

ANDREW DUFF SPEECH AT THE FEDERAL TRUST, LONDON

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'EUROPE, THE COALITION AND THE LIBERAL DEMOCRATS'

Five months into a coalition which is trying to last for five years is too early to be definitive. But we should now look at the European dimension of this coalition and the Federal Trust is a good place to do it. The European dimension appears to be of no interest whatsoever to the UK media, although it is naturally of great interest to the UK's EU partners and to the EU institutions in Brussels. There the question of how Britain's most anti-European party can cohabit with Britain's most pro-European party is a question of fascination.

The coalition of these two is certainly startling, and the question I want to raise today is: does this unexpected Liberal-Conservative coalition presage the beginning of the formation of the bipartisan consensus on British European policy that has eluded all of us for so long? I have always believed that the eventual emergence of a cross-party consensus on Europe would at last put an end to Europe's British problem.

COMPROMISE

One certainly welcomes the fact that the formation of the coalition administration has obliged the Tories to accept at last the Lisbon treaty which hitherto they purported to loathe. The new government has dropped the Conservative's election manifesto pledge which was in effect to renegotiate the terms of UK membership of the EU by scuppering the Charter of Fundamental Rights and by repatriating EU social and employment law. The coalition is also working to constrain rebellious Tory eurosceptics, a constraint which clearly infuriates the ultra-nationalist right wing. More importantly, perhaps, for the long run: the coalition has encouraged the residual minority of pro-European Tories to find their voice again after years of oppression - or as Nick Clegg puts it, to allow some Tories to find their 'inner liberal'.

Happily, too, the coalition has forced the Liberal Democrats to drop one of the most dotty ideas which found its way into their own election manifesto - that was, to hold a referendum on whether the UK should stay in or leave the European Union. Today that policy finds supporters only on the far right of the Tory party and in UKIP, way outside the embrace of the coalition.

The Tories' original manifesto plug for a UK Sovereignty Act which would try to assert the primacy of Westminster law over that of the EU has been downgraded by the coalition. Such a bizarre thing will now be merely 'considered' - and, one presumes, upon consideration, dismissed.

PRAGMATISM

In practice, the performance of the new government in its first few months has been wonderfully pragmatic. It has supported the setting up of the External Action Service. It has even agreed to establish the EU regulatory framework for the financial sector. It has absented itself judiciously from the negotiations on strengthening economic governance of the eurozone. It is committed to dealing with its multiple opt-outs in

justice and interior affairs on a case by case basis, sometimes decided at the top level in the cabinet committee on EU affairs which is co-chaired by William Hague and Chris Huhne. Inevitably there will be decisions to opt out of EU legislation which will displease the pro-European camp: one such current example is the recast human trafficking directive. But there does not seem to be a split between Tories and Lib Dems on these issues: it is Ken Clarke at the Ministry of Justice who seems to be leading the pro-European arguments.

For both sets of ministers there is some catching up to do: the Tories were last in office at the time of the Treaty of Maastricht, the Liberals not since the Treaty of Versailles! Mr Clegg, of course, has EU experience and languages, and is likely to participate in the affairs of the European Liberal family, led by Guy Verhofstadt.

Tory ministers, including George Osborne, are being well-received at the sectoral meetings of the Council of Ministers. Unlike their Labour predecessors, they tend to turn up and stay. Good engagement is being reported from ministers who are variously backing EU initiatives in the area of the single market, trade, economic recovery, energy and climate change.

IDEOLOGY

Mr Cameron, on the other hand, has yet to have much experience of or impact on the European Council, and as long as he keeps his MEPs outside the European People's Party his influence will remain low. And Brussels observers have noted with dismay the election of arch-nationalist Bill Cash MP as chairman of the Commons' EU scrutiny committee -- an election which does not bode well for interparliamentary cooperation.

The foreign secretary's own contribution is difficult to gauge. In his first major speech (1 July) Mr Hague barely disguised his contempt for the European Union. He proposed two changes to EU policy from that of his predecessor Mr Miliband. One was to be nicer to smaller countries from central Europe. The other was to install (somehow) more Brits as *fonctionnaires* in the Commission. Both are laudable objectives in their own way -- but neither will help the UK much when negotiations on the EU federal issues gets tough.

By 'federal issues' I mean the reform of the budget, the multiannual financial framework from 2013 and enlargement. Here it is Paris and Berlin which still matter most, and they need to be cultivated. Neither the French nor the Germans take kindly to being lectured by the British about how Turkey must be admitted into the EU. Everyone suspects that Tory policy unadulterated by coalition would be to let the Turks wreck the Union.

Unreconstructed euroscepticism is also in evidence within the coalition government's stated determination to avoid any treaty change for the whole of its 5-year mandate and to refuse to make any preparation for joining the euro. Indeed these two decisions look highly ideological and, from a Brussels perspective, provocative.

Let us hope I am right that the idea of a UK Sovereignty Bill will come to naught. Mr Hague, according to his speech to the Conservative Party conference (6 October), appears to think otherwise. He says that the sovereignty of the Westminster parliament is an indivisible 'eternal truth', and appears to believe that this 'key

principle' can and should be enshrined in law. I must say as a constitutionalist, and as a loyal foot soldier of the coalition, I fear he is mistaken. To challenge the primacy of EU law in those areas where the Treaties have conferred competence on the Union is a subversive act. If that were to be enacted by Parliament at Westminster, the UK Supreme Court would arrogate to itself the power to pass judgment in matters of *ultra vires* – thereby flatly contradicting the authority of the European Court of Justice in Luxembourg.

REFERENDA

The next immediate step is the EU Referendum Bill. This will for the first time substantively and substantially amend the 1972 EC Accession Act. On this matter, I am not impartial, having long believed that referenda should be reserved for things which are really big, simple and visceral -- like legitimising a coup d'état (or joining the EU). Referenda do not work for issues which are petty, complex and cerebral.

Isolated national referenda on EU issues may well unleash populist and nationalist forces that will be impossible for the mainstream political parties to manage, will provoke unholy coalitions of nay-sayers, will damage the Westminster parliament, will force the UK even further on to the margins of the EU, and, ultimately, settle nothing. (Which of us, if losing a referendum on Europe, would give up the fight?)

David Lidington's statement (13 September) threatens an obligatory referendum on all EU treaty revisions which 'transfer areas of power or competence'. The Minister of Europe proudly presents the 'referendum lock' before HMG would either ratify a treaty change or cross a 'major' passerelle -- dubbed 'ratchet clause'. For good measure, he adds that a referendum will also be needed before sterling joins the euro or before the UK agrees to the establishment of the EU public prosecutor or before giving up border controls (does that mean join Schengen?) or adopt a common EU defence policy (including, presumably, joining a core group of militarily-capable EU states).

However, in a constitutional order which is not of a classic federal type it is impossible for the government to clarify precisely what will and will not trigger a referendum. For example, Mr Lidington seems keen that a referendum will be needed to introduce QMV for CFSP matters -- whereas in fact, of course, QMV is already permitted in a wide range of foreign policy circumstances under the terms of the Lisbon treaty (Article 31(2) TEU).

It is telling, and deeply unfortunate, that the coalition uses the deliberately prejudicial eurosceptic terminology of 'ratchet' clause. (The correct English translation of *passerelle* is footbridge; the French translation of ratchet is *cliquet*.) The passerelle instrument is a well-respected constitutional device to allow for necessary flexibility, and should not be treated with contempt. It is frankly demeaning for the government to use the contemptuous and contemptible term 'ratchet': the multilingual Clegg should suppress it.

Passerelle clauses are inserted into the Lisbon treaty precisely in order to allow the constitutional order of the Union to develop pragmatically. They are there to oil the wheels of decision making. They might very well prove to be a useful device for the UK when its own national interest is being blocked or distorted by another EU State.

There are seven formal passerelle clauses, all of which can only be deployed by unanimous agreement. If the British coalition government wants to wield its much-prized national veto against the use of a passerelle it can indeed do so. The seven are:-

1. Article 48(7) of the Treaty on European Union is the **general passerelle clause** which allows, in areas where competences have already been conferred by the States on to the EU, for a unanimous decision procedure to become a QMV procedure or a special legislative procedure to be normalised to the ordinary legislative procedure (involving QMV in the Council and co-decision by the Parliament). In all cases the European Council has to act by unanimity, and any single national parliament has the right of veto. The European Parliament has the right of consent by an absolute majority of its Members.
2. Article 31(3) allows the European Council, acting unanimously, to extend the scope of QMV in **common foreign and security policy** on matters without defence or military implications.
3. Article 81(3) of the Treaty on the Functioning of the European Union allows the Council of Ministers, acting unanimously on a proposal of the Commission, and after consulting the Parliament, to extend the scope of QMV in the area of **family law with cross-border implications**. Any single national parliament has the right of veto.
4. Article 153(2) allows the Council, acting unanimously on a proposal of the Commission, and after consulting the Parliament, to extend the scope of the ordinary legislative procedure in the fields of **workers' rights and employment of third-country nationals**.
5. Article 192(2) allows the Council, acting unanimously on a proposal of the Commission and after consulting the Parliament, to extend the scope of the ordinary legislative procedure to **environment measures of a fiscal nature, to planning and land use (with the exception of waste management), to the management of water resources, and to measures significantly affecting energy sources and the general structure of energy supply**. (Both of these last two passerelle provisions, by the way, existed before the Treaty of Lisbon.)
6. Article 312(2) allows the European Council, acting unanimously, to extend QMV to the decision adopting the **multiannual financial framework**.
7. Lastly, Article 333 allows the Council, acting unanimously, to extend the scope of the ordinary legislative procedure in the context of **enhanced cooperation** between a core group of integrationist States.

TREATY CHANGE

Treaty change has always been an important dynamic of European integration. Treaty changes, all fully respectful of the principles of subsidiarity and proportionality, will surely be needed in future to give greater added value to EU policy-making -- for example, in pooling defence expenditure, in fighting international organized crime, in boosting the popular legitimacy of the EU institutions, in strengthening economic governance or in reforming the budget and own resources system.

Indeed, an IGC as early as next year on economic government cannot be excluded if the temporary bail-outs have to become permanent. Such a treaty reform would certainly trigger a UK referendum, a likely No vote on a low turnout, an adverse market reaction, a loss of confidence in the coalition government and the consequent further marginalisation of Britain.

By binding itself and its successors into referenda, the coalition government is heading for trouble. If its EU Referendum Bill is passed unamended, all future British governments will be put through contortions when confronted by the threat of EU treaty change -- and any EU treaty change will have to run the gauntlet of the hapless British voter. Try as they might (and they do), the government's criteria for deciding about what is a major shift of competence and powers will remain subjective.

I have to add that it is not clear to me, as the European Parliament's rapporteur on electoral reform, if the proposal to install a transnational list for a pan-EU constituency will trigger a British referendum or not.

The government puts undue weight on the similarity between what it is trying to achieve in Britain and what other States are doing post-Lisbon. Yet no other State would dream of adding a referendum on top of the already mandatory approval of national parliaments about the use of a passerelle clause. Although the Bundestag has legislated to increase its own powers over important EU decisions, including some passerelle clauses, Germany has a constitution in which the checks and balances between government and parliament are comprehensively laid down in any case, and a Basic Law which commits the Federal Republic to advancing European integration.

The proposed changes in British law, on the other hand, are taken in isolation from a broader constitutional review. They are clearly intended, and will be interpreted by the UK courts as having been intended, to stop further European integration.

The Referendum Bill serves to accentuate British exceptionalism on constitutional matters, and therefore will force Britain's EU partners to go ahead further and faster without the UK. Already the Union suffers the hangover from the excessive 'red lines' of MM. Blair and Brown. It is largely to escape from the British opt outs and cop outs that the Lisbon treaty facilitates 'enhanced cooperation' between a core group of like-minded States. In some cases, as in criminal law, the passage to enhanced cooperation is automatic once nine integrationist States find themselves frustrated by more nationalist States (Articles 82(3) and (83(3) TFEU). In other cases, the decision by a core group to go ahead and leave others behind will not be able to be stopped by this UK government or any other.

It would be a pity if the impression were to be given that the coalition is happy to leave the UK as a second-class European player, and even to contemplate with equanimity its permanent relegation to the third division. But this is the likely consequence of some aspects of current coalition policy. The quest for a bipartisan pro-European approach to the making of British European policy remains elusive. For the rest of the Union, the British Question remains problematic.