

Same job, different income: withdrawing EU migrants' benefits would violate an EU founding principle

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*The UK could make both Britons and EU migrants wait four years before having access to in-work benefits – but the ECJ might still rule it illegal, writes **John Springford**.*



Last week, David Cameron gave a speech and sent a [letter](#) to [Donald Tusk](#), the European Council president, setting out his EU reform demands. Most of the reforms are not surprising, and compromise is achievable. But Cameron appears to be upping the ante on his key demand that is most difficult to achieve: that immigrants from the EU should be denied in-work benefits, such as tax credits and housing benefit, for four years.

The speech was accompanied by some new statistics claiming that 43 per cent of EU migrants receive a UK benefit in the first four years of residence in the country. The 43 per cent figure is surprisingly high, and is based upon administrative data, which is not available to the general public. By contrast, data from the official, publicly available Labour Force Survey, puts the figure at 21 per cent in the first quarter of 2015. The government has made the decision to continue to push for the four-year demand, despite the fact that it would require treaty change, unless similar measures were applied to Britons.

The [Centre for European Reform](#) has repeatedly argued that the four-year demand was discriminatory and violated the EU's treaties. In December 2014, shortly after Cameron's speech announcing the demand, Camino Mortera-Martinez [pointed out](#) that Article 45 of the [Treaty on the Functioning of the European Union](#) (TFEU) forbids discrimination against workers "as regards employment, remuneration and other conditions of work and employment". Tax credit payments are dependent on workers' hours and income, and whether they have children, so restricting them would amount to discrimination between Britons' and EU immigrants' income from the same job.

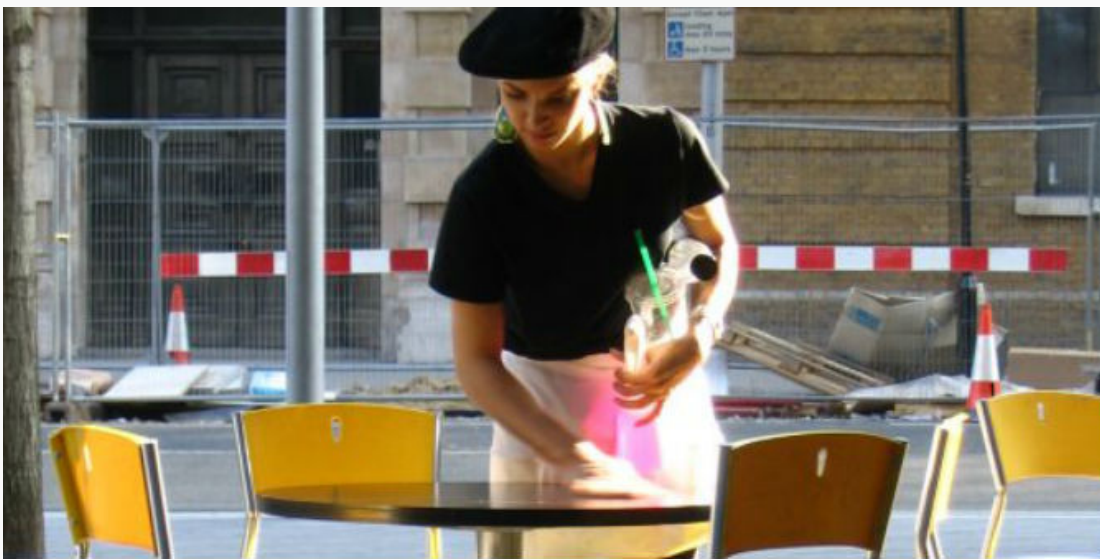
In May 2015, I [noted](#) that this discrimination could be quite large: the new universal credit, which will lump together housing benefit and tax credits, would more than double the income of the average Central and East European migrant with a child in the UK. Withdrawing in-work benefits from migrants would lead to many British workers receiving higher incomes than EU immigrants for doing the same job. This is a violation of a founding principle of the EU – that workers and companies should be free to do business anywhere in the single market without discrimination. Would Britain accept the French government applying different income tax rates to French nationals and Britons living in France? No. Discrimination through tax credits amounts to the same thing.

Then why is David Cameron proposing it? At the time of his migration speech, the political context was challenging for No. 10: public hostility to immigration was increasing, and the rise of UKIP fed Tory fears that the party would deprive the Conservatives of a majority at the 2015 election. Cameron wanted ideas that would take the heat out of the migration issue. Damian Chalmers, a professor of EU law at the LSE, and Open Europe's Stephen Booth [called for](#) a three year pause before EU migrants could access most benefits, to be enshrined in EU law through a new directive. ('Directives' are secondary EU legislation that must not conflict with the underlying EU treaties.)

They said this had a legal basis, because article 20 and 21 of the TFEU say the Council of Ministers can make secondary laws on welfare, which seems to suggest that the treaties do not have the final word on the issue. But, as the University of Essex professor Steve Peers [wrote](#) at the time, this is true for migrants who do not work in their host state. For those who do work, discrimination is not allowed in the treaties, and secondary laws are only permitted when they accord with TFEU's article 46, which allows only "measures required to bring about freedom of movement for workers", not measures that restrict it.

At the time of Cameron's speech, many Conservatives were demanding quotas to limit the number of EU migrants. Indeed, late drafts of the speech included this demand – despite the fact that it was evidently incompatible with the EU treaties or what Britain's partners would accept. At the last minute, Angela Merkel, the German chancellor, helped to persuade Cameron to abandon quotas. So Cameron took up Open Europe's proposal – which they had marketed as a way to “save free movement” by, it was hoped, making the issue less toxic for British voters.

As a result, the four-year waiting period for in-work benefits went into the Conservatives' election manifesto. Of all the British government's demands in its EU renegotiation, this is the only one that looks unachievable. One suggestion, floated by government sources in August, might be to act unilaterally, and make a domestic policy change: stop EU migrants from getting in-work benefits for four years as well as Britons between the ages of 18 and 22. On the face of it, this idea might solve the government's difficulties, but in reality, it is still legally problematic. Since migrants from the EU tend to be older than 22, and more likely to have children than British 18-22 year-olds, the ECJ might rule that the policy amounted to de facto discrimination.



A waitress works in a London cafe. Low-paid jobs like the ones typically taken by new migrants often entitle workers to tax credits. Photo: [Mike Atherton](#) via a [Flickr Creative Commons licence](#).

The government may find it somewhat easier to reform rules on out-of-work benefits, payments of child benefit overseas and the right of people from countries joining the EU to work in other member-states, as my colleague Charles Grant [explains](#) in his recent analysis of Cameron's demands. But Cameron has been very specific about what he wants on in-work benefits and his government is now in a difficult position. Free movement is the EU policy that British voters most dislike.

Other EU governments, however, will not amend the treaties to accommodate the British. For some, such as Poland, this is because it would be directly against their national interest, and for many, it is because they view the principle of non-discrimination as a central plank of the single market. If treaty change to make discrimination between EU workers legal were put on the table, countries more hostile than the UK to free trade might demand discrimination in other areas – between national and foreign companies, for example – and the single market process could go into reverse.

As my late colleague Philip Whyte [put it](#): “The reality is that the EU keeps its members ‘honest’ by anchoring their behaviour”. The EU limits protectionism by enforcing a body of laws – laws which may not violate treaty principles. Any changes to that fundamental principle of the single market will always be very difficult to make. It appears that the only way out is to withdraw benefits from young Britons as well as EU migrants, and hope that the ECJ rules in favour of the reform.

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