
DISCUSSION PAPER

How to deal with Europe's British problem

Andrew Duff

This paper argues that the UK government's renegotiation bid is too feeble to be deserving of concessions by its EU partners, but that the rest of the EU can give the British what they seem to want by pressing on themselves to federal union.

Is David Cameron really serious about renegotiating the terms of the British membership? One has to begin to ask the question. For much has been boasted but little done. British officials are still trotting around foreign ministries of EU capitals, but it is reported that their inquiries about what might be acceptable to Britain's partners are increasingly lame, narrow and few.

There are reasons for this lack of vigour. For one thing, the famous, long-winded and costly 'balance of competences' review undertaken by the coalition government threw up no concrete examples of powers conferred upon the EU that could sensibly be repatriated. For another, once through the bluster of this year's election campaign, the new Conservative government came into office without its promised blueprint for a reformed UK relationship with the EU. No doubt the veil of official secrecy cast over the whole business by the government is supposed to indicate big politics and high level diplomacy. The reality may be rather different – that behind the veil is an embarrassing void. The prime minister's own travels around EU capitals have made him seem ignorant about and careless of the future of Europe: he still preaches 'reform', but has little of substance to offer. The suspicion grows that the whole 'renegotiation' adventure has been cooked up by Cameron and George Osborne for entirely internal Tory party reasons. No wonder those UK civil servants sent out to bat for Britain, most of whom under any definition of the term can be counted as 'pro-European', are dejected.

Britain's EU interlocutors complain that they cannot react when they have not been given a comprehensive catalogue of UK demands. Where details have emerged, they are not consistent between one capital call and the next. Some topics raised by the British at the outset of the exercise, such as the challenge to European fundamental rights, seem later to have been dropped on the advice of liberal Tory lawyers and legislators. An early lunge against the free movement of EU citizens into the UK has run up against one of the key principles underpinning the single market. An attempt to discriminate against non-British EU citizens in terms of social welfare has met the hurdle of another key principle of EU law, namely non-discrimination on the grounds of nationality.

Everywhere there is real puzzlement about what more opt-outs could reasonably be sought by the UK when, thanks to its long run of eurosceptic governments, it is already a very detached member state of the European Union. Britain enjoys (if that's the word) derogations from the EU norm with respect to the euro and the banking union, the Schengen agreement, and justice and home affairs. These opt-outs cause routine political and technical problems for Britain's partners, and are generally held to weaken Europe's solidarity at home as well as its clout abroad. Cameron's refusal to help out the EU in its current acute refugee crisis may be the last straw. In Brussels, there is precious little sympathy left for Britain - and Cameron on his travels has discovered belatedly that while other EU states would regret Brexit none will risk much to prevent it.

Confusing signals

So what can we adduce from such confusing British signals? In his latest pronouncement on the matter during a visit to Madrid (4 September), the prime minister told the press that he had 'already set out the four areas where we want reform: on competitiveness, sovereignty, social security and economic governance'. The first is hardly contentious, having been the stuff of policy of both the European Council and European Commission for many years. The difficulty lies in completing the single market, especially in services, where contrasting political views and economic interests make enacting and implementing EU legislation problematic. The fact that Cameron's Tory party has few friends and precious little influence in the European Parliament does not help his cause.

By 'sovereignty' Cameron appears to mean giving more powers to national parliaments to block EU legislation. This is a fairly spurious demand because national parliaments already have effective powers to advise and warn the EU institutions of their displeasure about impending EU laws which they use according to the best of their variable ability.

I have written elsewhere <http://blogs.lse.ac.uk/europpblog/2014/02/14/why-david-camerons-red-card-plan-for-national-parliaments-wont-work/> about the strengths and weaknesses of the 'early warning mechanism'. Tweaking the current system by giving national parliaments powers they do not need (and few want) will make things more difficult for both chambers of the Union's legislature (including the Council), blur the lines of the EU's democratic accountability and weaken overall its system of governance.

Cameron's bid to tighten in-work social security benefits has a sympathetic hearing with several EU national governments grappling with fiscal constraints. But EU legislation already gives room for large national discretion over what gets paid by the state to whom and when as long as there is no unfair discrimination against EU workers, their families and students. Even were there to be further liberalisation at the EU level, the UK would still be up against the problem that its social security system is not run on a contributory basis so that every EU citizen will have to be treated equally regardless of their length of residence in the UK. To sacrifice the welfare interests of British nationals on the altar of EU renegotiation would seem bizarre indeed, and would certainly serve to pitch the British left into the No camp in the upcoming Brexit referendum.

In the light of the financial and economic crisis, there is, of course, a great debate already started about EU 'economic governance'. But as this concerns the federalisation of the eurozone which Cameron and Osborne have pledged never to join, the British government – avowedly anti-federalist – has nothing of importance to contribute. What the dynamic duo seem to want is a veto for the UK on EU financial regulation in order to protect the interests, as they see them, of the City of London. In an earlier concession, a dual majority of 'ins' and 'outs' must be found in the Council to change the regulations for the surveillance of the EU's banking sector. Yet this concession is to dry up once the non-euro states number four or fewer (there are nine at the moment). The British government may wish to extend this derogation from normal Council voting rules into other areas of the single market, but there will never be agreement on this. In these delicate political times there is no appetite in the EU institutions for Europe à la carte. In fact, rather the contrary: a big effort will be made to stop the spread of the British disease to newer member states in Central Europe, notably Hungary and the Czech Republic.

Never closer union

Shorn of realistic hope of achieving substantive objectives, the UK government is thrown back to rely for dramatic effect on its attempt to extricate the UK from the mission of 'creating of an ever closer union among the peoples of Europe'. A zonked-out European Council meeting of 26-27 June 2014, exasperated by Cameron's opposition to the election of Jean-Claude Juncker as Commission President, conceded that 'the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further'. The general presumption was that this meant different paths to the same destination, a confirmation (and no more) that the EU has long since been operating at multi-speeds and could continue to do so. The British government interpretation of those European Council conclusions, however, was that 'different paths' lead to separate destinations.

Faced with the British demand that the treaties be amended to reflect this divergence, lazy commentators have suggested that 'ever closer union' is merely of rhetorical or preambular importance. Not so. The phrase indeed has appeared in the preamble of the treaties since earliest days, but the Treaty of Maastricht (1992) upgraded the term by installing it in the very first article of the new Treaty on European Union. Article 1 describes the historic purpose of the Union from which flow the provisions on its values, principles and objectives. The phrase signals towards the *finalité politique* of the Union: even if the definition of the ultimate goal is still contested (as it will be), the removal of those words from the treaty would undermine the constitutional foundation of the Union as well as begging basic political and jurisprudential questions about the nature of the enterprise. If the UK were to choose another destination, such as partial or associate membership, so be it: but it has no right to subvert the European project for everyone else.

There was a time I thought that a serious and sustained effort by the UK to achieve a formal new category of affiliate membership of the EU would be in the best interests of all parties. This would have reduced Britain's rights and obligations as an EU member state in exchange for the dropping of the British veto against moves towards federal union. However, the cack-handed nature of Cameron's 'renegotiation' has blown the chances of reaching any comprehensive constitutional settlement of the British problem. Ironically, the meagre nature of the British shopping list makes the chance of any clear-cut deal less rather than more likely. Cameron has revealed himself in his true colours as a conservative and not a reformist. He is not seeking reform of the major common policies, like agriculture and fisheries, or of the structural funds. He will resist the much-needed reform of the EU's financial system, and will closely guard the British budgetary rebate.

In the place of genuine reform, the British prime minister appears to want merely to tinker with British opt-outs whose effect will be to continue to impair the EU's development of a common area of freedom, security and justice and to blunt its efforts to consolidate the social dimension of the single market. Cameron will not concede in return for his tinkering any shift of competence from EU states upwards to the EU in the matter of asylum and immigration policies. Nor will he commit the UK to leading the EU's quest for common foreign, security and defence policies. In short, Britain's EU adventurism looks a footling and pointless sideshow which, nevertheless, risks the disintegration of the Union as a whole at a time when maximum cohesion and solidarity are the orders of the day.

Dénouement

As the paucity of the British demands is revealed, attention turns to what form their outcome will take in the package that will be offered by Cameron and Osborne to the hapless British people before the now unavoidable referendum in 2016 or 2017. Bearing in mind that whatever they come up with will be opposed by the nationalists of right and left, it had better look convincing at least for the pro-European centre ground.

Apart from Harold Wilson's skimpy first British 'renegotiation' of EU terms in 1974, there are no useful precedents. Both the Irish and the Danes have had cause to 'renegotiate' an EU treaty in order to persuade their respective electorates to change their minds after negative referendum results. But despite their claims to the contrary at the time, neither Denmark nor Ireland succeeded in revising the conditions of a treaty: their declarations, decisions and putative future treaty commitments were tautological or oxymoronic in nature, merely confirming that the treaties meant what they in fact said. Moreover, both the Danish over Maastricht and the Irish over Nice and then again Lisbon were taking steps designed to bring into force a treaty that had already been signed. Denmark and Ireland were merely playing their part, albeit an idiosyncratic one, in the formal ratification process of a new Union treaty.

Today the UK's position is very different. Cameron is trying to re-open for amendment the Treaty of Lisbon which already entered into force some six years ago. Indeed, in wanting to overthrow the commitment to 'ever closer union' he is discarding something negotiated carefully and agreed by his predecessor as Tory prime minister, John Major. Any British 'promissory note' about future treaty amendment, extracted under threat from the European Council, may well have to withstand a legal challenge in the European Court of Justice. Any new law coming out of the renegotiation that is based on the 'flexibility clause', Article 352 TFEU, will have to run the gauntlet of votes in the House of Commons and House of Lords. In neither of those illustrious places does Cameron, elected on less than 37% of the popular vote, enjoy a convincing majority. We have already noted the likely hostility of the European Parliament to any ordinary legislation that weakens the *acquis communautaire*.

It is difficult to escape the conclusion that devising a special deal for a more detached United Kingdom is unlikely to fly. That is not to say that the EU can avoid a greater degree of asymmetric integration in the future as it strives to come out of the eurozone crisis. What is in the offing, however, is not a British treaty but a eurozone treaty whose purpose will be to deepen fiscal integration. As Juncker's recent Five Presidents' report *Completing Europe's Economic and Monetary Union* suggests, treaty change cannot long be avoided if the banking union is to be completed and moves towards a fiscal union permitted.

Juncker's timetable was quite leisurely, not planning the next step of a white paper until spring 2017. Many, and not only militant federalists, would like to accelerate that process on the grounds that the EU's avant-garde needs a federal government before the next crisis hits. The British, especially if frustrated by a (first) negative referendum result or even an inconclusive Yes to an essentially spurious package, will still be yearning for a more semi-detached arrangement from the hard core of European integration. A treaty of federal union, crafted in the first place for the nineteen eurozone countries, would give them just that.

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