The UK's Five 'noes' on EU Economic Governance

Pierre Schammo*

In February this year, David Cameron negotiated a so-called 'new settlement' for the UK within the EU.[1] This agreement, which will only come into force if the UK stays in the EU, is supposed to strengthen the UK's 'special status' within the EU. It includes, among other things, a section on 'economic governance'. This section (hereinafter, the 'Agreement') is made of a series of provisions that are meant to ensure the co-existence between the UK and the Eurozone in the wake of the establishment of the Banking Union (BU) and further integration within the Eurozone. From a UK standpoint, the Agreement can be summed as follows:

- 'no' to discriminatory treatment;
- 'no' to 'one-size-fits-all';
- 'no' to budgetary responsibility for the Eurozone;
- 'no' to a loss of authority over the implementation of measures aimed at safeguarding financial stability; and
- 'no' to a loss of say over EU decision-making.

These 'noes' can be associated with particular grievances that the UK has been nursing, and attempting to address, for many years. Thus, at least since 2011, the UK has had concerns that closer integration within the Eurozone might open the door to discriminatory treatment of UK businesses: e.g. based on currency. Already in 2011, it had attempted to obtain safeguards from other Member States in return for agreeing to Treaty changes that would have buttressed fiscal coordination among Eurozone countries.[2] The attempt failed, but in the following years it did secure safeguards in different legislative acts: e.g., in Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories.[3] In 2015, the UK also successfully challenged the ECB's location policy which it viewed as discriminatory.[4] Yet, despite the UK's successes, the ECB's attempt to implement its location policy continued to over-shadow the relationship between the UK and the Eurozone. The Agreement attempts to draw a line under this episode.

The second 'no' addresses one of the UK's traditional concerns. The financial crisis strengthened the EU's resolve to achieve a level playing field in areas such as banking. The idea of a 'single rulebook', made of harmonized legislation, binding technical standards and guidelines, epitomizes this drive towards uniformity and a level playing field. However, the preference for uniformity does not square well with

---

* Pierre Schammo, Durham University, Law School.

[1] Available at http://www.consilium.europa.eu/en/meetings/european-council/2016/02/euco-conclusions_pdf/.

[2] Letter from George Osborne to the Chairman of the Treasury Committee, Draft UK Requests on Financial Services at the December 2011 European Council, (February 2012), available at http://www.parliament.uk/documents/commons-committees/treasury/120228-LetterfromChxtoChair.pdf

[3] [2012] OJ L201/1.

[4] P Schammo 'Protecting the City of London? UK challenges before the Court of Justice of the EU' (2016) 37:1 The Company Lawyer 1-2.

the UK's not uncommon preference for flexibility and discretion at the level of its domestic law. In 2011, it led the UK to attempt to secure a new voting arrangement from its EU partners: unanimity for maximum harmonization measures.[5] Such an arrangement – controversial to say the least – would have offered the UK protections. However, unsurprisingly, the attempt failed and since 2011, the voices in favour of greater uniformity have only grown stronger. The Agreement offers the UK a degree of success. While it insists on the need for a level playing field, it acknowledges that rules might in the future need to be 'conceived in a more uniform manner' if applied by actors such as the ECB or the Single Resolution Board, than 'corresponding rules' that are applied by authorities outside the BU.

The third 'no' – 'no' to budgetary responsibility (or perhaps better: 'no' to financial liability through the EU budget without appropriate mechanisms to ensure full reimbursement) – denotes an especially sensitive issue for the UK: the prospect of bearing financial liability because of financial assistance given to Eurozone Member States. Clearly the UK did not always get its way: in 2015, the European Financial Stabilisation Mechanism (EFSM) was used in order to offer bridging finance to a Eurozone Member State (Greece),[6] despite the UK's opposition. However, the UK was able to secure some safeguards. They were subsequently implemented in Council Regulation (EU) No. 407/2010 which now ensures that non-Eurozone Member States are compensated in case where a Eurozone country, which benefited from financial assistance under the EFSM, defaults.[7]

The fourth 'no' – 'no' to a loss of authority over the implementation of measures aimed at safeguarding financial stability – stands for another sensitive UK issue. The UK has long been opposed to transfers of supervisory competence to EU bodies/institutions. In 2011, it attempted to convince other Member States that any such transfers in the prudential field should be subject to unanimity.[8] It failed (again unsurprisingly). The Agreement now offers assurances, especially with respect to the supervision and resolution of financial institutions/markets and macro-prudential responsibilities.

The final 'no' – 'no' to a loss of say – reflects the UK's concern that the Eurozone might *de facto* agree legislative positions in informal settings such as the Eurogroup to which the UK has no access. The Agreement offers the UK a degree of assurance by inter alia calling on the Eurogroup to respect the Council's powers.

The Agreement hardly reflects new UK bottom lines. It is also hardly going to throw the Eurozone of its path. The Eurozone too got assurances by the way: e.g., the agreement 'acknowledges' in its opening paragraphs that the so-called 'outs' must abstain from creating obstacles and facilitate the process of deepening Economic and Monetary Union. But from an EU standpoint, there is nevertheless room for controversy: e.g., as far as the future of the single rulebook is concerned. Admittedly, the single rulebook is not a monolithic block of rules with no room for national options or national discretion. However, powerful institutions such as the ECB have been calling for more, rather than less, uniformity in recent years. The Agreement appears to signal a certain evolution in thinking by suggesting that Member States are ready to consider two-tier (BU/non-BU) arrangements. That said, the language used is vague. It remains to be seen whether any rethink of the single rulebook idea is going

---

[5] (n 2).
[6] For details, see http://www.consilium.europa.eu/en/press/press-releases/2015/07/17-efsm-bridge-loan-greece/.
[7] [2010] OJ L118/1, as amended.
[8] (n 2).

to be substantial. Other parts of the Agreement seem rather difficult to monitor effectively: e.g. the question of whether the Eurogroup respects the Council's authority. Indeed, the question of effectiveness must also be raised with respect to the Council decision on the effective management of the BU and the consequences of further Eurozone integration. This decision complements the Agreement. It establishes, according to rec (2), a 'mechanism' in order to ensure respect of the principles laid down in the Agreement as regards legislative acts that relate to the management of the BU or the management of the effects of further Eurozone integration. Like the Agreement, this mechanism is not specifically addressed to the UK. It benefits any Member State that is not part of the BU. The mechanism essentially seeks to avoid that a non-BU Member State is outvoted in Council in relation to legislative acts to which the Agreement applies. Thus, it is applicable where the Council adopts legislative acts (to which the Agreement applies) by way of qualified majority and the rules are subject to the vote of all the Member States. Specifically, in case where a (non-BU) Member State opposes a vote by qualified majority, the 'mechanism' provides that the Council shall 'discuss the issue' and attempt to find a 'satisfactory solution' to address the concerns. This formulation is not greatly improved by the requirement for the Council to 'do all in in its power' to reach a satisfactory solution 'within a reasonable time and without prejudicing obligatory time limits'. One has become accustomed to 'mechanisms' and 'systems' as the EU's language of choice for describing new institutional inventions in the banking/financial area, but on this occasion Member States just drew on an existing arrangement – see the declaration on Article 16(4) TEU and Article 238(2) TFEU[9] – but with a new addition: the mechanism also envisages the possibility to escalate the issues to the European Council, but for 'discussion' only.

Clearly, this mechanism does not offer the UK the unanimity requirement which it had hoped to secure in 2011. A veto for the UK would have been unacceptable. Unanimity would have taken the EU decades back. On the other hand, non-BU Member States are entitled to maintain an effective say in Council, as the Eurozone block continues on its closer integration path. The mechanism's answer to this conundrum is to rely for its effective functioning on what Member States tend often to do anyway when issues arise: on a willingness to compromise. As such, the mechanism testifies to a typically European way of addressing issues. This might be a good thing for some Member States; whether it is a good thing for a more fractured EU remains to be seen.

[9] The arrangements laid down in the declaration, which is attached to the Treaties, were adopted in Decision 2009/857/EC of 13 December 2007 [2009] OJ L314/73.