

Number 10's UN ploy is meaningless

The Prime Minister promised ahead of the election that he was going to secure 'full on treaty change' in his EU renegotiation. After the election he has since admitted the Treaties won't change until after our referendum. This has led to Downing Street briefing that they will seek to register the reform package with the UN in order to give it legal force.

In the [Sunday Telegraph](#), a 'government source' claimed that lodging the agreement on the UK's renegotiation 'with the UN makes it legally binding'. In October 2015, the Foreign and Commonwealth Secretary, Philip Hammond, said that:

'We can have international agreements made between the member states which are registered as international agreements, legally binding, to be taken into account by courts in making decisions, that will then be incorporated into the treaties at the next opportunity, when the treaties are next open.'¹

It is asserted that the process of Danish ratification of the Maastricht Treaty in 1992 offers a precedent for the UK. This is wrong. As the UN itself makes clear, registering an agreement with the UN gives it no additional legal force. Denmark registered its agreement at the UN in 1993 on the basis of which it approved the Treaty in a second referendum. The EU reneged on a key part of the agreement with Denmark, while only some of the remainder was incorporated into the EU Treaties in 1999. Academic analysis made clear the agreement was invalid insofar as it violated the EU Treaties.

This is nothing more than a PR ploy. A 'post-dated' agreement, whether registered at the UN or not, will not supersede the EU treaties. Nothing short of ratified treaty change can be said to be legally binding.

Registering an agreement at the UN is just a ploy

The registration of a Treaty at the UN does not affect its legal status or give it any additional legal force that it would not otherwise have. The relevant UN regulation makes clear that:

'Registration of an instrument submitted by a Member State, therefore, does not imply a judgement by the [UN] Secretariat on the nature of the instrument, the status of a party or any similar question. It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status and does not confer on a party a status which it would not otherwise have.'²

This follows from article 102 of the UN Charter which provides that international agreements must be registered with the UN, not that an agreement registered with the UN has legal force.³ As *The Oxford Guide to Treaties* makes clear:

¹ J McDermott & G Parker, 'UK says migrant benefits at the forefront of EU negotiations', *Financial Times*, (20 October 2015) <<http://www.ft.com/cms/s/0/805c2250-771b-11e5-933d-efcdc3c11c89.html>>.

² UN, 'Registration and publication of treaties and international agreements: regulations to give effect to article 102 of the Charter of the United Nations', Annex, <https://treaties.un.org/xml/db/MSDB/pageRegulation_en.html>.

³ UN Charter, Chapter XVI <<http://www.un.org/en/sections/un-charter/chapter-xvi/index.html>>.

'The act of registration does not change the status or conditions of a treaty and in that sense parties can expect no additional benefits from registration'.⁴

It is clear therefore that registration of an international treaty with the United Nations will not confer on it any status it would not otherwise have.

The UN ploy did not work for Denmark

In a June 1992 referendum, Danish voters rejected the ratification of the Maastricht Treaty. This led to the Danish government setting out a number of demands for renegotiation in a document called 'Denmark in Europe'. The paper called for less EU centralisation, greater application of the principle of subsidiarity, a desire for more transparency and democracy within the EU and action to combat unemployment. The European Council adopted a Decision concerning the problems raised by Denmark and made certain declarations – this was known as the Edinburgh Agreement.⁵ The Decision was registered with the UN on 1 November 1993.⁶ The Decision included endorsements of much of 'Denmark in Europe'.

Most significantly, the Council declared that the provisions of the Maastricht treaty on EU citizenship did 'not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.'⁷ This promise was never added to the EU treaties.

The EU has since reneged on this agreement. In 2001, the European Court of Justice declared that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.⁸ In 2010, the ECJ held that the deprivation of national citizenship by a member state is a matter of EU law. In its *Rottmann* judgment, the ECJ ruled that 'member states must, when exercising their powers in the sphere of nationality, have due regard to European Union law'.⁹ A member state may no longer, for example, apply an automatic policy of depriving national citizenship from those who acquired that status by deception. The ECJ was referred to the 1992 Decision but nevertheless ignored it.¹⁰

The Council also declared that Denmark would not participate in the third stage of EMU.¹¹ Under the original text of the Maastricht Treaty, Denmark was in any event exempt from participating in the third stage if it chose not to.¹² However, the Decision emphasised that Denmark would not be bound by common economic policies adopted by countries participating in the third stage and

⁴ A Hinojal-Oyarbide & A Rosenboom, 'Managing the Process of Treaty Formation: Depositaries and Registration', in *The Oxford Guide to Treaties*, D.B. Hollis (ed.), (Oxford, 2012), p. 272 <<http://ukcatalogue.oup.com/product/9780199601813.do>>.

⁵ 'European Council in Edinburgh, 11-12 December 1992: Conclusions of the Presidency', (1992) pp. 49-53 <http://www.europarl.europa.eu/summits/edinburgh/default_en.htm>.

⁶ UN Treaty Series vol. 1765-I-30685 <<https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b253f>>.

⁷ Decision concerning certain problems raised by Denmark on the Treaty on European Union' Section A <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1445436501252&uri=CELEX:41992X1231>>.

⁸ *Grzelczyk v Centre Public D'Aide Sociale D'Ottignies-Louvain-La-Neuve* [2000] ECR I-06193, at [31] <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1439914746455&uri=CELEX:61999CJ0184>>.

⁹ *Rottmann v Freistaat Bayern* (Case C-135/08) at [45]

<<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1439915500439&uri=CELEX:62008CJ0135>>; [2010] QB 761, 783.

¹⁰ *Ibid.*

¹¹ Decision concerning certain problems raised by Denmark on the Treaty on European Union, Sections B-C <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1445436501252&uri=CELEX:41992X1231>>.

¹² 'Protocol on certain provisions relating to Denmark', (1992), p. 194 <http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf>. This has now been renumbered as Protocol (No 16) to the Treaties in a slightly amended form.

would retain its powers in the field of monetary policy in accordance with national law.¹³ This has never been incorporated into the Treaties.

Academic analysis concluded at the time concluded that 'if an element of the Edinburgh Agreement conflicts directly with matters in the Treaty of Rome, then the ECJ can find that element to be invalid'.¹⁴

The ECJ has previously stated that it will not follow UN Security Council Resolutions

In any event, the EU has previously refused to accept that UN Security Council Resolutions can supersede EU law. This is of considerable significance, because under article 103 of the UN Charter, the UN Charter prevails over every other international agreement.¹⁵ In its seminal judgment in the 2008 *Kadi* litigation, the ECJ said the following:

'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the court by virtue of the exclusive jurisdiction conferred on it..., jurisdiction that the court has, moreover, already held to form part of the very foundations of the Community'...

'[T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty'...

'Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law... That primacy at the level of Community law would not, however, extend to primary law'.¹⁶

The ultimate arbiter of whether any agreement between the UK and the EU will have legal force will be the ECJ.

Conclusion

The only way of ensuring immediate and meaningful reform to the UK's relationship with the EU is to Vote Leave in the EU referendum. The Danish example in 1992 shows that 'post-dated' treaty change is not a reliable device for securing reform. Promises on citizenship and monetary policy were never incorporated into the Treaties. The Treaties took precedence over the 1992 agreement with Denmark. The EU reneged on a key commitment that EU citizenship would not in any way replace national citizenship and that national citizenship would remain the sole responsibility of member states. The UN and leading academic analysis make clear that registration of an agreement with the UN does not give it any additional force, while the ECJ has previously refused to apply resolutions of the UN Security Council, which are undoubtedly binding on the EU as a matter of international law.

¹³ Decision concerning certain problems raised by Denmark on the Treaty on European Union, Sections B <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1445436501252&uri=CELEX:41992X1231>>.

¹⁴ D Howarth, 'The compromise on Denmark and the treaty on European union: A political and legal analysis', *Journal of European Integration*, (1994), 18(1), p. 90 <<http://www.tandfonline.com/doi/abs/10.1080/07036339408429014?journalCode=geui20>>.

¹⁵ UN Charter, 'Chapter XVI', art. 103 <<http://www.un.org/en/sections/un-charter/chapter-xvi/index.html>>.

¹⁶ *Kadi v Council* [2008] ECR I-06351; [2009] 1 AC 1225 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62005CJ0402>>.