

Input to the House of Lords Debate on 13th October 2015

ISSUES THE REFERENDUM BILL IGNORES AT PERIL

*Will there be a turnout threshold making the referendum decisive? At the 2014 European Parliament election turnout was 35.6 percent and at the 2015 British general election 66.2 percent. Turnout at EU referendums across Europe normally falls between an EP and a national election. This implies a likely UK turnout of around 51 percent. If this occurred, the referendum majority would be little more than one-quarter of the British electorate.

On issues of constitutional importance most democratic countries introduce special requirements to secure broader commitment. In the 1979 referendum on devolution to Scotland endorsement by 40 percent of the registered electorate was required to secure approval. Although a majority approved on a turnout of 63 percent, devolution failed since less than a third of the Scottish electorate approved the Act.

For the European referendum, a turnout threshold of 50 percent of the electorate would require approval by at least a bit more than one-quarter of the electorate. Any turnout threshold would encourage campaigners on both sides to make strong efforts to get people to vote. However, a threshold set too high would risk denying authority to a majority. For example, a threshold of two-thirds of the electorate would be higher than what was achieved at the last British general election. There is a trade between competing goals: a higher threshold would register more popular commitment, but if not achieved it would nullify any claim to commit the government.

*When the government puts a date to Parliament for the EU referendum, will it give details of the reforms already in place at the time of the referendum and what it expects to follow? The government's desire to hold a referendum sooner to endorse what has been agreed with Brussels is in conflict with the Brussels practice of arriving at agreements slowly. Slowness is most evident in dealing with any changes requiring a treaty, which would require unanimous endorsement by 27 other member states and would not start to be negotiated until after the UK holds its referendum.

Within the time scale of the UK government, there will be three very different categories of EU commitment to reforms that the government is seeking. (1) Binding EU actions that reduce its powers over the UK by a fixed date. (2) A statement of principle to reduce its powers subject to negotiation of details within the life of a Commission expiring in 2019. (3) Powers sought for repatriation to be included in the next intergovernmental discussion of treaty changes whenever it may be held.

A report that recognises different degrees of commitment to whatever bargain the government has achieved would inform the electorate of the extent of uncertainty about the future. It would also enable EU leaders and national government such as

Germany to confirm or correct any misinterpretations of what they had agreed with the UK government prior to a referendum vote.

*Will the vote be binding or advisory? A binding referendum can be implemented by the British government if its object is solely within the control of the government. However, whatever the referendum result, any change in the existing status of the EU will involve further negotiations with the EU to achieve a fully binding outcome.

If the referendum endorses staying in, the government will have to continue negotiations about points (2) and (3) above. In such circumstances a clause could be added to the bill to require it to publish periodically, and not less than once a year, a full report to Parliament on the progress of negotiations.

If the referendum endorses withdrawal, then the UK government can start the process of doing so but to complete it requires EU cooperation. An amendment by a group of MPs to mandate a strict and unilateral timetable on withdrawal was rejected in the Commons. Withdrawal would require substantial amendment of British laws in parallel with negotiations about the terms of the UK's future external association with the EU. The tempo and duration of negotiations would be in the hands of the EU and the outcome would require separate approval by the UK Parliament and by multiple EU institutions. A clause could require that in the case of withdrawal the government should periodically report to Parliament the progress of negotiations.

The referendum can advise the UK government about the purpose of further negotiations, but the inability to bind the EU to conditions or timetable means that a great deal of uncertainty will remain after the ballot. However, as negotiations proceed the government will have to give an account to Parliament of their progress. The next British general election in May, 2020, provides a firm date for voters to endorse the government that negotiated the follow up to the 2016 or 2017 referendum. The newly returned government can then claim a fresh mandate for the UK's relationship with Europe after several years of negotiations have revealed what has been achieved in progress toward meeting its commitments.

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