

Cameron's 'renegotiations' (or Russian roulette) with the EU

An interim assessment

Michael Emerson

No. 413 / September 2015

Abstract

Since the May 2015 general election when the Tory Party gained an absolute majority in the House of Commons, Prime Minister Cameron has put his campaign into high gear to get a 'new settlement' with the EU and invested much personal diplomacy to try to advance his objective. "What does he really want?" is still heard from other EU leaders, yet his agenda is taking rough shape with calls for results under four headings: "competitiveness, sovereignty, social security and economic governance". These are however only code words for a mixed bag of more specific desiderata, which overall seem to be moderate. Impossible demands have been quietly dropped. Some items will still be tricky to negotiate while others can be placed on the agenda for ongoing EU 'reform' that can be widely supported. The Brussels side of the affair thus seems manageable, but the wild cards at home in the UK remain or are becoming even wilder. The standard hazards of the referendum instrument are now exacerbated by the unknown quantity of the new Labour leadership alongside the aggressively Eurosceptic majority of Tory MPs and the great migration crisis, which is translating now into a negative factor for the EU in UK opinion polls. This ostensibly very democratic process is looking more and more like a deadly serious game of Russian roulette.

CEPS Working Documents are intended to give an indication of work being conducted within CEPS' research programmes and to stimulate reactions from other experts in the field. The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of CEPS.

ISBN 978-94-6138-482-9

Available for free downloading from the CEPS website (www.ceps.eu)

© CEPS 2015

Cameron's 'renegotiations' (or Russian roulette) with the EU

An interim assessment

Michael Emerson*

CEPS Working Document No. 413 / September 2015

Since his re-election in May 2015, Prime Minister Cameron has devoted much of his time trying to advance his 'renegotiations' with the EU, given his commitment to reaching conclusions as soon as possible, ahead of the referendum scheduled for no later than 2017. Cameron has been holding one-on-one talks with the leaders of all other EU member states, whose substantive content has been non-transparent. He has been invited to address the European Parliament, which would be an opportunity to be transparent with respect to his objectives, but his spokesperson has so far only said that he is considering the request.

The reason for this approach is evident enough. He must try to placate his Eurosceptic Tory MPs with the argument that he is in delicate negotiations to secure an important new settlement. But his margin for 'renegotiation' is objectively small, given four major structural facts on the ground:

- The UK's existing opt-outs and special deals are already huge and unique (euro, Schengen, refugee and asylum opt-outs and the special rebate on the budget). The euro and refugee/asylum crises of the past year have only underlined how the UK escapes the heavy commitments shared by most other member states.
- The bulk of the rest of the EU's hard-core activity is around the single market, which is the UK's highest-priority domain, and where on the contrary he wants a fuller opening of the single market for services and further advances in sectoral policies such as for climate change and the digital sector.
- With respect to popular demands for the EU to cut red tape, the Juncker Commission has already given the UK what it has been asking for, in the shape of a first vice-president charged with weeding out unnecessary EU regulations.
- The EU's potentially increasing role in foreign and security policy is subject to unanimity voting rules, so the UK can control any systemic development there as and when such issues are posed.

Cameron's four areas for 'reform'. As a result Cameron's demands are a mixed bag of items, which he presents under much broader labels. After his meeting in Madrid with the Spanish prime minister on 4 September, he told the press that he had "already set out the four areas where we want reform: on competitiveness, sovereignty, social security and economic governance". It is notable and commendable that his key word here is "reform", rather than "renegotiation". This is an important distinction. Reform is something that the UK may do cooperatively together with all the other member states and the EU institutions; renegotiation is about obtaining special conditions for the UK, which as pointed out above, are already very substantial. What is, or might be behind these labels for reform?

* Michael Emerson is Associate Senior Research Fellow at CEPS. Thanks to Steven Blockmans for helpful comments and suggestions.

On '*competitiveness*', Cameron was clear at his Madrid press conference: "We [the UK and Spain] both want to exploit the full potential of the single market, while preserving its integrity for all 28 Member States. We both want to complete the single market in services and energy. We agree the EU must do more to back start-ups and entrepreneurs. We want to create a genuine online single market for businesses and consumers alike. And crucially we want the EU to conclude ambitious new trade deals with the United States, with Japan and with Mercosur – the South American trading bloc.

All of this is regular ongoing EU business, and language supporting these objectives can surely be placed in Cameron's concluding settlement with the EU. In addition, the work of the Juncker Commission in cutting EU red tape can come in here, which Cameron can say to be a major instance of the EU reforming itself in ways that Britain wants.

On '*sovereignty*', there seem to be two issues: the "ever-closer union of the peoples of Europe" (in the preamble to the Lisbon Treaty) and the role of national parliaments in EU legislation.

As regards the "ever-closer union", this is not a legally precise or operational phrase. It is a broad and sympathetic aspiration, and absolutely justified as antidote to the horrors of Europe's recent past. It is not clear why Cameron has chosen to do battle over this particular phrase. Maybe it is the best textual specimen he could find in the Treaty to justify fears that the EU is on some automatic pilot heading towards a federal Europe. But the phrase implies no constitutional commitments at all. It refers to the peoples of Europe, not institutions, and underlines this point by using the word "union" without a capital U, whereas constitutional or legal references in the Treaty to the Union always use the capital U. This means that any debate about what the phrase actually means is bound to throw up a multitude of interpretations, with no clear operational significance. The UK agrees that the eurozone should head towards fuller systemic integration, and so language can surely be found to express this, while saying that the same does not necessarily apply to non-eurozone member states. Given the political importance that Cameron and his party attach to the phrase, one can imagine that negotiations might lead to reassuring language being worked out. This could be given what is being called the 'post-date cheque' treatment, e.g. through agreement at the European Council level that the reassuring language would be included in a Protocol to the next EU Treaty amendment, or some such solution

On the role of national parliaments, radical Eurosceptic Tory MPs want Westminster to have the last word on EU legislation, and thus for parliament to retain the power to deny the application in the UK of 'unwanted' EU laws. Such laws might have been voted for by the UK government in the EU Council of Ministers, or the UK may have been outvoted in instances of qualified majority voting. The Eurosceptic position here would amount to re-imposing a return to unanimity voting on all matters, with the special twist that it would be for any national parliament to opt out of any EU law even after its own government may have voted for it. Such a 'red card' proposal would of course require Treaty amendment, which would have no chance of securing the unanimity of other member states, so its advocates are in reality asking for secession. There is no sign that Cameron is asking for this *kamikaze* proposition, and so the task is to find language to enhance the existing 'yellow card' treaty provisions,¹ such as in some 'green card' proposals of the House of Lords² and Danish

¹ Protocol No. 2 of the TFEU "On the Application of the Principle of Subsidiarity and Proportionality" provides for a procedure whereby a minimum of one-third of national parliaments may require a legislative proposal to be reviewed by the EU institutions.

parliament, or to encourage national parliaments to do their own scrutiny of EU legislation more effectively.³

On '*social security*', this is actually about intra-EU migration and related issues of welfare benefits. In EU law there is the distinction between migrants who are in, or not in the labour force. In all cases the non-discrimination principle is a red line for the rest of the EU. For both categories, however, the Court of Justice of the European Union has recently handed down judgments that help accommodate British concerns, namely the *Dano* case in November 2014⁴ and the recent *Alimanovic* case⁵ on 15 September 2015. For non-active persons, the *Dano* ruling involving a case in Danzig clarifies the competence of member states for determining rights to permanent residence and thence of social benefits. In the *Alimanovic* case, also in Germany, the court judged that member states could in certain circumstances deny non-contributory social benefits to migrants who were searching for work but were without employment. These cases took Cameron by surprise, but allow him now to see that the CJEU has been helping him achieve his objectives. The other member states in this situation should encourage Cameron to maximise the UK's margin of manoeuvre opened by these judgments, which do not then require difficult 'renegotiation'.

In addition the Commission is preparing a legislative proposal, expected for December 2015, under the heading of a 'labour mobility package', which would amend an existing EU law on coordination of social security systems with a view, inter alia, to tackling abuse by intra-EU migrants.⁶ This might help meet other detailed demands by Cameron on social welfare provisions, but this remains to be seen.⁷

For perspective, it should be remembered that the entire 'welfare tourism' debate is not actually about core social security provisions at all. All legally employed workers may receive benefits for which they make contributions, including health care, pension rights and unemployment insurance. Nobody is proposing that legally employed intra-EU migrant workers should be cut out of these core contributory social security provisions. This leaves only the issue of non-contributory social welfare benefits, which tells us that the political debate over curtailing these benefits in order to discourage migration is a red herring. The 'Polish plumber' may well have migrated in search of a normal, legal job with its normal

² See House of Lords European Union Committee, "The Role of national Parliaments in the EU", March 2014. Paragraph 59 reads: "... we would envisage a 'Green Card' as recognising a right for a number of national parliaments working together to make constructive policy or legislative suggestions, including for the review or repeal of existing legislation, not creating a (legally more problematic) formal right for national parliaments to initiate legislation".

³ For a detailed review of the subsidiarity issue and the role of national parliaments, see S. Blockmans, J. Hovenaars, A. Schout and J. Wiersma, "From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU", CEPS Essay No. 10, CEPS, Brussels, April 2014.

⁴ See C-333/13, *Elisabeta Dano v Jobcenter Leipzig* (<http://curia.europa.eu/juris/liste.jsf?num=C-333/13>).

⁵ See C-67/14, *Jobcenter Berlin Neukölln. v. Nazifa Alimanovic* (<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-67/14>).

⁶ Regulation EC/883/2004.

⁷ For a thorough review of how these Court judgments relate to Cameron's demands in this area, see Steve Peers, "EU Citizens' Access to Benefits: The CJEU clarifies the position of former workers", EU Law Analysis, 15 September 2015 (<http://free-group.eu/2015/09/15/eu-citizens-access-to-benefits-the-cjeu-clarifies-the-position-of-former-workers/>).

social security provision, but there is no evidence at all that he came in pursuit of the marginal extra non-contributory social benefits.

More broadly, there are demands from Tory MPs for opting out again from EU labour market regulations, on which Cameron has not yet made his position clear. Remember that the UK has zigzagged on this – out under Prime Minister Major, in under Blair and still today. The latest twist here comes with the election of the new, far-left Labour Party leader, Jeremy Corbyn. There has been speculation that if Cameron requests and gets a renewed opt-out over EU labour market law, there will be pressures in his party and in the trade unions to vote for Brexit in the referendum. While Corbyn has himself moved fast to try and dispel this concern, the political response within the UK to a renewed opt-out will be bitterly divisive.⁸ So other member states can be tough here, knowing that Cameron's position is problematic at home.

Finally, under this heading there is Cameron's demand that future EU enlargements should not again result in 'massive migrations'. This is the easiest box to tick, since all enlargements are subject to unanimity, and indeed even each chapter, such as for free movement of people, has to be signed off as an individual decision by all member states. So a future British government can control the transitional arrangements, as can any other member state.

On '*economic governance*', Cameron declared in Madrid: "We both believe that further reform is needed within the eurozone, while upholding the rights of those EU Member States that are outside the euro." The Chancellor of the Exchequer, George Osborne, has also been travelling in Europe to advance the case for safeguards for non-euro member states. There was already in 2013 legislation providing for a 'double-majority' decision-making rule for actions of the European Banking Authority (EBA) and European Securities and Market Authority (ESMA): meaning that decisions should be supported by a qualified majority of both euro and non-euro member states. Here the lawyers have the task of building on this model to find some legally robust and operational language to cover the UK's legitimate concerns in a manner acceptable to other member states. However, in the event of the UK's secession, there will be no such safeguards at all, only the certainty that other member states with serious financial market ambitions, starting with France and Germany, would use new opportunities to engineer competitive advantages for their financial markets. This is a point that the Eurosceptics seem not to have digested.

The French economics minister is now saying explicitly that the eurozone should be strengthened with measures requiring a Treaty change after the French and German elections in 2017, and that UK concerns could be bundled into that. This would meet UK demands for Treaty changes, except that it would come after the referendum. However this would again constitute a 'post-dated cheque' treatment, i.e. a binding agreement to include a specified change in a future Treaty. Lawyers would have to work out a secure formulation for precisely how this would work.

⁸ Writing in the *Financial Times* on 17 September, soon after his election as leader of the Labour Party, Mr Corbyn sought to dispel concerns that his position on the EU might be equivocal (he voted against the EU in the 1975 referendum): "Our shadow cabinet is clear that the answer to any damaging changes that Cameron brings back from negotiation is not to leave the EU but to pledge to reverse those changes with a Labour government elected in 2020."

The dogs that are no longer barking. In Cameron's early speeches on Europe, there was talk of repatriating EU powers, including also the powers of the European Court of Human Rights.

Repatriation has disappeared from the script. The Eurosceptic war cry was and still is for repatriation of competences of the EU back to the national level. However, the most constructive element in Cameron's policy over Europe was to undertake a comprehensive 'Balance of Competences Review', for assembling evidence from independent sources on where the EU might have gone too far in extending the competences of the EU. The 30 volumes of evidence published, however, came to the overall conclusion that the actual balance of competences between the EU and the member states, often under 'shared competences', was about right.⁹ So 'repatriation' has disappeared from Cameron's public discourse, which is just as well, since if he were to propose repatriation of this or that competence now, his request would not only fail to win support from the rest of the EU, but his own government's evidence would also be quoted to contradict such requests.

So this has been a rational learning process. The Eurosceptic Tories who continue to argue for repatriation are now effectively and deliberately arguing for secession, since such demands have no chance of acceptance.

On human rights, various Eurosceptic Tory MPs want the legal status of judgments of the European Court of Human Rights¹⁰ to be downgraded to being merely advisory, leaving parliament free to decide whether to follow them or not. This position was advocated by Chris Grayling MP when he was Justice Minister in the first Cameron government. Lawyers have pointed out that this was an impossible proposal for the Court or Council of Europe to accommodate, and others have pointed out the huge reputational damage this would mean for the UK at a time it was celebrating the 800th anniversary of the Magna Carta. In the second Cameron government, Mr Grayling has been moved to another position, and the subject of human rights seems to have dropped off the agenda.

These two examples illustrate how untenable proposals may have been espoused in the early days of Cameron's Europe policy, but that with the passage of time and due deliberation they can be filtered out.

On 'the question'. Cameron pledged an 'in' or 'out' referendum. His first proposal for formulating the question was:

"Should the UK remain a member of the European Union? Yes, or No?"

This was objected to on the grounds that it gave a positive bias to the 'Yes' camp. Eurosceptic Tories therefore pushed him into an allegedly neutral question, which now appears in the European Union Referendum Bill as:

"Should the United Kingdom remain a member of the European Union or leave the European Union?"

The possible responses to this question to appear on the ballot paper will be:

⁹ As analysed in detail in M. Emerson (ed.), *Britain's Future in Europe - Repatriation, Renegotiation, Reform or Secession*, London and Brussels: Rowman & Littlefield International and CEPS, 2015.

¹⁰ NB this does not directly concern the EU since the target is the Strasbourg-based Court of the Council of Europe. However, there are indirect implications for the EU since the European Convention on Human Rights is referred to in the EU treaties.

“Remain a member of the European Union” or “Leave the European Union”.

The criticism of bias in the first formulation has validity. But this has led to a revised formulation that has its own serious bias. The ‘remain’ option is clear for what it will stand for, namely the status quo system of the EU, enhanced by whatever specific results Cameron obtains from his renegotiations.

By contrast, the ‘leave’ option is hugely underspecified. There are many possible results from the negotiations that the UK would have to undertake in order to secede. First, there is the primary issue of whether to try to retain the fullest possible inclusion in the EU’s single market, for which there is a tailor-made solution, namely the Norwegian option in the European Economic Area (EEA). But Cameron has already said that this would be unacceptable on grounds that it would insufficiently repatriate sovereignty. What then would it mean to go for less than the EEA? For example, following Eurosceptic preferences, there could be limitations on the free movement of EU citizens into the UK (requiring visas?) and their freedom of employment in the UK (work permits?). If this were the case, there is every likelihood that the EU would demand reciprocity. Will therefore the ‘leave’ option be accompanied by an explanation that UK citizens might no longer be guaranteed the freedom to choose to retire or live half the year in sunny Spain, or that professional people might be required to apply for work permits to accept a job in the EU? There is no sign so far that the government intends to give any such guidance on the meaning of the ‘leave’ option. One can speculate that the government will not face up to these questions, with the argument that they hope to be able simply to recommend the ‘remain’ option. But the impression for those not well informed about the EU (i.e. a large majority of the population) could be that to ‘leave’ is as easy as it is to leave a golf club. This would be a gross and irresponsible neglect of duty by the government.

Who will vote? The referendum bill gives the right to vote to anyone entitled to vote in UK parliamentary elections in any constituency, plus Gibraltar, plus (as a bizarre and exotic detail) Commonwealth and Irish citizens living in Gibraltar. We have no time here to enquire into what quaint matters of precedence and custom may explain this latter detail. Much more important is the clear and simple fact that as many as around 2 million British citizens living now in other EU member states as workers or pensioners are to be denied the right to vote on what could affect them very directly on matters of residence, employment and social security provision. (The present writer declares his interest as one of the two million.)

On the political climate for final deliberation. The well-known political hazard of the referendum instrument is that voters may be influenced by burning contemporary issues other than the one appearing on the ballot paper. This hazard is especially great for the Cameron referendum campaign, which started effectively in 2013 and will have had to live through four to five years of politics before the actual referendum day in 2016 or 2017. During this time, Europe has seen the outbreak of dramatic events that dominate the news, such as Russia’s hybrid war against Ukraine, the continuous twists and turns of the Greek euro crisis, and now the chaotic flood of asylum-seekers and refugees fleeing war and devastation in the Middle East and Africa. Illustrating the referendum hazard all too clearly, results from opinion polls in the UK have shifted in recent weeks from a majority in favour of remaining in the EU to a small majority supporting secession. The change has reportedly been influenced by the negative images of the refugee crisis, neglecting the fact that the UK insulates itself largely from its effects owing to its Schengen opt-out.

Thus, secession from the EU would not change anything for the UK on this score. At the same time, the UK's effective evasion from the huge solidarity issues confronting both the eurozone and the Schengen area will not help the UK to secure understanding for its renegotiation demands where these are difficult from other member states.

In conceding to Eurosceptic pressures to decide the matter with a referendum, Cameron launched a multi-year process that began with admirable research in pursuit of an evidence-based resolution to the question. This may have helped the government to moderate its demands and bring them into the realm of potential negotiability, but it did not bring under control the wild cards in the British political arena, which are ominous: the continuingly aggressive Euroscepticism of the majority of Tory MPs, the unknown quantity of the new Labour Party leadership in Jeremy Corbyn, and the continuing flow of new headline events that dominate public attention, from the Grexit crisis now on to the great migration crisis, which can heavily influence voting on a referendum that focuses on a different question. This means that Cameron's ostensible intention to resolve the question democratically is becoming more and more like a deadly serious game of Russian roulette. He should have known that from the start.

References

- Blockmans, S., J. Hoevenaars, A. Schout and J. Wiersma (2014), "From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU", CEPS Essay No. 10, CEPS, Brussels, April 2014.
- Emerson, M. (ed.) (2015), *Britain's Future in Europe - Repatriation, Renegotiation, Reform or Secession*, London and Brussels: Rowman & Littlefield International and CEPS, 2015.
- House of Lords (2014), "The Role of national Parliaments in the EU", European Union Committee, March (www.parliament.uk/role-of-national-parliaments).
- Peers, Steve (2015), "EU Citizens' Access to Benefits: The CJEU clarifies the position of former workers", EU Law Analysis, 15 September (<http://free-group.eu/2015/09/15/eu-citizens-access-to-benefits-the-cjeu-clarifies-the-position-of-former-workers/>).



ABOUT CEPS

Founded in Brussels in 1983, the Centre for European Policy Studies (CEPS) is widely recognised as the most experienced and authoritative think tank operating in the European Union today. CEPS acts as a leading forum for debate on EU affairs, distinguished by its strong in-house research capacity, complemented by an extensive network of partner institutes throughout the world.

Goals

- Carry out state-of-the-art policy research leading to innovative solutions to the challenges facing Europe today,
- Maintain the highest standards of academic excellence and unqualified independence
- Act as a forum for discussion among all stakeholders in the European policy process, and
- Provide a regular flow of authoritative publications offering policy analysis and recommendations,

Assets

- Multidisciplinary, multinational & multicultural research team of knowledgeable analysts,
- Participation in several research networks, comprising other highly reputable research institutes from throughout Europe, to complement and consolidate CEPS' research expertise and to extend its outreach,
- An extensive membership base of some 132 Corporate Members and 118 Institutional Members, which provide expertise and practical experience and act as a sounding board for the feasibility of CEPS policy proposals.

Programme Structure

In-house Research Programmes

Economic and Social Welfare Policies
Financial Institutions and Markets
Energy and Climate Change
EU Foreign, Security and Neighbourhood Policy
Justice and Home Affairs
Politics and Institutions
Regulatory Affairs
Agricultural and Rural Policy

Independent Research Institutes managed by CEPS

European Capital Markets Institute (ECMI)
European Credit Research Institute (ECRI)

Research Networks organised by CEPS

European Climate Platform (ECP)
European Network for Better Regulation (ENBR)
European Network of Economic Policy
Research Institutes (ENEPRI)
European Policy Institutes Network (EPIN)