MEIJERS COMMITTEE
STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL
IMMIGRATION, REFUGEE AND CRIMINAL LAW

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Accommodating British EU-demands and democratic change of the Treaties

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1. Introduction

In recent years, the British government has repeatedly expressed concerns about current EU law and suggested particular changes. Some of these changes require amendments to the Treaty on the Functioning of the European Union (TFEU) or the Treaty on the European Union (TEU). According to public sources, the European Council asked David Cameron to present his particular proposals in writing four weeks in advance of the European Council of 17/18 December 2015. It is not certain that those proposals will be made publicly available.

An agreement by the Heads of Government to change the Treaties, would give rise to serious concerns over legality, transparency, parliamentary scrutiny and democratic oversight. The Meijers Committee argues that the European Council should not be the exclusive forum to consider changes to the Treaties in an effort to accommodate British political demands. The Meijers Committee stresses that national parliaments, the European Parliament and, possibly, a Convention have a role to play and should not be left out of the current negotiations only to be confronted later on with a political agreement cast in stone.

This note describes the proper procedures by which the EU treaties can be amended and explains why a European Council or Head of Government agreement would be void or unlawful. In addition, the reforms of one of the substantive policy areas, free movement law, are analysed on the basis of specific proposals formulated by British Ministers over the past year.[1] At the European Councils of 25/26 June and 15 October 2015 Mr Cameron raised this issue and it was decided that it would be further discussed in December.[2] After the June European Council, Mr Cameron announced that the UK is seeking changes under three other headings as well: sovereignty of Member States (no longer 'an ever closer union' and more influence of national parliaments), fairness (the interests of Member States not participating in the Euro should be "more fairly balanced") and on competiveness of the EU.

2. European Council agreement to amend the Treaties

There is a suggestion that the European Council may agree by declaration or decision to amend the Treaties in a way that reflects British concerns, and that this agreement may be legally binding in either EU or international law. According to the TEU there are two procedures for amending the Treaties, the ordinary and the simplified revision procedure (Article 48 TEU). Under the first of these a Convention is convened composed of representatives of the national Parliaments, the Heads of State or Government of the Member States, the European Parliament and of the Commission and a

[1] We gratefully acknowledge the inspiration and information from Steve Peers, A legally binding commitment to Treaty change: is it humanly possible? posted on EU Law Analysis (eulawanalysis.blogspot.com) on 26 June 2015.
[2] Document EUCO 22/15, p. 8 adn EUCO 26/15, p. 6.

conference of representatives of the governments of the Member States: both Convention and conference play a central role. Moreover, Article 48(2) TEU provides that the national parliaments shall be informed about the proposals for amendment before a decision is made to amend the Treaties. Under the second, simplified revision procedure, the European Council takes a decision after consulting the European Parliament, but there is no explicit provision requiring prior notification of the proposals to the national parliaments. Under this simplified procedure the decision on amendment only comes into effect after national approval according to the Member States' constitutional procedures – which may often involve their parliaments. The simplified procedure is intended for policy change rather than institutional change. A fundamental change to the freedom of movement of Union citizens would not qualify as a simple policy change.

An agreement to amend is a matter of concern in that if the European Council were to bind itself to adopt a particular Treaty amendment these two procedures would be hollowed out: the role of the conference, the EP or the national parliaments would effectively be marginalised since a politically binding decision would already have been taken.

No such decision would be legally binding. European Council decisions must be compatible with the Treaties, or else they are void. Given that there is an existent Treaty amendment procedure, any decision that proposes de facto to achieve the same end by a different process, and which renders certain aspects of the Treaty process ineffective, must be seen as incompatible with that process, and therefore void.

It is notable that in the past the European Council has never made such agreements by decision. Three times it has indicated an agreement to make a Treaty amendment, related to the concerns of Denmark in 1992, Ireland in 2008 and the Czech Republic in 2009, but each time it has done so by declaration, which is not a legally binding form. It did adopt a decision on the meaning of the Treaty in the Irish and Danish cases, 'deciding' that the Treaty had no effect on certain aspects of national law. However, the Council emphasised that these were interpretative decisions, and that they were fully compatible with the Treaty. There was thus no intent to amend the Treaty, merely to 'clarify' it.

In any case, in all likelihood both decisions were technically void: the European Council does not have the highest interpretative authority over the Treaty. That is reserved to the Court of Justice. In Rottmann (C-135/08) the Court of Justice indicated that the European Council's interpretative declarations and decisions should be 'taken into account' in interpreting the Treaty, but then went on to decide in a way clearly contrary to the Danish decision. The European Council's views on interpretation will undoubtedly be taken seriously, but will not be treated as law.

Nevertheless, it is feared that even if such decisions or declarations may have no effect in EU law, they might be binding in international law. There seems to be no reason to think this. Such decisions or declarations are clearly taken within the context of the European Council, and all aspects of them indicate that they take place within the institutional structure and legal regime of the EU.

If the Member States wished to bind themselves in international law to a certain Treaty change they would need to agree to this in a forum that was expressly outside the EU – for example, by meeting not as the European Council, but as representatives of the Member States, in the absences of other EU representatives. In substance this would be a new treaty to change the Treaty. Whatever its international legal status might be, it would be extremely unlikely to be enforceable, and would nevertheless be contrary to EU law, as a violation of the duty of loyalty.

In real life, European Council attempts to pre-empt Treaty amendment procedures amount to purely strong political commitments, albeit very strong ones. Such commitments can be extremely difficult

to retreat from, even for a successor government with different views. Moreover, although neither the role of the EP nor national ratification and approval procedures are formally affected by such commitments, the EP and national parliaments might be reluctant to upset a later Treaty-changing procedure for fear of critique that they are unreliable, do not respect agreements or are upsetting the political balance. They would be under great political pressure not to use their powers to block Treaty change or ratification. This, we suggest, should be the primary concern: not that Member States are legally bound but that they are put in a position where any government or (European) parliament or even constitutional court wanting to stand in the way of the agreement might be intimidated by moral-political pressure exerted both domestically and from other Member States. Hence, it is essential that the European Parliament or national parliaments be informed before a decision on future amendments of Treaties is made, inside or outside European Council.

3. The political demands of the United Kingdom concerning migration

On 22 November 2014, David Cameron announced eight points on which he was considering proposals for amending EU law in relation to the referendum on the UK membership of the EU, to be held in 2016 or 2017. Home Secretary Theresa May added a ninth point in an article published in the Sunday Times on 30 August 2015. The remainder of this note discusses the implications of these proposals for EU law.

1. Longer waiting periods for free movement of Union citizens from new Member States.

The rules on waiting periods are set out in each accession treaty, which has to be approved by each Member State. No amendment of TEU or TFEU is required. The proposed rule could result in indefinite postponement of free movement of workers of certain Member States and create semi-permanent second class Member States. Permanent or indefinite restriction of the free movement of Union citizens from new Member States or restriction for far longer than the maximum of seven years, as in the recent accession agreements, could run counter to the fundamental principle of equal treatment and free movement as a fundamental element of the EU. So far, waiting periods in accession agreements have been restricted to workers only and have not questioned the status of EU citizenship.

2. Union citizens should have a confirmed job offer before they can enter another Member State for the purpose of employment.

This proposal was mentioned by Home Secretary Theresa May in August 2015. The CJEU in its judgment in *Antonissen* (C-292/89) held that the right to free movement of workers in the Treaty also applies to job-seekers, giving them the right to enter and stay in a Member State to look for work. Hence, this proposal would require an amendment of the TFEU. However, effective monitoring of this rule would require the reintroduction of checks at the internal borders of the Schengen area and the abolition of the fundamental right of free movement that allows Union citizens to travel to another Member State regardless of their purpose. Moreover, how would an EU tourist, business visitor or student effectively be prevented from looking for a job or soliciting a job offer during his or her lawful stay in another Member State? This proposal will effectively entail a return to the first phase of development of free movement of workers which has been in force on the basis of Regulation No. 15 (OJ 26 August 1961) between the original six Member States. If the UK were to demand the application of this rule for the UK only, it would still require amending the TFEU since

the free movement is an essential part of Union citizenship and, except for possible transitional provisions in the first years after accession of a new Member State, applies to all Union citizens regardless of their nationality.

3. Member States may deny social benefits, social housing and tax credits to Union citizens of other Member States during the first four years of residence in that Member State.

As regards Union citizens who are not workers, former workers or self-employed, this proposal is in line with current Union law according to the recent judgments of the CJEU in *Dano* (C-333/13) and *Alimanovic* (C-67/15). Application of this proposal to workers, former workers and self-employed Union citizens would violate the right to equal treatment guaranteed in the TFEU and thus require an amendment of the TFEU.

4. A job-seeker from another Member State can be removed from the territory if he does not find a job within six months.

This change would require amending the TFEU, since according to the 1991 judgment of the CJEU in *Antonissen* job-seeking Union citizens cannot be expelled as long as they 'can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'.

5. No public assistance or other kind of support from public funds shall be provided to job-seekers from other Member States.

Union law as interpreted by the CJEU in the judgment in *Alimanovic* does not grant a right to social assistance to job-seekers from other Member States, who do not have a residence right on the basis of previous employment in the Member State. No Treaty amendment is required for this purpose.

6. Restricting the right of Union citizens to bring their non-EU family members of Union, unless they have previously been lawfully resident in a Member State.

Under current EU law, Union citizens can bring with them their spouse or partner, the children who are under 21 or dependent, and the dependent parents of either spouse. This applies regardless of whether or not the family members are EU citizens. In 2003, in the judgment in *Akrich* (C-109/01), the CJEU ruled that Member States could insist that non-EU family members had previously been lawfully resident a Member State. No such rule had previously existed in EU legislation. But in 2008, in *Metock* (C-127/08), the CJEU overturned this ruling, holding that a prior legal residence requirement was not allowed. Moreover, the CJEU held that such a rule would not be compatible with the objective of an internal market characterised by the abolition of obstacles to the free movement of persons between Member States as set out in Article 3(1)(c) of the old Treaty. Hence, the proposed rule would be a deterrent to free movement of those Union citizens whose rights are based on the Treaties and would probably require a Treaty amendment. In case reunification with non-EU family members were to be made subject to restrictive income and language requirements, a Treaty amendment would certainly be required.

7. More room for Member States to deport Union citizens from other Member States after a criminal conviction.

A change to the rules on deportation after a criminal conviction would require at least an amendment to the current rules of Directive 2004/38. These rules are a codification of the case-law of the CJEU since 1977 in the judgment in *Bouchereau* (C-30/77) on the interpretation of the clause in the Treaty providing protection against removal on grounds of public policy, public security or public

health set out in the Treaties for EU migrant workers, currently in Article 45(3) TFEU. Thus, this proposal most likely would also require a Treaty amendment. A similar proposal to amend EU law was made by the UK and the Netherlands in the JHA Council in 2008 but was not supported by the majority of Member States.

8. Introduction of long re-entry bans for Union citizens who have been removed for begging or fraud.

Under current EU law no re-entry bans can be imposed for begging. Article 15(3) of Directive 2004/38 states that a ban on entry cannot be imposed where a person was expelled for grounds other than public policy, public security and public health and Article 27(1) of that Directive provides that such grounds cannot be invoked for economic ends. These provisions could be amended, but such re-entry bans could constitute a disproportionate restriction on free movement for Union citizens entering to seek employment. In that case, the CJEU could well rule such bans to be a disproportionate restriction, of the free movement of Union citizens, and amendment of the TFEU would be needed to permit the bans.

Under the current Directive 2004/38, Member States may adopt measures to combat fraud, and a similar proposal to amend EU law was made by the UK and the Netherlands in the JHA Council in 2008 but was not supported by the majority of Member States.

A Union citizen convicted of fraud may be expelled on grounds of public policy, public security and public health if he presents a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society. In such cases re-entry bans are allowed and the Citizenship Directive does not set absolute limits on the duration of such bans. This allows for long entry bans for serious fraudsters. Long re-entry bans for Union citizens convicted for less serious fraud, under current Union law could be challenged as a disproportionate restriction on free movement rights. To allow re-entry bans in such cases would require amending the TFEU.

9. Stop payment of child benefits for children of Union citizens living in another Member State

The CJEU in its judgments in 1986 and 1989 in de *Pinna* case (C-41/84 and C-359/87) held that non-payment of child benefit to children living in other Member States is indirectly discriminatory, since it affects more nationals of other Member States than nationals of the Member State of residence. This change with regard to children of EU workers would require amendment of the TFEU, since the Treaty guarantees the equal treatment of workers.

4. Conclusion

Proposals nos. 2, 3, 4, 6, and 9 would require amendment of the TFEU, since they would restrict the free movement of workers or of Union citizens. Proposals nos. 7 and 8 would most likely require amendment of the TFEU. Proposal no. 1 does not require the TFEU to be amended, since the issue could be settled in new accession agreements as long as the rules in the agreements are compatible with general principles of EU and EU fundamental rights. Proposal no. 5 is in conformity with Union law as interpreted by the CJEU in recent judgments.

All proposals mentioned above, except nos. 1 and 5, aim at reducing the rights of all Union citizens, regardless of their national or Member State of origin. All proposals aim at restricting either the free movement of workers or the scope of equal treatment of categories of Union citizens. Proposal 6

(reduction of the right to family reunification) also restricts the rights of nationals of non-EU countries. Several proposals aim at changing Union law rules that have been in force for many decades, such as the 1961 rules on family reunification, the 1977 rules on expulsion after a criminal conviction, and the 1986 case-law against discriminatory exclusion from child benefits.

The Meijers Committee takes the view that amending central rules on the free movement of Union citizens, especially central rules that have been in force for so long, should be the subject of public debate and full parliamentary scrutiny, both by the European Parliament and the Parliaments of the Member States, before any decision is taken on such issues.

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.
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Contact info:
Louis Middelkoop
Executive secretary
post@commissie-meijers.nl
+31(0)20 362 0505

Please visit www.commissie-meijers.nl for more information.