The flaws of the renegotiation
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An analysis by Vote Leave

February 2016
Abstract

As recently as March 2015, the Prime Minister, David Cameron, told the House of Commons that ‘in the coming two years, we have the opportunity to reform the EU and fundamentally change Britain’s relationship with it’ (HC Deb 23 March 2015, col. 1122, link). It is now clear that much of what he is asking for is the status quo. The Prime Minister’s demands in his renegotiation fall into ‘four buckets’, which were described in his Chatham House Speech of 10 November 2015 (Prime Minister’s Office, 10 November 2015, link). These are:

- Bucket 1: ‘Economic governance and the Eurozone’
- Bucket 2: ‘Competitiveness’
- Bucket 3: ‘Sovereignty and subsidiarity’
- Bucket 4: ‘Immigration’

The EU’s response to the Prime Minister’s speech and subsequent letter was set out by the President of the European Council, Donald Tusk, on 2 February 2016 (European Council, 2 February 2016, link). This will form the basis for a decision of the European Council which will likely be adopted at the European Council on 18-19 February 2016 ahead of a referendum on 23 June.

This paper analyses the content of each of the four buckets and the EU’s response to them, explaining in each case why what has been proposed is fundamentally trivial. In the case of immigration, it considers not merely the four year proposal championed by the Government, but all the major alternatives that have been suggested. It then analyses various other mooted deals Number 10 may claim to secure in order to give the impression that fundamental reform has been achieved, identifying the flaws in each case. The document concludes by highlighting ten unambiguous promises from David Cameron to change the EU which do not form part of his renegotiation and have thus been broken.

As the renegotiation approaches its conclusion, it is now clear that the only way to obtain the ‘fundamental’ change which the Prime Minister once promised is to Vote Leave.
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Bucket 1: ‘Economic governance and the Eurozone’

In his letter to the President of the European Council, Donald Tusk of 10 November 2015, the Prime Minister called for the recognition of ‘legally binding principles that safeguard the operation of the Union for all 28 member states’ (Prime Minister’s Office, 10 November 2015, link).

1. ‘The EU has more than one currency’

- **This is a statement of legal fact, not a renegotiation demand.** As the Prime Minister admits in his letter, ‘the United Kingdom has a permanent opt-out from the Eurozone.’ Protocol (No 15) to the EU Treaties states that ‘unless the United Kingdom notifies the Council that it intends to adopt the euro, it shall be under no obligation to do so… The United Kingdom shall retain its powers in the field of monetary policy according to national law’ (Consolidated Treaties, 2012, link). Protocol (No 16) to the Treaties states that ‘Denmark shall have an exemption’ (Consolidated Treaties, 2012, link). These Protocols ‘form an integral part’ of the Treaties (TEU, art. 51, link).

- **The UK’s former judges in the ECJ have said it will make no difference.**
  - Professor Sir Francis Jacobs QC, the UK’s Advocate General in the ECJ between 1988 and 2006, has said: ‘It seems to me that that recognition is already contained, to some extent, in the treaty as it stands and the protocols. The treaty is clear that there are separate categories: member states whose currency is the euro; member states that are not yet in the single currency; and member states that are under no commitment to join it… I understand there has been some doubt expressed about the legal force of the protocols to the treaty, so perhaps I could mention in parenthesis that the protocols to the treaty are not in any way subordinate to the treaty itself’ (European Scrutiny Committee, 18 November 2015, link).
  - Sir Konrad Schiemann, a former Lord Justice of Appeal and Judge of the European Court of Justice, has said the phrase is ‘more in the nature of an aspiration than a legally binding commitment to achieve anything in particular. Although I have judged many cases in which the legality of EU and national legislation and decisions has been in issue, I do not recollect a challenge based on an assertion that the measure in question was in breach of a legal obligation to achieve ever closer union’ (Treasury Select Committee, November 2015).

- **It is notable that this was omitted from the text of the draft Decision published on 2 February and was only included in the recitals** (European Council, 2 February 2016, link).
  - Manfred Weber MEP, Chairman of the European People’s Party in the European Parliament, stated that ‘the fundamental principle of the recognition of the Euro as the EU’s currency is not in question’ (EPP, 2 February 2016, link).
  - The President of the Commission, Jean-Claude Juncker, proclaimed that ‘the euro remains the single currency of the Union’ (Telegraph, 3 February 2016, link).
2. ‘There should be no discrimination and no disadvantage for any business on the basis of the currency of their country’

- **This already exists in EU law.** The EU Treaties state that ‘any discrimination on the grounds of nationality shall be prohibited’ (TFEU, art. 18, [link]). Since the ‘currency of their country’ is an identical criterion to the nationality of a business, the Prime Minister is merely asking for the status quo.

- **The UK’s former Advocate General in the ECJ says it will make no difference.** Professor Sir Francis Jacobs QC, the UK’s Advocate General in the ECJ between 1988 and 2006 has said that as for: ‘the principle that there should be no discrimination for any business on the basis of the currency of their country. It seems to me that principle is already implicit in the treaty… the prohibition of discrimination is a fundamental, all-important general principle of law that is recognised across the whole of European Union law and upheld by the court’ (European Scrutiny Committee, 18 November 2015, [link]).

- **The draft decision permits natural and legal persons in the UK to be treated differently from those in the Eurozone.**
  - The draft Decision states that ‘any difference of treatment must be based on objective reasons (European Council, 2 February 2016, [link]).
  - Since the ECJ will remain in charge of what constitute ‘objective reasons’, this principle offers no protections for the UK.

3. ‘The integrity of the single market must be protected’

- **This already exists in EU law and is repeated in the draft Decision.**
  - The UK’s former Advocate General, Professor Sir Francis Jacobs QC, has said: ‘the integrity of the single market is also certainly inherent in the treaty’ (European Scrutiny Committee, 18 November 2015, [link]).
  - The European Commission has said that ‘the unity and integrity of the Single Market… are enshrined in the Treaty and remain one of the greatest achievements of European integration’ ([Single Market News, 2012, link](#)).
  - The ECJ has been claiming to protect this principle for nearly 50 years. In July 1966, the ECJ said that ‘what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between member states in a manner which might harm the attainment of the objectives of a single market between states’ ([Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11966M0299) [1966] ECR 299, 341, [link](#)).

4. ‘Any changes the Eurozone decides to make, such as the creation of a banking union, must be voluntary for non-euro countries, never compulsory’

- **The Eurozone has a permanent qualified majority in the Council of Ministers, meaning the UK is always outvoted when the Eurozone decides to make changes to EU law.** Under new voting rules introduced by the Treaty of Lisbon, the nineteen countries in the Eurozone have a permanent qualified majority in the key EU institution, the Council of Ministers (European Council, 2016, [link](#)). These rules will become permanent on 31 March 2017 (TFEU, art. 238, [link](#)).
Protocol (No 36), art. 3, link. The only way to stop the Eurozone taking decisions which bind the UK is to Vote Leave.

**The Eurozone’s permanent majority has been acknowledged by pro-EU groups.**
- The Chancellor of the Exchequer, George Osborne, has said that ‘under the Lisbon Treaty, from 1 November 2014, the Eurogroup on its own will have sufficient votes to pass any financial services legislation for the whole of the EU. That’s a problem because it could leave us in a position where euro members – including ones with little or no financial services industry – can caucus together to impose financial services legislation on the UK – the world’s leading financial centre. And we’ve already started to see the Eurogroup discussing EU directives privately before involving other member states – like they did over the Bank Recovery and Resolution Directive last June’ (HM Treasury, 15 January 2015, link).
- The pro-EU CBI has said: ‘the Eurozone makeup could change, continuing to grow in numbers until the UK is the only country outside the zone, leaving the risk of potentially being outvoted in all areas of EU policy by a Eurozone caucus’ (Our Global Future, November 2013, p. 113, link).
- The EU-funded Centre for European Reform has said ‘the 19 euro countries could caucus and impose their wishes on the 28-country single market. The euro countries can do so since new voting rules – introduced by the Lisbon treaty – came into force last year: their votes combined make a “qualified majority” in the Council of Ministers’ (Centre for European Reform Bulletin, August/September 2015, link).

**The UK is always outvoted when it opposes a measure in the Council of Ministers.** Since records began to be published in 1996, the UK has opposed 72 legislative measures in the Council of Ministers. Every one of these measures has gone on to become law, costing UK taxpayers £2.4 billion per year. The rate at which the UK is defeated is accelerating. 40 of the UK’s defeats have occurred since David Cameron became Prime Minister, meaning he has been outvoted more than any other Prime Minister (Vote Leave, 11 October 2015, link).

**The only example the Prime Minister can give of what could change is the banking union, which is already established and which the UK is not part of because the UK is not in the Eurozone.**
- The Prime Minister, David Cameron, has said ‘because we are not in the single currency, we won’t take part in the profound elements of that banking union’ (Telegraph, 7 June 2012, link).
- The Chancellor of the Exchequer, George Osborne, has said ‘we have fought hard to keep Britain out of a banking union in Europe’ (HM Treasury, 13 February 2014, link).

**The draft Decision emphasises how narrow this ‘principle’ is.**
- The draft Decision makes clear the principle applies only to ‘Union law on Banking Union’ (European Council, 2 February 2016, link).

5. ‘Taxpayers in non-Euro countries should never be financially liable for operations to support the Eurozone as a currency’

**The Government claimed that it had achieved this when it began the renegotiation.**
- In March 2011, the Prime Minister told the House of Commons that ‘we should not have any liability for bailing out the eurozone… I ensured last December that the
eurozone treaty change would carve Britain out of the eurozone bailout arrangements when the new permanent arrangements were introduced in 2013, and specifically secured agreement that, from that point onwards, article 122 would not be used for this purpose. That ends our current potential liability, and makes it clear that from 2013 Britain will not be dragged into bailing out the eurozone’ (HC Deb 28 March 2011, col. 35, link).

- In his January 2013 Bloomberg Speech which launched the renegotiation, David Cameron, said ‘look too at what we have achieved already. Ending Britain’s obligation to bail-out Eurozone members’ (Prime Minister’s Office, 23 January 2013, link).
- In December 2013, the Prime Minister said ‘we got Britain out of the EU Eurozone bailout mechanism’ (Prime Minister’s Office, 20 December 2013, link).

- The Government has accepted this deal was breached by the Eurozone last year.
  - In March 2011, the Government secured a political commitment in the recital to a Decision of the European Council that the European Financial Stabilisation Mechanism (EFSM) should ‘should not be used for such purposes’ [supporting the Eurozone] (European Council Decision 2011/199/EU, recital (4), link).
  - On 17 July 2015, contrary to the 2011 agreement, the Eurozone decided to use the EFSM to grant €7.16 billion in bridging finance to Greece (Council Implementing Decision 2015/1181/EU, art. 1, link).
  - Initially, George Osborne claimed that this episode established ‘an important principle in EU law: that the responsibilities of the euro zone countries and those members of the EU, like Britain, who are not part of the single currency and do not want to be, are very different’ (Reuters, 16 July 2015, link).
  - In his speech to the BDI, the Federation of German Industries, in November 2015, however, the Chancellor of the Exchequer admitted that ‘out of the blue, in flagrant breach of the agreement we’d all signed up to, and without even the courtesy of a telephone call, we were informed we would have to pay to bail out Greece’ (HM Treasury, 3 November 2015, link).

- Without Treaty change, this could happen again. Another promise of a legally binding opt-out from Eurozone bailouts in the draft Decision isn’t credible. The Government has said once it had secured a legally binding opt out from Eurozone bailouts. More promises of the same simply aren’t credible. Article 122(2) of the Treaty on the Functioning of the European Union still allows the Council of Ministers by qualified majority to ‘grant… Union financial assistance’ as part of ad hoc bailouts of the Eurozone (Consolidated Treaties, 2012, link). In September 2015, the EU’s General Court confirmed that this provision ‘enables the Union to grant ad hoc financial assistance to a Member State’ (Anagnostakis v Commission Case T-450/12, para [48], link).
6. ‘Just as financial stability and supervision has become a key area of competence for Eurozone institutions like the ECB, so financial stability and supervision is a key area of competence for national institutions like the Bank of England for non-Euro members’

- **This is the status quo.** Protocol (No 15) to the Treaties states that ‘the United Kingdom shall retain its powers in the field of monetary policy according to national law’ (Consolidated Treaties, 2012, [link](#)).

- **The draft Decision does not recognise this principle absolutely.** It states that it ‘is without prejudice to Union mechanisms of macro-prudential oversight for the prevention and mitigation of systemic financial risks in the Union and to the existing powers of the Union institutions to take action that is necessary to respond to threats to financial stability’ (European Council, 2 February 2016, [link](#)). In other words, the position remains unclear.

7. ‘Any issues that affect all Member states must be discussed and decided by all member states’

- **This will not stop the UK being outvoted and has been endorsed by the draft Decision.** The UK has been in the room on every occasion it has been outvoted by other EU member states. Since records began to be published in 1996, the UK has opposed 72 legislative measures in the Council of Ministers. Every one of these measures has gone on to become law, costing UK taxpayers £2.4 billion per year. The rate at which the UK is defeated is accelerating. 40 of the UK’s defeats have occurred since David Cameron became Prime Minister, meaning he has been outvoted more than any other Prime Minister (Vote Leave, 11 October 2015, [link](#)). The Eurozone countries have a permanent majority in the Council, meaning that the UK can be outvoted on every occasion.
Bucket 2: ‘Competitiveness’

1. ‘[P]otentially massive trade deals with America, China, Japan and ASEAN’

- **This cannot be delivered as part of the renegotiation.** These deals require the agreement of third countries which are not even involved in the renegotiation discussions.

- **The EU has proven very bad at negotiating trade deals. Small countries which do not have to take account of 28 divergent interests have proven better at doing so.** Since the UK joined the then EEC in 1973, it has been prohibited from striking its own trade deals but is instead represented by the European Commission.
  - The Commission has failed to negotiate trade deals with major economies such as the United States, Brazil, India, and China (European Commission, 3 December 2013, [link](#)). It has failed to even begin negotiations with China.
  - Iceland, a country with a population of less than half a million, has negotiated a free trade agreement with China (Icelandic Ministry of Foreign Affairs, April 2013, [link](#)). Switzerland also has a free trade deal with China (Swiss State Secretariat for Economic Affairs, April 2014, [link](#)).
  - The aggregate value of economies with which the EU has free trade deals in force is $6.7 trillion. The aggregate value of economies with which Chile has free trade deals in force is $58.3 trillion. Chile’s free trade agreements are more likely to include services than the EU’s (Civitas, January 2016, [link](#)).

- **The EU has made similar promises and never delivered.** For example, in 2000, the European Council at Lisbon announced ‘a clear strategic goal and agree[d] a challenging programme for building knowledge infrastructures, enhancing innovation and economic reform, and modernising social welfare and education systems… If the measures set out below are implemented against a sound macro-economic background, an average economic growth rate of around 3% should be a realistic prospect for the coming years’ (Lisbon European Council, 23-24 March 2000, [link](#)). The Lisbon Agenda is widely acknowledged to have been a failure, with economic growth in the Eurozone averaging 0.7% between 2004 and 2014, less than a quarter of what was predicted by the European Council (Eurostat, 2 June 2015, [link](#)).

2. A ‘target to cut the total burden on business’

- **The EU has made such commitments before which have never materialised. Promises to the same effect now cannot be taken seriously.**
  - In October 1998, Mario Monti, the Commissioner for the Single Market and Taxation, said: ‘Our aim must therefore be on the one hand to eliminate superfluous rules and those imposing a disproportionate burden on business… For its part, new legislative proposals from the Commission have been reduced to a trickle’ (European Commission, 13 October 1998, [link](#)).
  - In July 2001, the President of the European Commission, Romano Prodi, said the *acquis communautaire* ‘is 80,000 pages long. It is far too much. The Commission has to significantly reduce the number of pages’ (*Financial Times*, 26 July 2001). On the same day, the Commission claimed that after 2005, ‘the number of pages of the acquis could be reduced by about one third’, stating that ‘according to Commission estimates, the *acquis communautaire* will comprise 90,000 pages by 2003. Based on current
experience in consolidating the *acquis communautaire*, there is a potential to reduce this number by between 30,000 and 35,000 pages’ (European Commission, 26 July 2001, link).

- In October 2005, Günter Verheugen, European Commissioner for Enterprise and Industry, said: ‘We propose to scrap, modify or codify more than 1,400 legal acts across all policy areas. Simplification of legislation is also essential for improving competitiveness and conditions for more growth and jobs. It is obvious that red-tape and over-regulation put a break on the EU’s economic growth’ (European Commission, 25 October 2015, link).

### Successive British Governments have claimed to have convinced the EU at last to cut regulation. Promises to the same effect now cannot be taken seriously.

- In September 1992, the Prime Minister, John Major, said ‘the Maastricht treaty itself enshrined the important principle that the Community should only legislate in areas which cannot be better controlled at national level. This meant the scrapping of some existing “overbearing” legislation and the avoidance of new, unnecessary regulation’ (*Press Association*, 7 September 1992).
- In July 1999, the Prime Minister, Tony Blair, said ‘we have halted the tidal wave of new EU legislation. The number of Commission proposals for new legislation has fallen from an average of 50 a year in the early 1990s to fewer than 10 a year recently’ (*Guardian*, 27 July 1999, link).

3. **A ‘clear long-term commitment to boost the competiveness and productivity of the European Union and to drive growth and jobs for all’**

### The EU has made such commitments before which have never materialised. Promises to the same effect now cannot be taken seriously.

- In 2000, the European Council at Lisbon announced ‘a clear strategic goal and agree[d] a challenging programme for building knowledge infrastructures, enhancing innovation and economic reform, and modernising social welfare and education systems…If the measures set out below are implemented against a sound macro-economic background, an average economic growth rate of around 3% should be a realistic prospect for the coming years’ (Lisbon European Council, 23-24 March 2000, link).
- The Lisbon Agenda is widely acknowledged to have been a failure, with economic growth in the Eurozone averaging 0.7% between 2004 and 2014, less than a quarter of what was predicted by the European Council (Eurostat, 2 June 2015, link).
Bucket 3: ‘Sovereignty and subsidiarity’

1. “[T]o end Britain’s obligation to work towards an “ever closer union” as set out in the Treaty”

- The Prime Minister has said that he has already achieved this.
  - The European Council declared in June 2014 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’ (European Council, 27 June 2014, link).
  - The Prime Minister then told the House of Commons that ‘we broke new ground, with the Council conclusions stating explicitly that ever closer union must allow for different paths of integration for different countries and, crucially, respect the wishes of those such as Britain that do not want further integration’ (HC Deb 30 June 2014, col. 600, link).

- The phrase ‘ever closer union’ does not impose any legal obligations on the UK, so removing it will not stop further EU integration which is embedded in the institutions.
  - The EU’s Court of First Instance decided in 2007 that the phrase lacks ‘direct effect’ in law, stating ‘the second paragraph of Article 1 EU, according to which “[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen” lacks direct effect’ (Pitsiorlas v Council [2007] ECR II-4779, para [216], link).
  - The UK’s former Advocate General in the ECJ, Professor Sir Francis Jacobs QC, has said ‘there are references to the idea that this notion creates a legal rule, it seems to me nothing of the kind. It does not create rights or obligations. It does not impose obligations on member states... There is also a view that reference to ever-closer union in the treaty has been used by the Court of Justice as the basis for an integrationist interpretation of the treaty, but again there again seems very little basis for that view. In fact, the phrase seems to have been invoked very rarely by the Court of Justice’ (European Scrutiny Committee, 18 November 2015, link).
  - Professor Damian Chalmers of the London School of Economics has said that ‘there is only one judgment where the phrase really made a difference, which was the Pupino judgment, which has now been superseded’ (European Scrutiny Committee, 18 November 2015, link).
  - Sir Konrad Schiemann, a former Lord Justice of Appeal and Judge of the European Court of Justice, has said the phrase is ‘more in the nature of an aspiration than a legally binding commitment to achieve anything in particular. Although I have judged many cases in which the legality of EU and national legislation and decisions has been in issue, I do not recollect a challenge based on an assertion that the measure in question was in breach of a legal obligation to achieve ever closer union’ (Treasury Select Committee, November 2015).

- The phrase was retained in the preamble to the Maastricht Treaty by John Major as a means of halting EU integration and was omitted from the European Constitution.
• The phrase was retained at Maastricht an alternative to the draft: ‘this treaty marks a new stage in the process leading gradually to a Union with a federal goal’ (Press Association, 8 December 1992).
• The phrase was omitted from the draft European Constitution (Official Journal, 16 December 2004, link).

- **The phrase can only be removed by a Treaty amendment.** Professor Damian Chalmers of the LSE has said that ‘this will require quite a significant treaty change’ (European Scrutiny Committee, 18 November 2015, link). This has not been secured by the Prime Minister.

2. ‘[T]o enhance the role of national parliaments, by proposing a new arrangement where groups of national parliaments, acting together, can stop unwanted legislative proposals’

- **This is not a serious check on the EU institutions.**
  - The former Foreign Secretary, William Hague, stated; “Ah,” they say, “look at the enhanced role of national Parliaments set out in the treaty.” If a majority in half the Parliaments in the EU object to an EU measure, they might be able to block it. Again, it does not take much political analysis to work out that the chances of that mechanism being employed on any regular basis are vanishingly small. It could be used only if 14 different national Parliaments, nearly all of which have a Government majority, defeated an EU proposal, and did so within an eight-week period. We have only to consider that for a moment, as Members of Parliament, to begin to laugh about it. Given the difficulty of Oppositions winning a vote in their Parliaments, the odds against doing so in 14 countries around Europe with different parliamentary recesses—lasting up to 10 weeks in our own case—are such that even if the European Commission proposed the slaughter of the first-born it would be difficult to achieve such a remarkable conjunction of parliamentary votes’ (HC Deb 21 January 2008, col. 1262, link).
  - Professor Damian Chalmers of the London School of Economics has said that it would ‘have largely symbolic effects. In the six years since the Lisbon Treaty came into force, there is not a single instance of a proposal becoming EU law where a yellow card has been issued. The simple reason is that it would be very difficult for the Commission to secure a qualified majority in the Council where it is clear that a third of national parliaments are against the measure. Whilst desirable for protecting against the fanciful scenario where Member States vote such a proposal through, it is likely to make a difference very rarely, if at all’ (European Scrutiny Committee, October 2015, link).
  - The requirement under the draft Decision for 55% of national parliaments to block new EU legislation is so high as to make it highly unlikely that the mechanism will ever be used (European Council, 2 February 2016, link).

- **The yellow card has been used on just two occasions since it was introduced in 2009.** The Commission withdrew one proposal and decided to continue with the other (European Commission, June 2015, link).

- **This would not give the UK Parliament the ability to stop damaging EU law it disagrees with.**
• Even if a clear majority of MPs voted against a damaging new EU law, it would still come into force unless politicians in other EU member states could be persuaded to agree with them in a very short period of time.
• David Cameron admitted in his Chatham House speech that ‘we are not suggesting a veto for every single national parliament’ (Prime Minister’s Office, 10 November 2015, link).
• The President of the European Council, Donald Tusk, has said the UK will not be given a ‘veto right’ (European Council, 7 December 2015, link).

**This would not apply to existing damaging EU law.** Even in the unlikely event that the requisite number of national parliaments did agree, they could only block proposed legislation. They could not repeal any existing damaging EU legislation.

**As the Government have admitted, this would require Treaty change to be legally binding.**
• The so-called ‘yellow card procedure’, the ability of national parliaments to force the Commission to reconsider legislative proposals, is contained in Protocol (No 2) to the EU Treaties (Consolidated Treaties, 2012, link).
• Turning this into a ‘red card procedure’ would require a Treaty amendment in order to bind the EU institutions.
• The Commission ignored a ‘yellow card’ issued by national parliaments over the creation of a European Public Prosecutor in 2013 (European Commission, 27 November 2013, link).
• The Minister for Europe, David Lidington, has accepted that to be made ‘concrete’, a Treaty amendment is required and that all that can be made by the Commission now is a ‘political commitment’ (FCO, 26 June 2014, link).
• The Foreign Secretary, Philip Hammond has admitted ‘ultimately that probably would need to be dealt with by treaty change’ (Andrew Marr Show, 7 June 2015, link).

3. ‘[T]o see the commitments to subsidiarity fully implemented, with clear proposals to achieve that’

**The draft Decision makes clear that no powers will be returned to the UK without a Treaty amendment.**
• The draft Decision states ‘the competences conferred by the Member States on the Union can be modified, whether to increase or reduce them, only through a revision of the Treaties with the agreement of all Member States’ (European Council, 2 February 2016, link).
• Since there will be no Treaty amendment, no powers will be brought back to member states.

**British Governments have misleadingly claimed ‘subsidarity is a meaningful principle for the last twenty years.**
• In June 1992, the Prime Minister, John Major, claimed that the Maastricht Treaty ‘established the principle of subsidiarity rather than centralism’ (HC Deb 3 June 1992, col. 827, link).
• In 1993, the Foreign Secretary, Douglas Hurd, said that ‘the principle of subsidiarity is now for the first time enshrined in the treaty as a substantial and legally-binding decision’ (HC Deb 11 March 1993, col. 1150, link).
In July 1999, the Prime Minister, Tony Blair, claimed ‘subsidiarity is working’ (Guardian, 27 July 1999, link).

‘Subsidiarity is an empty formula’. The ECJ has never struck down EU legislation for breaching the principle of subsidiarity and is unlikely ever to do so.

- The Government has admitted that ‘some would like to see the European Court of Justice (ECJ) playing a bigger role in upholding subsidiarity, pointing to the fact that it has sometimes struck down EU and national measures for violating the principle of proportionality, but has never explicitly done so for breach of subsidiarity’ (HM Government, December 2014, link).

- The leading textbook on EU law, Craig and de Burca, states: ‘the ECJ will not lightly overturn EU action for violation of subsidiarity…. If the CJEU continues with very light touch review, it will be open to the criticism that it is effectively denuding the obligation… of all content’ (P Craig and G de Burca, EU Law: Text, Cases and Materials, (Oxford, 6th ed.: 2015), p. 100).

- On 23 December 2015, Advocate General Juliane Kokott concluded that EU legislation did not contravene the principle of ‘subsidiarity’ even where the EU institutions merely recited ‘an empty formula’ to the effect that the matter was better dealt with by the EU rather than by member states (R (Philip Morris Brands) v Secretary of State for Health Case C-547-14, para [292], link).

4. The ‘UK will need confirmation that the EU institutions will fully respect the purpose behind the JHA Protocols in any future proposals dealing with Justice and Home Affairs matters, in particular to preserve the UK’s ability to choose to participate’

The UK’s ‘opt-out’ from justice and home affairs is contained in Protocol (No 21) to the EU Treaties (Consolidated Treaties, 2012, link). This provides that EU laws adopted under Title V of Part 3 of the Treaty on the Functioning of the European Union are not to apply to the UK unless it opts in to the measure. Title V concerns asylum and immigration policy, judicial cooperation in civil and criminal matters and police cooperation.

- The opt-out is being circumvented by the Commission and ECJ, undermining the UK’s border controls and allowing the EU to control admissions of third country nationals into the UK.

  - Despite the UK’s opt-out, in December 2014, the ECJ decided that the UK could not require third country nationals who are married to EU citizens to obtain a permit from UK authorities to be able to enter the UK. The British Government is instead obliged in principle to accept as valid permits issued by other EU countries (R (McCarthy) v Secretary of State for the Home Department (Case C-202/13), link). This is despite the fact that a High Court Judge had found that forgery of such permits was ‘systemic’ (R (McCarthy) v Secretary of State for the Home Department [2012] EWHC 3368 (Admin), para [99], link).

  - The EU-Philippines Agreement of 2011 allows for provision on migration and development to be made by the signatories, including on ‘admission rules, as well as the rights and status of persons admitted’ and rules governing returns (Council of Ministers, 21 January 2011, link). The UK therefore claimed that it had the right to opt
in to the measure. The Commission and ECJ disagreed, with the latter ruling that because the overall purpose of the agreement was ‘development cooperation’, on which the UK does not have an opt out, the UK was obliged to participate whether it wanted to or not (Commission v Council (Case C-377/12), link).

- **The ECJ has said the purpose of the UK’s opt-out is irrelevant to the question of whether the EU can circumvent it using another provision of the Treaties.** In December 2014, it ruled that ‘Protocol No 21 is not capable of having any effect whatsoever on the question of the correct legal basis for the adoption of the contested Decision’ (United Kingdom v Council (Case C-81/13) at [37], link).

- **Parliamentary committees have concluded the Government’s attempts to protect the opt-out have been a dismal failure.**
  - The House of Lords’ European Union Committee has stated that ‘the only available recourse for the Government to ensure the opt-in Protocol is applied as it wishes, is to seek to renegotiate it’ and that recent ECJ decisions have ‘far-reaching implications’ for the Government’s policy on Justice and Home Affairs (European Union Committee, 24 March 2015, link).
  - The European Scrutiny Committee has also expressed its concerns about how ‘the Government’s policy has been further undermined by the ECJ’ (European Scrutiny Committee, 12 March 2014, link).

- **Since the undermining of the UK’s opt out is the result of decisions of the ECJ interpreting the Treaties, it cannot be stopped without (1) a Treaty amendment (which cannot happen before the referendum) and (2) controls on the ECJ, which the Government is not seeking. The draft Decision will not alter this fact.**

5. **‘National security is – and must remain – the sole responsibility of Member States’**

- **This is, in theory, the status quo.** The EU Treaties already provide that ‘national security remains the sole responsibility of each Member State’ (TEU, art. 4(2), link).

- **The draft Decision will make no difference.** It states that this provision ‘should not be interpreted restrictively’ (European Council, 2 February 2016, link). However, the European Council’s view as to how the Treaty should be interpreted does not bind the ECJ.

- **There is no way of stopping the EU taking control of national security while the ECJ remains in charge of UK law.** The ECJ is increasingly taking control of national security using the Charter of Fundamental Rights. In July 2015, the High Court in London struck down the Data Retention and Investigatory Powers Act 2014 as inconsistent with the Charter (R (Davis) v Secretary of State for the Home Department [2015] EWHC 2092 (Admin), link). In November 2015, the Court of Appeal referred the law to the ECJ to see whether or not it is allowed (R (Davis) v Secretary of State for the Home Department [2015] EWCA Civ 1185, link). When the law was introduced the Home Secretary, Theresa May, stated that it was ‘crucial to fighting crime, protecting children, and combating terrorism’ (HC Deb 15 July 2014, col. 704, link).

- **Since the Government is not seeking any controls on the ECJ, the only way to ensure the British Parliament and Government remain solely responsible for national security is to Vote Leave.**
Bucket 4: ‘Immigration’

1. ‘[W]e should end the practice of sending child benefit overseas’

- **This will have very little impact on immigration due to its limited scale.** Only a small proportion, less than 1%, of EU migrants claim child benefit for children living overseas. In December 2013, there were 20,400 awards of child benefit in respect of 34,268 children living elsewhere in the EU (House of Commons Library, 27 November 2014, link). According to figures from Oxford University’s Migration Observatory, there were 2.67 million EU citizens living in the UK in 2011 (Oxford University, 1 May 2014, link).

- **This is not a major reform.**
  - Even pro-EU politicians such as Nick Clegg have called the current system ‘perverse’ and have said it should end (Guardian, 9 January 2014, link).
  - The European Commission announced in October that it was proposing a ‘revision of Regulations on social security coordination’ (European Commission, 27 October 2015, link).

- **The European Commission has stated that it will be stuck down by EU judges after the referendum unless there is Treaty change.** Lazlo Andor, the then European Commissioner for Social Affairs, said in 2014 that workers from another EU country ‘are entitled to receive child benefits irrespective of whether their children are actually resident in the same country. Currently this is the case in all member states. Any change to these rules would require an amendment to the treaty that would have to be ratified by the parliaments of all 28 EU countries’ (Independent on Sunday, 12 January 2014, link).

- **The draft Decision contemplates the promise will not be fulfilled.**
  - It suggests member states will be given with regard to the exportation of child benefits to a Member State other than that where the worker resides, an option to index such benefits to the standard of living in the Member State where the child resides (European Council, 2 February 2016, link).
  - This is contrary to the 2015 Conservative manifesto, which stated ‘If an EU migrant’s child is living abroad, then they should receive no child benefit or child tax credit, no matter how long they have worked in the UK and no matter how much tax they have paid’ (Conservative Party Manifesto, 2015, p. 30, link).
  - It is highly likely the Government will achieve a victory on this point at the February European Council.

- **This could be vetoed by the European Parliament after the referendum.**
  - The draft decision proposes an amendment to Regulation 2004/883/EC to give effect to its conclusions. Since this regulation was agreed to by the European Parliament and Council by co-decision, any amendment to it must have the concurrence of the European Parliament (TFEU, art. 48, link). Since the deal will be an agreement between the Heads of Government, it will not bind the European Parliament.
2. ‘when new countries are admitted to the EU in the future, free movement will not apply to those new members until their economies have converged much more closely with existing member states’

- **This will not have any effect on migration now.** This is, at best, a promise to defer a future increase in migration.
- **This does not need a renegotiation.**
  - Under the EU Treaties, every member state has a veto on new accessions to the EU (TEU, art. 49, [link]). Under UK law, Parliament would have a veto on any future accession Treaty (European Union Act 2011, s. 4(4)(c), [link]).
  - As the UK’s former Advocate General in the ECJ, Professor Sir Francis Jacobs QC, has said: ‘Those treaties would then have to be ratified by all member states, so every member state, including the United Kingdom, would need to agree on the precise and specific terms by which nationals from new member states were entitled’ (European Scrutiny Committee, 18 November 2015, [link]).

- **The draft Decision merely notes rather than endorses the UK’s position.** The draft Decision states ‘the position expressed by the United Kingdom in favour of such transitional measures is noted’ (European Council, 2 February 2016, [link]).

3. ‘We also need to crack down on abuses of free movement, an issue on which I have found wide support in my discussions with colleagues. This includes tougher and longer re-entry bans for fraudsters and people who collude in sham marriages’

- **David Cameron will obtain strong support for this principle, which will make no difference.** The existing 2004 Directive on Free Movement states that: ‘Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience’ (Directive 2004/38/EC, art. 35, [link]).

- **‘Abuse of rights’ has a very narrow meaning** in EU law which the renegotiation will not change because it proposes no reforms to the ECJ.
  - In December 2014, the ECJ decided that national measures to prevent an abuse of rights ‘must be based on an individual examination of the particular case’. As a result, the UK cannot require the spouses of EU nationals to have a residence card issued by UK authorities to enter the UK ‘in pursuit of an objective of general prevention’ (R (McCarthy) v Secretary of State for the Home Department Case C-202/13, para [52], operative para, [link]). This is despite the fact a High Court Judge had ruled that ‘systemic abuse of rights and fraud calls for systemic measures’ (R (McCarthy) v Secretary of State for the Home Department [2012] EWHC 3368 (Admin) at [99], [link]).

4. ‘[A]ddressing the fact that it is easier for an EU citizen to bring a non-EU spouse to Britain than it is for a British citizen to do the same’

- **The draft Decision does not achieve this.**
  - The Commission’s declaration makes clear that the entry and residence of spouses of EU nationals who have lawfully resided for just one day in another member state will still be regulated by EU law (European Council, 2 February 2016, [link]).
- It will therefore remain easier for an EU citizen to bring a non-EU spouse to Britain than it is for a British citizen to do the same.

**The changes contemplated by the draft Decision could be vetoed by the European Parliament after the referendum.**

- The draft decision of the European Council states that the changes will be adopted by an amendment to Directive 2004/38/EC (European Commission, 2 February 2016, link). Since this Directive was agreed to by the European Parliament and Council by co-decision, any amendment to it must have the concurrence of the European Parliament. Since the deal will be an agreement between the Heads of Government, it will not bind the European Parliament.

**To be fully effective, a Treaty amendment is required, which will not happen.** The ECJ has consistently held that the Treaties grant rights of residence in the UK to third country nationals.

- In 2002, the ECJ held that a third country national could not be removed from the UK in circumstances where it might ‘obstruct the exercise of the freedom to provide services’ by her husband who would be required to look after his children rather engage in economic activity if his wife were removed. The ECJ relied on the ‘fundamental right to respect for family life’ in order to reach its decision (Carpenter v Secretary of State for the Home Department [2002] ECR I-6279, link).

- Professor Damian Chalmers of the London School of Economics has said: ‘There are a number of judgments where the Court has indicated that refusing to grant a non EU national family member residence would violate the Treaty because it would discourage the EU citizen from exercising their rights to free movement. On its face, therefore, unilateral income and language requirements would require Treaty reform’ (Open Europe, December 2014, link).

5. ‘[S]tronger powers to deport criminals and stop them coming back, as well as preventing entry in the first place’

**Existing EU law fetters the UK’s ability to remove criminals.**

- The 2004 Citizens’ Rights Directive makes it very difficult to remove criminals from the UK on the grounds of public policy or public security (Directive 2004/38/EC, link). In 2005, the ECJ held that the Directive forbade member states from having a policy, or even a presumption of removing criminals convicted of a specified offence, such as theft or drug dealing. Instead, in every case, it must be shown, based solely on the personal conduct of the person in question, that the criminal represents a ‘genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society’ (Orfanopoulos v Land Baden-Württemberg [2004] ECR I-5257, link). This has meant that the UK cannot deport violent killers such as Theresa Rafacz (Telegraph, 5 April 2013, link).

**The draft Decision offers no change.**

- The Commission’s proposals will only be contained ‘in a Communication’ (European Council, 2 February 2016, link). Since there is no commitment to amend the 2004 Directive, there is no offer of legally binding change.
The draft Commission declaration states that the ‘Commission will clarify that Member States may take into account past conduct of an individual in the determination of whether a Union citizen’s conduct poses a “present” threat to public policy or security’ (European Council, 2 February 2016, link). Yet the ECJ has already ruled that a previous conviction can ‘be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat’ (R v Bouchereau [1977] ECR 1999, para [28], link).

The draft Commission declaration states that member states ‘may act on grounds of public policy or public security even in the absence of a previous criminal conviction on preventative grounds but specific to the individual concerned’ (R v Bouchereau [1977] ECR 1999, para [28], link). Yet the ECJ ruled this was the law in the first case referred to that court after the UK joined the EEC in 1973 (Van Duyn v Home Office [1974] ECR 1337, link).

To be fully effective, a Treaty amendment is required.

- The ECJ has long held that while the right to free movement must be interpreted broadly, ‘departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed‘ and that ‘exceptions to and derogations from the principle of freedom of movement for workers must be interpreted strictly’ (Bonsignore v Oberstadtdirektor der Stadt Köln [1975] ECR 297, para [6], link; Kempf v Staatssecretaris van Justitie [1986] ECR 1741, para [12], link).

- The ECJ will continue to interpret any new EU directive on this subject very restrictively. It will remain in ultimate control of whether foreign criminals can enter and reside in the UK.

- On 4 February 2016, Advocate General Professor Maciej Szpunar delivered an opinion stating that it was ‘in principle’ contrary to the Treaties to remove a Moroccan national, CS, from the UK, who had been sentenced to a year’s imprisonment (CS v Secretary of State for the Home Department, Case C-304/14, link). It later emerged that CS was Abu Hamza’s daughter-in-law, who had attempted to smuggle a SIM card to him in high security prison (Telegraph, 5 February 2016, link).

6. ‘Addressing’ ECJ judgments that have widened the scope of free movement that has made it more difficult to tackle this kind of abuse

- ‘Addressing’ the ECJ is impossible within the EU.

  - In October 2015, the President of the Court, Koen Lenaerts, said that ‘we speak as Supreme Court of the European Union’ (Wall Street Journal, 14 October 2015, link).

  - The ECJ is in ultimate control of all the other EU institutions. In 1986, the ECJ declared that the EU ‘is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty… [which] established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions’ (Parti écologiste ‘Les Verts’ v European Parliament [1986] ECR 1339, para [23], link).
7. ‘[P]eople coming to Britain from the EU must live here and contribute for four years before they qualify for in-work benefits or social housing’

The Prime Minister has said that ‘we can reduce the flow of people coming from within the EU by reducing the draw that our welfare system can exert across Europe’ (Prime Minister’s Office, 10 November 2015, link). The four year policy is intended to have this effect.

- **Any proposal to reform welfare would have very little impact on immigration.**
  - One of the top three members of the independent Office of Budget Responsibility, Sir Stephen Nickell CBE, has said that the proposal would have ‘not much’ impact on immigration, stating that ‘any changes to benefit rules are unlikely to have a huge impact on migration flows’ (BBC News, 8 December 2015, link).
  - The Foreign Secretary, Philip Hammond, has admitted that changes to welfare are ‘clearly a second-order approach’ compared to ‘quantitative restrictions on migrants’ (Guardian, 18 January 2016, link).

- **Any reforms to in-work benefits will be wholly undermined by the introduction of the living wage.**
  - In his budget statement of 8 July 2015, the Chancellor of the Exchequer announced the introduction of a compulsory national living wage of £9 per hour by 2020. This will increase wages for low-paid, lower skilled migrants from the EU substantially, offsetting any impact of the proposed welfare reforms (HM Treasury, 8 July 2015, link).
  - The Director of the National Institute for Social and Economic Research, Jonathan Portes, has said that the impact of the living wage ‘will be to make the UK labour market more attractive to low-paid EU migrants’ (NIESR, 9 July 2015, link).
  - Research shows the living wage will mean a single migrant from Poland on the minimum wage will be 156% better off in the UK in 2020 than in Poland, even if the welfare reforms are agreed. An equivalent worker from Bulgaria would be 353% better off in the UK than in Bulgaria (Vote Leave, 11 November 2015, link).

- **The Government has been unable or unwilling release statistics on the subject because they would be ‘unhelpful’ to the renegotiation.**
  - In June 2015, the Treasury was asked if it could ‘estimate the number of EU nationals who would not have chosen to migrate to the UK if they had not been entitled to tax credits for the first four years of their stay.’ The Government admitted that ‘the information requested is not available’ (‘Welfare Tax Credits: EU Nationals: Written question – 4124’, 29 June 2015, link).
  - In December 2015, the former Chief Economist at the Cabinet Office, Jonathan Portes, requested under the Freedom of Information Act 2000 various statistics about the number of active national insurance numbers registered to EEA nationals and the number thereof which were linked for claims of tax credits and benefits. The Government replied that it was not obliged to release the information, stating that ‘that releasing information in the form requested would, at this stage, be unhelpful to the negotiation process’ (HMRC, 16 December 2015, link).
On 4 January 2016, HMRC stated that ‘the number of EU families that claimed tax credits in 2013/14 and had been issued a NINO [national insurance number] during the previous four years was 84,000’ (Guardian, 4 February 2016, link). Of these, 50,000 claims were by couples and 34,000 by single persons, i.e 134,000 in total. This is likely an overestimate, as some of the couples include British citizens. In the same period over a million EU citizens registered for national insurance numbers. The Government is still refusing to release the number of EU citizens who are active in the UK labour market (Press Association, 4 February 2016, link).

- **This will be struck down by unelected EU judges after the referendum.**
  - The EU Treaties forbid discrimination ‘as regards remuneration’ between EU workers and national workers (TFEU, art. 45, link).
  - The ECJ has previously ruled that this forbids a discriminatory system of income tax, because of the effect it would have on remuneration (Finanzamt Köln-Altstadt v Schumacker [1995] ECR I-225, link). It will take the same view of a discriminatory system of tax credits.
  - The ECJ has also ruled that a residence requirement which applies only to EU workers is illegal because it ‘constitutes a clear case of discrimination on the basis of the nationality of workers’ (Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout [1985] ECR I-973, para [24], link).
  - A worker from an EU member state with a contributory social security system would not be able to invoke periods of employment in other member states to count towards the four year period in the UK.
  - The ECJ has held that the Treaties require ‘that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement’ and that national legislation may not ‘not purely and simply result in the payment of social security contributions on which there is no return’ because workers have exercised free movement rights (Commission v Cyprus Case C-515/14, paras [34] & [40], link).
  - The leading German MEP, David McAllister, has made clear, ‘there’s no use passing some legislation and then the European Court of Justice repealing it later on’ (Press Association, 4 December 2015, link).
  - The head of the pro-EU Centre for European Reform, Charles Grant, has said ‘even if the Visegrad nations can be persuaded politically to accept this, anybody can go to the ECJ and say “I’m being discriminated against”’ (Telegraph, 28 November 2015, link).

8. **Alternatives to the four year proposal**

- It is possible that a four year residence test for in-work benefits applying only to EU citizens will not be delivered notwithstanding the fact that it will have no impact on EU migration. EU leaders have voiced significant opposition to the proposals:
  - Witold Waszczykowski, Poland’s Foreign Minister, said the Prime Minister’s original proposal was an ‘idea to cancel the basic treaty freedom of the free movement of people’ (Telegraph, 9 December 2015, link).
• Poland’s then Deputy Foreign Minister, Rafał Trzaskowski, said the original proposal was ‘against all the existing laws of the EU and obviously that would be a red line for us’ (BBC News, 2 December 2014, link).

• German Chancellor, Angela Merkel has said ‘it also goes without saying that there are things that are non-negotiable. That there are achievements of European integration that cannot be haggled over, for example ... the principle of non-discrimination’ (Telegraph, 15 October 2015, link). She has also said ‘we don’t want to restrict the EU’s basic principles, non-discrimination and freedom of movement’ (Politico, 17 December 2015, link).

• The Prime Minister of Belgium, Charles Michel, has said that ‘we believe in Belgium... that non-discrimination and equal rights for European citizens is a very important thing’ (Guardian, 11 June 2015, link). His spokesman said that Mr Michel told Cameron his original proposals were a ‘non-starter’ (Telegraph, 11 June 2015, link).

• The President of Romania, Klaus Iohannis, has said ‘no member state is allowed to treat people coming from elsewhere differently from its own people... Nobody wants a discriminatory solution’ (Guardian, 11 June 2015, link).

• Poland, Hungary, Slovakia and the Czech Republic issued a joint statement that ‘as the Visegrad Group countries consider the freedom of movement one of the fundamental values of the European Union, proposals regarding this area remain the most sensitive issue for us. In this respect, we will not support any solutions which would be discriminatory or limit free movement’ (Reuters, 17 December 2015, link).

• The Czech Secretary of State for Foreign Affairs, Tomas Prouza, has said ‘reforms to the social system should apply to everybody. If you haven’t lived in the UK for a number of years, for example, and you are a British citizen or a Czech citizen the same rules should apply. I think that’s the only solution because non-discrimination of EU citizens is a basis of the permanent treaties and I don’t think there is any other way around this’ (Telegraph, 3 December 2015, link).

• The then Foreign Minister of Denmark, Martin Lidegaard, said ‘the solutions we find will be non-discriminatory and will not disturb the free movement of Europe. That’s the red lines for the government’ (Telegraph, 14 June 2015, link).

• The President of the European Council, Donald Tusk, has said ‘We need to come up with a reasonable compromise that is not detrimental to the basic freedoms. There will be no room [for] discrimination’ (Reuters, 18 January 2016, link).

• The President of the European Parliament, Martin Schulz, has said ‘Cameron's four-year benefit ban won't get through. It is not for the EU to accommodate Cameron but the other way around’ (MailOnline, 18 December 2015, link).

• The European Commission has said the proposals are ‘highly problematic as they touch upon the fundamental freedoms of our internal market; direct discrimination between EU citizens clearly falls into this last category’ (Independent, 10 November 2015, link).

• The draft European Council decision states that free movement may be limited ‘on objective considerations independent of the nationality of the persons concerned’ (European Council, 2 February 2016, link).
Any compromise from the Government would be in breach of its manifesto but this does not appear to worry the Government.

- The Conservative Party Manifesto of 2015 pledged that ‘we will insist that EU migrants who want to claim tax credits and child benefit must live here and contribute to our country for a minimum of four years. This will reduce the financial incentive for lower-paid, lower-skilled workers to come to Britain. We will introduce a new residency requirement for social housing, so that EU migrants cannot even be considered for a council house unless they have been living in an area for at least four years’ (Conservative Party Manifesto, 2015, p. 30, link).
- Yet on 5 January 2016, the Prime Minister, David Cameron, said ‘I am very happy to look at alternatives’ (HC Deb 5 January 2016, col. 30, link).
- The Foreign Secretary, Philip Hammond, has said ‘there is no magic about four years’ (Guardian, 18 January 2016, link).

Reforms to welfare would have no impact on migration (see above).

9. A four year residence test applying to all workers

In little noticed comments in November 2015, the Foreign Secretary, Philip Hammond, said that ‘the proposal that we have made for a four-year waiting time would be applied without discrimination to people entering the UK: EU nationals, non-EU nationals, indeed, even people who were born abroad but are British nationals entering the UK workforce for the first time’ (The Times, 14 November 2015, link).

This proposal would hit a significant number of returning expatriates who would be ineligible for in-work benefits for the first four years after their return. Under existing legislation, a person is only entitled to claim benefits if they are ‘ordinarily resident’ in the UK. A person is treated as permanently absent from the UK if at the beginning of a period of absence, their absence is likely to last for more than a year (HMRC, 2006, link). This means that thousands of British citizens returning to the UK, including students who have studied abroad, would lose out.

This proposal will be struck down by EU judges after the referendum without Treaty change.

- As the ECJ ruled in February 2015, ‘the rules regarding equal treatment prohibit not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, such as the residence criterion, lead in fact to the same result… the freedom of movement of workers, first, prohibits a Member State from adopting a measure which favours workers residing in its territory if that measure ultimately favours that Member State’s own nationals, thereby giving rise to discrimination based on nationality’ (Sopora v Staatssecretaris van Financiën Case C-512/13, paras [23]-[24], link).
- In October 2012, the ECJ said Belgian legislation which required benefit claimants, including Belgian citizens, to have completed six years’ education in Belgium was covertly discriminatory and unlawful (Prete v Office national de l’emploi Case C-367/11, link).
10. A four year residence test also applicable to British nationals from the age of 18

- **This would hit tens of thousands of young British working families.** According to HMRC, in December 2015, there were 68,300 single persons in receipt of tax credits aged between 18 and 24, and 32,000 couples in receipt of tax credits where the eldest partner was aged less than 24 (HMRC, December 2015, [link]). This would imply that 132,000 adults under 24 are in receipt of tax credits awarded on the basis of work.

- **Compensation payments to British workers would be unlawful under EU law, since they would have the same effect as a directly discriminatory proposal.** Professor Steve Peers of the University of Essex has doubted whether paying young adults a ‘social payment’ in compensation is legal, saying ‘if the court agreed that Britain was still discriminating against migrant workers, this could be portrayed by the losing side as a con, and that we voted to stay in Europe on a false premise. Calls for a second referendum in that case would be hard to avoid’ ([Independent on Sunday], 9 January 2016, [link]).

- ** Transitional provisions would not help future British claimants.** It is likely that existing claimants will be protected. Future potential claimants will still lose their entitlement to support.

- **It is also likely to be illegal, since it would deter young British nationals from exercising their right to free movement to study at universities elsewhere in the EU.**
  - In 2002, the ECJ struck down Belgian legislation which required benefit claimants, including Belgian nationals, to have completed secondary education in Belgium. This was because such legislation ‘places at a disadvantage certain of its nationals simply because they have exercised their freedom to move in order to pursue education in another Member State’ ([D’Hoop v Office national de l’emploi][2002] ECR I-6191, para [34], [link]).
  - On 21 January 2016, the ECJ held that the Treaties ‘prevent a worker who, by exercising his right of freedom of movement, has been employed in more than one Member State from being treated, without objective justification, less favourably than one who has completed his entire career in only one Member State’ ([Commission v Cyprus][Case C-515/14], para [42], [link]).
  - The ECJ could also take the view that this proposal was a subsidy for British universities which was incompatible with the ‘single market’.

11. Redefining the status of a worker

It has been speculated that new EU legislation might be proposed which ‘would see the term “worker” being redefined. A person would only be classified as a worker… once they earn a fixed sum of money’ ([Daily Mail], 15 January 2016, [link]).

- **The Government would be telling persons working on the minimum wage that they are not ‘workers’.**
  - By law, all persons employed in the United Kingdom, regardless of their nationality, must be paid ‘at a rate which is not less than the national minimum wage’ ([National Minimum Wage Act 1998, s. 1(1)], [link]).
To have any impact, therefore, the Government would have to agree with other EU member states that workers being paid the minimum wage in the UK were not ‘workers’ for the purposes of EU law.

**This would hit those on low pay.** As in-work benefits would only be paid to workers with salaries above the threshold set to qualify as a ‘worker’, millions of low paid British families would lose out.

**This would introduce perversity into the welfare system.** Since in-work benefits would only be paid to workers with salaries above the threshold set to qualify as a ‘worker’, in-work benefits would be payable only to wealthier families.

**This proposal is illegal under EU law.**
- The term ‘worker’ is not defined in the Treaties (TFEU, art. 45, link). The ECJ has always said that ‘the terms “worker” and “activity as an employed person” may not be defined by reference to the national laws of the member states but have a community meaning’ (Levin v Staatssecretaris van Justitie [1982] ECR 1035, para [11], link).
- The ECJ has made clear that neither the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law (Trojani v Centre public d’aide sociale de Bruxelles [2004] ECR I-7573, para [16], link).
- Since these judgments interpret the Treaties, they can only be reversed by Treaty amendment.

**12. Migrants to remain subject to their country of origin’s welfare system for a year**

It has been reported that the European Commission is considering new EU legislation under which ‘migrant workers [would] live off their home country’s benefits for up to a year after arriving’ in a new member state (Independent, 19 December 2015, link).

**This would mean unemployed EU citizens could be supported while seeking work in the UK by the social security systems of other member states.**
- Under EU law, ‘special cash non-contributory benefits’ are benefits funded out of general taxation to provide ‘a minimum subsistence income’, eligibility for which does not depend on having made contributions (Regulation 2004/883/EC, art. 70(2), link).
- At present, ‘special non-contributory cash benefits’ are payable ‘exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence’ (Regulation 2004/883/EC, art. 70(4), link).
- If this proposal were adopted, EU member states could be obliged to support their nationals seeking work overseas with special non-contributory cash benefits.

**This would undermine the Prime Minister’s pledge that EU jobseekers should not be able to claim benefits in the UK (see below).**

**This would make the UK liable to pay benefits to British citizens overseas.**
- At present, claimants for most UK benefits, including jobseeker’s allowance and tax credits, have to be ‘in the United Kingdom’ or ‘in Great Britain’ (Tax Credits (Residence)
The proposal would therefore extend eligibility for benefits to persons leaving the UK, exposing the UK to a significant bill.

13. Making eligibility to claim in-work benefits conditional on a previous claim of out of work benefits

It has been reported that all claimants would be denied in-work benefits unless they have received unemployment benefit in the previous year (BBC News, 13 November 2015, link).

- This would hit millions of British families. According to HMRC, on 2 December 2015, there were 3.135 million in-work families in receipt of tax credits (HMRC, December 2015, link). By contrast, the claimant count for unemployment benefits in December 2015 was 785,900 (ONS, January 2016, link). If this proposal was adopted, millions of families which have not out of work benefits in the previous year would lose out.

- The proposal would create perverse incentives in the welfare system. The BBC has noted that one official said this proposal would ‘create an incentive for people to give up work for a little while in order to subsequently qualify for in-work help’. In addition, ‘the proposal could see someone who has worked for many years failing to qualify for support if their income fell because, for example, their employer cut their hours’ (BBC News, 13 November 2015, link).

- The proposal is likely illegal under EU law because it will be easier for British workers to claim benefits. It is much easier for a UK national to claim unemployment benefits than it is for an EU citizen to do so. In September 2015, the European Court of Justice (ECJ) ruled that the UK could deny jobseekers from other EU countries jobseeker’s allowance, save in very limited circumstances where the EU jobseeker had previously worked in the UK (Jobcenter Berlin Neukoelln v Alimanovic Case C-67/14, link). Making eligibility for in-work benefits dependent on a test which is met more easily by British nationals amounts to covert discrimination, meaning any change could be struck down by EU judges after the referendum.

14. Changes to out of work benefits for EU migrants

It has been reported that the Prime Minister is considering ‘strict new limits on benefit payments to out-of-work migrants rather than those in jobs’ (Observer, 13 December 2015, link).

- The Government claimed it has already achieved this. In his Chatham House speech, the Prime Minister said ‘I promised 4 actions at the election. Two have already been achieved. EU migrants will not be able to claim Universal Credit while looking for work’ (Prime Minister’s Office, 10 November 2015, link).

- The Government will present this as a victory in its renegotiation but it never needed the EU’s permission to change policy, as it has admitted on several occasions.
  - In September 2015, the European Court of Justice (ECJ) ruled that the UK could deny jobseekers from other EU countries jobseeker’s allowance (Jobcenter Berlin Neukoelln v Alimanovic Case C-67/14, link).
  - In November 2014, the ECJ ruled that non-contributory cash benefits, such as jobseeker’s allowance, need not be paid to EU migrants who are not seeking work and never had any intention of doing so (Dano v Jobcenter Leipzig Case C-333/13, link).
• In November 2014, the Prime Minister, David Cameron, said ‘as Universal Credit is introduced, we’ll pass a new law that means EU jobseekers will not be able to claim it and we’ll do this within existing EU law’ (Prime Minister’s Office, 28 November 2014, link).

• The Minister for Europe, David Lidington, admitted in October that all the Government was seeking was a ‘codification of some quite important and welcome European Court judgments’ (European Union Committee, 12 October 2015, link).

• **Very few EU migrants claim out of work benefits now.**
  • A study produced for the European Commission shows that 1% of ‘non-active’ EU migrants in the UK were in receipt of unemployment benefits in 2011, as opposed to 4% of British citizens (ICF GHK, 16 December 2013, p. 52, link).
  • In 2014, just 2.7% of claimants of ‘key out-of-work benefits’ were EU citizens (House of Commons Library, November 2014, link).

• **This proposal will have very little impact on immigration from the EU, as the Government has admitted.** As the Government’s Balance of Competences Review observed, a European Commission study of October 2013 concluded that ‘employment was the main motivation for intra-EU migration and the flow of inactive migrants between EU States was a relatively small proportion of total migrants… On the role of social welfare systems in driving migration patterns or acting as a pull factor, the study concluded there was no available evidence that access to benefits was a significant factor in migration patterns. This is not surprising, given the complexity of systems and variations in how they operate; most migrants’ primary motivation will be to work’ (HM Government, Summer 2014, link).

15. **An emergency brake on welfare payments**

The draft Decision explicitly contemplates an emergency brake on welfare payments. It is likely that the Government will secure an emergency brake on numbers (see the ‘Rabbits out of the Hat’ section below). It is nonetheless worth analysing the mechanism contained in the draft Decision.

• **Like all proposals to reform welfare, it will have no impact on migration (see above).**

• **This could be vetoed by the European Parliament after the referendum.**
  • The draft decision of the European Council states that the emergency brake will be adopted by an amendment to Regulation 2011/492/EU. Since this regulation was agreed to by the European Parliament and Council by co-decision, any amendment to it must have the concurrence of the European Parliament. Since the deal will be an agreement between the Heads of Government, it will not bind the European Parliament.
  • The Prime Minister has admitted ‘this emergency brake can be brought in… only with legislation through the European Parliament’ (HC Deb 3 February 2016, col. 937, link).

• **The emergency brake would be controlled by the European Commission and Council of Ministers, which David Cameron once opposed.**
  • In November 2014, the Prime Minister dismissed ‘some arcane mechanism within the EU, which would probably be triggered by the European Commission and not by us… some sort of EU led, EU determined brake, which would be determined and applied**
probably by the European Commission, I don’t actually think that would be effective’ (Prime Minister’s Office, 28 November 2014, link).

- The draft Decision states that the UK could only trigger the emergency brake with the permission of the Council of Ministers ‘on a proposal from the Commission’ (European Council, 2 February 2015, link).
- The draft Decision states that the Council of Ministers ‘could’ agree to the brake being pulled, not that they will do so (European Council, 2 February 2015, link).

- **This does not comply with the Conservative Party Manifesto.**
  - The Conservative Party Manifesto stated that ‘We will insist that EU migrants who want to claim tax credits and child benefit must live here and contribute to our country for a minimum of four years’ (The Conservative Party Manifesto, 2015, p. 30, link)
  - However, the draft Decision states that ‘the limitation should be graduated, from an initial complete exclusion but gradually increasing access to such benefits to take account of the growing connection of the worker with the labour market of the host Member State’ (European Council, 2 February 2015, link).
  - This makes clear that EU citizens working in the UK will be able to claim in-work benefits during their first four years.

- **This does not restore control over the UK’s social security system.** The draft Decision states that the emergency brake will only apply in ‘exceptional’ situations and that it will be of ‘a limited duration’ (European Council, 2 February 2015, link).

- **It is unclear whether returning expatriates would be caught by this proposal.**
  - The draft Decision is unclear on this point. It states that ‘based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim pursued, conditions may be imposed in relation to certain benefits to ensure that there is a real and effective degree of connection between the person concerned and the labour market of the host Member State’ (European Council, 2 February 2015, link).
  - This would seem to imply that UK expatriates entering the UK labour market in a period when the emergency brake was triggered would be caught by the proposals.

- **Any decision to apply an emergency brake could be vetoed by EU judges without Treaty change.**
  - In January 2016, the Foreign Secretary, Philip Hammond, admitted that ‘there are issues… without treaty change can they be proofed against judgements in European court? (Guardian, 18 January 2016, link).’
  - When the emergency brake is applied, EU migrants entering the workforce will initially not receive in-work benefits, whereas British citizens entering the workforce as school leavers will be able to claim, in effect giving rise to different levels of remuneration. This means that the proposal for an emergency brake raises all the same legal questions as the original proposal to end the payment of in-work benefits to EU migrants during their first four years in the UK (see above).

- **There is little reason to think EU judges will permit the UK to trigger an emergency brake under current levels of migration.**
  - Other countries have far higher levels of net migration than the UK. For example, over a million asylum seekers entered Germany in 2015 (Federal Ministry of the Interior, 18
January 2016, [link](#). As the chart below shows, six member states had higher levels of net migration than the UK in 2014 (the last year for which data are available). This number is likely to have increased in 2015, given the refugee crisis and the fact the UK is not in the Schengen area.

![Crude rate of net migration (2014)](image)

Source: Eurostat, [link](#).

- The European Court of Justice has said that limitations on free movement must be proven by hard evidence. On 21 January 2016, the ECJ said that any move by a national government to restrict free movement to protect the welfare system must be supported by ‘specific evidence substantiating its arguments. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the balance of the social security system’ ([Commission v Cyprus Case C-515/14, para [54], link](#)). The Government has thus far been unable to release statistics showing that the balance of the UK’s social security system is under strain (see above).
Mooted alternatives

1. A new voting system in the Council of Ministers

A likely ‘rabbit’ is some form of ‘double majority lock’, similar to that negotiated by the Government in the European Banking Authority. It provides that for a measure to pass, it must have the support of a majority of states in the Banking Union and those outside it (Regulation 2010/1093/EU, art. 44(1), link). Alternatively, the minority of countries needed to block a proposal might be reduced from countries representing 35% of the EU’s population to countries representing 20% (Sunday Times, 24 January 2016, link). It is highly likely that the Government will emerge victorious in February with a significant strengthening of the draft Decision.

- The draft Decision suggests that a new delaying mechanism will be created.
  - It provides that if an unspecified number of member states outside the Banking Union object, the Council will discuss the issue and potentially refer the matter to the European Council (European Council, 2 February 2015, link).
  - However, ‘any such referral is without prejudice to the normal operation of the Union legislative procedure’ and discussions cannot continue beyond ‘obligatory time limits laid down by Union law’ (European Council, 2 February 2015, link).
  - In other words, the draft Decision contains a delaying, not a blocking mechanism.

- Another delaying mechanism will be of no benefit to the UK.
  - The President of the European Council, Donald Tusk, has said that the EU is considering ‘the possibility of [a] mechanism that will support these principles by allowing Member States that are not in the euro the opportunity to raise concerns, and have them heard, if they feel that these principles are not being followed, without this turning into a veto right’ (European Council, 7 December 2015, link).
  - A delaying mechanism in the Council of Ministers has been in place since an informal meeting of EU foreign ministers in Ioannina in 1994 (EUR-Lex, 21 January 2016, link). This provides that if members of the European Council sufficient to constitute three quarters of a blocking minority (whether by number or population) oppose a measure, then the Council must discuss the matter with a view to achieving consensus (Council Decision 2009/857/EC, link).
  - This delaying mechanism has been of such limited significance that the current Government does not even know how many times it has been invoked (‘EU Law: Written Question No. 10013’, 18 September 2015, link). In 2008, the then Labour Government ‘identified two occasions on which the Ioannina compromise has been invoked in the council’, the most recent in 1996 (HL Deb 6 February 2008, col. WA187, link).

- A genuine new voting system would require Treaty change. The voting mechanism for the adoption of legislative acts in the Council of Ministers is set out in the Treaties (TFEU, art. 238, link; Protocol (No 36), art. 3, link). It can only be altered by a Treaty amendment.

- A genuine new voting system would not stop the UK being outvoted. Even if the Government did secure a genuine, legally binding new voting system, this would not stop the UK being outvoted.
Research shows that if the double majority lock applicable in the European Banking Authority had applied in the Council of Ministers since the introduction of the single currency in 1999, the UK would still have been outvoted on 96% of the occasions that it lost under the old voting system.

Even if the Government succeeding in reducing the blocking minority from countries representing 35% of the EU’s population to countries representing 20%, the UK would still have been outvoted on 90% of the occasions on which it was outvoted since the Lisbon Treaty entered into force in 2009.

2. The ‘British model of membership’ or associate membership

In his Chatham House Speech, the Prime Minister said ‘we need a British model of membership that works for Britain and for any other non-Euro members’ (Prime Minister’s Office, 10 November 2015, link). It is likely that this new status will include some other countries, perhaps Poland, Denmark and Hungary.

- This is a rebranding exercise, not a substantial change. David Cameron said ‘there is no reason why the single currency and the single market should share the same boundary, any more than the single market and Schengen… we have to make sure that there is a point to being in the EU but not in the Eurozone’ (Prime Minister’s Office, 10 November 2015, link). This makes clear the Prime Minister is planning to rebrand the status quo, namely the UK’s opt-outs from the euro and Schengen, as a new model of membership.

- It would require Treaty change. The EU Treaties at present provide that there is only one model available: full membership. In 1979, the ECJ stated that ‘the equality of Member States before Community law’ was ‘at the very root of the Community legal order’ (Commission v United Kingdom [1979] ECR 419, para [12], link). Without a Treaty amendment, it will continue to treat the UK as it does now, as a full member of the EU.

3. Amending the European Communities Act 1972

It has been speculated that the Government is intending to follow suggestions made by the Mayor of London, Boris Johnson, that Parliament should ‘amend section 2 of the European Communities Act, so that we accept the primacy of EU law if, and only if, parliament has not expressly and subsequently decided otherwise, and passed clarifying legislation’ (Daily Telegraph, 18 October 2015, link). This is not part of the renegotiation. As Johnson has said, ‘you don’t need a negotiation’ (Sunday Times, 15 November 2015, link). This proposal will not of itself be of any assistance to the UK:

- This is a confirmation of the status quo.
  - It is an established constitutional principle that EU law only has effect by virtue of the European Communities Act 1972, which, in theory, Parliament could repeal at any time. In March 2015, Lord Mance JSC (with the concurrence of a majority of the Supreme Court) recalled ‘the constitutional fact that the United Kingdom Parliament is the supreme legislative authority within the United Kingdom. European law is part of United Kingdom law only to the extent that Parliament has legislated that it should be’ (Pham v Secretary of State for the Home Department [2015] UKSC 19 at [76], link).
- **This has already been done with no practical consequences.** Section 18 of the European Union Act 2011 provides that: ‘directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act’ (European Union Act 2011, [link](#)). Section 18 has had no impact in practice. Ministers claimed that section 18 was a sovereignty clause when it was passed:
  
  - William Hague, Foreign Secretary: ‘A sovereignty clause on EU law will place on the statute book this eternal truth: what a sovereign parliament can do, a sovereign parliament can also undo. It will not alter the existing order in relation to EU law… This clause will enshrine this key principle in the law of the land’ ([BBC News](https://www.bbc.com/news/6 October 2010, link)). He also claimed section 18 would put the matter beyond doubt ‘once and for all’ ([Guardian](https://www.theguardian.com/6 October 2010, link)).
  
  - David Lidington, Minister for Europe: ‘if we pass clause 18 and enshrine in statute the principle that the authority of European law derives solely from Acts of Parliament… there is no persuasive legal authority to support the contention that the doctrine of parliamentary sovereignty in relation to EU law is no longer absolute. However, there is a need to put the matter beyond speculation for the future. By confirming in statute that directly effective and directly applicable EU law takes effect in this country only by virtue of an Act of Parliament, we are putting the matter beyond doubt for the future’ ([HC Deb 11 January 2011, cols 244-245](#)).
  
  - The Prime Minister’s Office: ‘The Bill also places on a statutory footing the principle that Parliament is sovereign and that EU law only takes effect in the UK by virtue of the will of our own Parliament, expressed through Acts of Parliament’ ([Express](https://www.express.co.uk, 7 August 2011, link)).
  
  - As the Prime Minister admitted, ‘asserting the sovereignty of this House is something that we did by introducing the European Union Act 2011’ ([HC Deb 3 February 2016, col. 934](#)).

- **Disapplying EU law while remaining in the EU would throw the UK’s membership into doubt.**
  
  - If Parliament did ever choose to disapply EU law in a specific case, this would throw the UK’s membership of the EU into doubt. Supremacy and direct effect have been constitutional principles of EU law since the early 1960s and a member state that explicitly chose to reject them would be disavowing the fundamentals of EU membership.
  
  - In January 2011, the Minister for Europe, David Lidington, admitted that ‘of course the political reality is that if we chose to repeal the 1972 Act or to disapply unilaterally a particular piece of European Union legislation, there would be a serious crisis in terms of this country’s relationship with the European Union’ ([HC Deb 11 January 2011, col. 247](#)).

- **Disapplying EU law in a specific case could lead to massive fines for the UK.**
  
  - Under the Treaties, the ECJ can fine the UK for failing to abide by its judgments, whether by way of ‘lump sum or penalty payment’ ([TFEU, art. 260(2)](https://www.eur-lex.europa.eu, link)).
In the 1990s, the ECJ invented the principle that private individuals prejudiced by ‘sufficiently serious’ national legislation which is inconsistent with EU law have a directly effective right to damages in the national courts (Brasserie du Pêcheur SA v Federal Republic of Germany [1996] ECR I-1029, link).

- **The Government has admitted that it will never disapply EU law in practice.** In 2011, the Minister for Europe, David Lidington, made clear the Government had no intention of ever disapplying EU law in practice, stating ‘That might be a state of affairs that some hon. Members would wish to bring about and see as an opportunity, but that is not the Government’s aspiration’ (HC Deb, 11 January 2011, col. 247, link).

- **Requiring the courts to ‘take account’ of the doctrine of parliamentary sovereignty would not oblige courts to give effect to an Act of Parliament rather than EU law.**
  - It has been suggested that the courts will be required to ‘take account’ of parliamentary sovereignty ‘when deciding how to interpret and enforce rulings by the European Court of Justice’ (Sunday Times, 7 February 2016, link).
  - It is lawful to take account of something but to give it no weight. As Lord Hoffmann has stated: ‘The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given… if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it’ (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780-784).
  - The courts have repeatedly held that the requirement to take something into account does ‘not necessarily [mean] to follow’ it (Manchester City Council v Pinnock [2010] UKSC 45, para [48], link).

4. **Domestic legislation on the Charter of Fundamental Rights**

In his Chatham House Speech, David Cameron said ‘as was agreed at the time of the Lisbon Treaty: we will enshrine in our domestic law that the EU Charter of Fundamental rights does not create any new rights. We will make it explicit to our courts that they cannot use the EU Charter as the basis for any new legal challenge citing spurious new human rights grounds’ (Prime Minister’s Office, 10 November 2015, link).

- **David Cameron once promised to negotiate a ‘complete opt-out’ from the Charter.**
  - In 2009, David Cameron said that ‘we will want a complete opt-out from the Charter of Fundamental Rights’ (BBC News, 4 November 2009, link).
  - The 2010 Conservative Manifesto stated that ‘A Conservative government will negotiate for three specific guarantees – on the Charter of Fundamental Rights… with our European partners to return powers that we believe should reside with the UK, not the EU’ (Conservative Party Manifesto, 2010, p. 114, link).

- **This promise has been dropped.**
  - There is no mention of the Charter in the Prime Minister’s letter to the President of the European Council. He is thus not seeking changes at EU-level.
  - A week later, the Foreign Secretary, Philip Hammond confirmed that ‘the Charter of Fundamental Rights is enshrined in the European Union architecture. We have no
proposals in the package we have put forward that would disengage from that’ (European Scrutiny Committee, 17 November 2015, link).

- **What ‘was agreed at the time of the Lisbon Treaty’ is already in domestic law and would not change the Charter’s legal effect, as the Conservatives once argued.**
  - The UK’s ‘opt out’, Protocol (No 30) to the Treaties is currently in force in domestic law (Consolidated Treaties, 2012, link). Since it is part of the Treaties, the Protocol is ‘without further enactment to be given legal effect... in the United Kingdom [and] shall be recognised and available in law, and be enforced, allowed and followed accordingly’ (European Communities Act 1972, s. 2(1), link).
  - Tony Blair told the House of Commons after he negotiated it that it ‘is absolutely clear that we have an opt-out from ... the charter’ (HC Deb, 25 June 2007, col. 37, link). This proved to be wholly inaccurate (see below).
  - The Conservative Party argued Protocol (No 30) was not an opt-out. During the passage of the Lisbon Treaty, Shadow Attorney, General Dominic Grieve, said ‘the protocol is merely a fig leaf... If the protocol is in fact worthless—as in my view it is—there will be instances where the European Union and the European Court of Justice will use the charter of fundamental rights to affect the development of UK domestic law in areas such as criminal justice to which we have opted in’ (HC Deb 5 February 2008, cols 865-866, link).

- **The EU and British courts have repeatedly said the Charter applies in the UK notwithstanding the UK’s ‘opt out’**:
  - In December 2011, the ECJ ruled that Protocol (No 30) ‘does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions’ (R (NS) v Secretary of State for the Home Department (Case C-411/10), para [120], link).
  - In November 2012, the UK Supreme Court stated ‘the Charter thus has direct effect in national law’ (Rugby Football Union v Consolidated Information Services Limited [2012] UKSC 55, para [28], link).
  - In July 2015, Lord Justice Bean, sitting in the Divisional Court, ruled that Protocol 30 ‘cannot be used to prevent the court from defining the extent of rights contained in the Charter which set out provisions within the material scope of EU law’ (R (Davis) v Secretary of State for the Home Department [2015] EWHC 2029 (Admin), para [10], link).

- **The only way to end the legal effect of the Charter is to pass primary legislation stating ‘the Charter has no effect notwithstanding the European Communities Act 1972’**.
  - The Conservatives tabled an amendment to do this at the time of the Lisbon Treaty (House of Commons, 5 February 2008, link).
  - This would throw the UK’s EU membership into doubt and expose the UK to unlimited fines in the ECJ (see above).

5. **The UK Supreme Court to be a ‘constitutional court’ like Germany**

In his Chatham House speech, David Cameron said: ‘we need to examine the way that Germany and other EU nations uphold their constitution and sovereignty. For example, the Constitutional
Court in Germany retains the right to review whether essential constitutional freedoms are respected when powers are transferred to Europe. And it also reserves the right to review legal acts by European institutions and courts to check that they remain within the scope of the EU’s powers or whether they have overstepped the mark. We will consider how this could be done in the UK’ (Prime Minister’s Office, 10 November 2015, link). This is not a serious solution.

- **The President of the Supreme Court and other leading legal figures are opposed to the idea.**
  - Lord Neuberger of Abbotsbury, the President of the Supreme Court, has said ‘One of our great advantages compared with most of Europe is that we have a very simple system of courts and I think replicating the civil, European system of having a supreme court and a constitutional court — a supreme administrative court — is just a recipe for complication, for cost and for unnecessary duplication’ (*The Times*, 4 February 2015, link).
  - The leading barrister, Lord Pannick QC has said: ‘For our Supreme Court to be given a function similar to that of the German constitutional court would not have any practical effect. The proposal has no legal merit. It may have a useful political purpose for the government, but the prime minister should be careful about raising expectations that will not be achievable’ (*The Times*, 4 February 2015, link).

- **The Government says it has already implemented the German model in the UK.**
  - In 2010, the Foreign Secretary, William Hague, stated that the government’s sovereignty clause (see above) ‘will be in line with other EU states, like Germany who in a different constitutional framework give effect to EU law through their own sovereign act. This clause will enshrine this key principle in the law of the land’ (*BBC News*, 6 October 2010, link).
  - In 2011, the Minister for Europe, David Lidington, stated the legislation ‘will be in line with the practice of other member states such as Germany, whose federal constitutional court ruled in 1993, in the case of Brunner v. European Union, that Community law applies in Germany only because laws passed by the German Parliament say that it does’ (HC Deb, 11 January 2011, col. 247, link).

- **The German Constitutional Court is a paper tiger and has never disapplied EU law in practice.** As Judge Landau of the Federal Constitutional Court observed in 2010, there is a ‘problematic tendency which is already recognisable in the previous case-law of the Federal Constitutional Court, that is of only asserting on paper the democratically founded national right to hand down a final ruling on the application of sovereign power in one’s own territory and the concomitant responsibility for compliance with the competences granted to the [European] Union, and of shying away from effectively implementing them in practice’ (*Re Honeywell* 2 BvR 2661/06, (6 July 2010), para [104], link).

- **Giving the UK courts similar powers would politicise the judiciary and would be inconsistent with the separation of powers.** The German Constitutional Court (in theory) asks questions such as whether EU integration means ‘sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions’ (*Re Lisbon Treaty* 2 BvE 2/08, (30 June 2009), para [249], link). This is a political question: in fact, it is what voters are being asked in the referendum. It would be extraordinary for Parliament to give the power to answer such questions to unelected judges.
If the UK Supreme Court did disapply EU law in practice, it would have the same effect on the UK’s membership and financial consequences for the taxpayer as if Parliament had done the same (see above).

- The ECJ has said that national courts as well as national parliaments and governments are under a duty to uphold the supremacy of EU law, stating in 1978 that ‘every national court must, in a case within its jurisdiction, apply community law in its entirety’ (Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629, para [21], link).
- In 2003, the ECJ held that a decision of a national supreme court which was inconsistent with EU law could give rise to a right to damages, stating ‘the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court’ (Köbler v Republik Österreich [2003] ECR I-10239, operative para [1], link).

6. An emergency brake on migration

It is likely that an ‘emergency brake’ on EU migration will be announced as part of efforts to convince the public that the Prime Minister has achieved fundamental change. In January 2016, the Foreign Secretary, Philip Hammond, said ‘the emergency brake is still being discussed in the European commission’ (Guardian, 18 January 2016, link).

- The Prime Minister has previously rightly dismissed this proposal. In November 2014, the Prime Minister dismissed ‘some arcane mechanism within the EU, which would probably be triggered by the European Commission and not by us… some sort of EU led, EU determined brake, which would be determined and applied probably by the European Commission, I don’t actually think that would be effective’ (Prime Minister’s Office, 28 November 2014, link). The EU, not the UK, will ultimately be in charge. Even if the UK is allowed formally to trigger the mechanism, it will not have the final say.

- Any decision to apply an emergency brake could be vetoed by EU judges without Treaty change.
  - The ECJ has held that the right to free movement in the EU Treaties has direct effect in national law. As a result, ‘the application of the limitations and conditions acknowledged… in respect of the exercise of that right of residence is subject to judicial review’ (R (Baumbast) v Secretary of State for the Home Department [2002] ECR I-7091, para [86], link; cf. Walrave v Association Union cycliste internationale [1974] ECR I-1405, link).
  - In January 2016, the Foreign Secretary, Philip Hammond, admitted that ‘there are issues… without treaty change can they be proofed against judgements in European court? (Guardian, 18 January 2016, link).’

- There is little reason to think the European Commission or EU judges will permit the UK to trigger an emergency brake under current levels of migration.
  - The European Commission has previously made clear that any decision to restrict free movement must be based on objective criteria. The then President of the Commission,
Jose Manuel Barroso said in 2014 that ‘an arbitrary cap will never be accepted’ (Telegraph, 20 October 2014, link).

- Other countries have far higher levels of net migration than the UK. For example, over a million asylum seekers entered Germany in 2015 (Federal Ministry of the Interior, 18 January 2016, link). As the chart below shows, six member states had higher levels of net migration than the UK in 2014 (the last year for which data are available). This number is likely to have increased in 2015, given the refugee crisis and the fact the UK is not in the Schengen area.

![Crude rate of net migration (2014)](chart)

Source: Eurostat, link.

- The European Court of Justice has said that limitations on free movement must be proven by hard evidence. On 21 January 2016, the ECJ said that any move by a member state to restrict free movement to protect the welfare system must be supported by ‘specific evidence substantiating its arguments. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the balance of the social security system’ (Commission v Cyprus Case C-515/14, para [54], link). Yet the Government is refusing to release relevant statistics (see above).
Ten broken promises

David Cameron’s renegotiation does not include several key promises that he once made about how he would change the EU. Here are ten of the most significant:

1. ‘[T]he Treaty change that I’ll be putting in place before the referendum’

   Source: The Andrew Marr Show, 5 January 2014, [link].

   - On 16 November 2015, the Minister for Europe, David Lidington, stated that ‘our timetable for referendum by the end of 2017 means that you just cannot [have] treaty negotiation and 28 national ratifications within that timeframe’ (The Herald, 16 November 2015, [link]).
   - This was confirmed by the President of the European Council, Donald Tusk, on 2 December 2015. He stated that ‘it’s impossible to change the treaty before the referendum’ (Guardian, 2 December 2015, [link]).
   - In January 2016, the Foreign Secretary, Philip Hammond, said ‘we know we cannot have it before the referendum; that is impossible’ (Guardian, 18 January 2016, [link]).
   - The draft Decision says that some of its conclusions will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States’ (European Council, 2 February 2016, [link]). This makes clear that each member state could veto the future Treaty and that any changes will occur after the referendum.

2. ‘[W]e want EU jobseekers to have a job offer before they come here’

   Source: BBC News, 28 November 2014, [link].

   - This pledge is never mentioned by the Government today.
   - In 1991, the ECJ held that the Treaties contain ‘the right for nationals of Member States to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment’ (R v Immigration Appeal Tribunal, Ex parte Antonissen [1991] ECR I-745, para [13], [link]).
   - In November 2015, the Foreign Secretary, Philip Hammond confirmed this pledge had been dropped, telling the European Scrutiny Committee that ‘if you are self-supporting, under the principle of freedom of movement you can come to the UK’ (European Scrutiny Committee, 17 November 2015, [link]).

3. ‘[I]f an EU jobseeker has not found work within six months, they will be required to leave’

   Source: BBC News, 28 November 2014, [link].

   - In 1991, the ECJ ruled that the Treaties forbid the removal of jobseekers from another EU member state regardless of the duration of their stay if ‘the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged’ (R v Immigration Appeal Tribunal, Ex parte Antonissen [1991] ECR I-745, operative para, [link]).
   - In his Chatham House speech in November 2015, the Prime Minister said that this pledge had ‘already been achieved’ (Prime Minister’s Office, 10 November 2015, [link]).
The Government admitted in December that some EU migrants can ‘keep the status of jobseeker for longer than six months’ (‘EU Nationals: Employment: Written question – 17574’, 2 December 2015, link).

In any event, EU law forbids systematic verification of whether EU citizens are lawfully resident in the UK (Directive 2004/38/EC, art. 14(2), link).

Removals of EU migrants are thus very limited, with fewer than 4,000 removed in 2014 (Home Office/ONS, September 2015, link).

4. ‘To restore social and employment legislation to national control’

Source: Guardian, 6 March 2007, link.

This forms no part of the renegotiation.

5. ‘A complete opt-out from the Charter of Fundamental Rights’

Source: BBC News, 4 November 2009, link.

In November 2015, the Foreign Secretary, Philip Hammond confirmed that ‘the Charter of Fundamental Rights is enshrined in the European Union architecture. We have no proposals in the package we have put forward that would disengage from that’ (European Scrutiny Committee, 17 November 2015, link).

The Government’s proposals on the Charter are either meaningless or unworkable (see above).

6. ‘Break the formal link between British courts and the European Court of Human Rights’


This is impossible for as long as the UK remains in the EU. This is because the EU Treaties provide that ‘fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms… shall constitute general principles of the Union's law’ (TEU, art. 6(2), link).

7. ‘To limit ... the European Court of Justice’s jurisdiction over criminal law to its pre-Lisbon level’

Source: BBC News, 4 November 2009, link.

The ECJ had no jurisdiction over justice and home affairs until the Lisbon Treaty.

The Conservatives opposed giving the ECJ such jurisdiction at the time of the Treaty, with spokesman Mark Francois stating ‘we believe that it would not be long before important parts of our criminal law were potentially superseded by a body of European law… It would represent a major transfer of power to the EU and severely diminish Britain's control over its criminal justice system’ (HC Deb 29 January 2008, cols 241-242, link).

Nonetheless, in 2014, the Government opted into 35 justice and home affairs measures, including the European Arrest Warrant, thereby accepting the ECJ’s jurisdiction, with the Home Secretary, Theresa May, admitting that ‘it is true that the measures that we opt back
into will be subject to the European Court of Justice’ (HC Deb 7 April 2014, col. 29, [link]; Protocol (No 36), art. 10, [link]).

- The Home Secretary, Theresa May, said ECJ jurisdiction would form part of the renegotiation, telling the House of Commons that ‘I understand the concerns raised about the European Court of Justice in the many debates we have had on protocol 36. I believe we must look again at this matter in our renegotiations with the European Union before the referendum’ (HC Deb 10 November 2014, col. 1238, [link]).
- The matter does not form part of the renegotiation.

8. ‘[R]evising the [working time] directive at EU level’

Source: HC Deb 18 January 2012, col. 746, [link].

- No amendments have been adopted to the Working Time Directive since David Cameron made this promise in 2012.
- On 1 December 2015, the Chancellor of the Exchequer, George Osborne said to the Treasury Select Committee: ‘but are we seeking to put the Working Time Directive front and centre of our renegotiation? No, we are not’ (Treasury Select Committee, 1 December 2015, [link]).

9. ‘The European Parliament must end its absurdly wasteful practice of meeting in Strasbourg as well as Brussels’

Source: Conservative Party European Election Manifesto, 2009, p. 21, [link].

- This forms no part of the renegotiation.

10. ‘[F]urther reform of the EU’s Common Agricultural Policy’

Source: Conservative Party Manifesto, 2015, p. 21, [link].

- On 10 November 2015, the Prime Minister’s Office admitted that ‘we have never mentioned this in the context of the renegotiation’ (Prime Minister’s Office, 11 November 2015, [link]).