

**Frank Vibert**

## On the edge: David Cameron's EU renegotiation strategies

### Book

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# **On the edge**

**David Cameron's  
EU renegotiation  
strategies**

**Frank Vibert**



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## Introduction

After promising the British public a referendum on whether to stay in the EU, David Cameron is currently trying to renegotiate the terms of the UK's membership. His increasingly Eurosceptical party and a press that is often hostile towards the European Union makes the task a particularly challenging one.

In this series of five essays, Frank Vibert, a Senior Visiting Fellow in the Department of Government at the London School of Economics and Political Science, draws on his experience as a founder director of the European Policy Forum to analyse the five strands of Cameron's renegotiation strategy. He concludes that – if he succeeds - the Prime Minister's approach may lead member states and Brussels institutions to move away from their current strategy of stressing EU citizens' rights, rather than their consent.

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## Executive summary

Even if the UK's worries that eurozone members will overrule 'outs' are seen as well founded, there are several ways in which some form of redress might be provided within EU structures, each with different levels of future security.

Although all EU member states are now looking again at immigration and border controls, and the salience of these issues is now very high across the continent, Treaty constraints on the UK's demands are still restrictive.

Though the EU might be able to reach agreement on its goals in the area of competition, institutional tendencies to over-regulate – and business demands for legal certainty in a large market – mean that change will still be difficult to realise.

Cameron has sought to swing some key EU doctrines behind his arguments for reform. At face value, making these links enhances the PM's chances of success. But once again, the issues he raises are not as tractable as they may at first appear.

The climate of populist scepticism about the EU has raised the temperature generated by UK demands for extra 'sovereignty'. UK demands may induce member states and Brussels institutions to alter course – or alternatively to hold fast to current strategies of stressing EU citizens' rights, but not their consent.

### About the Author

**Frank Vibert** is Senior Visiting Fellow in the LSE's Government Department. He is the founder director of the [\*European Policy Forum\*](#), and was senior advisor at the World Bank and senior fellow at the United Nations University WIDER Institute, Helsinki. His latest books are [\*The New Regulatory Space: Reframing Democratic Governance\*](#) (Elgar 2014), and [\*Democracy and Dissent: The Challenge of International Rule Making\*](#) (Edward Elgar, 2011).

## Eurozone ‘ins’ and ‘outs’: can Cameron achieve a new relationship between eurozone members and the rest?

*Even if the UK's worries are seen as well founded, there are several ways in which some form of redress might be provided within EU structures, each with different levels of future security.*

David Cameron has identified the relationship between euro-ins and euro-outs as one of the four areas to be addressed in renegotiating Britain's relationship with the EU. The chancellor, George Osborne, has referred to it as the most important of the four. In very broad terms, Cameron and Osborne are concerned about the possible negative effects that decisions taken by eurozone members may have on countries outside the single currency. This fear was framed in the Prime Minister's letter to the President of the European Council, Donald Tusk, in terms of potential damage to the principle of the single market.

In other words, Britain is suggesting that this relationship involves a core interest and principle for all EU member states (whether they are Euro ‘ins’ or ‘outs’). Of course, the government's real concern is actually about the position of the City of London – currently far and away the most important financial centre in Europe. At the root of Osborne's fear is the fact that eurozone member states now (since November 2014) have a qualified majority in the Council of Ministers if they act together as a bloc under the relevant provisions of the Treaties (TEU Art.16 (4)).

The Lisbon treaty changed the votes needed in the Council of Ministers to win a ‘qualified majority vote’ (QMV) decision to require member states comprising at least **65% of the population of the Union**, plus 55% of all the member states (i.e at least 15). Weighting by population benefited Germany, France and Italy (in the eurozone), albeit the UK as well. The 19 eurozone states now control 66% of the QMV votes and thus meet both thresholds. In theory, this means that neither the UK alone, nor even the UK acting in combination with other non-members of the eurozone (such as Poland), can now stop measures that are uniformly supported by eurozone members.

### **Britain outvoted – is it a real fear?**

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But how likely is it that all the eurozone states will act in such a concerted way? Many observers feel that the British worry is greatly overblown. All members of the Union have an interest in the success of London as far and away Europe's largest financial centre. Many have a substantial stake in the London market through the presence there of their own major banks and financial institutions. And of course the eurozone itself has some prominent cleavages between member states – for instance, between its ‘northern’ and southern countries, and between those doing

well under past austerity policies (like Germany) and those subject to their full impact (like Greece). So in any case members of the eurozone may not act as the totally unified bloc needed if they were to automatically or reliably predominate in QMV decision-making.

The other side of the coin is the recognition, both inside and outside the eurozone, that if the euro is to consolidate its role in Europe and as an international currency, much further policy development is required. Current policy proposals include 'mutualisation' through debt write-offs, or issuing joint euro bills or euro bonds. Other fiscal proposals include tax harmonisation and new EU taxes. Some of these ideas will not command a majority within the eurozone states. But a large element of unpredictability remains, combined with a sense that 'something must be done' to strengthen the euro. Safeguarding and developing the euro's future certainly cannot all be left to the European Central Bank (the ECB).

Adding to the general unpredictability is the ongoing debate about financial regulation in the EU. Many financial market observers feel that the policy balance has gone too far towards a precautionary stance, and that the measures agreed in the wake of the 2008 crisis should be reviewed – but perhaps they would say that anyway. At the same time, the debate about the future structure of banking in the EU is far from over. In addition, there are ongoing weaknesses in the balance sheets of many EU banks that need to be addressed, for example, about the assessment of non-performing loans.

A number of lines of defence are potentially available to the UK and other non-members of the eurozone. One is to gain a permanent, legally enshrined recognition that the Single Market operates on the basis of more than one currency. Currently, economic policy provisions in the Treaty are framed only in terms of a single currency – the euro (TEU Art.3 and TFEU Article 119 (paragraph 2)). A second approach is to get agreement that heads off the costs to non-members of any financial rescue in the eurozone, particularly in the form of new lending to over-indebted members. A third option would be for the euro-ins to agree that they will forbear to use the 'necessary powers' provision of the single currency area (TFEU Art.133), which non-members might feel could be misused. However, the key line of defence concerns voting, and the need for non-members to protect themselves from being outvoted in the Council of Ministers.

### **Voting in the Council**

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Voting behaviour in the Council is notoriously [difficult to analyse](#). Votes are rarely taken because deals are negotiated beforehand – unless the member state wishes to make a point to its own public. Behind the scenes there are two different strategic games being played out. One is



between member states themselves, where two or three shifting alliances are involved most of the time. The other is between the major Brussels institutions – the Council of Ministers, the Parliament (EP) and the Commission. For example, the Commission has the right of initiative on new policy proposals, but it will normally carefully weigh the existence and mood of the integrationist majority in the EP and assess the chances of achieving a qualified majority vote in the Council, before bringing new ideas forward.

In order to deal with the uncertainties of strategic behaviour for the long term, the most secure form of protection would be for member states outside the eurozone to insist on a ‘dual majority’ for any proposal that they fear may have negative impact on themselves. What this would mean is that, if a qualified majority is reached by eurozone members alone under QMV, a second majority would still have to be obtained from the 9 member states outside it. If this second majority were aligned to fit with the 55% of members threshold, five out of the nine would have to agree, and to meet the 65% of population QMV limit, the opposition of the UK alone would be sufficient to block the proposal.

A weaker form of defence for eurozone non-members would take the form of the so-called ‘Ioannina’ compromise. Under this procedure any measure perceived by any member of the euro-outs to have negative effects would be referred to Heads of States, or heads of governments, who would try to reach a decision by consensus.

### **Legal form, legal effects and trust**

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Each of the possible lines of protection outlined above could be put into effect through different forms of agreement. In ascending order of ‘hardness’ and long-run security for the UK agreements could be

- between members of the European Council, or
- between the institutions (Council, Commission and EP), or
- by a Protocol attached to the Treaties, or
- by changes to the internal provisions of the Treaties.

The differences here are in the degrees of protection these alternatives offer. For example, an agreement in the European Council to adopt the Ioannina compromise procedure might succumb to the pressure of later events. And any Council agreement by itself might be challenged by the other institutions, including the EU’s ‘supreme court’, the European Court of Justice.



No matter what the form of agreement is reached between eurozone member states and outside EU states, uncertainties will still arise from divergent interpretations about whether or not the effect of measures adopted in the eurozone have a negative effect on other states or not. Even Treaty change protections may not be fully watertight. The euro-ins could still develop self-regarding policies under the arrangements for 'enhanced cooperation' (TEU Art. 20). They could also reach agreements amongst themselves outside the Treaty framework.

Divergent interpretations of the impact of eurozone measures on other states are a particular concern. Under current arrangements any disputes are referred to the European Court of Justice (ECJ). However, the ECJ may not be seen as a neutral arbiter, since opponents argue that it has a pro-integrationist majority. An alternative would be for euro-in and euro-out states to establish some kind of dedicated arbitration panel whose decisions on disputes between them would be final.

Ultimately the choice of legal form boils down to a question of trust. Game theorists say that trust is formed by experience with repeated interactions. No doubt some or many of the eurozone insider states will feel that their experience of past interactions with the UK makes them pessimistic about giving it any extra blocking power under a system of dual majority voting. They may fear that the UK will misuse the new provisions. Conversely, the UK might feel that its experience with euro-ins is that it cannot trust them not to take measures that could damage the City of London's position. Here it is the gap in trust that is the issue – the choice of words and routes to agreement is secondary.

## Immigration: EU attitudes are more fluid, but substantial barriers to change remain

*Although all EU member states are now looking again at immigration and border controls, and the salience of these issues is now very high across the continent, Treaty constraints on the UK's demands are still restrictive.*

With a few recent polls showing a narrow UK majority for leaving the EU, there is no doubt that in raw political terms the need to 'do something' about immigration from within the EU is the number one priority for Cameron and Osborne. Economists debate the costs and benefits of immigration – with different answers of course. But what makes immigration so salient is politics, not economics. It is probably the single most important issue for motivating voters who favour exit.

David Cameron's letter to the President of the European Council refers to estimates that the UK is on track to become the most populous country in the EU by 2050. This means that, even when the present period of budget 'austerity' comes to an end, there will be ever-continuing pressure on future budgets to help fund critical infrastructure, schools, health services, other social services, housing and transport. Public concern about immigration may be emotive in many aspects of how it is expressed – but it is not irrational.



The debate about immigration in the EU is changing fast in reaction to the Syrian refugee crisis and terrorism. Moreover it is not simply about security at the external borders of the EU. The

issue is also concerns the movement of immigrants within the Schengen group of EU member states, who have been experimenting with 'borderless' travel. UK government demands to be able to control the flow of immigrants into the UK, and to make the Britain a less attractive destination by denying access to welfare benefits, are thus being pitched into a fluid debate where all the EU's member states realize that they have a problem. Every country is now equally aware that failure to respond to the problem will further stimulate a very negative political and public opinion response.

### **Maintaining treaty principles**

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Despite the newly increased fluidity and urgency of the issue, the British government still faces an uphill battle in negotiating restrictions on flows of EU citizens (and refugees) into the UK. The reason is that the problem from Britain's perspective is not mainly about immigration from outside the EU, it is about immigrant flows within – from Poland, Romania, Bulgaria and, in the more distant future, from prospective new member states such as Serbia, or Albania, or Ukraine.

And here the UK government runs up against those provisions in the EU Treaty base on the Single Market that establish the principles of

- non-discrimination on grounds of nationality (TFEU Article 18)
- the right to move and reside (TFEU Articles 20 and 21) and
- the freedom of movement provisions of TFEU Article 26.

Of similar importance to the general principles of non-discrimination and free movement are those Treaty articles referring specifically to

- the freedom of movement of workers and
- non-discrimination against workers from other EU member states (TFEU Article 46).

In addition there is the further stipulation (in TFEU Article 48) that EU measures in the field of social security should provide for freedom of movement for workers.

Notwithstanding the many current stresses in the Schengen area, other EU member states have made clear that they wish to maintain the freedom of movement principles of the Single Market. The UK government thus has to show that the restrictions it is demanding can take a form that will leave these general principles still intact.

## Derogations

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The treaty base of the EU offers a time-honoured way for squaring these kinds of circles. It takes the form of *derogations*, that is, exceptions to whatever the general principle lays down. For example, TFEU Article 48 on the provision of social security benefits to workers from other EU states already refers to a special procedure relating to any EU measures in the field that would impact the social security budget of a member state and would affect 'important aspects of its social security system, including its scope, cost or financial structure'. (TFEU Article 48 paragraph (b)).

Another kind of derogation, relating to the different principle of the freedom of movement of capital, is the '*step-back*' procedure. In this particular example, the Council is able to take a step backwards in Union law from the general principle regarding the liberalization of the movement of capital to or from third countries. (TFEU Article 64 paragraph 3).

So the UK government will have some precedents that it can cite, either in looking for ways to restrict claims on social security by workers coming from other EU member states, or possibly, to 'step back' from the freedom of movement and right of abode provisions more generally.

## Legal challenge and human rights

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In thinking about the legal protections the UK might win, there is a further dimension that distinguishes the negotiations over immigration from other aspects of the negotiation – such as the relationship between euro ins and euro outs (discussed in the first chapter). In the case of any economic or financial disputes with the eurozone any quarrel lies between governments – or possibly with official institutions such as the ECB. In the case of immigration the possible challenges to any protections gained by the UK may come not only from other member states (for example, the Polish or Romanian government) but also from individual workers pursuing legal cases, or from NGOs or lawyers representing them.

If such legal challenges do emerge from non-governmental sources they make take the form of cases brought under the Charter of Fundamental Rights of the EU (agreed in 2000 and adapted in 2007). According to the Treaty (TEU Article 6) these provisions have the same legal value as the Treaties. The Charter does not create new rights not already in the Treaties. It does however reaffirm the freedom of movement and right of abode provisions of the Treaty (in Article 45), the right to engage in work (Article 15) and the right to social security benefits (Article 34).

Under a special Protocol agreed under the Treaty of Lisbon, the UK (and Poland) negotiated an exemption to the application of the Charter 'except insofar as Poland or the UK has provided for such rights in its national law'. (Protocol Article 1, paragraph 2). However, the UK's Human Rights Act prohibits discrimination based on national origin (Article 14). Thus, the Protocol itself, and the exception it provides, both open up potentially fertile avenues for legal challenges. In negotiating derogations or 'step-back' procedures the UK government will therefore have to take a further look at the Protocol, and at its own human rights legislation.

The danger for the UK government is that it may negotiate derogation or step-back procedures that appear to provide it with protection from immigrant flows into the UK from other EU states – only to find that these protections then come under immediate challenge from the EU Charter of Fundamental Rights. Such a confused outcome will only add to the incentives for those groups who want Britain to vote for exit.



## Competition: why cutting regulation is so hard for the EU

*Though the EU might be able to reach agreement on its goals in this area, institutional tendencies to over-regulate – and business demands for legal certainty in a large market – mean that change will still be difficult to realise.*

When the Governor of the Bank of England, Mark Carney, **intervened** in the debate about British membership in the EU, he stressed the dynamic benefits conferred by the single market on the British economy. Unfortunately, although the single market is a very large one, it is not dynamic. Other markets outside the EU – such as the US, India and China -have been growing much faster. Even with the slowdown in world trade, and in China more specifically, non-EU markets offer more dynamic growth prospects.

It is the need to revive the dynamism of the single market that the British government is trying to address by identifying ‘competitiveness’ as one of its four key negotiating aims.

Competitiveness differs from the other three British negotiating aims, in the sense that in this case the UK is pushing at an open door rather than having to overcome a general reluctance or resistance. All the member states are concerned about Europe’s poor economic prospects, its high unemployment levels and particularly serious youth unemployment levels.

In his now-famous **letter** to EU president Donald Tusk, Cameron’s proposals on competitiveness included a number of references to specific policies in the single market, including the need to bring capital markets closer together. ‘Capital markets union’ plays to the hope that businesses in the EU can turn more to equity financing to meet their needs and become less dependent on bank financing. The pattern of corporate funding in the EU would thus become more similar to that in the USA. Start-up companies would be among the intended beneficiaries of such a shift.

### **Regulatory techniques and drivers**

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The main thrust of the PM’s letter is, however, about the costs of doing business in the EU. Here the UK government’s key target for change is the need to lower regulatory burdens. This means finding ways to reduce the existing stock of regulation and to minimise new regulatory burdens arising from fresh EU legislation.

Over the past 20-25 years, the European Commission has embedded in its working practices all the techniques of regulatory scrutiny that are to be found in developed markets worldwide.

Cost/ benefit analysis, tests of necessity and proportionality, mechanisms for regulatory

oversight and evaluation are all to be found in Commission practices. It has introduced the usual mantras of 'better regulation' or 'smart' regulation into its lexicon and has carried out various exercises to simplify and to reduce the size of the existing rule book for doing business in the EU. No doubt technical improvements are still possible. But the core of the problem is not about the techniques of regulatory practice. It is about the underlying drivers behind the urge to legislate and to regulate.

If the British government is to return from the negotiating table with a convincing story to tell Conservative and Ukip voters – at least on reducing the costs of doing business in the EU – it has to offer more than Commission promises on how to carry out 'better regulation'. Cameron and George Osborne have to be able to say how they have blunted the underlying drivers behind the EU's compulsion to regulate. There are two different types of driver. One centres on the institutional incentives to regulate. The other involves the quest for legal certainty in the single market, popularised in such expressions as the need for 'a level playing field' and a uniform compliance that avoids 'gold plating' at one end, and avoidance at the other.

### **Institutional incentives**

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What lies behind the EU's urge to regulate? Public choice theorists focus their attention on the institutional incentives involved, especially as they relate to the jewel in the crown of the European Commission's powers – which is its right of initiative in all legislation. Take this away and the Commission becomes like any other bureaucracy. Meanwhile, the jewel in the European Parliament's crown is its right of co-decision on new legislation, shared with the Council of Ministers. Take this away, and the Parliament becomes a mere talking shop.

Put in another way, according to a public choice view, the *raison d'être* of the 28 members of the European Commission (and their staffs) is to come up with new proposals for EU action. The *raison d'être* of the integrationist majority in the EP is to co-legislate new measures. Neither have any self-interest in legislative or regulatory restraint. Nor do they have a particular interest in spending time and attention on ways to reduce the stock of existing regulation.

If this view of institutional incentives is correct, it will not be possible for British negotiators to address the problem head-on, even if they wanted to. At best it might be possible to negotiate an Inter-Institutional Agreement that all future measures that add to the costs of doing business in the EU should come with 'sunset' clauses attached – so that they will expire automatically.



The more radical alternative, from a public choice perspective, is to bypass the Brussels incentive system and to turn to national parliaments to keep regulations in check. For example, a largish minority of national parliaments might be able to propose deletions to the existing rule book, and also be able to block new measures that would increase the costs of doing business. Possibly actions to propose deletions could be agreed by the European Council on the basis of a simple majority of member states. The PM's letter refers to a 'red card' role for national parliaments in the context of 'sovereignty'. Such a red card system might also have an application in relation to the costs of doing business.



Volkswagen vehicle emissions ... a failure of EU law and regulation to assure certainty in the single market

### **Honesty and legal certainty**

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The quest for legal certainty is not about public choice. It is about private choice, and in particular about the desires of private business. The business attitude towards regulation is two faced. Businesses deplore it – but they are often supporters of it.

Economists often fail to point out that markets do not work unless there is honesty and an absence of intent to defraud in contracts and pricing – the twin pillars of any market system.

We can decide on the honesty of a trader in a market with repeated face-to-face contact. In any large market that involves distant relationships, such as the EU's single market, we rely on the

law to uphold contracts and to punish dishonesty. Adam Smith referred to 'emotional distance' as the reason for law.

In the case of the single market, EU law provides an attractive way of introducing legal certainty into commercial and business relationships. Otherwise businesses have to make their own judgments on the possibilities and timeliness of redress under, for example, Bulgarian or Italian law. Despite well-noted differences in what is euphemistically called 'compliance culture' (due to non-enforcement in some locations) the demand by businesses for a level playing field is a frequently recurring refrain.

Unfortunately, in the case of VW emissions standards, it has become all too apparent that EU law and regulation does not assure honesty in the single market. The British government could therefore use the opportunity to open up a different kind of debate on how to improve standards that does not involve ever-increasing recourse to EU law.

The alternative to ever-greater reliance on EU law involves efforts by national authorities on two fronts. Emphasising the importance of business ethics is a first strategy. A second might be bringing civil and criminal prosecutions against those who transgress. It is unfortunate for Cameron and Osborne that the UK's own record is poor on both these counts. It has never been clear what ethical standards are included under the 'fit and proper persons' test applied to company boardroom appointments by the Business and Innovation department on behalf of the UK government. Equally, as the cases of Northern Rock, HBOS and RBS in the 2008 financial crisis all demonstrate, there has also been a great reluctance by UK authorities to prosecute business wrongdoing.

Yet leaving aside the less than stellar performance of the British government, it might be possible for the member states in the European Council to agree that they will each be more active in promoting codes of ethics and in prosecuting wrongdoing in their own markets. They might start with VW.

The fact that for once the British push on competitiveness faces an open door in terms of other EU states' reactions will be refreshing for the UK government. The difficulty is that it is not clear how far this general receptiveness translates into a willingness to look at the fundamental drivers behind EU regulation – either the institutional drivers, or the quest for legal certainty. The door is open; the cupboard may be bare.

## Subsidiarity: can Cameron secure reform without treaty change?

*Cameron has sought to swing some key EU doctrines behind his arguments for reform. At face value, making these links enhances the PM's chances of success. But once again, the issues he raises are not as tractable as they may at first appear.*

David Cameron's now famous (or notorious) [letter](#) to EU President Donald Tusk makes specific reference to the EU doctrine of subsidiarity (see the [Treaty of the European Union \(TEU\) article 5](#)) and to [Dutch government proposals](#) on enhancing subsidiarity, 'Europe Where Necessary, National Where Possible'.

In fact, these references allude to three different issues. The first is about how agenda setting currently operates within the EU machine. The Dutch would like an assurance that certain policy areas will be kept off the EU's agenda and reserved to the member states. For example, the Netherlands suggests that policies in respect of direct taxation and criminal law procedures should be defined as off the agenda for the EU.

The institutions might reach a political agreement on policy priorities here. However, there is also an underlying institutional question about who sets those priorities. The European Council's function is to define priorities (see TEU Article 15), but this sits uneasily with the European Commission's right to initiate policy proposals (TEU Article 17). The Netherlands suggest that the Commission should refrain from carrying forward any proposals where there is a widely shared objection in the Council on grounds of subsidiarity.

A second question arises because the current subsidiarity provision is ineffective as a means of protecting member states from overreaching measures from the EU. In the eyes of its critics, it receives ritual acknowledgment from institutions such as the Commission and the European Court of Justice (the EU's 'supreme court'), but it has little practical effect. Supported by the UK in Cameron's letter, the Netherlands suggests that the principle should be interpreted in terms of EU measures 'only when necessary', rather in the existing terms of when it might be 'better' for the EU to act (TEU Article 5, paragraph 3).

The third aspect of subsidiarity concerns a related weakness in the principle of conferral (TEU article 5, paragraph 2) that is also meant to protect the prerogatives of member states. Again, in the eyes of critics, the principle has little practical impact. The Treaty base offers many different pegs on which to hang initiatives. So if one basis appears problematic, the Commission and or

Parliament can always turn to another. The Netherlands proposals emphasise the need for a clear legal base before joint EU action is proposed. Taken individually and together, these areas raise rather fundamental questions about the distribution and exercise of powers in the EU. However, the Netherlands government suggest they can be addressed without Treaty change.



The lobby of the European Court of Justice.

### **Constitutional interpretation and 'ever closer union'**

A fundamental question also underlies the PM's request that the Treaty reference to 'ever closer union' (in TEU article 1) no longer apply to the UK. The underlying issue here is about the judicial philosophy followed by the ECJ in its interpretations of the Treaty base. This is usually referred to as a philosophy of 'integration through the law'.

For some observers, this philosophy is exactly as it should be in a Union of states based on the idea of the rule of law. For others, it is a normative philosophy that means that the European Court of Justice (ECJ) will always in its judgments lean towards the Union rather than towards member states. According to this view, the effect of applying this provision is that the ECJ cannot be a 'neutral' arbiter of the powers in the Treaty. So the Netherlands proposals suggest a procedure under which the European Council (bringing together EU heads of government) can go back to amend legislation if there is an unforeseen ruling by the ECJ. However, critics of the Court argue that (even if it could be agreed) any such procedure would still leave the judicial stance of the Court untouched.

Possibly Cameron can receive some form of 'comfort letter' from other European Council members stating that they accept that the UK does not share the goal of 'ever closer union'. Supporters of the UK leaving the EU will say that such a letter has little or no value in influencing the future philosophy applied by the Court.

### **Flexibility and the structure of legal pluralism**

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Lastly, Cameron's letter asserts that his entire reform agenda can be summed up in one word – 'flexibility'. It also makes specific reference to one of the 'pillars' of the European Union, previously called Justice and Home Affairs (JHA, and now termed Police and Judicial Co-operation in Criminal Matters (PJCC)) and stressing co-operation in the fight against crime. Here the letter expresses concern about the erosion of the national opt-outs and opt-ins that form the essential instruments for flexibility.

The underlying issue here involves what is known as legal pluralism. It is an issue that has received considerable recent attention from constitutional lawyers – prompted both by the growth of international rule making, and by the need to rethink arrangements for courts in what are known as 'deeply divided' societies – such as Bosnia-Herzegovina.

The EU's Treaty base provides for a form of legal pluralism. Article 67 of the TFEU calls for respect for 'the different legal systems and traditions of the Member States'. However, the Court also has the right to review the legality of the acts of the other institutions, including the Council (under TFEU Article 263). Here the ECJ has asserted the supremacy of EU law over member state law. This means that should a clash ever occur between the highest court of a member state interpreting that state's constitution (including powers transferred to the EU) and the ECJ over the interpretation of the Treaties, the ECJ will assert its superior authority. Rather than put this to the test, so far both member state courts and the ECJ itself have tried to avoid direct constitutional confrontations.

An alternative form of legal pluralism involves a principle of mutual deference. Depending on how it is articulated, this could mean that the ECJ would defer to the highest courts of member states in the event of constitutional dispute. If flexibility is to become the norm in the EU, as Cameron would hope, a stronger form of legal pluralism than is now recognised in the Treaties may well be necessary.

## Sovereignty: David Cameron challenges the EU's own explanation for its unpopularity

*The climate of populist scepticism about the EU has raised the temperature generated by UK demands for extra 'sovereignty'. UK demands may induce member states and Brussels institutions to alter course – or alternatively to hold fast to current strategies of stressing EU citizens' rights, but not their consent.*

In recent years there has been an upsurge across Europe of what is usually referred to as 'populism', by which is meant the rise of 'extreme' parties – sitting further right or further left than the mainstream centre-left/centre-right groupings that have largely dominated European politics in the post-war era, and especially since the fall of communism. In the UK, UKIP is often seen as a rightwing example of this phenomenon. France has the Front National, and Hungary Jobbik. In Spain, Podemos is often cited as a leftwing example, Greece has Syriza, while Jeremy Corbyn's unexpected rise to lead the Labour party might have a similar explanation.

In seeking to explain this phenomenon, political scientists often offer an economic rationale. This interprets populism as primarily a 'backlash' response to the 2008 economic crisis and austerity, lower growth expectations for the future and the difficulties faced by 'blue collar' workers in today's 'knowledge' economy. If the economic 'explanation' of populism is correct, then European leaders can hope that that these movements and parties will fade as economic prospects improve.

An alternative explanation is more politico-cultural. It holds that the European Union has failed to find a political structure that responds to what significant numbers of people want. Partly this is a problem of distance – the gulf between the Brussels 'bubble' and the everyday concerns of ordinary voters. Partly it is a problem of 'insiders' versus 'outsiders' – the gap between the elites who know how to influence the Brussels game and those who feel excluded and out of the loop. A key flashpoint for rightwing parties has been concerns over immigration levels and 'anti-foreigner' reactions, discussed in the second chapter. For left populists, it is the EU's involvement in the imposition of harsh austerity conditions on their countries that is key. If the political 'explanation' is correct then populism is probably here to stay – unless the EU reforms its political structures in fairly radical ways.

Populism, together with the spreading sense that it may represent more than a passing mood, is a cause of great unease across the established mainstream parties in Europe. It is not just the



British Conservative party's concern about UKIP. It is this more general sense of unease about the structure of politics that provides the backdrop to Cameron's demands on 'sovereignty'.

### **Brit-centricity and sovereignty**

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West Midlands Ukip campaigners and their battlebus in 2009.

It seems unfortunate that David Cameron has sought to voice British concerns about the political structure of the EU using the peculiarly British terms of 'sovereignty'. Of course this choice of language reflects the British convention that long-standing (but perhaps not now so applicable) UK view that the Westminster parliament is sovereign in the broad sense of having the final say on all matters of British legislation – including (still) arrangements for regionally devolved and local powers in the UK. According to this account, Parliament is the unique source of the powers of institutions that have public authority in the UK and of the rights of citizens.

This is not the view of how power is exercised in the rest of the EU member states. Here, instead, written constitutions set out institutional roles and powers, and legislative procedures and rights. Often a separate constitutional court rules on matters in dispute between different institutions or parties. In the EU itself the treaties between member states act as a form of constitution and the Court is responsible for their interpretation (see the Treaty of the EU (TEU) [Article 19, paragraph 1](#)). The member states thus sit down to consider British demands about sovereignty without a shared understanding about what sovereignty itself means.

This lack of a common understanding may not stand in the way of agreements on the specific items that David Cameron has identified in his letter to Donald Tusk. Under the current 'yellow card' system national parliaments are simply able to object to proposals from the Commission that they dislike ([TEU Article 12 and Protocol](#)). The UK now wants national parliaments to be able to actually block proposals from the Commission, and this idea may meet with some sympathy. Unfortunately for Cameron, however, the instances where British exceptionalism and the interests of other member states coincide may be few and far between.

## **Consent**

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One thing that the Prime Minister's letter does not explicitly refer to is consent. Yet the concept lies behind the whole British negotiation approach. The PM has been forced into the negotiation because a significant part of the British electorate no longer consents to the terms of British membership. He wishes to show that he can regain that consent with adjusted terms.

One of the features of modern constitutionalism, including in the EU itself, is that the idea of the consent of the people to the constitutional framework and its provisions has been eroded. It has been replaced by the inclusion of declarations of rights within a constitution. Rights offer legal content and protections with which people can identify. So identification has replaced consent, which (in the word of one legal scholar) has now become 'secondary'. The EU reflects this trend to emphasise identification through rights.

The issue of consent extends beyond one country, in this case the UK, and beyond one occasion. Many member states fear that allowing for more expressions of consent by citizens will only lead to them rejecting more provisions and policies.

So the question is whether the EU Treaty base should strengthen the provisions for the exercise of consent by citizens within member states. This would involve a much more extensive capacity for people to demand referendums, to block the transfer of powers to the EU, and to block the exercise of these powers at later implementation stages.

## **The art of the possible**

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In his [letter](#) David Cameron says that the UK is looking to achieve its negotiating objectives in forms that are legally binding. The problem for the British government is that it is completely unrealistic to expect that all the fundamental questions about the EU's institutional and judicial structure (covered here and in my earlier posts) can be addressed within the necessarily short timeframe of the negotiations. At the most, it might be possible for the European Council to



agree to set up an expert group to examine the underlying constitutional issues and to prepare alternative ways to approach them.

Over the years, the EU has extended the reach of its policies and institutions through an adroit balance between what is visible in the Treaties and what is largely invisible to member states' electorates. For instance, the principle of subsidiarity has been highly visible while the judicial doctrine of the supremacy of EU law over national constitutions (unstated in the Treaties) has not. The aim of ever closer union has been visible, but not the less visible procedures for trying to reach consensus solutions. European citizens' rights have been visible, but their consent has been less visible (except for sporadic and exceptional national referenda on Treaty changes).

British demands can be interpreted by other member states as a warning about the limits of a union conducted on the basis of the invisible – a warning that they should try to respond to if they wish to combat populism in their own countries. Alternatively, British demands can be seen as an unwelcome intrusion into a proven recipe for the attainment of increasing levels of mutual cooperation, whose spreading benefits will (eventually) lead to populism fading back to manageable levels.

## Summary

# **On the edge? David Cameron's EU renegotiation strategies**

**Frank Vibert**

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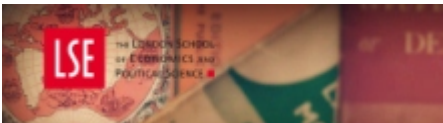
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