

13 June 2011

The Lord Kerr of Kinlochard GCMG
House of Lords
London
SW1A 0PW



Foreign &
Commonwealth
Office

King Charles Street
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Minister of State

Dear John,

EUROPEAN UNION BILL

Thank you for your letter of 19 May 2011 and, moreover, for your diligent scrutiny of the EU Bill to date. In addition to the query you outlined in your letter, on the process to hold any future referendum on a decision to adopt the euro in clause 6, you also raised two issues during Day 7 of Committee on which I promised to write: the first in relation to enhanced cooperation; the second in relation to Article 64(3) of the Treaty on the Functioning of the EU (TFEU), which concerns the liberalisation of capital flows to or from third countries. Please accept my apologies for the delay in replying to you.

A decision to adopt the euro

Clause 6(5)(e) of the Bill as drafted provides that the approval of Parliament, by Act, and the people, by referendum, would be required before the Government could agree to a decision under Article 140(3) TFEU, which would make the euro the currency of the UK. You are concerned that the decision to adopt the euro would not be made under Article 140(3), and that this provision in the Treaty relates specifically to fixing the rate at which the euro is to substitute the Pound. Instead, you advocate a separate clause which does not make reference to a specific Treaty Article, but would nonetheless require approval by referendum before the UK could adopt the euro.

Having looked closely again at the provisions of the Bill in this regard, I remain satisfied that clause 6 as drafted enables a single referendum to be held before the UK decides to adopt the euro, and at a point when the terms can be set out in a draft decision under Article 140(3) TFEU.

The provision allows for the maximum possible flexibility as to when the referendum on the euro could be held. Paragraph 9 of Protocol No.15 ('on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland') sets out the steps which must be satisfied before the UK could adopt the euro. As the TFEU and the Protocol are silent on the timetable in which the relevant decisions thereunder must be taken, clause 6(5)(e) would not prevent the Government of the day, if it so

wished, to prepare the detail of the decisions provided for by paragraph 9 subsections (a) to (c) prior to the UK's initial notification to the EU of its intention to adopt the euro. The question of the UK's notification would then be subject to a referendum, by the time of which a draft decision under Article 140(3) TFEU would be available for public discussion. It is important to note that Article 140(3) TFEU provides for the adoption of all other necessary decisions to enable the UK to adopt the euro. Consequently, it is not a certainty that the Article 140(3) TFEU decision will only set the conversion rate.

The advantage of such an approach is that the terms of the paragraph (c) decision – i.e. the Article 140(3) TFEU decision, as posited by clause 6(5)(e) – could be drafted before the first step of notification of intention to adopt the euro, so that the draft decisions under Article 140(3) TFEU on the outstanding details necessary for the adoption of the euro would form part of the public's consideration. There are other precedents for preparing EU instruments in advance to be decided as a package, and we believe that, in practice, this would be the approach to be followed by the Government at the time of any decision to seek adoption of the euro. Were the Government of the day to follow this course, i.e. preparing with the EU the broad terms of its entry in advance of formal notification, approval by the public by virtue of a single referendum in line with the requirements of clause 6(5)(e) would be required before the UK could then give notification.

Clause 7(4)(e) and (f) – enhanced cooperation

During day 7 of Committee, you asked for clarification on the provisions of clause 7 in respect of Articles 333(1) and 333(2) TFEU (Official Report, 23 May 2011: Column 1605).

Clause 7(4)(e) and (f) of the Bill would require the approval of Parliament to be specified in primary legislation before the Government could agree to move from unanimity to qualified majority voting in an area of enhanced cooperation of nine or more Member States of which the UK was already a part, and where unanimity presently applied. As you will be aware, Article 333 TFEU expressly states that it 'shall not apply to decisions having military or defence implications'. There is therefore no prospect of clause 7(4) applying in respect of an area of enhanced cooperation involving military engagement, as the Treaties do not allow for such a move to be made in this field under this Article.

One of the themes emerging from Committee is that the provisions of the Bill will hamper timely decision-making at EU level. As I have made clear to the Committee on previous occasions, I do not accept that argument. Taking the specific example of clause 7(4)(e), the use of Article 333(1) TFEU would first need to be negotiated and agreed in Council. As you know, such negotiations can take time. In approving the use of Article 333(2) TFEU, listed in clause 7(4)(f) of the Bill, the consent of the

European Parliament must also be obtained. These steps could potentially add months to the process. In addition to the Treaty processes, other Member States – such as Germany and Denmark – have constitutional requirements which must be met. So if Germany and Denmark were also participants in the enhanced cooperation alongside the UK, they too would require the approval of their national Parliaments. Again, such procedures would take time to complete. Consequently, I do not see how the provisions of the Bill would hamper effective UK participation and decision-making in this regard.

Article 64(3) TFEU – the liberalisation of the movement of capital

A little later during the day 7 debate (column 1607), you asked for some further explanation of Article 64(3) TFEU; what its use would involve in practice; and why we are proposing to subject its use to the requirements of clause 7.

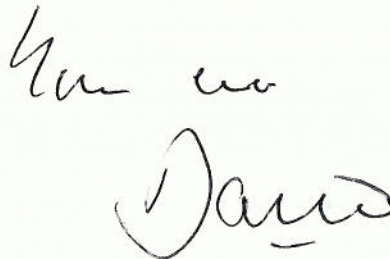
The Article itself states that the Council may unanimously 'adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries'. This should be read in the wider context of the 'four freedoms' provided for by the Treaties: the freedom of goods, capital, services and persons. In this specific case, the freedom of capital is enshrined in Article 63 TFEU, which prohibits any restrictions on the movement of capital amongst Member States, and between Member States and third countries. The absence of any such restrictions is essential to the effective functioning of the internal market.

The decisions provided for by Articles 64(2) and 64(3) TFEU are distinct. The first allows the European Parliament and the Council, acting by a qualified majority, to ensure the free movement of capital. The second allows the Council, acting unanimously after consulting the European Parliament, to adopt measures which constitute a step backwards in relation to the free movement of capital. So the provision of Article 64(3) TFEU would not involve a move from qualified majority voting to unanimity; it would instead involve the adoption of steps backwards in respect of one of the cornerstones of the internal market.

As the provision allows for a change in the scope of EU action without requiring treaty change, we judge this provision to be a passerelle. Furthermore, as the nature of such measures have been painted in broad, near-lyrical terms in the Treaties, and the fact that they have the potential to alter the scope of EU action in a vitally important area, the Government considers that the use of Article 64(3) should be subject to the enhanced parliamentary scrutiny afforded by an Act of Parliament.

I hope that this provides you with further assurance on the points that you raise; I would be pleased to discuss any of these issues with you further at your convenience.

I am copying this letter to the Minister for Europe, Lord Triesman, Lord Liddle, and to those colleagues who took part in Committee, namely Lord Ahmad of Wimbledon, Lord Anderson of Swansea, Lord Armstrong of Ilminster, Lord Blackwell, Lord Bowness, Baroness Brinton, Lord Brittan of Spennithorne, Baroness Butler-Sloss, Lord Clinton-Davis, Lord Davies of Stamford, Lord Deben, Lord Dubs, Lord Dykes, Lord Empey, Baroness Falkner of Margravine, Lord Faulks, Lord Flight, Lord Foulkes of Cumnock, Lord Garel-Jones, Lord Gilbert, Lord Goodhart, Lord Grenfell, Lord Hamilton of Epsom, Lord Hannay of Chiswick, Lord Howe of Aberavon, Lord Hurd of Westwell, Lord Janner of Braunstone, Lord Judd, Lord Kinnock, Lord Lamont of Lerwick, Lord Lea of Crondall, Lord Lester of Herne Hill, Lord Mackay of Clashfern, Lord MacLennan of Rogart, Lord Mandelson, Baroness Nicholson of Winterbourne, Baroness O'Cathain, Baroness Oppenheim-Barnes, Lord Pearson of Rannoch, Lord Phillips of Sudbury, Lord Radice, Lord Richard, Lord Risby, Lord Roper, Lord Sewel, Lord Stoddart of Swindon, Baroness Symons of Vernham Dean, Lord Taverne, Lord Tomlinson, Lord Waddington, Baroness Williams of Crosby, Lord Williamson of Horton and to Lord Willoughby de Broke. Following the request of Lord Hannay of Chiswick on the first day of Report Stage, I am also depositing a copy of this letter in the library of the House.

A handwritten signature in dark ink, appearing to read 'Howell' followed by a flourish, and 'David' below it.

LORD HOWELL OF GUILDFORD