs. However, today Political Union does not appear to have been achieved. More recently, the Five Presidents' Report, which deals with the necessary deepening of the EMU, under the proposed Political Union, takes in both measures for greater parliamentary control and the reinforcement of the Eurogroup, or the inclusion of the TSCG into the EU's legal framework. See: Jean-Claude Juncker, in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, *Completing Europe's Economic and Monetary Union*, Brussels, June 2015

¹³³ House of Lords – European Union Committee, *The referendum on UK membership of the EU...*, *op. cit.*, para. 108.

In any case, this opt-out is not necessary even with this preventive nature, given that in accordance with Article 48 of the TEU all reform of the Treaties is protected by the double rule of unanimity, which represents a right of veto that under no circumstances the United Kingdom would lose. Even Foreign Secretary Hammond ended up acknowledging that, in essence, this concession does not alter the status quo, but has huge symbolic significance¹³⁴. In Duff's view, if this Decision is ratified it will mean that for the United Kingdom the clause will mean "never closer union" and the States will cease to be equal before the Treaty regarding their commitment to the European project¹³⁵.

6.1.3. Interpretation of the notion "closer union" idea regarding the powers of the Union.

In a second part, the Decision places limits on the interpretation that the idea of "an ever closer union" might have. It states in detail, from every point of view, that this expression is not a legal basis for extending competences, nor for supporting an extensive interpretation of them, or for demanding conferral of further competences, and nor can it affect either the conferral or the exercise of competences and that competences can only be conferred on the EU through the revision of the Treaties¹³⁶. Such an exhaustive delimitation of the will of the parties adds nothing to the current Treaties, not even from an interpretative point of view. The strict rules on the conferral and exercise of competences laid down in Article 5 of the TEU and the need to revise the Treaties to confer new competences, as stipulated by Article 48 of the TEU, already limit the idea that the spirit of gradual integration can serve as justification for the undermining of national competences by the common institutions.

In our view, nor can we expect such a threat to the Member States from the interpretation of Article 352 of the TFEU concerning "closer union", as it subjects that new exercise of competences to the rule of unanimity. The British Government insinuates that these specifications seek to anticipate the judicial activism of the Court of Justice and prevent it in the future from being able to use the will of the States to continue European construction as an excuse to make extensive interpretations of the institutions' competences¹³⁷. In our view, all these clarifications are not at all necessary, since there are already sufficient guarantees in the Treaties themselves, and they hide a clear political purpose. According to Chalmers, the Court of Justice has used the expression "ever closer union" in many varied statements, but never in an aggressive manner to extend European competences¹³⁸. Therefore, these clarifications are also aimed exclusively at the British public; they look to reassure them by showing that the threat of that formula being used to undermine British sovereignty has been neutralised.

¹³⁴ House of Commons – European Scrutiny Committee, *Oral evidence: UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny: follow up*, 10 February 2016, (HC 818), p. 9.

¹³⁵ Andrew Duff, "Britain's special status in Europe...", *op. cit.*, p. 6.

¹³⁶ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 6.

¹³⁷ House of Commons – European Scrutiny Committee, *Oral evidence: UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny: follow up*, 10 February 2016, (HC 818), p. 9.

¹³⁸ House of Lords – European Union Committee, *The referendum on UK membership of the EU...*, *op. cit.*, para. 98.

6.1.4. “Ever closer union” and the future of the European integration project.

Tusk’s proposal, presented in early February, began with an interpretation of the expression “an ever closer union among the peoples of Europe”¹³⁹. It stated that it had to be understood in the sense that the purpose of the Union is to promote trust and understanding among the peoples of Europe who live in open and democratic societies and share common values, but that under no circumstances was it equivalent to political integration. When the proposal was published, this interpretation was rated very negatively by the European press¹⁴⁰. While it does not entail a legally-binding commitment to political integration, it has always been understood as defining the aspiration of the governments and peoples to one day create a supranational body. What did not make sense was that the Heads of State or Government should give it a very restrictive meaning that it had never been given.

This interpretation, which only suits the United Kingdom, is not shared by the rest of the Member States or by the institutions and is not in line with the idea of a common political destination that has always been implicitly present in European integration. In the European Council, the most federalist members – led by Belgium – fought hard for it to disappear and, fortunately, they managed it¹⁴¹. It would have been regrettable that an expression with such a long tradition in European integration should have been interpreted in a way that strays from the general and common understanding and which was adapted exclusively to meet the ideas and interests of a single Member State.

Lastly, the Decision includes a clarification regarding the compatibility of “closer union” and differentiated integration. It begins by recalling that the Treaties have already agreed exemptions from certain policies and obligations for some Member States. It states, therefore, that “closer union” is compatible with “different paths of integration” and does not compel all Member States to aim for a common destination. Regarding the final part of the sentence, we will not reiterate once again the absence of a legal obligation on the matter, but we will recall that it is indeed a political project that all the Member States have shared since their accession¹⁴². The Decision now formally contains a similar clarification to the one that the European Council already accepted in its Conclusions of June 2014, at the request of the United Kingdom¹⁴³. At the time, the European Council limited itself to “noting”, an expression that does not appear to indicate a binding nature, not even politically. With the Decision, the Heads of State or Government agree to being legally bound. In 2014, it mentions different paths of integration; today different destinations have also been added. This legally-binding clarification by the European Council appears to make flexibility the general rule, applicable to all the Member States, which is not true.

Regarding flexibility, the Treaties take into consideration exemptions for certain Member States, which are limited, and the possibility that a more ambitious group can move ahead

¹³⁹ European Council, *Draft Decision of the Heads of State or Government...*, *op. cit.*, p. 6.

¹⁴⁰ Jean Quatremer, “UE: le «Brexit» n’est pas le problème”, *Libération*, 2 février 2016; Xavier Vidal-Folch, “Una vergüenza: todo es retroceso”, *El País*, 3 febrero 2016.

¹⁴¹ Andrew Duff, “Britain’s special status in Europe...”, *op. cit.*, p. 6.

¹⁴² In this respect, one might recall how the European Council, on approving the criteria for the accession of new States in Copenhagen, stated: “*Membership presupposes the candidate’s ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union*”. European Council, *Presidency Conclusions*, Copenhagen, 21-22 June 1993, (SN 180/1/93 REV 1), p. 14.

¹⁴³ The Conclusions state: “*The UK raised some concerns related to the future development of the EU. These concerns will need to be addressed. In this context, the European Council noted that the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further.*” European Council, *Conclusions of the Presidency*, Brussels, 26-27 June 2014, (EUCO 79/14), para. 27.

without waiting for the rest, as the following sentence underscores: "The Treaties allow an evolution towards a deeper degree of integration among the Member States that share such a vision of their common future, without this applying to other Member States"¹⁴⁴. However, it is necessary to clarify that the obligations of the Treaties take precedence in every case and that flexibility is not equally available to all the States. At the present time, only those States that have an exemption explicitly recognised in the Treaty¹⁴⁵ are allowed to opt out of the established policies and commitments. All those that joined after the negotiation and regulation of those policies and their consequent exemptions are obliged to fully participate in them all¹⁴⁶.

According to the current wording of the Treaties, further integration that does not affect all the Member States can only be established through enhanced cooperation and this must necessarily fall within the goals and competences of the EU. Except for in the sphere of defence, this further integration would not affect national sovereignty since it is exercised in areas of competences that have already been transferred. The different paths of integration and different destinations available to the Member States is therefore something that only applies relative to the future, through a revision of the Treaty, and we will have to see how it is ultimately regulated in Primary Law.

In our view, the interpretation of the Heads of State or Government regarding flexibility is excessive and deliberately ambiguous. As in the case of the European Council of 2014, it simply tries to meet British requirements. It does not make it clear that the current model of the Treaty is one of "two speeds" and not "Europe à la carte", as it is not open to the States to choose in which policies to participate. Once again, we find a deliberate political intention directed at the British public. The wording of these paragraphs implies that flexibility is the general rule, when according to the Treaties it is the other way around: flexibility is only recognised at constitutional level rather than in a few exemptions.

6.2. A commitment to a better application of the subsidiarity principle

In his letter, Cameron called for full implementation of the commitments regarding subsidiarity, with clear proposals on the matter¹⁴⁷. The principle of subsidiarity, established by the Maastricht Treaty, is a principle that delimits the exercise of the competences shared between the EU and the Member States, which requires justifying added value for European action that national regulation cannot achieve on its own. The principle of subsidiarity today is defined in Article 5.3 of the TEU in the following way: "in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

¹⁴⁴ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 6.

¹⁴⁵ Along with the United Kingdom, which we have seen, the other States to have been granted opt-outs are: Denmark (AFSJ, citizenship, Euro and defence), Ireland (Schengen, AFSJ and defence) and Poland (exclusion from the application by the European Court and the national courts of the Charter of Fundamental Rights of the EU).

¹⁴⁶ The Decision itself recalls this general rule in the part on Economic Governance, where it specifically states that the Member States whose currency is not the Euro and who do not have an exemption are committed to make progress towards fulfilling the conditions necessary for adopting the Euro. "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 4.

¹⁴⁷ David Cameron, Prime Minister, "A New Settlement for the United Kingdom in a reformed European Union", *op. cit.*, p. 4.

This principle has traditionally been championed and promoted by those more nationalist States that jealously guard their competences, as a means of controlling the eagerness to centralise of European legislation, as it has been demonstrated that it reinforces the Governments in the EU¹⁴⁸. Following its approval by the Treaty of Maastricht, it was perceived as a fundamental mechanism for trying to settle the differences between States and the Community regarding the division of competences, bearing in mind the lack of provisions in the Treaty on this matter¹⁴⁹. With the Treaty of Lisbon, it continues to perform that function: on matters of shared competences it is the criterion for determining the appropriate level of action. Its role when it comes to ensuring the accommodation of the diversity of models and national perspectives within a common framework is also significant. Yet, as the political criterion that it is, its implementation encounters major difficulties that cannot be overlooked.

It has been said that the subsidiarity principle (the s-word) would be used to try to counteract the fears raised by its opposite, federalisation (the f-word)¹⁵⁰. From this very British perception of federalisation¹⁵¹ it is no coincidence that even before the Maastricht Treaty took effect it should have been the British Presidency that promoted the work so that the European Council could lay down the directions and guidelines for its immediate implementation¹⁵². The following Treaty, that of Amsterdam, constitutionalised those criteria, including them as Protocol No 2 on the principles of proportionality and subsidiarity. It began to be used from the outset as an instrument to prevent the Community from overstepping the line in the use of its functions.

As well as extending its scope to regional and local authorities, the Lisbon Treaty reformed the Amsterdam Protocol, including new obligations for the institutions and reinforced instruments for their political, legal and judicial control. In the first sense, it lays down the obligation that the Commission must make extensive enquiries before drawing up a legislative proposal, which includes the regional and local dimensions (Article 2). All the institutions are required to inform the national parliaments of their legislative proposals, so that they can participate effectively in the monitoring of these principles (Article 4). Moreover, it regulates the content and requirements that the subsidiarity form drawn up by the Commission must have and which must accompany all legislative proposals within the framework of shared competences (Article 5). It creates the control procedure in the hands of the national parliaments (Articles 6 and 7). It establishes the possibility of lodging repeal appeals for violation of the subsidiarity principle both by a Member State, on behalf of its parliament, and by the Committee of the Regions (Article 8). Lastly, the Commission is obliged to present an annual report on the implementation of subsidiarity.

One of the few conclusions that Cameron's government drew from the exercise of reviewing competences was the need for fuller implementation of the principles of subsidiarity and

¹⁴⁸ Kees Van Kersbergen and Bertjan Verbeek, "Subsidiarity as a Principle of Governance in the European Union", *Comparative European Politics*, vol. 2, nº 2, 2004, pp. 142-162.

¹⁴⁹ Paul Craig, "Subsidiarity: A Political and Legal Analysis", *Journal of Common Market Studies*, vol. 50, nº S1, 2012, pp. 72-87, p. 72.

¹⁵⁰ Paul Craig, "Subsidiarity: A Political and Legal Analysis", *op. cit.*, p. 74.

¹⁵¹ It is worth mentioning that for classic federalist doctrine federalisation and subsidiarity are not conflicting concepts, but, on the contrary, part of the same model of distribution of power between different levels of government. See: Dusan Sidjanski, *El futuro federalista de Europa. De los orígenes de la Comunidad Europea a la Unión Europea*, Barcelona, Ariel, 1998, pp. 219-223.

¹⁵² Driven by the British, the European Council adopted the guidelines for the application of the subsidiarity principle gathered in the then Article 3b). European Council: "Overall approach to the application of the subsidiarity principle and Article 3b of the Treaty on European Union", *Conclusions of the Presidency*, Edinburgh, 11 and 12 December 1992 (SN 456/92), Annex I to Part A.

proportionality¹⁵³. Consequently, this aim became one of the renegotiation requests. The British Government is not demanding a change of the Treaty's rules, but a more correct, complete and thorough implementation of this principle through "clear proposals", which we understand could materialise in the shape of new legislation. Its aim is to get legislation redirected to the national level, provided that it is demonstrated that the European level is excessive. In this goal to secure a fuller implementation of the subsidiarity principle Cameron has found allies among other Member States that share the same concern, such as the Netherlands, which also conducted a study on the observance of subsidiarity on the part of European legislation¹⁵⁴.

Subsection 2 of Section C of the Decision covers this issue, although it does not contain anything new worth mentioning¹⁵⁵. The first paragraph clarifies the scope and purpose of the principle of subsidiarity, in a way that is compatible with and complementary to what is laid down in Article 5 of the TEU. It states that its goal is for decisions to be taken as closely as possible to the citizen. It stresses the need for added value from European action: "The choice of the right level of action therefore depends, inter alia, on whether the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States and on whether action at Union level would produce clear benefits by reason of its scale or effects compared with actions at the level of Member States"¹⁵⁶. The absence of anything new in this area means that the issue has not received attention either in the public debate or in the assessment of specialists.

The second paragraph states that according to what is stipulated in Protocol 2, the opinions of the national parliaments on subsidiarity are to be *duly* taken into account by the institutions concerned and that appropriate arrangements will be arranged to ensure this. The emphasis is placed on the obligation of the institutions, especially the Commission, but also the European Parliament and the Court of Justice, to take into account the arguments of the national parliaments and it takes us to the next subsection, with its new "red card" procedure. The Decision includes as an annex a Declaration of the Commission on the establishment of a future subsidiarity implementation mechanism¹⁵⁷. This makes every sense, as it is the institution primarily responsible for safeguarding it, given that it has the monopoly on legislative initiative and is in charge of ensuring compliance with European Law and, as we have seen, it is not bound by the Decision.

The Declaration includes the key innovation regarding the new arrangements for a better guarantee of subsidiarity. In it, the Commission announces the creation of a mechanism to review the existing legislation in the light of the principles of subsidiarity and proportionality, which will complement the existing mechanism for assessing new legislative proposals. In that review, the Commission states that it will draw up priorities, taking into account the views of the European Parliament, the Council and the national parliaments. The intention is to adopt a programme of work on this matter by the end of 2016 and it pledges subsequently to present report on an annual basis. A retrospective review of subsidiarity aims to examine in which cases European legislation is no longer justified and, in that event, study its repeal and a return of competences to the national sphere.

¹⁵³ Foreign and Commonwealth Office and Philip Hammond, *Final Reports in Review of EU Balance of Competences published*, 18 December 2014, <https://www.gov.uk/government/news/final-reports-in-review-of-eu-balance-of-competences-published>.

¹⁵⁴ Michael Emerson, "Proportionality needed in the subsidiarity debate in the EU – Appraisal of the British and Dutch initiatives", *CEPS Essay*, n° 11, 8 April 2014.

¹⁵⁵ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 6.

¹⁵⁶ *Ibid.* p. 6.

¹⁵⁷ "Declaration of the European Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism", Annex UV en: "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 13.

In any case, this is consistent with President Juncker's goal of improving the regulation of the EU, which is one of the strong points of his Commission's political programme. The aim, then, is to take action on its 10 political priorities, but leave the others to the Member States that, in accordance with the subsidiarity principle, are better equipped to provide effective political responses¹⁵⁸. Juncker argues that the European Commission has to focus on the big issues where its action can make a difference, but that it is necessary to put an end to overregulation and give the Member States more scope for action. That is why he

appointed a first Vice-President, Timmermans, in charge of the "Better Regulation" portfolio, with the task of placing the implementation of the principles of proportionality, subsidiarity and better regulations across the core of the Commission's activity¹⁵⁹. In accordance with this priority, the Commission has already adopted some guidelines on better regulation that specify how the different services of the Commission have to take into account the implementation of these principles, starting from the preliminary preparatory work on these proposals¹⁶⁰.

Prime Minister Cameron presented this arrangement as a major victory that enabled ongoing assessment of whether the competences already exercised by Brussels continue to be necessary and which, if subsidiarity is no longer respected, would justify their return to the Member States¹⁶¹. The British Government draws conclusions and institutional implications from this procedure that, in our view, cannot be justified from the brief draft Declaration of the Commission. In its document on the result of the negotiation, it maintains that: "This will require the European Commission to draw up a specific report to be discussed by the Council of Ministers every year. Where the Council agrees that legislation would be better enacted at national level, or that the EU has gone further than necessary, the Council will ask the European Commission to withdraw or amend the legislation in question"¹⁶². Believing that a Council request to the Commission to withdraw or reform legislation can be binding is, in our view, exaggerated to say the least. It does not take into account the fact that in the framework of inter-institutional relations regulated in the Treaty there is no provision by which the Council can give binding instructions to the Commission regarding its legislative initiative. Secondly, the British Government states that consulting national parliaments to establish the priorities of the review is a mechanism at the service of the British Parliament by which it can demand changes in existing European legislation¹⁶³. We think that this view is excessive too. We believe that these two conclusions are not possible according to the functioning of the European political system and are championed by the British Government with the sole intention of getting a positive vote in the referendum.

Regarding subsidiarity, the Decision on a new settlement for the United Kingdom does not include provisions that affect the Treaties or the project of integration. It only includes the commitment to guaranteeing this principle enshrined in the Treaty and reaffirms the role of the national parliaments in the preventive control of its respect with a view to new legislation. Cameron had asked for clear proposals to improve its implementation: the

¹⁵⁸ Jean-Claude Juncker, "A New Start for Europe...", *op. cit.*, p. 3.

¹⁵⁹ Jean-Claude Juncker, *Mission Letter. Frans Timmermans*, *op. cit.*, p. 2.

¹⁶⁰ EUROPEAN COMMISSION, *Commission Staff Working Document "Better Regulation Guidelines"*, Strasbourg, 19.5.2015 (SWD(2015) 111 final).

¹⁶¹ He would say to the House of Commons: "And we have a new mechanism to finally enforce the principle that – as far as possible – powers should sit here in Westminster, not in Brussels. So every year the EU has to go through the powers they exercise and work out which are no longer needed and should be returned to nation states". David Cameron, Prime Minister, *Oral Statement to Parliament on EU reform and referendum*, House of Commons, 22 February 2016, p. 4.

¹⁶² HM Government, *The best of both worlds...*, *op. cit.*, para. 2.82.

¹⁶³ *Ibid.*, para. 2.83.

Commission has pledged to create a new mechanism to review adherence to subsidiarity of all existing legislation. This mechanism will complement all the action that the Juncker Commission is already undertaking to improve European legislation, without us having reason to think that it might have an effect on the influence of the Council or the national parliaments to demand the return of powers to national level.

6.3. A reinforced role for the National Parliaments: a new “red card” procedure?

The participation of national parliaments is the other important issue in the “Sovereignty” section and, what is more, a highly visible political issue in the British debate. In all his speeches on the renegotiation, Prime Minister Cameron made it a priority to boost the EU’s democratic quality through strengthening the role of the national parliaments. In his Bloomberg speech, he conspicuously stated that the national parliaments were “the true source of real democratic legitimacy and accountability in the EU”¹⁶⁴, overlooking the chief role of the European Parliament. In his view, greater intervention from the national parliaments should include their capacity to block European legislation.

This concern is due to two different reasons: one is characteristic of the British political model and the other refers to the European political system. First, the British model is pure parliamentarism, by which national sovereignty is understood to lie with its Parliament and that this is inalienable. The doctrine of parliamentary sovereignty is considered to be a matter of British constitutional law¹⁶⁵. Hence, for example, the concern of the EU Act of 2011 to state that European legislation takes effect in the United Kingdom only by virtue of an act of Parliament. There has long been deep discontent within the British Parliament over losing powers as a result of their being transferred to the EU. In the European constitutional debate, this concern was channelled through proposals such as the creation of a second chamber in the European Parliament, made up of representatives of the national parliaments¹⁶⁶, or the possibility that the opposition of two-thirds of the parliaments could block European legislative proposals¹⁶⁷. One of the most maximalist stances was taken by the House of Commons itself, which demanded the option that it by itself could paralyse European legislation if it considered it to be unreasonable¹⁶⁸. The British Government already informed them that granting this veto capability to one single national parliament went against the supranational model and would also have devastating consequences for the Internal Market and for the country’s own negotiating position¹⁶⁹.

The second reason, the European political system, is to be found in two factors. The most general factor is the context of the management of the economic crisis and the growing

¹⁶⁴ David Cameron, Prime Minister, *Speech on Britain in the European Union*, Bloomberg, 23 January 2013.

¹⁶⁵ See the experts’ statements to the House of Commons European Scrutiny Committee: House of Commons, European Scrutiny Committee, *UK Government’s renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny, Fourteenth Report of Session 2015-16*, 9 December 2015, (HC458), para. 121.

¹⁶⁶ Tony Blair, “*Europe’s Political Future...*”, *op. cit.*

¹⁶⁷ Gisela Stuart, “*The Early Warning Mechanism: putting it into practice*” Contribution no. 233 to the *European Convention*, 6 February 2003, (CONV 540/03).

¹⁶⁸ Its European Scrutiny Committee recommended “*that there should be a mechanism whereby the House of Commons can decide that a particular EU proposal should not apply to the UK and also a power to disapply parts of the existing acquis (i.e. Treaties and legislation)*”. House of Commons, European Scrutiny Committee, “*Reforming the European Scrutiny System in the House of Commons*”, *Twenty-fourth Report of Session 2013-14*, 20 November 2013, (HC 109-I), para. 170-171.

¹⁶⁹ House of Commons, European Scrutiny Committee, *UK Government’s renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny, Fourteenth Report of Session 2015-16*, 9 December 2015, (HC458), para. 119.

concern over public disaffection and the spread of a line of argument over the need to boost the democratic control of the EU as the means of recovering that support. In this same period within the EU, people keep calling for greater involvement of the national parliaments in European political action¹⁷⁰. However, that involvement goes beyond that of the control of the implementation of subsidiarity in legislation to go down other paths, such as more effective control of each member of the European Council by its parliament¹⁷¹, or the promotion and institutionalisation of inter-parliamentary cooperation between the European Parliament and the national parliaments as the appropriate instrument for publicly controlling the policies managed under the intergovernmental method¹⁷².

The specific factor comes from the experience of the implementation of the early warning procedure, stipulated in Protocol No 2, by which the national parliaments participate in the control of subsidiarity¹⁷³. In effect since December 2010, for some national parliaments the experience of the early warning system has not been quite as satisfactory as it should. The results show something that cannot be overlooked: in over six years the yellow-card threshold (a third of the votes of the national parliaments) has been reached just twice and the orange card threshold (simple majority of votes) not once. Those two negative opinions have had different effects. In 2012, in the case of the Monti II regulation on exercising the right to take collective conflict measures within the framework of the freedom of establishment and the freedom to provide services, the Commission agreed to withdraw the proposal. With regard to the regulation on the European Public Prosecutor's Office, in 2013, the Commission justified maintaining it on the fact that as it was provided for in the Treaty it respected the principle of subsidiarity. As far as the national parliaments are concerned, the main limitations of the system are the short period of eight weeks that does not allow a common position to be reached with other parliaments; the limitation of the examination to compliance with subsidiarity, which does not allow for other appraisals such as proportionality, the adaptation of the legal basis, timeliness, or the means and instruments; and the lack of binding effects on the Commission¹⁷⁴.

In his letter of November 2015, the Prime Minister tried to make amends for his indiscretion at Bloomberg, as he began his request concerning the national parliaments by stating that the European Parliament plays an important role in European democracy¹⁷⁵. Now that he needs the involvement of the European Parliament to be successful in his aims

¹⁷⁰ Ingolf Pernice (Ed.), *Challenges of multi-tier governance in the European Union. Effectiveness, efficiency and legitimacy*, Brussels, European Parliament, 2013; Philippe de Schoutheete and Stefano Micossi, "On Political Union in Europe: The changing landscape of decision-making and political accountability", *CEPS Essay*, n° 4, 21 February 2013.

¹⁷¹ Wolfgang Wessels y David Rozenberg, *Democratic Control in the Member States of the European Council and the Euro zone summits*, Brussels, European Parliament, 2013.

¹⁷² Since the 2000s, there have been various more-or-less formal inter-parliamentary cooperation initiatives, which took on prime importance with the economic crisis and the introduction of the European Parliamentary Week, required by Article 13 of the TSCG, which provides a still embryonic and unsatisfactory response to the need to ensure democratic control of the economic policy agreed and managed within the European institutions. On this matter, see: Wolfgang Wessels, "National Parliaments and the EP in Multi-tier Governance: In Search for an Optimal Multi-level Parliamentary Architecture" en: Ingolf Pernice (Ed.), *Challenges of multi-tier governance...*, *op. cit.*, pp. 95-110; Mercedes Guinea Llorente, "Las relaciones Parlamento Europeo-Parlamentos Nacionales: hacia una agenda parlamentaria de la Presidencia española", en: Francisco Aldecoa Luzárraga, Mónica Guzmán Zapater y Luis Norberto González Alonso (Coords.), *La Presidencia española de la Unión Europea 2010: propuestas para una agenda ambiciosa*, Madrid, Marcial Pons, 2009, pp. 109-129.

¹⁷³ On this issue, see: Philipp Kiiver, *The Early Warning System for the Principle of Subsidiarity. Constitutional theory and empirical reality*, Abingdon, Routledge, 2012; Ian Cooper, "A 'virtual third Chamber' for the European Union? National Parliaments after the Treaty of Lisbon", *West European Politics*, vol 35, n° 2, 2012, pp. 441-465; Tapio Raunio, "The Gatekeepers of European Integration? The Functions of National Parliaments in the EU Political System", *Journal of European Integration*, vol. 33, n° 3, 2011, pp. 303-321.

¹⁷⁴ House of Lords, European Union Committee, *The role of National Parliaments in the European Union. Ninth Report, Session 2013-2014*, 24 March 2014, (HL 151).

¹⁷⁵ David Cameron, Prime Minister, "A New Settlement for the United Kingdom...", *op. cit.*, p. 4.

he cannot afford the luxury of snubbing it. He says that he wants to enhance the role of national parliaments through a new mechanism, by which a group of them, whose number will be a matter for negotiation, can stop unwanted legislative proposals. Cameron's letter is ambiguous, given that it implies that various options by which a group of national parliaments could act within the framework of the European legislative process, vetoing legislation, could be considered. On this matter, in the House of Commons the Foreign Secretary even raised the possibility of a mechanism by which the national parliaments, acting together, could identify certain areas of legislation for revision, areas in which the view is that there should be a repatriation of powers from Brussels to the Member States¹⁷⁶.

We must remember that the national parliaments are not part of the European legislative process as such and that their involvement is limited to examining whether the proposed European legislation that affects shared competences respects the subsidiarity principle and sending an express opinion to the institutions. By speaking of a new arrangement, Cameron's request could be interpreted as seeking greater involvement of the national parliaments that goes beyond the monitoring of subsidiarity. On the other hand, he clearly states his intention of stopping the decision; therefore he is requesting a procedure known as a "red card"¹⁷⁷. Constructive proposals, approved by the House of Lords, such as the capacity of a group of parliaments to make proposals to the institutions (known as the "green card"), or the reinforcement of inter-parliamentary cooperation¹⁷⁸ were not included in Cameron's demand.

The Decision of the European Council tackles the issue of the reinforcement of national parliaments in subsection 3 of Section C on Sovereignty¹⁷⁹. As one would expect, it does not change the role of these national authorities, as there was opposition from a good number of Member States, including Germany, Belgium and Spain, and from the European Parliament itself. The model that is maintained is that of confining the intervention of the national parliaments in the EU exclusively to the control of subsidiarity. Contrary to the demands of the British Parliament, the opinion requested does not extend to considering either the proportionality of the measures, or the legal basis, or timeliness. It rejects the idea that the national parliaments can become a kind of negative legislators, keeping them in the role that was agreed for them in the Treaty of Lisbon, as "guardians of national competences"¹⁸⁰.

The Decision established a new procedure that aims to reinforce the procedures established in Article 7 of Protocol No 2. Firstly, it extends the period that the national parliaments have to express an opinion from the eight weeks stipulated in Protocol No 2 to 12 weeks to

¹⁷⁶ House of Commons, European Scrutiny Committee, *UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny, Fourteenth Report of Session 2015-16*, 9 December 2015, (HC458), para. 125.

¹⁷⁷ In the European Convention debates on the capacity of the national parliaments to control the exercise of competences, the Working Groups always considered the so-called "yellow card", that is to say, the possibility that their opinions had a consultative influence on the Commission, but not an imperative one. The so-called "orange card", which allows either of the two legislators, by a certain majority, to stop the approval of the proposal, was only introduced in the IGC negotiating the Lisbon Treaty, at the request of the Netherlands, as a means of strengthening national legitimacy in European politics. Within the Convention, the "red card", that is to say, the capacity to block legislation, was raised through a signed Contribution from Gisela Stuart, a representative of the British Parliament. In it she proposed that if two-thirds of the national parliaments opposed the proposal, for reasons of the subsidiarity the Commission was obliged to withdraw it. As has already been stated, neither the orange card nor the red card had support among the members of the Convention. See: Gisela Stuart, *"The Early Warning Mechanism: putting it into practice"* Contribution no. 233 to the European Convention, 6 February 2003, (CONV 540/03).

¹⁷⁸ House of Lords, European Union Committee, *The role of National Parliaments in the European Union. Ninth Report, Session 2013-2014*, 24 March 2014, (HL 151).

¹⁷⁹ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, pp. 6 and 7.

¹⁸⁰ Francisco Aldecoa Luzarraga y Mercedes Guinea Llorente, *La Europa que viene...*, *op. cit.*, pp. 116-120.

give them more time to agree among themselves and reach a common position. The new arrangement stipulates that if 55% of the opinions of the national parliaments (31 votes) state non-compliance with the principle of subsidiarity, the Presidency of the Council will include the matter on the agenda for a comprehensive discussion on the content of the opinions and the consequences to be drawn. As a result of that discussion, the representatives of the States meeting within the Council will suspend consideration of the legislative proposal, unless it is amended by the Commission, or the institution that submits the draft, to include the concerns of the national parliaments.

The first controversial aspect that could be examined is the one concerning the involvement of the institutions. As an International Law Decision, this new arrangement is binding exclusively on the representatives of the Member States when they form part of the Council, but not on the other institutions. Whereas in other areas we have seen the incorporation of Declarations by which the European institutions undertake commitments concerning the agreements, we do not find any here. In the case of the Commission, this is hardly surprising, since, as well as limiting its degree of latitude, it poses the problem of clashing with the Treaty on matters of time frames. Moreover, nor does the Commission need to be bound, since its involvement is limited to taking into consideration the arguments of the opinions, which is already covered by Article 7.

The new mechanism aims to give the concerted action of national parliaments the capacity to block European legislation, which means that it can be considered a "red card". In our view, this new agreement does not clash with Protocol No 2, as it is legally binding only on the members of the Council as representatives of the Member States¹⁸¹. Therefore, it would be complementary to the other two cases provided for in Article 7 of Protocol No 2 and would be activated once the required number of negative opinions was reached and their concerns were not addressed by the European Commission. Even so, politically speaking, it certainly is reproachable that the Member States should now want to introduce through the back door a procedure that the Convention rejected and was not incorporated into the Treaty, without taking into account the other players with a say in the revision of the Treaties, such as the Parliament and the European Commission. It has been seen as the decision of the governments to alter the inter-institutional balance, stopping the adoption of the act until the Commission agrees to take into account the arguments of the national parliaments, harming the Commission's discretionary right of legislative initiative¹⁸².

In any case, we must also clarify that, in our view, it is a redundant provision, given that we consider it odd for a government to stray from what its parliament rules. A legislative proposal that has 16 parliaments against it would not have the majority in the Council required for its approval, far from it. Moreover, we also have to take into account the experience of the early warning to date and see that in over six years the threshold for the "orange alert", which is even lower than this "red alert", has never been reached and only on two occasions has a third of the votes been gathered to activate the "yellow card". Our impression is that a procedure has been adopted to satisfy the British Government, with the intention that it will never be used.

According to the Decision, where opinions represent 55% of the votes and the Commission, or the institution that has proposed the regulation, does not amend the proposal, the

¹⁸¹ Dashwood also defends this opinion and argues that it is compatible with EU Law, as there is no provision in the Treaties obliging the Council to proceed to adopt a certain proposal. House of Commons, European Scrutiny Committee, *Written evidence submitted by Professor Sir Alan Dashwood. Supplementary Note on rendering a reform agreement "legally binding and irreversible"*, February 2016, p. 6.

¹⁸² Araceli Mangas Martín, "Los dilemas del Reino Unido y de la UE: ¿salir o cambiar la Unión?", *op. cit.*, p. 11.

Council must necessarily stop consideration, without it having any degree of latitude. According to the rules of the Treaty, that suspension can only be adopted unanimously. While there is no Declaration on the matter, in the case of the Council, fulfilling the international legal obligations of its members separately would in some way mean having to incorporate this procedure into its operating rules. Since incorporation into the Treaty or the adoption of a Decision has not been provided for, we believe that it will have to be incorporated into the operating regulations of the Council itself. In the unlikely event of the threshold to activate this procedure being reached, before having to activate it the natural thing is for the Commission to drop its proposal, since it will know that it is impossible to get the minimum support for approval in the Council.

This procedure clashes with the Treaty on time frames and poses a serious problem. According to Protocol No 2, the parliaments would have eight weeks to issue an opinion; according to the Decision, they would have 12 weeks. This extension of the period is significant, since the national parliaments argue that they need more time to be able to agree on their position with other chambers and, therefore, reach the required thresholds. Insofar as this Decision is not binding on the Commission or any of the other institutions from which initiatives emanate, in our opinion, it cannot wait 12 weeks and take into account the opinions that appear in those four extra weeks, since it would be in breach of the Treaty and commit a legislative procedural irregularity. The extra time can only be binding on the Council, which will have to consider the opinions that arrive in that time. Therefore, we do not know what the Commission, or the other proposing institution, will have to do to study the opinions that arrive in those four extra weeks, since according to the Treaty they cannot do it. And the interested Member States cannot demand they be respected before the Court of Justice, which is why, from a legal point of view, we doubt that this provision can take effect. If the Court actually examined it, it would always apply what is stipulated in the Treaty.

In conclusion, the "red card" procedure has been conceived to give Cameron sufficient reason to be able to argue in his country that the sovereignty of the British Parliament has been adequately respected. However, we doubt that even the British Parliament will declare itself satisfied with this mechanism¹⁸³. Nevertheless, realistically this procedure does not serve to reinforce the power of the national parliaments, given that the stipulated threshold of parliaments that have to come to an agreement is even higher than the "orange card", a threshold to which the opinions of the parliaments have never come close. Having seen the procedures of the decision in the Treaty, it is more feasible that a much smaller number of parliaments with a similar perception coordinate to demand that their respective governments form a blocking minority¹⁸⁴. In our view, the issue of the reinforcement of the national parliaments in the EU is a justified aim that has been tackled from a very restrictive point of view. It should have been raised in other, more constructive ways that were likely to improve the democratic quality of the EU, such as the "green card" to convey initiatives to the Commission or the institutionalisation of inter-parliamentary cooperation between the European Parliament and the national parliaments, with deliberation and political control functions.

¹⁸³ On this matter the House of Commons European Scrutiny Committee said prior to its adoption: "*The red card as it is proposed represents a practical threat to the exercise of UK parliamentary sovereignty as it makes the will of the UK parliament in a particular case subordinate to the differing collective view of a group of parliaments*". Igualmente rechaza que el procedimiento de "tarjeta roja" se limite solo al control de la subsidiariedad. House of Commons, European Scrutiny Committee, *UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny, Fourteenth Report of Session 2015-16*, 9 December 2015, (HC458), para. 132-133.

¹⁸⁴ The number of States necessary to constitute a blocking minority is enormously variable, depending on the coalitions established. If we look at the issue from the point of view of a big State, such as the United Kingdom, it would be enough to combine with three other States, at least two of them big, or a series of small or medium-sized States that amount to either 14 States or 25% of the population.

6.4. The ratification of the opt-outs on Freedom, Security and Justice

Since the Treaty of Amsterdam, which began a gradual communitarisation of the areas of Justice and Home Affairs (JHA), previously under the intergovernmental method, the British Government has secured itself a special position on these matters through various opt-outs regulated in Protocols¹⁸⁵. Known today as the Area of Freedom, Security and Justice (AFSJ), it is a highly sensitive area, as it belongs to High Politics, in which not all the States share the same interest in cooperating to increase their national security. That has led to a highly fragmented system with a proliferation of opt-outs for Member States, as is the case of the United Kingdom, Ireland and Denmark. In the case of the British Government, at the two constitutional gatherings it secured itself a special set of arrangements to opt out in exchange for giving up the veto that protected its sovereign decision. As one specialist already said, the goal of the British Government on issues such as asylum and migration has been "to get the best of both worlds": preserve its sovereignty while getting the most out of cooperation, especially in the areas most related to security¹⁸⁶.

In the ICGs for Amsterdam and Lisbon, the British Government obtained special circumstances regulated in various Protocols, which it shares with Ireland, given the common border and the Common Travel Area established between the two States. Firstly, both are allowed to maintain border controls as an exception to the Schengen system, apply the Common Travel Area agreements and choose, case by case, in what legislative measures of those regulated by Schengen they wish to participate, a request that will have to be approved unanimously by the rest of the Members¹⁸⁷. Secondly, another Protocol allows them to choose the legal acts belonging to Title V of the TFEU – policies on asylum, immigration, border crossings, judicial cooperation on civil matters and police and judicial cooperation on criminal matters – in which they have an interest in participating¹⁸⁸. In this case, where they are excluded from the outset and they are granted an opt-in, participation is automatic from the moment these two States notify it, without the other Member States having the power to authorise it.

As a result of the Lisbon negotiation and the British red line, the United Kingdom alone obtained another opt-out concession on the latest element to be the subject of communitarisation at that time: police and judicial cooperation on criminal matters. Regulated in Paragraphs 4 and 5 of Article 10 of Protocol No 36, on transitional provisions, it stipulates that after a period of five years from the entry into force of the Treaty all the measures adopted in this area will be submitted to the jurisdiction of the Court of Justice¹⁸⁹. Should the United Kingdom wish for these measures to cease to apply to it as it does not want to accept the jurisdiction of the CJEU, it has the power to request that they all cease to apply to it en bloc. After, and in a period of six months, it can choose case-by-case the individual acts in which it wants to participate. The United Kingdom made this choice in July 2013, identifying 35 specific measures to which it submitted on an individual

¹⁸⁵ Maria Fletcher, "Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'", *European Constitutional Law Review*, n° 5, 2009, pp. 71-89.

¹⁸⁶ Andrew Geddes, "Getting the best of both worlds? Britain, the EU and migration policy", *International Affairs*, vol. 81, no. 4, 2005, pp. 723-740.

¹⁸⁷ See, respectively: *Protocol on the Schengen acquis integrated into the framework of the European Union*, added by the Treaty of Amsterdam and adapted by the Treaty of Lisbon (Protocol No 19) and Protocol on the application of certain aspects of Article 26 of the TFEU to the United Kingdom and Ireland (Protocol No 20).

¹⁸⁸ *Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice*, added by the Treaty of Amsterdam and modified by the Treaty of Lisbon (Protocol No 21).

¹⁸⁹ Protocol on transitional provisions, added by the Treaty of Lisbon (Protocol No 36).

basis, some of them as important as the European Arrest Warrant¹⁹⁰.

Against this backdrop of "à la carte" British integration into the AFSJ, Prime Minister Cameron called for confirmation of the opt-out on participating in future measures adopted in this area, which the United Kingdom enjoys by virtue of Protocol No 21 and, especially, its right to choose, case by case, whether to participate in those acts that might be of interest to it¹⁹¹. The reason behind this request is to be found in a history of disagreements between the British Government and the community institutions over the application of Protocol No 21¹⁹². The British Government complains that in a good number of decisions the European Commission has chosen as the chief legal basis one not belonging to Title V covered by the AFSJ, so that the United Kingdom was automatically bound and not allowed to exercise its right to choose. There have also been clashes over aspects directly related to Title V, but negotiated within the sphere of international agreements that have given preference to a different legal basis and, therefore, the British Government has been denied the possibility of opting out. In order to resolve this recurring problem, the House of Lords recommended adopting an inter-institutional agreement that set clear and applicable rules in all cases¹⁹³. The British Government has preferred to include an agreement that allows it to protect its sovereignty in such a sensitive area on the renegotiation agenda.

In an attempt to satisfy the British, Subsection 4 of Annex C of the Decision reiterates what is stipulated by the Treaty on the matter¹⁹⁴. It stresses that the rights and obligation of the States covered by the Protocols must be fully recognised, since their content has the same legal status as the Treaties. Next, it confirms that the Member States covered by Protocols No 21 and No 22 (the United Kingdom and Denmark, respectively) are not bound by the measures adopted within the framework of the AFSJ, unless they notify their wish to join. Until that point, the Decision simply repeats what is already laid down in the Treaty. It is no surprise that along with the British request to clarify the scope of application of Protocol No 21 it includes No 22, which covers Denmark, given that it regulates the same hypothesis and a similar arrangement.

The last paragraph incorporates something new: the commitment of the Member States, acting as members of the Council, to ensure that where a measure comes under the AFSJ what is stipulated in Protocols No 21 and No 22 will apply to it, even if that entails splitting the measure into two acts¹⁹⁵. In the hypothesis that the United Kingdom, Ireland or Denmark are interested in not subscribing to a part of a legislative measure belonging to the AFSJ, the representatives of the Council pledge to facilitate their being able to make that choice, dividing the measure into two drafts, so that they can subscribe only to that part that suits them. The desire here has been to secure the solution to the dispute over legal bases, meaning that, if it comes to it, the Council will commit to asking the Commission for the splitting of the measure into two parts, each one of them covered by each one of the legal bases in dispute. So, it will allow the right to choose of the United

¹⁹⁰ House of Lords, European Union Committee, *Follow-up report on EU police and criminal justice measures: The UK's 2014 opt-out decision, 5th Report of Session 2013-14*, 31 October 2013, (HL Paper 69).

¹⁹¹ David Cameron, Prime Minister, "A New Settlement for the United Kingdom in a reformed European Union", *op.cit.*, p. 4

¹⁹² A report by the House of Lords studied in detail the different factor and elements of conflict with the institutions, the Commission and the Council, including the judgments of the European Court regarding the choice of legal bases. House of Lords, European Union Committee, *The UK's opt-in Protocol: implications of the Government's approach, 9th Report of Session 2013-14*, 24 March 2015, (HL Paper 136).

¹⁹³ House of Lords, European Union Committee, *The UK's opt-in Protocol: implications of the Government's approach, 9th Report of Session 2013-14*, 24 March 2015, (HL Paper 136), p. 6.

¹⁹⁴ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 7.

¹⁹⁵ "European Council. A new settlement for the United Kingdom within the European Union", *op. cit.*, p. 7.

Kingdom, Ireland and Denmark on the part of the decision that is subject to Title V of the TFEU, in a measure that is compatible with the Treaties.

We have to make two clarifications on this commitment to future conduct on the part of the members of the Council. The first is that a draft Declaration of the Commission has not been attached on this matter either. Insofar as it is not bound by the Decision, it will be free to choose freely whether to agree to the Council request and split the proposal into two acts, or, on the other hand, whether to keep it as a single act under a legal basis that binds the United Kingdom. The second clarification is that as this Decision is a rule of International Law, the United Kingdom will not be able to demand its direct application from the Court of Justice. Therefore, it excludes the possibility of presenting an appeal to annul a rule that has not been split at its request¹⁹⁶. At most, should a new conflict over the legal bases between the institutions and the United Kingdom reach the Court, this Decision can be used as a supporting element to try to resolve it. The British Government sought to secure future respect for its opt-out on AFSJ matters: it has declared itself satisfied with this commitment, stressing that in the future it will allow it to maintain its right to choose in all cases related to Title V¹⁹⁷.

6.5. The reiteration of the sole responsibility of the Member States concerning national security

Finally in the section on Sovereignty, Cameron's letter stated that national security is, and must remain, the sole responsibility of the Member States, although he recognised the benefits of working together on matters that affect the security of all¹⁹⁸. One might wonder about the reason for this point, which repeats what is stipulated in Article 4(2) of the TEU and adds an aside about the benefits of working together. Initially, it appears to refer to a key issue of national sovereignty that is simply a very sensitive one in the eyes of the public. A more detailed study of this issue leads us to another area where there has been conflict with the institutions, on this occasion with the Court of Justice.

The British Government, then, states that through its judgments this Court has called sole national responsibility into question¹⁹⁹. Certain judgements by the Court of Justice consider that the acts of the States must submit to the control of the fundamental rights, both when they are applying European legislation and when they invoke an exception allowed by EU Law, such as national security²⁰⁰. Cameron is seeking a binding interpretation that protects his State from the institutions interfering in those matters that he believes belong to the area of national security, without there being any exceptions to what is laid down in the Treaty.

The final paragraph of Article 4(2) of the TEU was inserted in the IGC of 2007, leading to adoption in Lisbon, precisely at the explicit request of the United Kingdom²⁰¹. The preceding paragraph of the same Article already stated the EU's obligation to respect the essential

¹⁹⁶ *Written evidence submitted by Professor Sir Alan Dashwood, op. cit.*, p. 7.

¹⁹⁷ HM Government, *The best of both worlds...*, *op. cit.*, para. 2.94 – 2.95.

¹⁹⁸ David Cameron, Prime Minister, "A New Settlement for the United Kingdom in a reformed European Union", *op. cit.*, p. 4.

¹⁹⁹ HM Government, *The best of both worlds...*, *op. cit.*, para. 2.87.

²⁰⁰ Araceli Mangas Martín, "Los dilemas del Reino Unido y de la UE: ¿salir o cambiar la Unión?", *op. cit.*, p. 12. The author cites the following Judgments as examples of this case law that they are trying to counter : *Wachauf Judgment/ German Federal Republic*, of 13 July 1989 (as. 5/88); *ERT Judgment*, of 18 June 1991, (C-260/89); *Annibaldi Judgment*, of 18 December 1997, (C-309/96); *Karlsson Judgment*, of 13 April 2000, (C-292/97).

²⁰¹ Francisco Aldecoa Luzárraga y Mercedes Guinea Llorente, *La Europa que viene...*, *op. cit.*, pp. 107-108.

functions of the State as far as territorial integrity, public order and national security are concerned. Nevertheless, it required an additional guarantee that national security is the sole responsibility of each Member State, with the idea that neither the EU institutions nor other States can interfere.

The Decision reiterates the Prime Minister's statement, recalling that it is precisely what Article 4(2) of the TEU says. Subsection 5 of Section C of the Decision clarifies the importance that the Article must be given, stressing that it cannot be interpreted restrictively by the institutions as it is not a derogation from EU Law. It adds that in exercising their powers the Union institutions must fully respect this national responsibility. It ends with an additional sentence referring to the benefits of collective action in this matter, naturally understood to be always under the method of intergovernmental cooperation. The content of the Decision is a binding interpretation regarding Article 4(2) that is completely consistent with the wording and spirit of the Treaty²⁰². As in the sphere of the AFSJ, the British Government has included as an element of the renegotiation the defence of a national interest of major significance to it, where it has obtained satisfaction. It holds that: "This settlement helps ensure that we can exercise our sovereign responsibility for national security without interference from the EU, while retaining the freedom to cooperate closely with our EU counterparts, where it is right to take action collectively to tackle the threats we face"²⁰³. With this interpretation, the aim is to prevent fresh intervention from the CJEU limiting its freedom of action in the sphere of national security.

6.6. A new settlement for the United Kingdom?

In the "Sovereignty" section, the agreement of the representatives of the Member States does not fundamentally affect what is laid down in the existing Treaties. Therefore, it cannot be said that major concessions have been made to the United Kingdom that transform its constitutional relationship with the EU. Even when the United Kingdom has obtained an opt-out that allows it not to join in with deeper political integration, which increases the number of opt-outs that it already has, this is not significant at the present time. According to the existing Treaties, the Member States have not undertaken any legal obligation that commits them to integrate politically. The significance of this concession will be seen in the future; it will depend to a large extent on what specific wording it is given and the way in which it is included in the Treaty. As it is an element that does not belong to Part Three of the TFEU, an ordinary procedure for the reform of Article 48, paragraphs 2 to 5 of the TEU, with or without a Convention, will necessarily have to be opened in order to constitutionalise it. Therefore, the European Parliament will have a say and a vote in the final regulation that this opt-out gets.

As for subsidiarity, the Decision simply gathers the willingness to more fully implement what is laid down in the Treaties, which is always positive. In this respect, the Commission has pledged to create a mechanism to adapt all the legislation adopted in the past to the subsidiarity requisite. We believe that it is an exaggeration to say – as the British Government does – that this mechanism will allow the national parliaments to request and obtain the renationalisation of powers. We think that it is an argument aimed at obtaining the support of the Parliament and a positive vote from the public.

²⁰² *Written evidence submitted by Professor Sir Alan Dashwood, op. cit., p. 7.*

²⁰³ *HM Government, The best of both worlds..., op. cit., para. 2.88.*

The role of the national parliaments in the control of the subsidiarity principle is to be reinforced with the legal commitment of the national representatives to activate the "red card" if 55% of opinions are against a proposal. This procedure could be complementary to the one laid down in Protocol 2, although it has controversial aspects such as the question of time frames and inter-institutional relations. In any case, we are convinced it is a mechanism that will never be used, given the experience of the Early Warning System over the last few years. In this respect, it has been created simply to help the British Government in its bid to show that it has done everything possible to preserve British parliamentary sovereignty.

Regarding the AFSJ and national security, the British Government has used the renegotiation to defend its national interests against the action of the European institutions. Firstly, the new legal commitment from the rest of the Member States to facilitate the British right to choose by splitting the Decision when there are two legal bases in conflict appears positive, on account of its cooperative spirit. However, the International Law Decision is a mechanism that cannot be used to bind the Commission or by the United Kingdom (or Ireland or Denmark) to demand compliance before the Court of Justice. In accordance with the Rottman judgement, the interpretation regarding national sovereignty, however, will indeed be binding on the Court of Justice, therefore achieving the British Government's goal.

The answer to the question of whether what is laid down in the section on sovereignty is a new settlement for the United Kingdom in legal terms is "no". In our view, the rights and obligations of this Member State have not changed as a result of this Decision. The new opt-out, in our view, is no such thing, since any future deepening, be it in political areas or of another nature, will have to be freely accepted by this and all the other Member States through the corresponding revision of the Treaty.

Above all, the content of the Decision tackles a reform of certain elements of the EU according to the national interests of the United Kingdom. That reform affects the application of the Law on the basis of its interpretation, the creation of new mechanisms and procedures, or of a new direction for EU policies. It comes at a time when the EU itself had already embarked on a process of change. In defence of this view, we can see that the entire Decision, except for the subsection on the opt-out on "ever closer union", is aimed at and benefits all the Member States, or several of them. In his initial speech at Bloomberg, Cameron set out to negotiate a reform of the EU and a new role for the United Kingdom within it. In the course of the process, the idea of a reform of the Union has been diluted and, in the end, the Decision is "a new settlement for the United Kingdom" in name only. Paradoxically, this is not really its content, but a (limited) reform of some of the procedures of the Union to adapt it to British interests and sensibilities.

7. THE POLITICAL CONSEQUENCES OF THE RENEGOTIATION WITH THE UNITED KINGDOM: THE NEED TO PREVENT THE RISK OF UNRAVELLING

Finally, by way of conclusion, we want to assess the political consequences that the process of renegotiation with the United Kingdom might have on the EU as a whole, its functioning and its development. We will now take a broader view than that of our study to try to tackle a general reflection. The first result of the Decision is that it closes the "British question" within Europe. The institutions can now focus without further distraction on other urgent issues of great political significance right now: the refugee crisis, the fight against terrorism, conflicts in the vicinity, the economic growth crisis and the financial stability of the Eurozone.

The renegotiation process has taught us some positive lessons. The most significant is one of the least known: the result of the exercise to review competences. The fact that that comprehensive and thorough review showed there are no competences that are being exercised improperly is a very useful conclusion for the Member States and the institutions. This finding legitimises and justifies European functioning and action and the European institutions should advertise the fact in order to bring the Union closer to its citizens.

Rather than broker a special status for this Member State, transforming its constitutional relationship with the EU, the Decision on the new settlement for the United Kingdom reforms certain European procedures, mechanisms and policies to accommodate the British view. Not all its content is negative; some of it helps to improve the Union. That is the case of relations between the euro States and non-euro States, which are not regulated in the Treaty and which required some form of clarification to protect the legitimate interests of the States that do not form part of the euro. On the face of it, nor does the commitment to reinforcing the competitiveness of the European economic model appear to be negative. More debatable are the aspects concerning sovereignty or the section on immigration, which as well as a strong emotional content involve solutions that in most case can only be described as a lesser evil.

The interpretation of the phrase "an ever closer union among the peoples of Europe" is central among the causes for concern. The political interpretation that the United Kingdom has imposed is that the expression allows flexibility – and that this is not only understood as different speeds, but also as different political goals. This last line would allow each State to decide what their destination is and, as a result, choose in which areas and policies it decides to participate, in other words, a "Europe à la carte". Right now, this political approach is incompatible with the Treaty, in which rights and obligations are common to all. Certain exceptions for certain States have been agreed, but where there is no possibility of choosing.

However, we cannot ignore the danger of political acceptance of the desirability that in the future the model of the Treaty will be able to adapt to that interpretation of the European Council. It is only natural to think that in a Union of almost 30 Members, with diverse political models and different levels of economic development, the only way of moving forward is flexibility. In any case, that differentiated integration strategy will have to agree on what the political project is and on the model that all of them at some time or other must move towards to prevent the risk of an unravelling and, consequently, a dilution of integration.

In any event, we maintain that the current model of flexibility of the Treaty is that of the two speeds and the delayed opt-out that has been granted to the United Kingdom reinforces this interpretation. By accepting an "exception" on matters of political integration, just for the United Kingdom, the 27 other Member States also accept that there is a general rule. Consequently, the granting of that exception means, *on the other hand*, that the rest implicitly commit to that goal of future political integration that is not clearly stated in the Treaty.

In any case, we have to take into account the explicit wording of the exception, "the United Kingdom... is not committed to further political integration". At the present time, it is not committed, but it does not exclude it being able to commit in the future. Therefore, in essence the United Kingdom is not getting an opt-out on that Decision, but retains the right to opt in, in other words, the possibility of deciding whether it wants to form part of that political integration project in the future. The pragmatic character that defines the British may lead them to reconsider the idea. On this matter, it certainly can be said that the British Government has got the best of both worlds: a concession that allows it to say to its citizens that they will not move towards a "federal super-State", while retaining the possibility of choosing in what type of integration it wants to take part in the future.

During the renegotiation, however, the opportunity was lost to demand loyal cooperation from the United Kingdom on the future development of the Union, since we have to recall that this is the third "mortgage" that the British have imposed on the EU. That commitment has been partially secured regarding the deepening of the Eurozone, but not, for example, on more general political integration, to which this State has not committed. However, insofar as the exception that is to be incorporated into Primary Law has still to be drafted, those involved in the reform of the Treaty, including the European Parliament, have it in their power to demand that commitment not to obstruct the future development of the Union and to cooperate with its effective functioning.

Another cause for concern that has yet to be resolved is how ensure that the renegotiation of the United Kingdom does not serve as a precedent to begin similar processes in the event that a Member State enters into conflict with the institutions. Although the Declaration does not do so, it is necessary to make it clear in some way that the British case is unique and that there can be no repeat of it, since it could start an indefinite number of processes that obstructed the functioning of the Union.

Overall, the renegotiation process has not been as bad as one might have feared. A swift response has been given to the British demands and, from the point of view of its government, it is positive for its interests. Every effort has been made to better accommodate British sensibilities and concerns within the EU without touching the fundamentals of the EU. In this respect, the agreement allows the British Government to back the country remaining. However, referendums are hugely uncertain political processes and are subject to a variety of factors that are difficult to predict. In any case, the content of this Decision is so complex that it would be hard to transmit to the public in order to sway their vote. It is impossible to anticipate a result for 23rd June right now, although it certainly can be said that the institutions and the Member States have done everything in their power to help their partner remain in the EU.

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