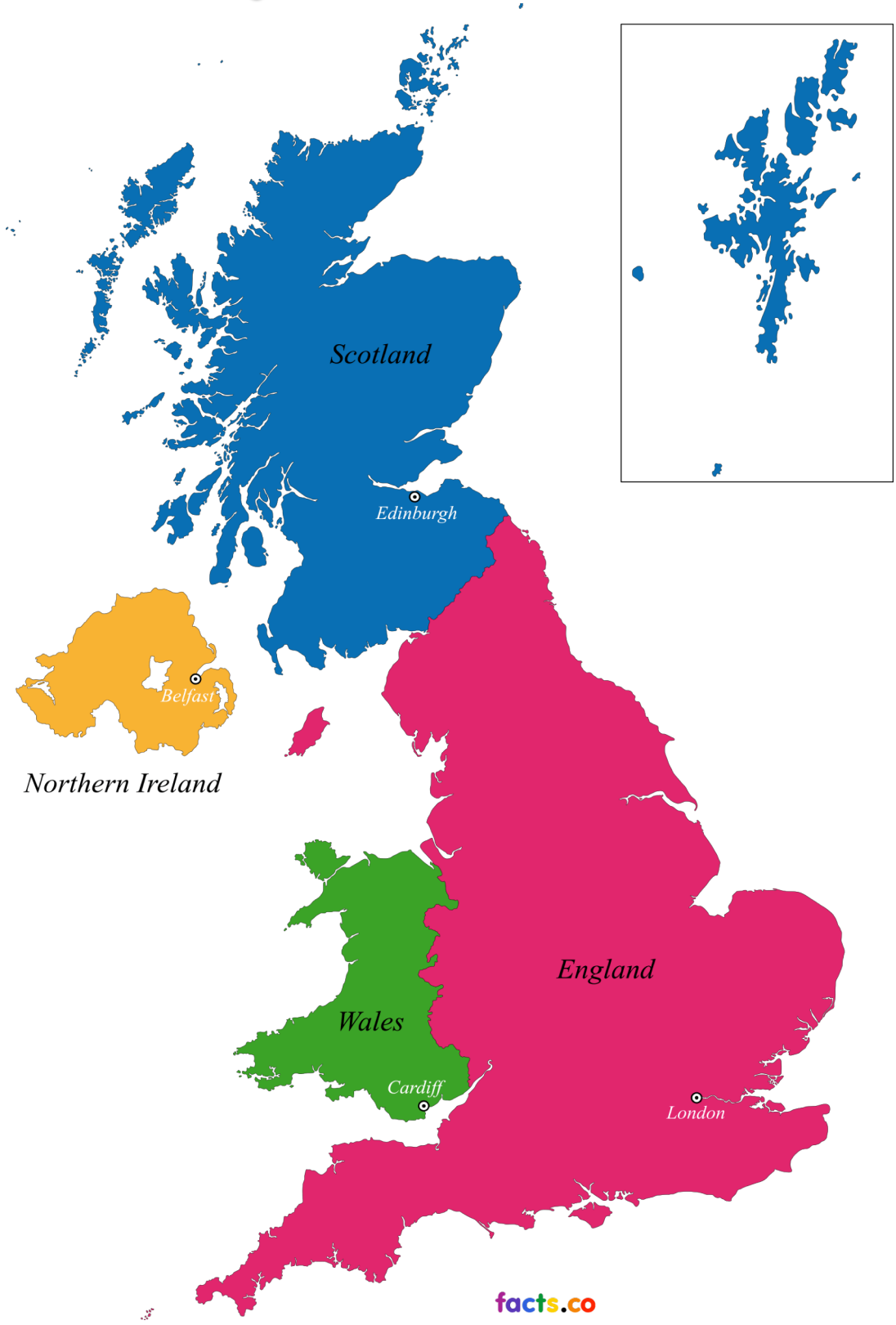
A Federal UK Council
by David Owen



14 December 2016 (revised version)

It is both logical and appropriate for all the political parties to seek to unite the UK after the nationwide referendum vote to leave the EU in June 2016.

Though Theresa May started well by making her first visit as Prime Minister to Scotland to meet with its First Minister, Nicola Sturgeon, she has in a letter to me rejected creating a constitutional convention and there is no chance therefore of a cross party initiative supported by the Government this side of the next general election. She may well move on limited but useful devolved measures; like a better needs based assessment to replace the Barnett formula, on how Scotland will have more control under Article 50 negotiations and have substantial additional policy control over fishing and agriculture; mechanisms surrounding Income Tax being assigned in Scotland and Wales, the Silk Report which has dealt with devolving Corporation Tax to Wales and also discussions of how central and reserved powers will be further exercised by new devolved authorities in England. But all this will not provide an intellectual challenge to separatist thinkers. They need to be offered a federal future in the UK.

I have therefore in this revised version of my original pamphlet of November 2016 removed the arguments directed at the government to establish a Constitutional Convention in all its different forms or even a Royal Commission. Instead I have focussed on the UK Labour Party and the SNP and an initial two party investigation of the German federal Bundesrat, without any commitment as to the outcome.

A strictly limited approach to a federal UK was put forward before Brexit on 16 March 2016 just as the referendum was getting underway by the All Party Parliamentary Group [APPG] on Reform, Decentralisation and Devolution, sadly without SNP representation. The Group's report entitled 'Devolution and the Union' included the Conservative Constitutional expert, Lord Norton, and a Conservative MP, Lady Victoria Borwick, and its Chairman was the former head of the Civil Service, now Crossbencher, Lord Kerslake. It made a broadly sympathetic short reference to the Bundesrat but only a minimalist recommendation that the UK "Government embarks upon a nation-wide, citizen based conversation to include the electorate in matters relating to our constitutional identity." This wording emerged after careful examination of the biggest problem, namely the asymmetrical structure of the UK. Post Brexit this approach is too general. A "conversation" does not have the sense of momentum that Brexit has engendered. The asymmetry of the UK is well recognized but a design can be found which accommodates it building on the technique of 'degressive proportionality'[1].

[1] Degressive proportionality is an approach to the allocation (between regions, states or other subdivisions) of seats in a legislature or other decision-making body.

Table 1: The asymmetry of the UK

- The population of England is approximately 55,416,028, and accounts for 84% of the UK's population.
- The population of Scotland is approximately 5,347,600, and accounts for 8% of the UK's population.
- The population of Wales is approximately 3,092,036, and accounts for 5% of the UK's population.
- The population of Northern Ireland is approximately 1,840,498, and accounts for 3% of the UK's population.

Source: Office For National Statistics, *Population Estimates for UK, England and Wales, Scotland and Northern Ireland: Mid-2015*, 23 June 2016

Some in the Labour Party, like Gordon Brown, favour a reformed second chamber as a federal mechanism. Obviously that may need to be considered as well but on the House of Lords the only consensus is on reducing its size. A Federal UK Council is a prior question which needs to be resolved first; after that House of Lords reform will find its place as discussed later. Electing a new House of Lords and calling it a Federal Chamber is very unlikely to be agreed by a sufficient number of MPs. Successive attempts to elect the House of Lords have failed with insufficient support from Labour as well as Conservative MPs. The latest attempt to go down this route was put forward by the coalition government as part of an agreed programme for government as recently as 2010. It was handed to the Liberal Democrat, Nick Clegg, to oversee in Parliament and it never engendered sufficient enthusiasm. Like so many other reforms, it 'withered on the vine'. Successive Cabinets and MPs of different parties have never made a wholehearted commitment to an elected second chamber. Nor, apart from academics, is there much enthusiasm for an unfocused generalized look at the UK constitution. That is seen, not just in Scotland, Wales and Northern Ireland, and rightly so, as a talking shop.

The German Bundesrat

Let us start by looking in some detail at the Bundesrat. It has the advantage of being a specific, proven mechanism designed to approve constitutional changes and all legislation that affects their 16 federal states or Lander. Also rather than electing members to a second chamber it draws on the existing members of their Landers who represent them on specific issues in the Bundesrat.

	Land	Population	Votes	Coalition	Group[a]	Minister-president
	Baden-Württemberg	10,736,000	6	Grüne and CDU	neutral	Winfried Kretschmann (Grüne)
	Bavaria	12,469,000	6	CSU	Government	Horst Seehofer (CSU)
	Berlin	3,395,000	4	SPD and CDU	Government	Michael Müller (SPD)
	Brandenburg	2,559,000	4	SPD and DIE LINKE	neutral	Dietmar Woidke (SPD)
	Bremen	663,000	3	SPD and Grüne	neutral	Carsten Sieling (SPD)
	Hamburg	1,744,000	3	SPD and Grüne	neutral	Olaf Scholz (SPD)
	Hesse	6,092,000	5	CDU and Grüne	neutral	Volker Bouffier (CDU)
	Mecklenburg-Vorpommern	1,707,000	3	SPD and CDU	Government	Erwin Sellering (SPD)
	Lower Saxony	7,994,000	6	SPD and Grüne	neutral	Stephan Weil (SPD)
	North Rhine-Westphalia	18,058,000	6	SPD and Grüne	neutral	Hannelore Kraft (SPD)
	Rhineland-Palatinate	4,059,000	4	SPD, FDP, and Grüne	neutral	Malu Dreyer (SPD)
	Saarland	1,050,000	3	CDU and SPD	Government	Annegret Kramp-Karrenbauer (CDU)
	Saxony	4,274,000	4	CDU and SPD	Government	Stanislaw Tillich (CDU)
	Saxony-Anhalt	2,470,000	4	CDU, SPD, and Grüne	neutral	Reiner Haseloff (CDU)
	Schleswig-Holstein	2,833,000	4	SPD, Grüne, and SSW	neutral	Torsten Albig (SPD)
	Thuringia	2,335,000	4	DIE LINKE, SPD, and Grüne	neutral	Bodo Ramelow (DIE LINKE)

a The Länder represented in the Bundesrat are usually summarised in three groups, depending on the parties represented in their government:

- Government: The Government of the Land consists only of parties represented in the federal government; the Land usually votes bills.
- Opposition: The Government of the Land consists only of parties not represented in the federal government; the Land usually opposes bills.
- Neutral: The Government of the Land consists of parties represented in the federal government and of parties not represented there; the Land usually abstains (which has the same effect as an opposing vote).

By convention, SPD-led Länder are summarized as A-Länder, while those with governments led by CDU or CSU are called B-Länder.

Voting

In contrast to many other legislative bodies, the delegates to the Bundesrat from any one state are required to cast the votes of the state as a single bloc (since the votes are not those of the respective delegate). If the members of a delegation cast different votes then the entire vote of the respective state is invalid.

The delegates of a state are equal to one other, in the Bundesrat, hence the minister-president has no special rights compared to his ministers. But it is possible (and even customary) that one of the delegates (the Stimmführer, "leader of the votes"—normally the minister-president) casts all votes of the respective state, even if the other members of the delegation are present.

Because coalition governments are common, states frequently choose to abstain if their coalition cannot agree on a position. As every decision of the Bundesrat requires a majority of all possible votes, not just a majority of votes cast or a majority of delegates present, abstaining has the same effect as voting against a proposal. Between 1949 and 1990, West Berlin was represented by four members, elected by its Senate, but owing to the city's ambiguous legal status, they did not have voting rights.[4]

Presidency

The President of the Bundesrat ("Bundesratspräsident"), is fourth in the order of precedence after the Federal President, the President of the Bundestag, the Chancellor and before the President of the Federal Constitutional Court. By tradition, the presidency rotates annually among the minister-presidents of each of the federal "Länder" (states). The President of the Bundesrat convenes and chairs plenary sessions of the body and is formally responsible for representing Germany in matters of the Bundesrat. He or she is aided by two vice-presidents who play an advisory role and deputise in the president's absence; the predecessor of the current President is first, his successor second vice-president. The three together make up the Bundesrat's executive committee.

Organizational structure

Because the Bundesrat is so much smaller than the Bundestag, it does not require the extensive organizational structure of the Bundestag. The Bundesrat typically schedules plenary sessions once a month for the purpose of voting on legislation prepared in committee. In comparison, the Bundestag conducts about fifty plenary sessions a year. The voting Bundesrat delegates themselves rarely attend committee sessions; instead, they delegate that responsibility to civil servants from their ministries, as allowed for in the Basic Law. The delegates themselves tend to spend most of their time in their state capitals, rather than in the federal capital. The delegations are supported by the Landesvertretungen, which function basically as embassies of the states in the federal capital.

This is a very different and possibly a far more attractive way of proceeding than having an elected second chamber to replace the House of Lords. The SNP does not participate in the Lords and does not see House of Lords reform as a way of dealing with a Federal UK.

Providing for elected members at Holyrood, Cardiff Bay and Stormont, as well as devolved and decentralized government structures in England, to participate in a UK Federal Council is a very different and potentially more acceptable form of federal governance. It would involve the devolved London Assembly and the eight big cities in England, with separate representation for County and Borough Councils and unitary authorities in England.

The Bundesrat and the federal state system[2]

This longer description I have selectively taken from the Bundesrat's own explanatory document as identified in the footnote. Where I have made additions to the text they are shown in square brackets. It is not vital to read this but it provides a more in depth description for those who wish to know more.

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Federalism – unity in diversity

The term "federalism" is derived from the Latin word "foedus", which can be translated as "alliance" or "treaty". Federalism means forming a federal state and cooperating within the entity thus formed: several states enter into an alliance to form one single all-encompassing state structure (federation, confederation), whilst to a certain extent maintaining their own characteristics as states (federal states, constituent states).

Advantages of the federal state system compared with the unitary state

- Power-sharing
  In a federation, the classical horizontal division of powers (legislative - executive – judicial) is complemented by a vertical division of powers between the state as a whole and the individual constituent states. Power-sharing means control of how power is used and protection against abuse of this power.

- More democracy
  The sub-division into smaller political units makes it easier to grasp and

[2] Dr Konrad Reuter, *The Bundesrat and the federal state system. The Federal Council of the Federal Republic of Germany*. Bundesrat PR, ISBN 3-923709-32-4 or available on www.bundesrat.de

comprehend the actions taken by the state, thus fostering active participation and co-determination. In addition, voters can exercise the fundamental democratic right to vote and thus to participate in decisions on two fronts, for in a federal state there are elections both to the central parliament and to the parliaments of the constituent states.

- Leadership opportunities
  Political parties enjoy greater opportunities and competition between them is promoted, as minority parties at national level can nonetheless take on political responsibility in the individual states making up the federation. This offers them a chance to test and demonstrate their leadership skills and overall performance.

- Closer to the issues
  In a federation public bodies are closer to regional problems than in a unitary state. There are no far-flung "forgotten" provinces.

- Closer to people
  The federal state brings state structures much closer to the general public. Politicians and public authorities are much more accessible than in a unitary state that concentrates power in an anonymous, distant centre.

- Competition
  The constituent states always automatically compete with each other. Competition has a stimulating effect. Exchanges of experience foster progress and serve as a safeguard, ensuring that any mistakes are not repeated across the whole country.

- Sound balance
  Mutual checks and balances, coupled with respect for each other and a need to reach compromises make it more difficult, if not well-nigh impossible, to adopt extreme stances. As federalism strikes a fair balance, it also has a stabilising effect.

- Diversity
  The division of the country into federal states or Länder ensures that a whole host of economic, political and cultural centres can exist. That offers greater scope to preserve and develop regional customs, as well as the specific historical, economic and cultural characteristics of an area. This diversity can give rise to greater freedom.

Ultimately these arguments in favour of federalism prove to be advantages for each individual citizen. Whilst the federal system may certainly have disadvantages too, these benefits clearly outweigh the drawbacks.

Disadvantages of the federal state system compared with the unitary state

- Lack of uniformity
  The federal states' autonomy automatically leads to differences. Diversity is

the opposite of uniformity. This can cause difficulties, for example, for school children if their family moves to another federal state.

- Complicated
  As there are many decision-making centres in the Federal Republic of Germany, the division of powers between the Federation and the federal states means the various tiers of state must work together, show consideration, exercise mutual oversight and also respect the limits of each part of the federal structure. The ensuing intermeshing of state activities is thus complex and can be hard for the general public to understand.

- Time-consuming
  Parliaments, governments and the public administrations of the Federation and the Länder have to wait for input, decisions or consent from other tiers of state, as well as engaging in lengthy negotiations with each other to reach a consensus. This can also be highly time-consuming.

- Expensive
  Generally speaking, the cost of maintaining distinct parliaments, governments and public administrations at the Federation and federal state level is considered to be more expensive than running the corresponding institutions in a unitary state. It is debatable whether this assumption is correct, for it would be impossible to simply dispense with institutions in the federal states by adopting a unitary state system. Various federal bodies would certainly have to grow accordingly and it is not clear that centralized mammoth authorities would really be cheaper in the final analysis.

The countries in the following list are all federal states, as stipulated in their constitutions: Canada, the USA, Mexico, Brazil, Argentina, Australia, India, Russia, Austria, Belgium and Switzerland. Even such traditionally centralistic states as France, Spain and Italy have shifted to "regionalising" their countries, which, although it does not constitute federalism, is nonetheless a step in that direction.

Bundesrat is a permanent body

There is no such thing as "elections to the Bundesrat", and thus the Bundesrat does not have legislative terms as such. In constitutional parlance it is a permanent body, whose membership is renewed from time to time as a consequence of elections at federal state level. As a result, elections to the parliaments in the federal states always have nationwide political significance too.

Distribution of votes

States and population figures

Must all of the constituent states have the same number of representatives in the federative body representing them at national level – for example, with each individual state having two senators, as is the case in the US Senate? Or would it be fairer and more democratic to take population figures as the yardstick, which would mean that North Rhine-Westphalia, for example, would have 26 times more votes

than Bremen? [North Rhine-Westphalia has a population of approximately 18 million and is the fourth largest Lander by area. Dusseldorf is its capital and Cologne its biggest city. It shares international boundaries with Belgium and the Netherlands.] An integral part of the "constitutional DNA" in Germany is the principle of a weighting system for the number of votes allocated to represent each of the constituent states. Whilst the system is shaped by population figures in each federal state, this is not the only decisive element. Each of the federal states united in the overall state structure also "counts" in its own right. The result is a system that is a hybrid of federative and democratic representation. However, the Basic Law definitely wished to avoid a structure that would allow the larger federal states to overrule the others, whilst at the same time not making it possible for the smaller federal states to have more power than their size would merit. When the Basic Law was adopted in 1949 each of the federal states was therefore allocated at least three votes, those with over two million inhabitants were granted four votes, while five votes were given to the federal states with a population of more than six million.

New rules in the united Germany

The introduction of the five relatively small federal states from the former GDR into this system cast a new light on the balance struck between the votes allocated to small, medium and large states. It was felt that the four largest federal states should still be able to function as a blocking minority (one-third of all votes) in respect of amendments to the constitution. Article 51 (2) of the Basic Law was therefore amended in the Treaty of Unification of 31st August 1990. A fourth category of voting rights was established, allocating six votes to federal states with a population of more than seven million.

"Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes."

The Bundesrat has a total of 69 votes and thus 69 full members. Accordingly, 35 votes are needed for an absolute majority, which is generally necessary to adopt a decision, whilst 46 votes are required for the two-thirds majority stipulated in certain instances.

The members

Only the Minister-Presidents and Ministers in the federal states, (or Mayors and Senate members in the case of the city-states of Berlin, Bremen and Hamburg) may be members of the Bundesrat. State Secretaries who have a seat and a say in the cabinet of a federal state are also entitled to be members of the Bundesrat. Membership is based on a decision adopted by each federal state government; it ends automatically if a member either leaves the Land government or is recalled due to a decision taken by the Land government.

This means that all members of the Bundesrat have a twofold role to play. They hold a position both at federal state and national level; they are politicians in both the Land and at federal level. Members of the Bundesrat take on comprehensive political responsibility as a result. They cannot simply ignore how decisions they take within their particular federal state will impinge on national policy, whilst in their ministries in the federal states they experience first-hand the consequences of policies they

pursue at the national level.

Individual members are not free to simply vote as they see fit, for each federal state must vote en bloc in the Bundesrat. Being a member of the Bundesrat does not therefore give members a "free mandate" but nor does it imply an "imperative mandate". Members of the Bundesrat vote in accordance with a uniform line devised jointly by the cabinet members in each individual federal state. They represent their federal state.

Second Chamber

The Bundesrat is sometimes referred to as the "House of Lords", the "Upper Chamber" or as a "well-tempered parliament in which everything is smaller, quieter, more refined". One could debate whether such descriptions are always accurate; however it is certainly true that efforts to drum up votes or set a particular mood are generally to little or no avail due to the special features of the Bundesrat's decision-making procedures. Impartiality is therefore one of the prime concerns in the Bundesrat. The rules of procedure take it for granted that members will be cooperative and show consideration in procedural manners, and dispense entirely with provisions on many aspects usually governed by detailed rules in other parliaments. Guidance is provided in these cases by the "customary practice of the assembly". The idea is to reach agreements in dealing with official business instead of adopting a confrontational approach, as even without specific rules no decision can be attained by "fighting matters out in a vote".

The committees

The work done in the committees lies right at the heart of parliamentary activity. Every piece of legislation, whether it is initiated by the Federal Government, the Bundestag or a federal state, is first examined in the committees. Ministers from the federal state ministries, who are well-versed in the subject-matter, or officials from their ministries go through the legislation "with a fine-tooth comb". Each federal state appoints a member to each committee and has one vote there. The Bundesrat has 16 committees. Their areas of responsibility correspond in essence to the portfolios of the federal ministries. Thanks to this system the Federal Government's expertise is directly complemented by that of the Bundesrat and the federal states. The heads of the Länder governments generally represent the federal states in the Foreign Affairs Committee and the Defence Committee, which are therefore described as "political committees".

In contrast, the ministers in charge of the relevant ministries attend meetings of the expert committees, such as the Committee on Economic Affairs or the Finance Committee. All Committee members may be replaced by "representatives", i.e. experts from the ministries. This facility is used especially frequently in the expert committees. Some committees almost always meet as civil servant groups. The "representatives" may rotate during the meeting, so that the appropriate experts from the federal states are involved for each specific point on the agenda. In the Committee on the Environment, Nature Protection and Reactor Safety, for example participants might include experts specialised in soil protection, water resources management, protection against dangerous substances, safety in nuclear facilities, waste disposal or emissions abatement.

Part of the ongoing dialogue between the Federation and the federal states occurs in the committees. The Federal Chancellor and the Federal Ministers are entitled – and at the request of the Bundesrat are obliged – to attend committee meetings (as well as plenary sessions). They have the right to speak at any time. "Envoys of the Federal Government", i.e. civil servants from the federal ministries, may also attend the meetings. The relevant experts from the national executive and the federal states' executive bodies all sit together around the same table in the Bundesrat's committee rooms. Meetings of the committees are held in camera, because discretion is crucial to ensure open and candid discussions, and because confidential matters may be on the agenda.

The Mediation Committee

Legislation is developed in a cooperative process involving both the Bundestag and the Bundesrat. Approximately half of all bills – consent bills – can only enter into force if both assemblies agree. The role of the Mediation Committee is to reach a consensus if there are differences of opinion concerning these bills, or relating to objection bills.

This is a joint committee in which the Bundestag and the Bundesrat are equally represented. Each federal state has one seat, and the remaining committee members making up the other half of the group come from the Bundestag, which allocates its seats as a function of the size of the various parliamentary groups. As there are 16 federal states the committee has 32 members. A named alternate is appointed for each member, but alternates may only attend meetings if the member they represent is unable to attend.

- The Committee may recommend that a bill passed by the Bundestag be revised, i.e. that provisions not acceptable to the Bundesrat be reformulated, that additions be made or sections deleted.

- A bill passed by the Bundestag may be confirmed. In this case draft amendments submitted by the Bundesrat are rejected.

- The proposal may be made that the Bundestag repeal the bill in question. This happens when the Bundesrat rejects a bill in its entirety and succeeds in having this position accepted by the Mediation Committee.

- Mediation Committee proceedings may be concluded without a compromise proposal being submitted. For example, this occurs when it is not possible to reach a majority decision in the Committee as there are an equal number of votes in favour of and
- against a proposal.

The Mediation Committee may only make proposals to resolve conflicts between the Bundesrat and Bundestag, but cannot adopt bills itself. It is not a "super-parliament".

The President of the Bundesrat

The President's main duty is to convene and chair the Bundesrat's plenary sessions. In legal terms he or she represents the Federal Republic of Germany in all Bundesrat

matters. The Bundesrat President is assisted by two Vice-Presidents, who advise the President in the conduct of official duties and deputise if the President is absent.

[The Presidency of the Bundesrat rotates among the heads of government represented in the Bundesrat, most of them holding the title of minister—president of each of the German states on an annual basis. They are the speaker or chair of the Bundesrat for one year]

The Bundesrat President is the highest administrative authority for the Bundesrat's officials. The Bundesrat Secretariat, with around 185 staff members, is primarily in charge of providing practical back-up for the preparation and conduct of plenary and committee meetings.

The Presidium of the Bundesrat, i.e. the President and the two Vice-Presidents, are responsible for drawing up the Bundesrat's draft budget plan, which always keeps a very tight rein on expenditure. At around 19 million Euro.

The Presidium is assisted by a Permanent Advisory Council, which is composed of the sixteen plenipotentiaries of the federal states to the Federation.

Voting

As stipulated in the Basic Law, each federal state or Lander must cast its votes en bloc, voting either for or against a motion or abstaining.

The votes of a federal state are cast by its Bundesrat members. Generally speaking, the federal state government decides before a Bundesrat session which of the members will cast the votes; alternatively, members decide themselves in the course of the plenary session. Usually votes are cast by just one member for each federal state, known as the vote-caster. He or she casts all the votes for the federal state in question, even if no other representatives from his or her federal state are in attendance at the meeting. In almost all cases a decision by the federal state government stipulates how the federal state's votes will be cast in the Bundesrat. However, sometimes the cabinet grants the vote-caster discretionary powers to vote as he or she sees fit, in order to ensure that he or she can reach an agreement with other federal states, has scope to consider possible compromise solutions or can take into account new circumstances that have arisen since the cabinet meeting.

The Basic Law expects that votes will be cast in a uniform, en bloc manner and respects the practice of vote-casters determined independently by the federal states.

Plenary sessions

On Fridays at 9.30 a.m. the Bundesrat comes together for its public plenary sessions, which are usually held every three weeks or more frequently. Members take their seats in sixteen blocks of seats. There are no party political parliamentary groups. The seats are arranged in alphabetical order according to the names of the federal states.

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This longer explanation of the Bundesrat is itself a much shortened version of the whole document which extends to 64 pages.

There are, of course, huge differences between the Germany of 2016 and the UK. But there are also some significant similarities. Germany has an asymmetry between its Landers. Bavaria is the Lander with seemingly the most similarities to Scotland, not in the nature of their political complexion but in their mountainous landscape and their long history as an independent country. There is no Lander with a similar equivalent of Wales with its Welsh language, though Saxony does protect the Danish language close by.

What the Bundesrat model represents is a radically different way to what we have in the present House of Lords. An in depth examination by a cross-party grouping advised by experts sitting through into 2019 would be the best way of discovering whether this model, suitably adjusted for the UK, has sufficient appeal amongst all our the UK political parties by the fixed term general election in May 2020 and to decide what, by then, to put in their party manifestoes on a federal UK.

To give a very provisional framework within which to discuss the concept I have suggested ways of setting the somewhat piecemeal and fast growing changes in devolved governance in England within a federal context. This involves not just the UK's four nations within its boundaries, English, Scottish, Welsh and Northern Irish but Londoners and those who live in the eight Core Cities initiative of 2012, the twenty City Deals of 2014, the Growth Deals with 39 Local Enterprise Partnerships. Also the 38 proposals for devolution in 2016 submitted from cities, towns and counties across the UK. These polices are all a significant advance towards decentralisation in England and in some cases devolution. To the 10 million people in the devolved nations and the 8 million in London, the policy adds 16 million people in these eight cities. Almost 55% of the UK population, therefore, now has some degree of devolution and the principle has been established in England beyond London. Provision is also made for those who live contentedly within county councils and separately to that grouping who live in unitary authorities. No doubt some of them may wish to develop a regional identity which could lead to separate representation but there should and would, under this pattern, be no pressure to move away from that current local government structure where they already combine to represent their interests to central government.

If the UK post Brexit is to deepen its unity it is a reasonable assumption that there has to be some kind of structural interrelationship between all its parts and not just an *ad hoc* series of relationships with Whitehall.

On the issue of a federal UK the Labour Party and SNP should forge an initial agreement during 2017 to build a cross party Convention involving other smaller UK parties to sit in 2018 and make recommendations before the end of 2019.

Some will ask: can the SNP negotiate a federal UK or are they only committed to separation? The answers lie in a speech Nicola Sturgeon made in 2012 when not yet leader of the SNP. Her speech in Strathclyde recorded how Neil MacCormick, the son of one of the SNP's founders and a distinguished academic at Edinburgh University, had distinguished between "existentialist" and "utilitarian" varieties of Scottish nationalism, the first demanding independence simply because that is what nations should have, and the second seeing it as a route to a better society. In a perceptive article in the *Guardian* on 23 April 2015 Ian Jack who writes with sensitivity and respect on Scotland supported this distinction. He returned to the theme in late September 2016 in the *Guardian* still seeing its potential despite the adverse Scottish reaction to Brexit.

Nicola Sturgeon recognized in 2012 that while some (by implication older) SNP members were existentialists she was a utilitarian; for her, she said, "the fact of nationhood or Scottish identity is not the motive force for independence ... nor do I believe that independence, however desirable, is essential for the preservation of our distinctive Scottish identity. And I don't agree at all that feeling British – with all of the shared social, family and cultural heritage that makes up such an identity – is in any way inconsistent with a pragmatic, utilitarian support for political independence."

Nicola Sturgeon also said that Scotland had to focus on "the most effective political and economic unit to achieve the economic growth and the social justice that the Scottish people want. It is, in many ways, our version of the same question being asked across all mature western democracies: how to build a thriving but sustainable economy that benefits the many, not the few. The Westminster system of government has had its chance – and failed. Today, independence is the pragmatic way forward." On this basis Sturgeon can, at least, conceive of a progressive alliance in a Convention establishing a better pragmatic way forward than Scottish separation from the UK. I hope that after discussion and reflection she and the SNP would at least consider a Bundesrat-like mechanism for the UK worth examining in depth with others from parties in the UK.

Eventual EU membership and membership of the EEA is an illusion for Scotland as a separate entity even were it to separate from the UK and that reality needs to be faced. Many of the gas and oil revenue assumptions on which the SNP campaigned and lost on the referendum on separation in 2014 have been shown to be invalid by movement downwards of the price of oil and gas. Scotland is now running a 9% deficit in GDP, mostly due to the oil price falling, and yet no country is even considered as a new entrant to the EU unless the deficit is below 3%. There is also a growing recognition in Scotland that as Spain faces a growing demand for independence from Catalonia there is an absolute refusal of any Spanish government to consider establishing a precedent in the EU. It is hard to reach any other practical conclusion that there are other countries too in the EU who will not lift their implicit

veto on any separatist country being admitted. Wallonia stood out over the ratification of the trade agreement with Canada (CETA). This was fortunately changed by agreement within Belgium. It, nevertheless, was another recognition that very small countries within an existing EU country are a potentially divisive element which could be potentially even more so if they were granted independence. The option of separate EU membership for Scotland or for Wales does not exist.

At the SNP 2015 party conference Nicola Sturgeon said she was a social democrat not a flags and anthems nationalist. She had a high profile on UK-wide TV in the 2015 general election and the 2016 EU referendum and as a result has earned name recognition and standing. The question of any future Scottish referendum will, of course, hang over any constitutional dialogue on Brexit between Edinburgh and London. While the Article 50 negotiations are proceeding it will probably be shelved. For most people in England any further referendum which a UK government might endorse should be linked to a settled will of the Scottish people with no dates fixed. The present Westminster Parliament will not recognize another Scottish referendum merely because Scotland voted to stay in the EU in 2016. It is a fact that the commitment to hold an EU referendum was announced in 2013 by David Cameron while Prime Minister well before the actual Scottish referendum vote in 2014. Also there are profound and many-sided dangers and principled objections to the constitutional integrity of a UK-wide EU referendum carrying within it a threat of another referendum in a part of the UK who do not agree with the other parts. A constitutional referendum result needs to be respected everywhere in the UK. The case for a constitutional referendum on Scottish separation depends, as in the existing commitment in Northern Ireland for potential referenda on joining with the South, on it being exceptional not a running event. There is still merit in referenda being, as SNP leaders indicated before 2014, a “once in a generation” event. It should not be a periodic test of will dependent on opinion polls or on other UK referendum results.

What of Wales, the land of my father and mother? There are lessons to learn from the way its devolution settlement, which was only carried in a referendum by a minuscule majority in 1997, with Cardiff and Newport voting against, has developed and has now achieved wide popular appeal. The devolved National Assembly for Wales or Seneed has embedded itself into Welsh politics and culture developing a distinct Welsh political will that has not previously surfaced in Wales since the early Middle Ages in the days of Hywel Dda and Wales showed its new image in rejecting Labour’s advice over the UK referendum and, in contrast to Scotland, voted strongly for Brexit, except in Cardiff, the Vale of Glamorgan and in Y Fro Cymraeg where most people speak Welsh.

A Constitutional Convention on the Bundesrat cannot carry any commitment to a positive recommendation. The test is whether this model does or does not not satisfy rigorous scrutiny of its potential. Only within one situation will any UK Federal

Council legislation follow: that is when sufficient MPs are ready to vote for the reforms in the House of Commons. A Constitutional Convention divorced from party political manifestoes and formally agreed pre-election alliances will be a mere talking shop or academic exercise.

What the coalition government of 2010-15 demonstrated is that the post-election horse trading in forming a coalition government, with no prior manifesto authority, is not a sufficient, let alone a satisfactory, basis for ensuring Acts of Parliament covering both AV and Lords Reform. Both were rejected: the first in a referendum, the second in Parliament.

The lesson of all this is that on constitutional reform it is better to start discussions between the parties *before* elections. Fixed Term parliaments have like most reforms, disadvantages and advantages but it does ensure that a government is likely to last long enough to legislate manifesto commitments whether for a Federal UK Council or to overcome resistance from the House of Lords to an elected second chamber. A reformed second chamber would hand over all federal legislative scrutiny to the Federal UK Council, but it would retain scrutiny over other legislation. There is no second chamber scrutiny for Scottish, Welsh or Northern Irish legislation and very few signs that their electorate think it necessary. Depriving the second chamber of involvement in federal UK matters makes it more acceptable if it were to continue to be appointed and also justifies a very substantial reduction in its present membership which is ludicrously large.

Prime Minister Theresa May, as Brexit proceeded under Article 50, established a timetable for a formal procedure involving the Secretary of State for Exiting the EU having talks with the First Ministers of Scotland, Wales and Northern Ireland, which because of the power sharing executive includes Martin McGuinness from Sinn Fein. This is a good start but it is now clear the Prime Minister will not call together this same forum to start an initial dialogue on a Federal UK Council.

Meanwhile an unprecedented Constitutional dialogue is developing between the SNP led Scottish Parliament and David Davies' new Department in Whitehall about the European Economic Area agreement, EEAA. The evidence that is being evaluated is more about how we leave the EU and the Treaties. The UK's relationship with the EEA has a lot of subtleties within it which need teasing out before any rational decision can be taken. The submission to the Scottish Parliament by George Yarrow is attached to this pamphlet as Annex A. It is worth explaining that the EEA Agreement does not cover the following EU policies: CAP; CFP (although it contains limited provisions on trade in agricultural and fish products); the Customs Unions; common trade policy; common foreign and security policy; justice and home affairs.

The UK is already opted out of the Schengen area and economic and monetary union. All these will go with the Treaty of Lisbon under an Article 50 exit from the EU before the end of 2019.

The key question is whether Jeremy Corbyn will agree that Labour should play a constructive role in establishing such a Convention with the SNP in 2017, well before the 2020 General Election? The first essential question, as for the SNP, is does Labour have the political will? Can trust be established on such a focused proposition as creating a Bundesrat model for the UK? I believe Corbyn could agree to a Convention as the UK Labour Party leader more easily now that Labour's Scottish Party has been given greater freedom. It is obvious that UK constitutional reform has to go wider than a purely inter-Scotland political debate that will remain polarized between the SNP and Labour in Scotland up to and during the 2020 General Election.

Almost every psephologist agrees that the SNP are most likely to remain the third largest party in the Westminster Parliament after the 2020 General Election. That may be wrong but it must be an inescapable factor in Labour's own calculation of their chances of outright victory in 2020. Corbyn has shown he has an appeal to the young, he seems to many authentic as a person and interested in extending as, he says, democracy outside Westminster. He could accept the challenge of participating in a Constitutional Convention with the SNP. But will the SNP believe he has a chance of emerging as the Prime Minister?

Many, at this stage in opinion polling, believe he cannot ever be elected Prime Minister. History, however, often shows it is governments who lose elections rather than the main opposition party winning General Elections. Corbyn's unique problems stem from a lack of support as a potential Prime Minister from as many as 170 Labour MPs in the House of Commons who made their criticisms known publicly. That may diminish but it is unlikely to disappear completely by 2020. He has one very distinctive hobby as an allotment holder. In my experience of allotment holders in Plymouth they are independent figures all of a piece content in their own skin. Corbyn is not someone the right wing press have been able, despite trying, to dismiss out of hand as a Trotskyist. Nor to depict as a hater of his country. In the 2016 annual conference in Liverpool he seemed to be readier to show he is not a pacifist and does see the need for conventional defence. His personal position against nuclear deterrence may ensure, amongst other policies, that Labour will not be elected as a government.

Is there any chance that Corbyn, having secured a far more left wing programme for Labour than since 1955, be content to step down as leader of the parliamentary party, as distinct from leader of the party in the country, in the autumn of 2019 before the 2020 General Election. The risk if Corbyn does not split the two roles is that he might well be ousted before the 2020 election as was Lansbury in

1935[i]. Lansbury, the only declared pacifist leader of the Labour Party, was denounced by Ernest Bevin, then leader of the T&GWU, only weeks away from the General Election and stood down as leader. Attlee stepped in as the acting leader, Labour increased its representation in the House of Commons from 52 to 154 MPs and Attlee was then elected leader defeating both Herbert Morrison and Arthur Greenwood. Greenwood thereafter supported Attlee and both became members of Churchill's War Cabinet on 10 May 1940.

By remaining just leader of the Party outside Parliament in 2019 Corbyn would be in a position to protect much of the left wing policies he by then will have built into Labour's manifesto. Other political parties have split these two roles. For example, when Willy Brandt resigned in May 1974 as German Chancellor over Guillaume, one of his advisers being involved in spying for East Germany, his successor, Helmut Schmidt, explicitly asked him to retain the post of party chairman. Later Schmidt wondered after being forced out as Chancellor in 1982 by Hans-Dietrich Genscher switching Liberal support to Kohl if he should have taken on both roles. But the SPD at that time was badly split between left and right factions and one commentator wrote about Brandt's influence, "Under no other Chairman would the SPD have followed Government policy so far without rebelling or falling apart".[ii]

There are individual MPs in all parties who in 2016 support a federal UK conceptually but will oppose other reforms like proportional representation to elect MPs to the House of Commons or an elected second chamber for the House of Lords. This reality, I believe, should be taken into account in limiting reform initially to considering the Bundesrat model. Such self discipline will be hard to achieve. Particularly since proportional representation [PR] for the House of Commons is the big prize for the Liberal Democrats and the Greens. It is, however, less so for the SNP, Plaid Cymru and the Northern Ireland parties since PR exists for the Scottish Parliament and the respective Welsh and Northern Ireland Assemblies. Labour MPs are still divided over introducing PR for the Westminster Parliament although it could be introduced sooner in local government in England. These are the realities and they are also the reason for starting the dialogue on a federal UK, initially between Labour and the SNP. This is the grouping that has to forge agreement.

What of the term Progressive Alliance? Glibly used it nevertheless raises questions for a federal UK reform. The Liberal Democrats, before they join any Labour/SNP progressive alliance would need to show, after the record in the coalition government of 2010-15, that they are truly back again as a progressive political party, as they were under Charles Kennedy, in the eyes of SNP and Labour supporters. For example, over Iraq and the NHS. Liberal Democrats must divorce themselves from their continuing support for the marketisation of the English NHS as provided for in the Health and Social Care Act 2012. This legislation during the Liberal Democrats' time in coalition was opposed by Labour and even more strongly by the SNP. No

'progressive alliance' worth the name can be credibly formed under Labour and the SNP if the Liberal Democrat party also goes on keeping their options open on doing a deal with the Conservatives again in 2020. Fortunately one of their eight MPs, John Pugh, is a signed up supporter of the reinstatement of a non marketised NHS but the former health minister in the coalition government of 2010-2015, Norman Lamb, is still equivocal at best and at worst against abandoning market driven NHS changes. There are many other examples where Tim Farron appears to be returning to the Liberal tactic of splitting the difference between Labour and the Conservatives.

All this means that there is no need for Labour and the SNP to hurry over opening up any cross party constitutional convention to the Liberal Democrats in 2017. Though the Greens and Plaid Cymru present no such difficulties over being truly progressive, it would probably make more sense to ask them to participate later with the Liberal Democrats rather than earlier. But the SNP and/or Labour may prefer to have them involved from the start, along with other parties from Northern Ireland. Since the SNP and Labour, in coalition with Plaid Cymru, control the Scottish Parliament and Welsh Assembly respectively they will have some resources, both financial and in terms of expertise, to help provide key information for a Convention and so while it will be unfortunate not to have the assistance of Whitehall its effects can be negated by the use of academics, thereby ensuring the quality of any Convention.

A federal UK Council is radical politics such as we have not seen since 1906. Brexit makes it sensible for the power sharing Executive in Northern Ireland to also participate in full in a Convention if there has been progress made between Labour and the SNP. The process must ultimately be as inclusive as possible and at some stage it would be worth inviting sympathetic individual Conservative MPs to join. For all these reasons, it may be wiser for the initial Constitutional Convention to be limited in 2017 to only Labour and the SNP. Then to open up to all the other opposition parties in late 2018-2019 if there is emerging a basis for agreement, and to encourage individual Conservatives and Unionists to participate.

To start to establish a Convention infrastructure, Labour and the SNP will need funds and to appoint research workers, and agree on a Chair of the proceedings, possibly an independent without party political affiliation. A broad based Convention starting in January 2018 would still give time to absorb the implications of any recommendations at party conferences in 2019 and make manifesto commitments well before the General Election in 2020. This means completing the Convention's work by the end of 2019.

At the 2020 election party politicians would certainly in Scotland and for the most part elsewhere in the UK be competing for votes with no electoral pacts while at

the same time presenting themselves as ready to fight for UK constitutional change on a cross-party manifesto commitment not subject to a referendum.

Recently talk of constitutional reform has been firstly an academic subject and then something to be done only by all the parties and through referendums. Yet constitutional reform has been in the past politically very controversial. We should remember, for instance, how, on 24 July 1911 during the Parliament Bill, the Conservatives howled down Asquith as Prime Minister for 30 minutes in partisan rage while he remained on his feet unable to speak until Foreign Secretary Grey intervened.[iii] It is possible, but not certain, that the Conservatives in 2020 will oppose a federal UK in which case it will have to be fought for as the great Liberal reforming government fought to end the powers of the House of Lords from 1906. Those of us who supported Brexit were doing so as part of a much wider agenda of restoring our very democracy which had been distorted by the false claim of post modernism that the days of the nation state were over. Far from being over, the quiet unobstrusive patriotism of Attlee[3] has become recognised for what it was, a proper assertion of an identity and that national identity, whether it be Scottish, Welsh, Irish or English deserves to be treasured as a binding force, not divisive one. It all depends on whether we can find the correct balance.

[3] John Bew, *Citizen Clem: A Biography of Attlee* (Riverrun, 2016).

Proposed Composition of a UK Federal Council

Nations & Regions	Population	Votes
Scotland	5,373,000	6
Wales	3,099,086	6
Northern Ireland	1,851,621	6
Non-metropolitan councils/counties	21,079,726	6
Unitary Authorities	10,061,530	6
London	8,673,713	6
West Midlands	2,833,557	5
Greater Manchester	2,756,162	5
West Yorkshire	2,281,718	5
North East	1,957,152	4
Merseyside	1,524,558	4
South Yorkshire	1,374,655	3
Nottingham	1,124,749	3
Bristol	1,118,807	3
Total population:	65,110,034	68 members

This table has been amended since the pamphlet was first issued

Source: Office for National Statistics, *Population Estimates for UK, England and Wales, Scotland and Northern Ireland: Mid-2015.*

The boundaries chosen to represent the City regions in this table are the *existing* five and *proposed* three combined metropolitan authorities. The existing combined authorities area are South Yorkshire (which includes Barnsley, Doncaster, Rotherham and Sheffield); North East (which includes County Durham, Gateshead, Newcastle Upon Tyne, North Tyneside, Northumberland, South Tyneside and Sunderland); Greater Manchester (which includes Bolton, Bury, Manchester, Oldham, Rochdale, Salford, Stockport, Tameside, Trafford and Wigan); Liverpool/Merseyside (which includes Halton, Knowsley, Liverpool, St Helens, Sefton and Wirral); and West Yorkshire (which includes Bradford, Calderdale, Kirklees, Leeds and Wakefield). The three potential combined authorities are Bristol (which would include Bath and North East Somerset, City of Bristol, North Somerset and South Gloucestershire). These boundaries are in line with discussions occurring locally around greater joint working. For Nottingham the boundaries chosen reflect those in a proposal that has been submitted for approval by government (to include Ashfield, Bassetlaw, Broxtowe, Gedling, Mansfield, Nottingham, Newark and Sherwood, and Rushcliffe). The West Midlands (would include the existing metropolitan area of Birmingham, Coventry, Dudley, Sandwell, Solihull and Walsall with Wolverhampton). (*This information and figures have been drawn from the Office for National Statistics, City Regions July 2015, p.12*)

These eight City regions (encompassing 51 local authorities) are home to 26%

of England's population of 55,416,028 25% of England's jobs and 23% of England's economic output. That leaves unallocated to any regional grouping the remaining non metropolitan councils, county and borough councils and unitary authorities with a population of 32,016,150. The Local Government Association has for many years represented those bodies to central government. Both, I propose, would have a weighting of representation of 6 votes in Group One. Gradually more regional combined groups may emerge from these local authorities but pure tidiness should not be used to pressurise authorities into a change of status. Many people in the UK are happy with their existing local government structure and this varied pattern can be accommodated within the asymmetry of the UK and in the German Lander, Bremen only has 663,000 people.

The explanation for this suggested pattern for the UK is fairly obvious and follows to a large extent the Bundesrat model, though there is considerable scope for adjustments and different groupings. These are only initial suggestions and will no doubt change as a result of wider debate and consultation.

Composition of the Bundesrat

Land	Population	Members/Votes
North Rhine-Westphalia	18,058,000	6
Bavaria	12,469,000	6
Baden-Wütternberg	10,736,000	6
Lower Saxony	7,994,000	6
Hesse	6,092,000	5
Saxony	4,274,000	4
Rhineland-Palatinate	4,059,000	4
Berlin	3,395,000	4
Schleswig-Holstein	2,833,000	4
Brandenburg	2,559,000	4
Saxony-Anhalt	2,470,000	4
Thuringia	2,335,000	4
Hamburg	1,744,000	3
Mecklenburg-Vorpommern	1,707,000	3
Saarland	1,050,000	3
Bremen	663,000	3
Total population:	82,438,000	69 members

The formula for a blocking mechanism over changing the federal structures is

particularly difficult. My personal wish is for Scotland, Wales and Northern Ireland to be given a uniquely low threshold of 16% of the UK to be able to block legislative changes affecting a federal UK Council. But there is a stronger case for that to be raised to 20% which would involve the need for a further 4% of the population coming from England which ensures working across all groupings. In the Bundesrat a built-in blocking vote of a third of the Chamber is required on some constitutional matters. This is a delicate mechanism to devise and will need a lot of discussion but if the correct balance were to be achieved it could become a powerful unifier for the UK as the US Senate has been over the centuries.

At least until a Federal UK Council is established it would be better to retain a non elected House of Lords to scrutinise the non federal legislation from the House of Commons. But since federal legislation will pass from the Lords to the UK Federal Council, members of the Lords would have to be very substantially reduced in size, eventually no more than 200 members and legislation would have to limit age and length of tenure. The advantage of letting the Lords continue is that with reduced legislative coverage it could be reduced in size by nearly three quarters without generating a huge controversy and not impact on support for a Federal UK Council. The House of Lords for centuries shared its space with the Law Lords until they were transformed into a Supreme Court and this dual functionality could continue particularly if adaptation coincided with the renovation of the Parliament building. This approach fits with not introducing elections by proportional representation. Better to focus and to succeed in creating a UK Federal Council. The Federal Council should, while having its base in Westminster, hold meetings in Belfast, Cardiff and Holyrood and could expect to start its life in the Westminster Conference Centre complex opposite Westminster Abbey in 2023.

It would be wise to use the 2020 party manifestoes as the basis for legislation and not a referendum. The recent Brexit vote has not increased public enthusiasm for referendums. The capacity for the manipulation of a referendum was seen on the Alternative Vote referendum conceded by the Conservative Party in the negotiations with the Liberal Democrats. Every poll in the second half of that year showed AV being won in a referendum. By February 2011 Ipsos/MORI had "Yes" on 49% and AV looked certain to be endorsed in ten weeks time much to the chagrin of many Conservatives and to predictions of adverse electoral consequences despite initial claims by Cameron that AV would have few consequences. Cameron was forced to focus on AV by Osborne who is reported to have said, "we have to win this .... thing; who cares what Clegg thinks?"[iv] Cameron true to his character moved fast. Money was found to overpower the "Yes" to Fairer Votes campaign. Also more and more people became aware that AV was neither truly proportional nor fair and could have bizarre results. Some also saw it as yet another manipulation agreed post election inside the coalition by Conservatives and Liberal Democrats with no electoral mandate. The "No" campaign spent the last few weeks exposing the three 'Cs': cost,

complexity and Clegg. The Liberal Democrat leader at the time was ruthlessly lampooned and Cameron now talked of AV being "bad for democracy", not something he ever said while the negotiations were underway. On 5 May the referendum resulted in the "No" campaign achieving 67.9% support with 30.1% voting "Yes" to AV. The turnout was a miserable 42.2%.

Cameron then won the Scottish referendum and ‘Project Fear’ emerged as a technique. Overconfident, he felt he could do the same on the EU referendum but ‘Project Fear’ across the UK backfired as did the visit of President Obama resulting in a step like increase in Vote Leave support of something between 3-4%. . There is nothing unusual about this political saga. People dislike outside intervention in their own polling. Tammany Hall politics is not confined to New York nor to any one political party in the UK. Referenda are a device, part of the struggle for power in democratic politics. First past the post is also part of a struggle for retaining power. It is kept by Conservative MPs because it best suits them win and many Labour politicians believe it is better for their Party than proportional representation. The Labour left prefers to wait out of power longer in order to be more certain of being in a position to make radical reforms when in power. That is a rational choice.

Democracy can benefit from more online petitions, more sophisticated polling of policy options, more popularly triggered debates in Parliament and elsewhere. Jeremy Corbyn in his first appearance at Prime Minister’s Questions by asking the question of a named voter created a more serious dialogue. Of course, partisan politics will continue; it is the life blood of political debate. But the relentless adversarial, abrasive cockpit in the House of Commons has outlived its time and the ever larger House of Lords is an indefensible combination of patronage and privilege where peerages are seen to have their price. Constitutional reform is vital but MPs must prioritise their legislation and first and foremost should be setting a federal agenda.

Labour will need to consider how to win support for a Federal UK legislation from some of the smaller UK parties, not just the SNP, but Liberal Democrats, Greens, Plaid Cymru, and even on improving their representation in the House of Commons. A limited seats deal to help the Liberal Democrats and Greens in England and Plaid Cymru in Wales should be considered by Labour in 2020. If there was a manifesto agreement on specific proposals for a federal UK with those parties by early 2020 that would make a seat deal easier. I see no SNP/Labour seat deal before 2020. The widest possible grouping of parties supporting federal reforms will help create a national mood for reform as it did for the Liberal Party in the 1906 General Election when the Liberals offered seat deals to help Labour.

My great grandfather, Alderman William Llewellyn, was for 25 years the Liberal leader of Glamorgan County Council. He was also Chairman of the Ogmore

Vale Liberal Association and interestingly of its Liberal and Labour Association. They made those 'seat deals' in Wales before the large 1906 Liberal victory to maximize their appeal for the constitutional reform of the power of the Lords.

I have no hesitation in saying that Labour will have to become more open-minded on the principle of individual seat deals with parties in England within a truly progressive alliance if they are to stand a chance of becoming the government in 2020. Pacts or deals do not involve merging of parties or the loss of their identity, but they could be the means to power for Labour on a commitment to legislate in the House of Commons for a federal UK. The number of seats involved are not great but they exist where Labour not having to field a candidate in seats where under all circumstances they cannot expect to win, and where it enhances a smaller party's chance under the first past the post system of beating the Conservatives. Gaming the system in the absence of proportional representation is a reasonable response to the first past the post distortions and it is high time Labour took a calculated decision to be involved in this as they were to their benefit in the election of 1906.

Summary

Referendums will not be in fashion at Westminster after the 2016 EU referendum. A federal UK could become a post-Brexit priority with broader support than would have been conceivable before 2016. Since the Prime Minister will not form an all party convention to consider a Federal UK Council every possible step should be taken by Labour to negotiate key elements of a Federal UK Council with the SNP, then both parties must include as many MPs from all the other parties as possible so as to create legislation for a Federal UK Council as soon as possible after the 2020 General Election.

References

[i] David Owen, *Cabinet's Finest Hour. The Hidden Agenda of 1940* (Haus Publishing, 2016), pp. 13-21.
[ii] Willy Brandt, *My Life in Politics* (Hamish Hamilton, 1992), pp. 310-313.
[iii] David Owen, *The Hidden Perspective. The Military Conversations 1906-1914* (Haus Publishing, 2014), p. 131.
[iv] Anthony Seldon & Peter Snowden, *Cameron at 10. The Inside Story 2010-2015* (William Collins, 2015), p. 118.

ANNEX A

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Response to the European and External Relations Committee call for evidence on Scotland's relationship with the EU in the light of the results of the referendum on 23 June 2016

Initial remarks and main point

The most influential factor in the determining the value of Scotland's membership of the EU is likely to be the future of the EU itself. Views therefore need to be taken on the Union's prospects, which are themselves subject to significant uncertainties.

Conceived as a political project in economic clothing, the central mission of the EU was rehabilitation of the nations of west and central Europe after WWII. The promotion of peace remains the first listed aim in Article 3 of the EU Treaty (see Annex), but the central mission was largely accomplished in the 1990s when the post-war division of Europe was ended. Since then a strong sense of political purpose has tended to fade. Put simply, the questions now are: What precisely is this supra-national institution for in today's world, i.e. what are its purposes now? What are its benefits and costs relative to other structures of cooperation?

De facto the original mission has morphed into a series of integrationist projects of much more dubious value for the welfare of the peoples of Europe, and a number of major policy mistakes have been made in recent years. The economic and political consequences of these missteps are very evident and the financial structures of the EU remain in a fragile state.

Some of the causes of current problems are not difficult to identify. A weakened sense of common purposes places much greater emphasis on 'rules' as the co-ordinating engine of a set of institutions covering 28 states, and that is the emphasis of the Union's most influential economic philosophy, Ordo-liberalism.[iv] Whilst the notion of the 'rule of law' is compelling, what the Ordo-liberalism perspective often lacks is a sense that different sets of rules can have quite different social and economic consequences. The perspective tends to treat its favoured set of rules as the 'right' ones, irrespective of the relevant context. In Biblical terms it might be said that the philosophy contains 'Pharisaic' tendencies.

The EU's general policy stance is under increasing challenge, both from internal intellectual critics and, less happily, from nativist/demagogic responses to its adverse consequences in the new political and economic contexts that have emerged in Europe. How this all will play out remains to be seen, but the value of Scottish membership of the EU is something that itself can only be highly uncertain.

In more specific policy terms, what this implies is that, in the face of major uncertainties, there is great value in retaining *optionality* in policy strategy, i.e. a capacity to be able to adjust and adapt in a relatively flexible and timely way as events unfold. At the same time, for such flexibility to be effective there needs to be a strong sense of common purposes and of commitment to those purposes.

In my view, the European Economic Area Agreement (EEAA) meets these criteria. It has a clear and widely shared purpose and offers flexibility for adjustment over time, including a quick and straightforward withdrawal mechanism should things go seriously awry.

The EEAA is far from perfect, but it can be said to be *sufficient unto the day.*[iv] The UK is a founding Contracting Party to this international Agreement and doesn't need to apply to remain a participant. The simplest Brexit strategy is to withdraw from the Treaty of Lisbon, but not to withdraw from the EEAA. My own view is that no better short- to medium-term strategy has yet been articulated and examined.

Two distinct agreements/treaties

In assessing Brexit issues it is important at the outset to bear in mind that the UK's relationships with other EU Member States are currently governed by two, distinct agreements:

- The Treaty of Lisbon, together with the associated Treaty on the Functioning of the European Union (TFEU) and
- The European Economic Area Agreement (EEAA).

The latter extends participation in the Single Market to territories other than the territories of Member States of the EU. Its purpose is to allow participation in the Single Market without entailing EU membership.

The two agreements differ significantly in their aims, as is apparent from any comparison of Article 3 of the Treaty of Lisbon and Article 1(1) of the EEAA – the Articles that are focused on stating the agreements' objectives (see Annex). Put broadly, the Treaty of Lisbon is much more political in nature, built around a strong theme of political integration, whereas the EEAA is much more in the nature of a commercial agreement. The former has strong supra-national elements, whereas the latter is chiefly inter-governmental in its approach. The EEAA also takes a more flexible view of the interpretation and application of its rules, and indeed provides explicitly for flexibility when circumstances call for it. Ordo-liberal influences are not absent in the text of the EEAA, but they are significantly weaker than in the EU's own institutional structure.

These differences in aims have important implications, not least for the interpretation and application of the principle of *free movement of persons*, which was perhaps the most vexed issue in the referendum debates. Free movement will be discussed further below, but in a nutshell it might be said that in the Lisbon Treaty free movement is conceived as an *end* in itself (see Article 3) whereas in the EEAA it is specified as a *means* to another end or set of ends (see Article 1(2)).

This last point identifies, in a precise way, the source of the flexibility allowed by the EEAA. If a particular interpretation and application of a specified means (e.g. of any of the four freedoms) is serving to hinder the achievement of that which is afforded the highest priority (the commercial aim set out in Article 1(1) of the EEAA), then interpretation and application of the specified means can be varied, subject always to the sound and widely recognised 'regulatory' principle that the variation should be no more than is necessary to secure the agreed end.

Exit provisions in the agreements/treaties

Both agreements have provisions for voluntary/unilateral exit of a party to the relevant agreement (see Annex):

- Article 50 of the Lisbon Treaty, which has been the focus of considerable political attention and which contemplates a negotiation period of up to two years or more.
- Article 127 of the EEAA, which has been relatively neglected and which allows for unilateral withdrawal of a Contracting Party on the giving of twelve months' written notice, without need for negotiation.

Importantly, neither agreement provides for exit other than via the specified, voluntary route.

This silence on alternative ways of terminating participation in the relevant agreement has major implications that have been largely ignored in post-referendum discourse. *Voluntary withdrawal from the Lisbon Treaty* – "Brexit", the matter on which the electorate was asked to vote by answering the question "Should the UK remain a member of the EU or leave the EU?" – initiated by Article 50 notification *does not imply automatic withdrawal from the EEAA* (on which the electorate was not asked to vote).

As indicated, the UK is a Contracting Party to the EEAA, which it signed and ratified according to its own constitutional requirements. It is currently one of 32 Contracting Parties, thirty-one of which are European States (the other being the European Union itself). In general, the principles of international law are conservative in nature, seeking to protect and sustain international agreements in the face of extraneous political shocks (see, for example, the Vienna Convention on the Law of Treaties and the Vienna Convention on Succession of States in respect of Treaties). These principles would work against any propensity to expel the UK from the EEAA in response to Brexit.

Given that the aim of the EEAA is highly consistent with the traditional goals of UK commercial policy and that any attempt to force UK exit from the Single Market (by means that, so far as I can see, no-one has identified and assessed, at least in public debate) would itself be contrary to the aim in Article 1(1), which all parties have signed up to, the bottom line is that it appears that the UK will still be a participant in the Single Market post-Brexit, provided only that it wishes so to remain.

The most relevant, initial question is therefore not whether the UK wishes to *apply for access* to the Single Market, but rather whether it wishes *to voluntarily withdraw* from the Single Market.

This distinction may matter a great deal for the way in which negotiations unfold, and it is therefore an issue to which the Committee might usefully give some attention and thought, particularly since politicians down south appear to be asleep on the point. Thus:

- Voluntary withdrawal would imply an initial deliberate choice that is not in any sense mandated by the referendum result, followed by possibility of protracted negotiations about bespoke, co-operative trading arrangements with the EU.
- In contrast, non-withdrawal offers the prospect of a potentially much simpler and quicker negotiation: there would need to be what the EEAA itself refers to as "necessary modifications" to the Agreement, but these appear to be relatively modest in scope and significance compared with the task of constructing a new agreement from scratch. More difficult issues could be dealt with by the addition of Protocols and Annexes (of which the EEAA has many) and could be taken at an appropriate pace without disturbing the operation of the Agreement in the interim. At least some Member States of the EU would likely see this easier path forward as being to their own, as well as to the UK's, advantage.

Implications of non-withdrawal from the EEAA consequent on Brexit

The immediate implication of Brexit (withdrawal from the EU Treaty) coupled with retention of EEAA status would be a major repatriation of powers to the UK in areas such as: Common Agriculture and Fisheries Policies; Customs Union; Common Trade Policy; Common Foreign and Security Policy; Justice and Home Affairs; Direct and Indirect Taxation; and Immigration (and see further below on free movement of persons).

It would, therefore, respond to what appears to have been the primary demand of Leave voters, to 'take back control'. I am not an expert in details of the current devolution settlement, but I would expect that this general repatriation of powers to the UK would lead an enhancement of the powers of the Scottish Parliament.

The other major implication would be a need to fit the UK into the administrative structure of that 'pillar' of the EEAA developed for its non-EU Contracting Parties. This implies early discussions with Iceland, Liechtenstein and Norway, but the task is simplified by the consensual nature of the existing arrangements: it would not affect the right of any one of these three Contracting Party to veto changes in the Agreement that were not to its liking, nor would it affect their trade arrangements with the wider world (negotiated via EFTA). Although the EEAA is often perceived as a bilateral, international agreement between the EU and EFTA, the fact is that it is not.

Free movement of persons

The repatriation of powers in relation to *free movement of persons* may come as a surprise to those not closely familiar with the EEAA and the Treaty of Lisbon, but it flows from two factors.

First, although the EEAA "entails" a commitment to free movement of persons, the entailment is (in Article 1(2)) "in order to attain the objective" (which is set out in Article 1(1)), and it is explicitly recognised in later Articles that the commitment can also come into conflict with other public policy objectives. That is, as indicated, free movement of persons in the Agreement is a means to achieve a specified end. This is not to say that the free movement principle is considered to lack any value in and of itself, only that there are explicitly recognised trade-offs when it comes to be assessed.

Explicit recognition of the trade-offs is to be found in Articles 28(3) and Chapter 4 (on Safeguard Measures) of the EEAA (see Annex) which allow for limitations on free movement of persons to be applied when they come into conflict with other public policy objectives. (It can be noted in passing that the EEAA also provides for the possibility of limitations on the free movement of goods and on the free movement of capital.)

In contrast, and in reflection of its more specifically political aims, the Treaty of Lisbon takes free movement of persons as a top-level aim: it appears as such in Article 3(2), although even in this case it is qualified by reference to it (free movement) being ensured *"in conjunction with appropriate measures"* in relation to external border controls, asylum, immigration and crime prevention. This qualification itself gives rise to questions of interpretation and application of the principle and these are currently contested matters within the EU. All that can safely be concluded is that the text of the Lisbon Treaty implies a significantly more restrictive interpretation and application than does the text of the EEAA.

Second, in addition to the differences in scope for limitations on free movement of persons provided by the two agreements/treaties, there are also differences in the processes by which decisions about these matters are made, which bears on the critically important matter of national sovereignty. In particular, for non-EU Contracting Parties to the EEAA (one of which the UK would become, if it chooses to remain in the EEA), the decisions are made independently by the governments of the relevant countries. On the other hand, for EU Contracting Parties decision making powers in relation to EEAA matters are entrusted to the EU, just as they are in the Treaty of Lisbon. This is most clearly visible in Article 113(3) in relation to the implementation of safeguard measures, which says explicitly that *"For the Community, the safeguard measures shall be taken by the EC Commission"* (see Annex).

This is not to say that the power of national governments to impose limitations on free movement of persons is unbounded: as with any other agreement, a contracting party necessarily accepts constraints on its own future conduct. The EEAA provides for discussion and consultation with other Contracting Parties and for what is ultimately a form of judicial supervision. Again, however, this is little different from the normal structure of judicial supervision of governmental activity more generally, whether the legislation or administrative decisions are local or international in their implications.

The bespoke agreement option

One argument in circulation at the moment is that the UK should withdraw from the EEAA in order to negotiate a better, bespoke agreement with the EU. There are two points that I would make about this policy position.

First, there is the timing issue already raised. Bespoke arrangements may take a long time to be negotiated and hence might be expected to contribute to a protracted period of political and economic uncertainty. Added uncertainty can be expected to have adverse effects on investment. Such negotiations also tend to absorb significant administrative resources.

Second, whilst it is highly likely that there are arrangements that would be better for the UK/Scotland than the existing terms of the EEAA Agreement – the Agreement was, after all, negotiated and drafted a quarter of a century ago and I think that it would be fair to say that it is not one of the finest pieces of legal draughtsmanship in existence – it should always be borne in mind that the possibility of achieving something better is accompanied by the possibility that something worse could be negotiated. One of the maxims I have used in my working life in public policy is "never underestimate the capacity of well-intentioned government to make matters worse" (and governments are not necessarily always well intentioned).

In current circumstances there are also some severe doubts about the availability of negotiating skills on the UK side. This is not just a matter of a dearth of experienced trade negotiators: the number of old-fashioned trade unionists (brought up in a culture of hard bargaining on behalf of their members) now to be found in front line politics, and who might in other circumstances have served, is much diminished.

A concrete example illustrates the possibility of ending up with something worse. In a referendum the Swiss rejected membership of the EEA at its outset and subsequently negotiated a series of bespoke agreements with the EU (reported to now total over 120), including in relation to the free movement of persons. Much more recently, in a referendum on 9 February 2014, the Swiss voted to impose stricter immigration controls, but, under the terms of the relevant agreement, this has to be negotiated with the EU. Two and a half years' later the negotiations are still ongoing. In contrast, as a Contracting Party to the EEAA the relevant actions could have been taken unilaterally and without significant delay.

Negotiating bespoke arrangements could pose particular issues for Scotland. For example, I understand that Scottish fishermen have already expressed anxieties that the potentially beneficial effects of repatriation of fisheries policy powers will be

bargained away in Brexit negotiations. My general view is that the Scottish Government and Parliament will have an easier task in monitoring developments and influencing outcomes in the context of a negotiation based on making "necessary amendments" to a relatively simple, existing Agreement than in staying abreast of the more complex, more protracted negotiations that starting from scratch would likely entail.

This last point is reinforced by the fact that the 'off-the-shelf EEAA' has been previously scrutinised by the Parliaments of Iceland and Norway, countries whose interests have a more than average degree of alignment with Scottish interests in some major policy areas.

Budgetary matters

As an existing Contracting Party the EEAA requires no financial contributions from the UK. Post Brexit, the EU would very likely seek to add a Protocol of the sort negotiated with Iceland, Liechtenstein and Norway to provide for such contributions (which are not specified in the main text of the Agreement itself). On the other side of the table, if it is to agree to such payments, the UK will likely seek some *quid pro quo*, such as more formalised contributions to Single Market rule making. As implied above, the validity and operability of the EEAA itself is not contingent on such a Protocol being agreed: it would be an add-on.

Without prejudging the detail of the bargaining, I think that it is safe to say that the UK could expect to see a substantial reduction in any net (of rebate) contributions that it currently makes to the EU. No doubt the Scottish Government and Parliament will wish to ensure that Scotland benefits from this outcome. Without delving into numerical detail, there is little reason to suppose that current programmes that are supported from EU funds, such as the European Structural and Investment Funds (ESIF) and Horizon 2020, would be seriously at risk. Ultimately, the funding for these programmes is currently supported by UK taxpayers, notwithstanding the smoke and mirrors aspects of the existing flow of funds.

Annex

Sections of the Agreements/Treaties referred to in the submission

Note: Underlined text is particularly relevant to the main points.

Aims

The EEAA

Article 1

1. *The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.*

2. <u>In order to attain the objectives set out in paragraph 1</u>, the association shall entail, in accordance with the provisions of this Agreement :

(a) the free movement of goods;
(b) the free movement of persons;
(c) the free movement of services;
(d) the free movement of capital;
(e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as
(f) closer cooperation in other fields, such as research and development, the environment, education and social policy.

The EU Treaty (Lisbon)

Article 3

1. *The Union's aim is to promote peace, its values and the well-being of its peoples.*

2. *<u>The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime</u>.*

3. *The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and*

improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Withdrawal provisions

The EEAA

Article 127

Each Contracting Party may withdraw from this Agreement provided it gives at least twelve months' notice in writing to the other Contracting Parties.

Immediately after the notification of the intended withdrawal, the other Contracting Parties shall convene a diplomatic conference in order to envisage the necessary modifications to bring to the Agreement.

The EU Treaty

Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State,

setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. *The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*

4. *For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*

   A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*

Free movement of persons/workers

The EEAA

Article 28

1. *Freedom of movement for workers shall be secured among EC Member States and EFTA States.*

2. *Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

3. *It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*

(a) to accept offers of employment actually made;
(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. *The provisions of this Article shall not apply to employment in the public service.*

5. *Annex V contains specific provisions on the free movement of workers.*

From Chapter 4 on Safeguard Measures

Article 112

1. *If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.*

2. *Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement.*

3. *The safeguard measures shall apply with regard to all Contracting Parties.*

Article 113

1. *A Contracting Party which is considering taking safeguard measures under Article 112 shall, without delay, notify the other Contracting Parties through the EEA Joint Committee and shall provide all relevant information.*

2. *The Contracting Parties shall immediately enter into consultations in the EEA Joint Committee with a view to finding a commonly acceptable solution.*

3. *The Contracting Party concerned may not take safeguard measures until one month has elapsed after the date of notification under paragraph 1, unless the consultation procedure under paragraph 2 has been concluded before the expiration of the stated time limit. When exceptional circumstances requiring immediate action exclude prior examination, the Contracting Party concerned may apply forthwith the protective measures strictly necessary to remedy the situation.*

For the Community, the safeguard measures shall be taken by the EC Commission.

4. *The Contracting Party concerned shall, without delay, notify the measures taken to the EEA Joint Committee and shall provide all relevant information.*

5. *The safeguard measures taken shall be the subject of consultations in the EEA Joint Committee every three months from the date of their adoption with a view to their abolition before the date of expiry envisaged, or to the limitation of their scope of application.*

Each Contracting Party may at any time request the EEA Joint Committee to review such measures.

Article 114

1. *If a safeguard measure taken by a Contracting Party creates an imbalance between the rights and obligations under this Agreement, any other Contracting Party may towards that Contracting Party take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of the EEA.*

2. *The procedure under Article 113 shall apply.*