

Going Dutch: can Cameron secure subsidiarity reforms without treaty change?

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*In his fourth post covering the UK's renegotiation strategies with its EU counterparts, **Frank Vibert** explores how David 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 so 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.



The lobby of the European Court of Justice. Photo: [Cedric Puisney](#) via a Flickr [Creative Commons licence](#)

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.

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

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.

This article represents the views of the author and not those of the BrexitVote blog or the LSE.

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