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PATHWAYS TO EU REFORM

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KEY FINDINGS

The topic of EU reform is high on the UK's political agenda. There are three main options for reform.

- Treaty change requires unanimous approval by all 28 member states, ratification by all national parliaments and, in some countries, by referendum. Treaty change is unlikely to be negotiated and ratified before 2017, the putative date for a UK referendum.
- New opt-outs from Treaty provisions are equally unlikely as these, too, require Treaty change.
- The reform of EU policies by adopting new legislation or changing existing laws, e.g. on social security, is likely to receive backing from other member states. In most cases unanimous agreement is not required and this option, therefore, offers the highest likely chance of success.

Introduction

The issue of EU reform has gained increasing prominence on the UK's political agenda. In his January 2013 [Bloomberg Speech](#), Prime Minister David Cameron linked the promise of an 'in/out' referendum on EU membership to a 'new settlement' for the EU; the UK Independence Party (UKIP) has increased its electoral success; and even parties more broadly in favour of the EU now argue for substantive reform.

Yet how could such reform effectively be achieved? What are the legal options? This briefing discusses the three main options for reform and the challenges associated with them in the current political and institutional, British and European context.

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Option A – Reform of the EU's Treaties

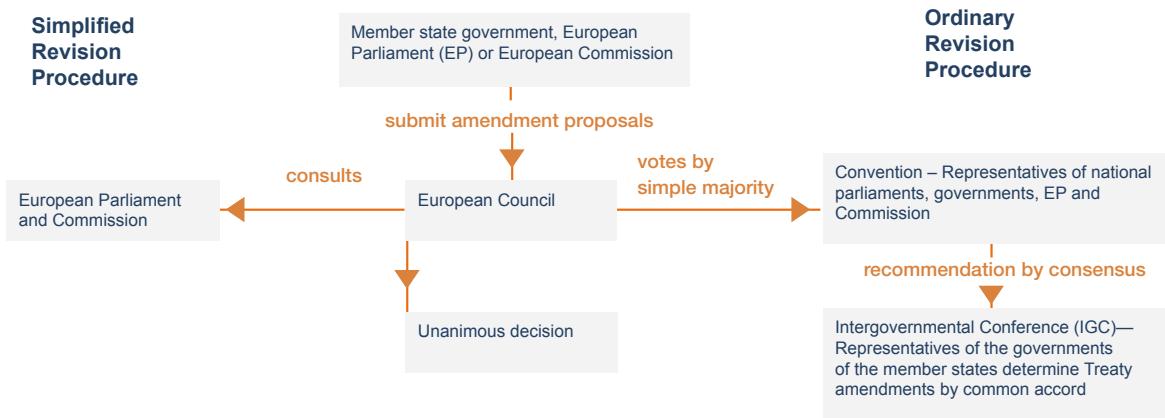
This is the formal way to change the EU's principles, institutions, decision-making and competences. The EU has seen **five major Treaty reforms** in its history: the Single European Act (1987) and the Treaties of Maastricht (1993), Amsterdam (1999), Nice (2003) and Lisbon (2009).

The current Treaties consist of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Signed in Lisbon, they are often jointly called the 'Lisbon Treaty'.

The Lisbon Treaty can be revised by two procedures (Art. 48 TEU): the ordinary revision procedure which is needed to amend the competences of the EU, and the simplified revision procedure which can be used to change internal policies and action. Both procedures can be initiated by any government, the European Parliament (EP)

or the European Commission through submitting proposals for change to the European Council (which brings together the EU's heads of state and government).

Under the simplified procedure, the European Council decides by unanimity, having previously consulted the EP and the Commission. The ordinary revision procedure requires an Intergovernmental Conference (IGC), if the European Council votes in favour of reviewing the proposed amendments. Prior to the IGC, a Convention—composed of representatives of national parliaments, national governments, the EP and the Commission—discusses the amendments. However, after obtaining the EP's consent, the European Council can decide by simple majority not to convene a Convention. If convened, the Convention makes a recommendation to the IGC, which decides by common accord.



Challenges

1. **Unanimity:** Opposition by just one government can prevent Treaty reform. For example, in 2011, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ('Fiscal Compact') was blocked by the Czech and UK governments.
2. **Non-ratification:** One national parliament or one failed referendum can halt ratification, potentially handing significant bargaining power to the respective member state. Examples include Denmark's negotiation of opt-outs from the Euro, defence policy, and Justice and Home Affairs in the Maastricht Treaty, following the Danish people's 'no' vote in 1992; and the reassurances granted to Ireland on, among others, taxation, neutrality and family policy following the first failed referendum on the Lisbon Treaty in 2008.
3. **Time:** Treaty reform is a long process. From the IGC's formal launch to the entry into force of the new Treaty, past reform rounds took between 22 months and 3 years to complete.

In sum, any new settlement requires the unanimous agreement of all national governments as well as ratification in all 28 member states according to their respective constitutional requirements, some of which include referenda. The UK's bargaining power, therefore, hinges not least upon whether other EU member states wish to change the status quo.

POTENTIAL TREATY REFORM IN PRACTICE – LIMITING THE RIGHT TO STAY FOR EU MIGRANTS

In November 2014, **the British Prime Minister suggested** the removal of EU migrants who do not find work within six months of entering the UK. Limiting the **free movement** of workers and citizens would require Treaty reform¹. Current EU case law states that prospective workers are allowed to stay beyond the six months period if they continue to seek employment and have a realistic chance of being employed². Even under the simplified revision procedure, Britain would face 27 potential veto players in the form of national governments and parliaments—**some of whom are very reluctant to consider Treaty change**. Visiting the UK in January 2015, the German chancellor Angela Merkel rejected a major revision of the EU's governing Treaties; as reform may trigger referenda, this view is shared by France; and the Polish finance minister Mateusz Szczeruk warned that tampering with free movement risks destroying the eurozone and the EU.

Option B – Opt-outs and flexible opt-ins

These are a ‘means of last resort’ to accommodate individual member states on core issues of national interest. In the past, member states have been granted:

- opt-outs from entire policy-areas (e.g. Denmark and the UK were granted opt-outs from Economic and Monetary Union in Maastricht);
- flexible ‘opt-outs/opt-ins’ from entire policy-areas (e.g. the UK in Justice and Home Affairs).

Challenges

1. Unanimity or Compromise: Opt-outs from entire policy-areas require Treaty reform (Option A); the UK government would, therefore, face similar challenges.
2. Limited Flexibility: Obtained through Treaty reform, the UK’s flexible arrangement in the Area of Freedom, Security and Justice (AFSJ) allows the British government and parliament to decide on a case-by-case basis on whether to join new EU-wide measures. However, once the UK has opted into a measure, it cannot use opt-outs in the future, should the political circumstances change.

PRECEDENT: THE UK AND THE AREA OF FREEDOM, SECURITY AND JUSTICE

Established by the 1999 Amsterdam Treaty, the AFSJ has progressively brought immigration, asylum, policing and judicial cooperation in the EU under supranational rule. To retain independent border and immigration controls, Britain negotiated a complex ‘opt-out / opt-back in’. Britain has the opportunity to opt into AFSJ initiatives on a case-by-case basis within three months after their proposal (Protocol 19 & 21, TEU). However, opting-in prevents future opting-out from such measures.

Britain recently used its **flexible opt-outs**, e.g. Post-Lisbon, 130 police and criminal justice measures became subject to supranational rule. Britain had until 31st May 2014 to decide whether to stay bound by the legislation, or opt out of the transferred measures. In July 2014 the UK chose to ‘re-opt-in’ using Art. 4 of the Schengen Protocol to rejoin certain Schengen measures and Art. 4 of Protocol 21 (TEU) to re-join certain non-Schengen measures, including the European Arrest Warrant.

Option C – Policy-change: Adopting new legislation or changing existing laws

The third and most likely option is the adoption of new (or the change of existing) legislation. This does not require Treaty change but is achieved through the **ordinary legislative procedure (OLP)**—not to be confused with the ordinary revision procedure described above—which applies in nearly all areas of EU law. One prominent exemption is the government-controlled area of EU foreign policy.

Under the OLP (Art. 294 TFEU), the European Commission initiates legislation. The EP and the Council of the European Union have to agree. Any British attempt at (re-) legislation, therefore, requires a proposal by the Commission as well as a qualified majority of Europe’s governments in the Council and a majority in the EP.

LESS LIKELY ALTERNATIVES TO REFORMING POLICY THROUGH THE OLP

1. Enhanced cooperation (Art. 20 TEU, Arts. 326 & 334 TFEU) allows a minimum of nine member states to ‘move ahead’ in a particular policy-area. Such closer cooperation ‘shall aim to further the objectives of the Union’ and is authorised by the Council as ‘a last resort’ (Art. 20 TEU).
2. The Flexibility clause (Art. 352 TFEU) offers governments the possibility to pass new legislation ‘to attain one of the objectives set out in the Treaties’, even if the Treaties themselves do not provide the necessary powers. However, using this possibility requires a Commission proposal, unanimity in the Council and a majority in the EP.

What does the OLP mean in practice?

At first reading, the Parliament can adopt amendments by simple majority of Euro-parliamentarians (MEPs). At second reading, Parliament can accept the Council’s first reading position by simple majority but requires an absolute majority to adopt amendments. This makes it more difficult to amend legislation at the second reading. Given that an overwhelming majority of **all legislation** is now adopted at the **first reading, coalition formation** in Parliament is important at a very early stage.

At the Council’s first reading, it can approve the Commission’s proposal, approve the proposal as amended by Parliament, or adopt its first reading position by a qualified majority of at least 55% of the members of the Council comprising at least 65% of the population of the Union (Art. 16 TEU); however, the Council needs to act unanimously if the Commission does not support a proposed change. A blocking minority must include at least four Council members representing over 35% of the EU’s population. If the Council and the Parliament disagree, the file goes to second reading, where the same voting rules apply. If the Parliament and the Council continue to disagree after the second reading, a ‘conciliation committee’ is convened at third reading.

On average, it took 17 months to conclude legislation at first reading, 32 months at second reading, and 29 months at third reading **in the 2009-14 EP**, but the process can take much longer for contested files.

Challenges

1. Composition of the EP: In the current parliament (2014-19), the two biggest political groups—the European People's Party (EPP) and the Progressive Alliance of Socialists and Democrats (S&D)—command **412 out of 751 seats**. Given potential absenteeism, mustering an absolute majority has become **more difficult**. On the one hand, this is good news for the British Conservatives, who are part of the European Conservatives and Reformists (ECR) group, a potential third coalition partner. Yet, for first reading agreements the loss of seats by the two biggest groups **may make 'grand coalitions' even more likely**. Hence, the Conservatives' scope for influence—via the ECR—may decline at this stage.
2. Alliances in the Council: **Reaching the population threshold** requires a minimum of six member states; a qualified majority requires another ten. Building coalitions to meet the population threshold, and to prevent a blocking minority, is the key challenge in the negotiations. Denmark, Sweden and the Netherlands have often been allies in the past, and newer member states have shown some **tendency to align with the UK**. Germany's Angela Merkel is a particularly important ally and has voiced her support for some reform on previous occasions. These potential coalition partners notwithstanding, building a robust majority in the consensus-oriented Council will be difficult for the British government, in particular on controversial issues such as rights related to freedom of movement.

PRECEDENT: SECONDARY LEGISLATION ON CROSS-BORDER HEALTHCARE

In May 2006, the Court delivered a key judgement on the case of a British woman who had received hip replacement in another EU country (France), and was refused coverage of the costs by the National Health Service (NHS)³. In the ruling, the Court clarified that EU citizens are hindered to make use of their freedom to receive services, if member states refuse to pay for medical treatment obtained in another EU country, despite the fact that the waiting time for clinical treatment exceeded what was acceptable in view of the patient's clinical needs. National governments and the EP followed up by passing novel secondary legislation on **cross-border healthcare**, clarifying both patients' rights and member states' obligations⁴.

POTENTIAL RE-LEGISLATION IN PRACTICE – IMMIGRATION AND BENEFITS

In 2014, the Court delivered a judgement on a Romanian citizen in Germany, who claimed unemployment benefits, although she had never worked in her home country and did not intend to work in Germany⁵. The Court ruled that social benefits could be refused to those unemployed EU citizens who exercise their right of free movement solely to seek benefits, without the means to claim right of residence.

To facilitate free movement, EU secondary legislation ensures that workers and their families are treated the same way as nationals in their host countries⁶.

- In order to tighten the possibility of 'benefit tourism' and to regain national control over access to welfare benefits, **it has been suggested** to reform the EU's directives and regulations on free movement (rights) and the coordination of social security systems.
- **An alternative way** of gaining closer oversight over EU migrants would be the use of compulsory registers for EU citizens; this measure is already used in other member states to check whether EU migrants meet the necessary conditions and pose no burden to the welfare state.

Conclusion

In sum, policy-reform through (re-) legislation seems the most viable option in Europe's current political climate. Depending on the domestic salience of, and media attention to, the reformed policy, new or amended legislation may also be perceived as far-reaching. New legislation could, therefore, offer (part of) the 'new settlement' to be voted on in a potential referendum.

However, throughout its history the EU has put a premium on compromise and accommodation. Member states may, therefore, look for alternative instruments to support the UK's reform agenda. **One suggestion** is the greater involvement of national parliaments, on the basis of an interinstitutional agreement between the Commission, the Council and the European Parliament (Art. 295 TFEU).

Overall, there seems to be a tension between the feasibility of reform and its political marketability vis-à-vis the electorate. This tension is likely to remain in the British political debate—and in an eventual referendum campaign—even if a second Conservative (-led) government from May 2015 were to generate greater political pressure through a potential British withdrawal from the European Union.

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BACKGROUND

This EINote has been produced as part of a 2-year series on [Britain & Europe](#) hosted by the UCL European Institute and co-funded by the EU's Erasmus+ Programme. For further background on the topic of the briefing, see our [Online Resource Area](#). Further comments and resources are available on our blog [britain-europe.com](#).

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