The draft decision (link) put forward by European Council President Tusk contains two commitments to "incorporate" new wording in the EU Treaties (while presumably not deleting any existing wording such as 'Ever Closer Union'), both commitments are in [square brackets] and it is unclear in both cases what effect the wording will have if any. They are:

- To incorporate new wording clarifying the prohibition of discrimination against non-Euro states. P.8
- To incorporate wording clarifying the meaning of "ever closer union" (not deleting it) particularly in relation to the UK. P.10

If these are two "clarifications" and do not change the existing Treaties they cannot be said to be a commitment to Treaty change.

In this respect the comments to the European Parliament of **Jean Claude Piris**, Former Director General of the Legal Service of the Council of the European Union, who drafted the Edinburgh Agreement that led to the Danish Protocol are interesting. He believed the agreement that led to previous protocols:

> *"just clarify existing treaty provisions and are 100% in conformity with the current Treaty at the date they were approved and it has been confirmed by a judgement of the Court of Justice"*

He added

> *"a promise to me is a promise, a political declaration of intent which does not commit future actors and Parliaments… making a promise legally binding transforms it into a Treaty which is in violation of Article 48.."* [1]

[In evidence to the European Parliament 3 September 2015 @15:54; http://www.europarl.europa.eu/ep-live/en/committees/video?event=20150903-1500-COMMITTEE-AFCO]

[1] In evidence to the European Parliament 3 September 2015 @15:54; http://www.europarl.europa.eu/ep-live/en/committees/video?event=20150903-1500-COMMITTEE-AFCO

Juncker: Tusk deal is "Fully in Line with existing Treaties":

With that in mind it is interesting that the EPP grouping has quoted Commission President Juncker this morning as saying the Tusk deal does not change the Treaties:

Relevant Documents to the Debate

There are many more useful quotes and explanations in this report that is linked to the debate:

European Scrutiny Committee report: UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny Fourteenth Report of Session 2015–16

http://www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/458/45802.htm

ERG Brief: Will the UK be able to cash a post-dated Treaty change cheque?

- **The Foreign Secretary envisages an agreement "*that interprets the treaties*" and that "*would include a commitment to change the treaties*"**
- **'Precedents' for a post-dated cheque - the Danish, Irish and Czech protocols – are precedents for promises to provide 'clarifications' of how the Treaties work rather than substantial treaty change.**
- **If treaty change is substantial a post-dated cheque will be difficult to cash; changes that are merely 'clarifications' will be less difficult to cash but will be of limited value.**
- **The European Parliament has a role in Treaty change (Art 48 TEU), their consent is needed to dispose of an Inter-governmental Convention MEPs are also represented in the Convention that needs to agree "by consensus"**

The Foreign Secretary Rt. Hon Philip Hammond MP has said he envisages "*an agreement that interprets the treaties*"

The Foreign Secretary in evidence to the European Scrutiny Committee has said he envisages a legally binding agreement to reinterpret the existing EU Treaties that would include a commitment to change the Treaties at a later date:

> "*We envisage that what will happen is that a package will be agreed by the 28 member states and that that decision will be made as* ***a registered agreement, binding in international law, an agreement that interprets the treaties according to the decision the 28 member states have taken****. That would then be required to be taken into account by the Courts. That agreement, as we envisage it, would include a commitment to change the treaties to give effect to what had been agreed at the next opening of the treaties. This is a methodology that is now familiar in the European Union. It has been used before and that is the way we anticipate that it is most likely to be done in those areas that require treaty change."*[1]

This statement raises a number of questions including:

1. **Can a 'non EU' EU28 agreement "reinterpret" the existing EU treaties and ECJ case law?**
2. **How do you inforce an international agreement? Is it reversible?**
3. **Are the Irish, Danish and Czech Protocols genuine precedents?**

Q1) Can a 'non EU' EU28 agreement "reinterpret" the existing EU treaties and ECJ case law?

International agreements are ultimately governed by the Vienna Convention on the Law of treaties.[2] Article 39 of the Conventions states that Treaties must in the first instance be amended in accordance with the provisions of the Treaty in question. In this case the EU treaties have a provision

[1] Evidence to House of Commons, European Scrutiny Committee, 17 November 2015:http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-scrutiny-committee/uk-governments-renegotiation-of-eu-membership-parliamentary-sovereignty-and-scrutiny/oral/23238.html

[2] UN, Vienna Convention on the use of Treaties 1969; https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

for treaty change (article 48) and one for interpretation – the ECJ. It is therefore unclear how an extra and separate EU28 level could change or interpret the treaties.

Jean Claude Piris, Former Director General of the Legal Service of the Council of the European Union, who drafted the Edinburgh Agreement that led to the Danish Protocol has told a European Parliament Committee that:

> *"a promise to me is a promise, a political declaration of intent which does not commit future actors and Parliaments… making a promise legally binding transforms it into a Treaty which is in violation of Article 48.."* [3]

In addition to being in violation of the EU Treaties and so of little force an EU28 agreement concluded outside of the formal procedure of Article 48 would not be recognised by the ECJ. The EU Treaties do allow (article 273) for the ECJ to be given power to adjudicate on separate agreements but only in so far as it "*relates to the subject matter of the Treaties*" not to change or reinterpret them.

Lastly, even if the member states and Commission agreed with a UK reinterpretation there is a danger that the ECJ could not be bound by the agreement. For instance an agreement either by a Council Decision or by secondary legislation or an EU28 "clarification" that a UK scheme to limit EU migrant's access to welfare was lawful would not stop an individual taking a case to the ECJ. As Charles Grant the Director of the Centre for European reform has stated:

> "*Even if the Visegrad nations can be persuaded politically to accept this, anybody can go to the ECJ and say 'I'm being discriminated against', British officials might argue that of discriminating 'for fiscal reasons' can be carried across to in-work benefits, but that's not what a lot of lawyers think. If everyone signs up to it and the Commission signs up to it, it might just work, but it looks to be built on shifting legal sands*."[4]

<u>Conclusion</u>: A separate EU 28 agreement will not be able to reinterpret the EU treaties or overturn ECJ case law.

Q2) How do you inforce an international agreement? Is it reversible?

Although international agreements are "binding" on the states that enter into them enforcement is problematic.[5] An agreement to conclude treaty change at a future date could potentially be submitted to the jurisdiction of the UN's International Court of Justice – under the UN treaty states

[3] In evidence to the European Parliament 3 September 2015 @15:54; http://www.europarl.europa.eu/ep-live/en/committees/video?event=20150903-1500-COMMITTEE-AFCO

[4] Telegraph, 30 November 2015; http://www.telegraph.co.uk/news/12022818/Cameron-digs-heels-in-over-plan-to-scrap-benefits-for-eastern-European-workers.htm

[5] Agreements are valid until they leave them in accordance with the provisions of the agreement or failing that the Vienna Convention.

agree to respect its rulings.[6], [7] However if the ICJ ruled in favour of the UK there is little it or the UK could do to enforce its will.

- **The Fiscal Compact – an intergovernmental treaty enforced by the ECJ?**

One precedent for an intergovernmental Treaty aimed at modifying the existing EU apparatus was the 2012 Fiscal Compact, the Treaty sought to use the ECJ as an enforcement mechanism. Under article 273 TFEU the Court is allowed to take responsibility if disputes between member states are referred to it although only if it "*relates to the subject matter of the Treaties*".[8] It is arguable whether this standard has been met in the case of the Fiscal Compact.

Leaving aside whether the UK would wish to rely on the ECJ to enforce its rights to reinterpret/change the EU Treaties, it is unlikely the ECJ would be able to accept jurisdiction over a Treaty seeking to modify its own case law and founding texts.

Would an EU/UK agreement be reversible?

Any agreement must be reversible before they come into force, if only to account for the possibility that the UK might leave the EU rendering the agreement void. If the UK agreement is a political promise, even if backed up by ICJ jurisdiction, it would be reversible as a party could leave the agreement or a future government or Parliament could chose not to honour a commitment made by a predecessor. EU treaty changes, if implemented they would however require unanimity – i.e a UK veto to change them back.

Can the European Parliament block a promise of Treaty Change?

The European Parliament has a role in Treaty Change. Under Article 48 it needs to give its permission to dispense with a convention. If it insists on a convention it will be represented on it and the convention has to reach an agreement "by consensus".

<u>Conclusion</u>: Even if the EU28, EC and Parliament agreed to specific changes, there is no guarantee their successors will implement them or that the ECJ will feel bound by something less than full and specific Treaty change.

Q3) Are the Irish, Danish and Czech Protocols genuine precedents?

The European Union has three precedents for promising future changes.

- **Danish Protocol**

Having voted against the Maastricht Treaty the Danish Government sought to negotiate a deal they could put back to the Danish electorate in order to secure a "Yes" vote. The upshot of this was the 1992 Edinburgh Agreement, concerning wording on citizenship and

[6] UN International Court of Justice in the Hague; http://www.icj-cij.org/information/index.php?p1=7&p2=2
7 The Lisbon Treaty (art 47) has given the EU a separate legal personality which could arguably allow it to enter into an agreement.
[8] Fiscal Compact, recitals cite Article 273, http://www.lexnet.dk/law/download/fiscal-c/Scg-2012.pdf

Justice and Home Affairs which were included in a Council Decision in the Council Conclusions, which were "*compatible with the Treaty and do not call its objectives into question*".[9],[10], [11]

- **Irish Protocol**

Following Ireland's rejection of the Lisbon Treaty the Irish Government sought reassurance on the application of the Treaty in the areas of the Right to a Family, Education, Defence, Taxation before putting the agreement to the electorate again.[12] Wording to this effect came into force at the time of Croatian accession in 2013 and is now appended to the back of the Treaties as a Protocol.

- **Czech Protocol**

The Czech President Klaus was the last hold out against the Lisbon Treaty and came under increasing pressure to sign it into force in order to avoid a referendum in the UK. When he did eventually sign the Treaty he asked for and was granted an opt-out to the Charter of Fundamental Rights.[13],[14],[15]

The agreement was to come into force at the next Treaty change, however following a change of Government and opposition from the European Parliament the Czech Republic withdrew its request and the protocol was never added. One way to avoid this scenario and ensure that a UK specific agreement is not withdrawn or reversed by a future UK Government could perhaps be to attach it to the UK's referendum lock.

Jean Claude Piris concluded that the promises that led to the Danish and Irish protocols did not change the EU Treaties as they:

> *"contained no promise of this kind, they just clarify existing treaty provisions and are 100% in conformity with the current Treaty at the date they were approved and it has been confirmed by a judgement of the Court of Justice"*

He went on to add that the European Court of Justice had ruled in the 2010 case of Rottmann that the ECJ did not feel itself bound by the decisions stating. The Court stated that:

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[9] European Council Conclusions 11 and 12 December 1992; http://www.europarl.europa.eu/summits/edinburgh/default_en.htm

[10] Text of Protocol p.302 Consolidated Treaties; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228848/7310.pdf

[11] **Professor Sir Francis Jacobs KCMG QC** in evidence to the ESC 18 November 2015also argued that they were "clarifications" "rather than substantive amendments" http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news-parliament-20151/eu-renegotiation-law-evidence-15-16/

[12] Text of Irish Protocol; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:060:0131:0139:EN:PDF

[13] The UK was also granted an opt-out, however this turned out to be a 'clarification' that UK domestic law would not be affected rather than an opt-out from its application in EU law.

[14] The issue was a sensitive one in Germany and the Czech Republic as the reasoning behind the opt-out was to protect the Czech Republic from Germans to property they lost following the Benes Decrees.

[15] 2009 Council Conclusions promising a Czech opt-out; http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf

"Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter"[16]

<u>Conclusion</u>: The Danish and Irish protocols are precedents for 'clarifications' prior to a treaty element entering force, not for substantial retrospective reinterpretation or change. The Czech protocol is an example of one that did not lead to treaty change.

A 'Clarification' or a 'Substantial' Treaty change

If the Irish and Danish Protocols seek to clarify how the EU treaties should work they do not seek to alter the substance of the treaties and were agreed before the treaties to which they referred came into force.

If the UK seeks a similar clarification, for instance; a 'British Protocol' – to clarify how Ever Closer Union affects the UK - it will be done after the Treaty is in force and will not be able to affect the existing substance of the main body of the Treaties or caselaw. It may be helpful politically on defining the future course of the EU but will not change the situation as it is now.

If however the UK gains an agreement to future Treaty Change which also affects the substance of the treaties and how they, and the ECJ's caseload, operate it would be not be possible to give them force until a full treaty change procedure had been completed – something that cannot be guaranteed.

Will the UK ask for a 'clarification' or 'substantial' treaty change

	Clarification	**Substantial**
Remove "Ever Closer Union"	Adding a "British Protocol" that restates that the UK is not bound by ECU. This would have no effect on the ECJ's existing or future case law as the existing treaties remain unchanged for the EU27. [17]	Remove references to ECU in Article 1 and in the 3 preambles to the Treaty. This would affect all the EU28 and could have a marginal impact on the ECJ's future cases.

[16] ECJ 2 March 2010, Janko Rottmann v Freistaat Bayern, (40 and 41) http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CJ0135&from=EN

[17] House of Common's European Scrutiny Committee, 18 November 2015;
Professor Damian Chalmers, European Union Law, London School of Economics (via video link) made this point at Q113 arguing that a removing ECU for the UK an not other EU states could not change ECJ case law, **Professor Sir Francis Jacobs KCMG QC**, President of the King's College London Centre for European Law however argued that the treaty wording had not made a difference in ECJ case law and so removing it would make no difference. **Martin Howe QC** meanwhile argued that removing the wording would make little difference and other cases were covered by the UK veto.
http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news-parliament-20151/eu-renegotiation-law-evidence-15-16/

Welfare Changes	EU28 and EC state that the UK can implement a scheme that is arguably already legal (one that effects EU and UK citizens equally). This would no debar an individual from taking a case to the ECJ or the ECJ deciding that it was indirect discrimination.	Alter the treaty articles relating to free movement and the secondary legislation. This would be followed in future ECJ cases.
Euro outs/ Euro Ins	A political agreement in the form of the Ionnina or Luxemburg compromises would not overrule QMV or ECJ case law.[18]	Changing the Treaties to remove the Euro as the EU's currency, introduce double majority voting and introduce opt outs for other EU states could have effect.
Single Market	A clarification that the Single Market is the primary EU project would not help the UK in ECJ cases such as that of the Euroclear.	
Competitiveness	A new statement that the EU should be competitive will not add much too all the previous ones.	
Red Card for National Parliaments	A political agreement to force the European Commission to respect the current yellow card.	A treaty change to place a red card into the treaties that has to be followed. [This is likely to be opposed by the European Parliament]
Non Eurozone states do not need to bail out Eurozone states	A further political agreement to honour the previous political agreement that was broken.	Removing or amending Article 122
End the "Spitzencandidate" elections for President of the European Commission	A political agreement by the European Council and European parliament to give the European Council primacy. [Highly unlikely the EP would agree]	Change the Treaties to remove the European parliament's veto on the appointment of the President of the European Commission.

Conclusion:

[18] **Professor Sir Francis Jacobs KCMG QC** in evidence to the ESC argued that the existing Treaties already provide safeguards.

If the UK is seeking a series of clarifications with no legal effect then it is likely the promise will be honoured. In this situation whether the ECJ honours it or not will be of little consequence.

If the UK seeks substantial changes to the Treaties and existing case law the chances of there is more possibility that they may fall foul of successor Governments, the ECJ or the European Parliament.

Appendix: Two Articles on post-dated cheques:

Steve Peers: A legally binding commitment to Treaty change: is it humanly possible?[19]

Prime Minister David Cameron has already achieved some feats that some thought impossible: a cut in the EU budget, and a majority in the House of Commons for the Conservative party. But are his plans for renegotiation of the UK's EU membership genuinely impossible for any human to achieve? The context of this is yesterday's confirmation that his intention in the forthcoming renegotiation is not an immediate Treaty change, but a 'legally binding' and 'irreversible' text that (apparently) commits to Treaty change. I have blogged before on the *content* of possible Treaty changes (see here on economic reform, and here on migration of EU citizens), but I will focus today on the *form* which a deal might take to satisfy Cameron's demands.

There is an EU history of promising Treaty amendments to its Member States. Back in 1992, the Member States' Heads of State and Government adopted a Decision addressing Danish concerns with the Maastricht Treaty. This was later transformed into a Protocol next time the Treaties were amended (in the form of the Treaty of Amsterdam), although this was not formally promised as such when the original decision was adopted.

Then, in 2008, a similar Decision was adopted to address Irish concerns about the Treaty of Lisbon. Apart from the Decision itself, look closely at point 5 of the European Council (summit) conclusions on that date, which specify that:

'(iii) the Decision is legally binding and will take effect on the date of entry into force of the Treaty of Lisbon; (iv) they will, at the time of the conclusion of the next accession Treaty, set out the provisions of the annexed Decision in a Protocol to be attached, in accordance with their respective constitutional requirements, to the Treaty on European Union and the Treaty on the Functioning of the European Union;'

A Protocol amending the Treaties to this effect was indeed later drawn up, and entered into force last year.

In 2009, another promise of Treaty amendment was made to the Czech Republic. This time it took the form of the full text of an agreed Treaty Protocol, along with the following text:

[19] Professor Steve Peers, 26 June 2015: http://eulawanalysis.blogspot.co.uk/2015/06/a-legally-binding-commitment-to-treaty.html

'the Heads of State or Government have agreed that they will, at the time of the conclusion of the next Accession Treaty and in accordance with their respective constitutional requirements, attach the Protocol (in Annex I) to the Treaty on European Union and the Treaty on the Functioning of the European Union.'

A Protocol amending the Treaties to this effect was again drawn up, but the ratification of this Protocol did not go ahead because the Czech government withdrew its request for this amendment.

So with these precedents in mind, what would a 'legally binding' and 'irreversible' commitment to Treaty change as regards the UK look like? There are various ways it could be done, but here's a suggestion, based on a combination of existing precedents. It would be possible to combine the Irish and the Czech approaches, and have a Decision of Heads of State and Government with an agreed Protocol attached. The Decision could also address other issues (changes to EU secondary law) besides the planned Treaty amendment. If the Heads of State and Government agreed at the same time that the Decision was legally binding, as they did in the Irish case, that would suffice to meet one of Cameron's criteria. The legally binding nature of the Decision could also be set out in the main text (although this wouldn't be necessary as such to make it binding; the intention of the Heads of State and Government to this effect could be expressed separately, in a linked text, as in the Irish case).

What about 'irreversible'? In fact the irreversibility of the commitment would be enshrined in the very nature of the Decision: a Decision of EU Heads of State and Government could only be amended by the unanimity of the Heads of State and Government which drew it up in the first place. (Note that this does not mean that the same *individuals* have to agree, since they are acting on behalf of States, not signing a personal contract). This could be explicitly set out in the main text of the Decision, or in a connected text, if that's deemed to be desirable.

To reassure those who may worry that the UK government would change its mind, the *European Union Act* 2011 could be amended to state that the UK government could only agree to amend some or all of this particular Decision after a referendum took place. Or it would also (or additionally) be possible, by amending the same Act, to ensure that parliamentary approval (in the form either of an Act of Parliament, or a resolution in favour) would be needed before the UK government changed its position.

So in that way, the agreement would be 'irreversible'. But would it be necessary also to build in a more specific guarantee that the intended Treaty amendment would take place? Cameron's statement did not go that far, and a text in the form as described above would meet the criteria of being 'legally binding' and 'irreversible' from the perspective of international law. Many treaties go no further in providing for their enforceability in practice. It's unlikely that Cameron meant more than this: he has a habit of opening his mouth before consulting lawyers. And it's not as if he could get legal advice from the Minister of Justice – who, like his predecessor in that role, has no legal background whatsoever.

Having said that, it would be possible, if it were deemed desirable, to go further to ensure the enforceability of the Decision. It could be provided, for instance, that the EU's Court of Justice has jurisdiction to give binding rulings as regards all or some of the Decision. Although the Decision would not constitute EU law as such, Article 273 of the Treaty on the Functioning of the European Union specifies that Member States may agree to give the Court dispute settlement powers as regards issues related to EU law. This power has been used several times in recent years, and the CJEU took a flexible approach to using this clause in its judgment in *Pringle*.

The clause could be used to ensure the enforceability of commitments in the Decision, as seen in the case of the so-called fiscal compact treaty, where the Court can issue binding decisions on whether

part of that treaty was breached by a Member State, and then order the imposition of fines to enforce those binding decisions.

Andrew Duff: How to make the Brexit deal formal, legally-binding and irreversible[20]

Whatever one thinks (and one does) about the British renegotiation of its terms of EU membership, one can only marvel at the prime minister's bravado when he insists on the changes being 'formal, legally-binding and irreversible'. Nobody expected David Cameron to be so categorical when he embarked on his long-anticipated speech and 'Dear Donald' letter, eventually delivered on 10 November. Surely somebody warned him that to demand something so trenchant would pose huge legal problems?

Everyone now knows, including the prime minister, that treaty change is impossible to deliver before the British referendum. So how can Cameron's concrete demand for a 'formal, legally-binding and irreversible' British exemption from Article 1 TEU ('ever closer union') be met? Other demands of his – notably giving more veto powers to national parliaments, changing the legislative procedure for the benefit of non-euro states or giving the UK an opt-out from the Charter of Fundamental Rights – will also entail treaty revision, but as the need to break away from the EU's historic mission seems to be his most important demand, let us stick to that.

Whatever it contains, Cameron's renegotiated package has to look better than it really is. He knows he faces a scornful reception in the House of Commons and much of the British media. Any empty boasting about a 'formal, legally-binding and irreversible' triumph will only stoke the No vote. Cameron's Brexit deal is also likely to be dispatched to the European Court of Justice for a preliminary ruling under Article 267 TFEU on whether it falls foul of the UK's treaty obligations: so it had better be good.

The prime minister says he is looking for arrangements of the type granted to Denmark on the Treaty of Nice in 2002 and to Ireland on the Treaty of Lisbon in 2009. He will shortly discover that those examples are not real precedents for Brexit, for two reasons. First, because the Brits are seeking actually to change the Lisbon treaty that they have signed and ratified, and is already in force, while the Danes and Irish were trying only to ratify treaties they had signed in order to bring them into force. In other words, whereas Denmark and Ireland were trying to honour their treaty commitments in spite of referendum slip-ups, the UK is promoting a referendum expressly in order to breach its treaty commitment. As Jean-Claude Piris has confirmed, no new opt-outs were conceded to the Danes or Irish. Quite frankly, a promissory note issued by the European Council to allow the UK in future to breach the treaties is unlikely to go down well in the EU's family of constitutional courts.

But there is another argument as to why a formal promise of the European Council to change the treaty in the future – even if put into a Council decision and tabled at the UN – can never be 'legally-binding and irreversible'. This is because the Lisbon treaty, now in force for six years, has changed the constitutive procedures of the EU by adding in the wild card of the Convention (Article 48(3) TEU). The Convention is made up of the European Council, the Commission, the European Parliament and national parliaments. Its job is to propose amendments of the treaties to an

[20] Eruactiv, 19 November 2015: http://www.euractiv.com/sections/uk-europe/making-brexit-deal-formal-legally-binding-and-irreversible-319647

intergovernmental conference. So while the member states can still lay claim to being the ultimate 'masters of the treaties', their prerogative is not unqualified: they cannot change the treaty, or even promise to change the treaty, left to their own devices. And it's the European Parliament, not the European Council which gets to decide on whether to call a Convention.

If the heads of government want to placate Cameron, therefore, they can promise formally to change the treaty in the future, but such a promise will be neither legally-binding nor irreversible (as prime ministers come and go every other day). The European Council cannot guarantee an explicit treaty amendment without the agreement of the European Parliament not to insist on the calling of a Convention. Parliament can only agree not to call a Convention 'should this not be justified by the extent of the proposed amendments'. There is no way that the UK's intended breach of its membership obligations does not justify a Convention several times over. MEPs will never lay themselves open to legal challenge and political ridicule by surrendering their prerogatives over such major constitutional disruption.

So if the European Council is minded to make a binding promise to the British it will have to charge the European Commission to initiate a proposed revision of the treaties under Article 48(2) if and when the UK has voted to remain in the EU. The President of the Commission, being a member of the European Council, can indeed be bound by a decision of the European Council. He is the only one who can instrumentalise the collective promise of the European Council. According to Article 48(2) it is only the Commission, the Parliament or a member state government (and not the European Council) who can submit to the Council proposals for the amendment of the treaties.

Any Brexit agreement, therefore, should command the President of the Commission to trigger the Article 48(2) process if (and only if) the British in their referendum have said Yes to staying in the Union. A strict timetable should be laid down for this to happen – say, within one year of the referendum.

Such a pragmatic formula would likely to be accepted by the Court of Justice as a reasonable fix in the circumstances, being as near as possible to legally-binding without actually having changed the treaties. It should also be enough to give Cameron the chance to persuade most Brits to stay in the Union. Jean-Claude Juncker should be happy to oblige.

And the European Parliament should welcome the breaking of a deadlock on treaty change. MEPs are already preparing their own dossier for constitutional amendments to rival those of the UK under the rapporteurship of the redoubtable Guy Verhofstadt. On 11 November Parliament voted to introduce transnational lists for a pan-EU constituency, a change in electoral procedure that requires a revision of primary law. It will shortly have more bright ideas. And faced with the pressing need to deepen its fiscal integration, the eurozone cannot be far behind with its own proposals for treaty change. Let a thousand flowers bloom, binding and irreversible.