# EU Renegotiation: Fighting for a Flexible Union

## How to renegotiate the terms of the UK's Membership of the EU

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# Foreword

Our main aim should be the full return of our powers of self-government, but that can't happen before the referendum promised for 2017. In the meantime, the Government plans to try to re-negotiate our relationship with the EU. There is little sign from other EU members that anything other than token concessions will be made. Nevertheless we should enter into the negotiations in good faith and so we invited Glyn Gaskarth to identify the powers we would like to be returned. He has produced a very worthwhile list of recommendations and, even if the negotiations draw a blank, his proposals serve as useful reminder of the vast powers that we have given up.

*David Green, Director of Civitas*

# Executive Summary

In January 2013 Prime Minister David Cameron began a countdown to a UK referendum on EU membership that would be preceded by a renegotiation of Britain's terms of EU membership. The UK possesses considerable diplomatic assets. We are a net contributor to the EU budget, have a net trade deficit with the EU, the City of London is the premier world financial centre, UK labour market policies represent a model of job creation that EU states can emulate, UK fishing grounds are very productive and EU fishermen want to access them, our EU partners have made greater use of the European Arrest Warrant than the UK has and continuation of a similar system will be beneficial to them. The UK's position as a world military power and member of the UN Security Council adds an additional weight to EU foreign policy positions. Contained within this report I also explore areas of policy where the UK could make policy concessions to achieve the goals outlined below. The twelve proposals contained below are our preferred policy aims. Within each chapter we also explore alternative aims that the UK negotiating team could explore if the below are too difficult to achieve.

| | **UK Policy Aim** |
|---|---|
| 1 | Secure a new agreement that opt-outs/carve-outs secured by any state must remain an option for that state if a subsequent administration decides to opt-in |
| 2 | An 'emergency brake' must be created to allow the UK to direct EU financial regulation proposals to the European Council, where the UK has a veto |
| 3 | The implementation of the new EU voting system must be blocked. Double majority voting must be installed in the EU arrangements in all measures affecting the Single Market to require a qualified majority among both (i) Eurozone and (ii) non Eurozone members for a regulation to pass |
| 4 | Derogate from Articles 151 to 161 Treaty on the Functioning of the European Union so we can restore control of employment and social regulation to UK competence |
| 5 | Secure the right to restrict welfare payments to prevent nationals from Romania and Bulgaria accessing them until they have a record of UK tax contributions |
| 6 | Revoke the Long Term Residents Directive and deport individuals that pose a threat to UK national security to non EU states even if they face mistreatment on their return |
| 7 | Protect UK independent representation at the UN, prevent the EU taking foreign policy decisions which adversely affect UK trade relations or committing the UK to military action unless UK support has been obtained through policy concessions elsewhere |
| 8 | Opt out of the European Convention on Human Rights and the Charter of Fundamental Rights and prevent the EU gaining power over UK asylum and immigration policy |
| 9 | Use existing powers of enhanced cooperation between groups of member states to negotiate enhanced trade deals between non-Eurozone members |
| 10 | Repatriate Common Agricultural Policy UK receipts and add that sum to the UK rebate and allow the UK to develop its own agricultural policy and attempt to repatriate UK fishing waters with an agreement to allow access to fisherman based in other EU states |
| 11 | Remove the UK from the European Arrest Warrant and trade bilateral extradition agreements with other EU states for policy concessions in other policy areas that are a UK priority |
| 12 | Reserve one of the commercial portfolios in the European Commission for the UK |

# Background

In January 2013 Prime Minister (PM) David Cameron at a speech at Bloomberg promised that the Conservative Party Manifesto in 2015 would "*ask for a mandate from the British people for a Conservative Government to negotiate a new settlement with our European partners in the next Parliament*." By the end of 2017, if elected, the Conservative Party would "*give the British people a referendum"* to *"stay in the EU on these new terms; or come out altogether. It will be an in-out referendum*."[1] This would be preceded by a period in which the terms of UK membership would be renegotiated. Conservative backbenchers tabled a parliamentary motion expressing regret that there was no mention of the referendum in the Queen's speech in 2013. PM David Cameron clarified his position indicating that were he PM in 2017 there would be a referendum. The omission of reference to the need for a Conservative majority government in the latest statement implies this would be a top priority and potential deal breaker in any future coalition negotiations.

The Liberal Democrats promised an in-out referendum in their 2010 General Election Manifesto. Leader Nick Clegg declared "*the Liberal Democrats want a real referendum on Europe. Only a real referendum on Britain's membership of the EU will let the people decide our country's future*."[2] They now oppose a referendum. Deputy Prime Minister Nick Clegg condemned the move stating "*The priority of the Liberal Democrats is to build a stronger economy in a fairer society. Now, that job is made all the harder if we have years of grinding uncertainty because of an ill-defined, protracted renegotiation of Britain's status within the European Union*."[3] Labour party leader Ed Miliband clarified his party's position, he stated: "*Our [the Labour party's] position is no: we don't want an in-out referendum*."[4]

Renegotiation will seek to amend the aspects of the European Union that British politicians find damaging to UK interests. The Confederation of British Industry (CBI) Director General John Cridland puts it best - he said that " *our challenge on Europe is to get it to do more of the stuff it does well and less of the stuff it does badly. I'm a European realist*."[5]

This report aims to provide a list of powers the UK should seek to repatriate. Former UK Chancellor Nigel Lawson suggests the renegotiation process will not achieve anything substantial. Supporters of a UK exit from the EU may wish for negotiations to fail. However, both supporters and opponents of our EU membership will benefit from the compilation of a list. Negotiations must be evidence based. They cannot succeed if the UK does not have a firm idea of what it desires and what it is willing to accept. Having a firm idea of UK aims makes it more likely that the renegotiation process will succeed. If UK proposals are rebuffed or watered down those seeking a UK exit will be emboldened. The EU would be shown to be inflexible and incapable of reform. A list would highlight the gap between the UK vision of

[1] Number 10, Bloomberg, *EU Speech at Bloomberg*, David Cameron, 23 January 2013
[2] New Statesman, *The EU referendum leaflet that will haunt Clegg today*, George Eaton, 15 May 2013
[3] The Guardian, *Ed Miliband unnerves colleagues by rejecting in-out EU referendum*, Patrick Wintour, 23 January 2013
[4] The Guardian, *Ed Miliband rules out support for in-or-out referendum*, Nicholas Watt, 23 January 2013
[5] CBI, *Fight tooth and nail for the benefits of the EU and against but against bad EU policies,* John Cridland, CBI Director-General, 21 March 2013

the EU and the compromises our EU partners are willing to make. This may be why the Foreign and Commonwealth Office, which is conducting a Balance of Competences Review to outline the full extent of EU powers, refuses to compile a list of target powers for repatriation.

# Introduction

This report considers what powers the UK should seek to repatriate in nine policy areas. These include; trade, city regulation, employment rights, Common Agricultural Policy, Common Fisheries Policy, national borders and immigration, foreign & security policy, the European Arrest Warrant and human rights. I consider the policy tools the UK can use to gain concessions, the allies the UK could cultivate and the relative value of each policy goal. Before considering these policy areas I consider the parameters of the renegotiation process as defined by Cameron in his speech at Bloomberg in January 2013, which began this debate.

Prime Minister David Cameron described British membership of the EU as "*a means to an end…not an end in itself*", and added "*our participation in the single market, and our ability to help set its rules, is the principal reason for our membership of the EU*."[6] He then specified that as "*there is not, in my view, a single European demos*" - national parliaments "*are, and will remain, the true source of real democratic legitimacy and accountability in the EU*" and should have powers returned to them. He implicitly rejected EU moves to give itself greater democratic legitimacy by transferring powers to the European Parliament. He preferred to negotiate reform on an EU-wide basis but said "*if there is no appetite for a new Treaty for us all then of course Britain should be ready to address the changes we need in a negotiation with our European partners*." Unfortunately he then proceeded to undermine Britain's negotiating position by declaring that his preference was to remain in the EU, suggesting the alternatives were not that attractive and a Britain outside the EU would be weaker.

Mr Cameron stated that "*even if we pulled out completely, decisions made in the EU would continue to have a profound effect on our country*" as we negotiated access to the Single Market having "*lost all our remaining vetoes and our voice in those decisions*."[7] He asked "*would that really be in our best interests?*" Britain was more respected worldwide as an EU member and "*there is no doubt that we are more powerful in Washington, in Beijing, in Delhi because we are a powerful player in the European Union*." Consequently, we should "*think very carefully before giving that position up*" because leaving the EU "*would be a one-way ticket, not a return*." He recognised: "*The fact is that if you join an organisation like the European Union, there are rules. You will not always get what you want*." But not always getting what you want "*does not mean we should leave*." In fairness to the Prime Minister, he suggested the EU was stronger with the UK involved and: "*It is hard to argue that the EU would not be greatly diminished by Britain's departure,*"[8] Given the Prime Minister's analysis it is fair to ask why our EU partners should contemplate concessions. Even the Balance of Competences Review statement declares that "*we are committed to playing a leading role in the European Union in order to advance our national interest. The single market is one of the greatest forces for prosperity the continent has ever known*."[9] Leaving

[6] David Cameron, No 10, *EU Speech at Bloomberg*, Bloomberg, 23 January 2013
[7] Idem
[8] Idem
[9] Foreign and Commonwealth Office, *Review of the Balance of Competences between the United Kingdom and the European Union*, July 2012, P4

the EU appears to be a hollow threat. UK negotiators may recall the comments of Lord Howe in his resignation speech about sending people into bat when the bat has already been broken by the team captain.[10]

Alastair Campbell, Communications Director for the previous Labour administration, was critical of the lack of a clear plan. He wrote that "*nobody inside No 10 seems to have a clue about the answers to some very basic questions. When is he making the speech? Where? Why? What is its strategic purpose? How does it fit with broader strategic goals? What are the main arguments he is putting forward? Who will support the main arguments and who will oppose them? What third parties are being lined up to echo his views? What are the potential diplomatic ramifications?*"[11]

A vital first step is to understand how the EU exercises powers in different policy areas. This is the task of the Balance of Competences Review. Initiated by the Foreign Secretary William Hague in July 2012, it aims to be "*an audit of what the EU does and how it affects the UK*" in 32 different policy areas.[12] Departments will prepare reports and draw on the evidence submitted to them over the course of four semesters. The timeline is contained below.

| **Review period** | **Topics** |
|---|---|
| Autumn 2012- Summer 2013 | Internal market (BIS), taxation (HM Treasury), Animal Health and Welfare and Food Safety (Department for Environment, Food and Rural Affairs), Health (Department of Health), Development Cooperation and Humanitarian Aid (Department for International Development), Foreign Policy (Foreign & Commonwealth Office). |
| Spring 2013 – Winter 2013 | Internal Market: Free movement of goods (HM Revenue & Customs), Internal Market: Free Movement of Persons (Home Office0, Asylum and Immigration (Home Office), Trade and Investment (BIS), Environment and Climate Change (DEFRA), Transport (Department for Transport), Research & Development (BIS), Tourism, Culture and Sport (DCMS) AND Civil Justice (Ministry of Justice). |
| Autumn 2013 – Summer 2014 | Internal Market: Services (BIS), Internal Market: Capital (HM Treasury), EU Budget (HM Treasury), Cohesion (BIS), Social and Employment (BIS), Agriculture (DEFRA), Fisheries (DEFRA) Competition (BIS), Energy (Department of Energy and Climate |

[10] New Statesman, *Geoffrey Howe 1990 Resignation Speech*, House of Commons

[11] The Guardian, *The saga of David Cameron's Europe speech exposes his strategic failings*, Alastair Campbell, 15 January 2013

[12] Foreign and Commonwealth Office, *Review of the Balance of Competences between the United Kingdom and the European Union*, July 2012, P6

| | |
|---|---|
| | Change), Fundamental Rights (MOJ). |
| Spring 2014 – Autumn 2014 | Economic and Monetary Union (HM Treasury), Workplace Health and Safety and Consumer Protection (Health & Safety Executive), Police and Criminal Justice (Home Office), Education (Department for Education), Enlargement (FCO), Cross Cutting Areas of EU Competence (Cabinet Office, FCO and MOJ), Subsidiarity and Proportionality (Foreign & Commonwealth Office). |

It is also important to understand how the EU assumed these powers. The Foreign and Commonwealth Office outlines below how the competences the EEC/EU gained with each new Treaty. This shows that European integration has been relentless but gradual. A 'big bang' repatriation of powers seems unlikely. A more realistic aim would be to view concessions made prior to any referendum as a down payment. Subsequent negotiations would need to make further progress. Central to any deal would be an agreement that any opt-outs won in one administration would be permanent. If the UK chose to opt back in to any legislation under a different administration then subsequent administrations should retain the right to re-opt out of that legislation. This would reflect the ideological differences present within EU member states and pay respect to the principle of parliamentary sovereignty under which no UK government can bind its successor.

| **Date** | **Treaty** | **Competences the EU were given powers over** |
|---|---|---|
| 1957 | Treaty of Rome | Customs Union, Free movement of goods, Common commercial policy, Free movement of persons, services and capital, Common Agricultural Policy, common transport policy, competition, coordination of economic policies, Common Market, European Social Fund, European Investment Bank |
| 1986 | Single European Act | Single Market, Environment |
| 1992 | Maastricht Treaty | Common Foreign & Security Policy, Justice and Home Affairs, Economic and Monetary Union, Education, Culture, Cooperation and Development |

| | | |
|---|---|---|
| 1997 | Amsterdam Treaty | Employment, Social Policy, Discrimination |
| 2007 | Lisbon Treaty | Space, Energy, Civil Protection, Data Protection, Sport |

The Balance of Competences Review, run by the Foreign & Commonwealth Office, will "*analyse the main Treaty articles (& what they mean in terms of the split of competences between the UK and EU); the key ECJ case law and the major pieces of legislation applicable to this competence."* It will also detail *"how the scope of the competence has changed over time"* and whether there have been *"changes in the legislative procedures for adopting measures under the Treaties (e.g. a move from consultation to co-decision or a move from unanimity to Qualified Majority Voting)" and "whether the UK enjoys any special status under the Treaties in respect of this competence"* e.g. an opt-out of a specific policy area. The review will consider *"why EU-level action is the most appropriate (rather than e.g. UN/G20 or national/ regional level)"* and *"how EU action in this field advantages the UK"* and *"how EU action in this field disadvantages the UK."* The review will describe *"the future challenges we might face in this policy area and the impact these challenges might have on the balance of competences."*[13] The Balance of Competences Review has sought the opinions of all 26 other EU members. Germany and France refused to respond but Italy and Sweden are among the nations that have responded.[14] The review has "*not been asked*" under "*Outcomes*" to "*produce specific recommendations*" either for EU-wide reform or for inclusion on a list of negotiating proposals.[15]

Central to the renegotiation process will be popular support for the Conservative Party position and such support exists. Research by the Chatham House think tank revealed that "*a clear majority (57%) of the general public would like to vote on the UK's membership of the EU"* [also demonstrated by Ipsos MORI polling on this topic].[16] *And in such a referendum, almost half (49%) would vote for the UK to leave the EU altogether. Further economic integration was particularly unpopular: 60% of the public have no desire for the UK to join the single currency at any point in the future. However, when presented with a broader range of options than a simple 'in/out' choice, the most popular preference was not for the UK's withdrawal but continuing membership of a less integrated EU, more akin to a free trade area*." The report found that "*among the general public, 57% would prefer either a less integrated EU or complete British withdrawal. Only 12% support British participation in a more integrated European Union*."[17] A Eurobarometer survey in May 2012 for the European Commission indicated UK citizens were the third least likely to say they feel like EU citizens

[13] Foreign and Commonwealth Office, *Review of the Balance of Competences between the United Kingdom and the European Union*, July 2012, P16

[14] The Guardian, *David Cameron snubbed as Germany and France ignore UK survey on Europe*, Nicholas Watt, Chief Political Correspondent, 1 April 2013

[15] Foreign and Commonwealth Office, *Review of the Balance of Competences between the United Kingdom and the European Union*, July 2012, P17

[16] The Chatham House YouGov Survey 2012, *Hard Choices Ahead: British attitudes towards the UK's International Priorities*, Jonathan Knight, Robin Niblett and Thomas Raines, July 2012, p.vi; Ipsos MORI, Generations, *EU Policy; European Union Poll*, October 2011

[17] The Chatham House Yougov Survey 2012, *Hard Choices Ahead: British attitudes towards the UK's International Priorities,* Jonathan Knight, Robin Niblett and Thomas Raines, July 2012, pp.vi, 8

after Greek and Bulgarian citizens and "*31% of UK respondents spontaneously say that they do not believe the EU has produced any positive results. This figure is more than twice as large as the corresponding EU27 average of 13%*."[18] A successful renegotiation process is vital for those seeking to maintain UK participation in the EU.

The renegotiation initiative has drawn a mixed response from EU partners. Angela Merkel did acknowledge that "*Germany, and I personally, want Britain to be an important part and an active member of the European Union*" and "*We are prepared to talk about British wishes but we must always bear in mind that other countries have different wishes and we must find a fair compromise. We will talk intensively with Britain about its individual ideas*."[19] The Italian Prime Minister Enrico Letta said there was "*an Italian interest and a European interest that the UK stays on board the European process*" and that "*without the UK on board, the EU would be worse. It would be less liberal, less innovative, less pro-open market, less pro-single market, less of a global player in the world*." He also indicated there could be "*treaty changes for having a more flexible Europe in the interests of the UK, but also in the interests of Italy and the euro area countries*."[20] The Dutch Prime Minister Mark Rutte, said on 29 November 2012 that "*what we want to do is have a debate at the level of the 27 [member states] whether Europe is not involved in too many areas which could be done at the national level*."[21] Laurent Fabius, the French Foreign Minister, declared "*we can't have Europe a la carte*."[22] Jonathan Faull, Director General of DG Internal Market and Services at the European Commission put the case quite simply - **"***So what should the UK do? Stand by and watch a continental system built largely on German principles develop? Here is the challenge for British eurosceptics: what is your strategy for the country in the 21st century? We hear incessantly what you don't like or want…… I see little constructive thinking about the future*."[23] This report aims to provide a clear narrative on what reforms the UK should prioritise.

The Fresh Start Group of Conservative MPs in their *Manifesto for Change* refer to the 2001 Laeken Declaration by the European Council, which set up the Convention on the Future of Europe which says the EU may *"adjust the division of competence between the Union [EU] and the Member States in the light of the new challenges facing the Union. This can lead to both restoring tasks to the member states and to assigning new missions to the Union."*[24] The Fresh Start Group "*note that the Council [European Council] has the power to request the repeal or amendment of mixed competence legislation, particularly to ensure respect for the principles of subsidiarity and proportionality. This power is clearly referred to in Declaration 18 to the Lisbon Treaty and contained in Article 241 of the Treaty on the*

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[18] European Commission, *Standard Eurobarometer 78*, *Public Opinion in the European Union – United Kingdon*, Autumn 2012, P4

[19] The Telegraph, *Angela Merkel: We will seek EU compromise with Britain*, Rowena Mason, Bruno Waterfield and Fiona Govan, 23 January 2013

[20] The Telegraph, *EU referendum for Britain is a good thing says Italian PM*, Rowena Mason, Political Correspondent, 17 July 2013

[21] Fresh Start Project, *Manifesto for Change: A new vision for the UK in Europe*, January 2013, P4

[22] The Telegraph, *We will seek EU compromise with Britain*, 23 January 2013

[23] E!Sharp, *Off on a Sonderweg?* Jonathan Faull, Director General of DG Internal Market and Services at the European Commission, December 2011

[24] European Council, *Laeken Declaration on the Future of the European Union*, December 2001, P3

*Functioning of the EU (TFEU). We urge the Government to take advantage of it*."[25] A two tier European Union is already a fact. There are nine non Euro EU members. Both Britain and the Czech Republic have opted out of a Treaty to establish a Euro Fiscal Union. A multi tier flexible EU is a possibility.

[25] Fresh Start Project, *Manifesto for Change: A new vision for the UK in Europe*, January 2013, P4

# Chapter One – Trade

| | **Proposal** |
|---|---|
| 1 | Allow non Euro member states to conclude enhanced trade deals through the 'enhanced cooperation' provisions with other non Euro member states to prevent protectionist EU states blocking deals. |
| 2 | Create a UK market access database to record non tariff barriers to inter state trade within the EU. This would resemble the EU list of non tariff barriers experienced by EU exporters to non EU states. |
| 3 | Protect access to the Single Market by making appeals to the European Courts to block Eurozone proposals which may affect UK firms' access to the Single Market |
| 4 | Amend existing trade policy to substitute national parliaments for the EU parliament, allowing national parliaments that approve trade deals with non EU members to proceed with a trade deal that includes only those states that ratify the deal. |
| 5 | Obtain one of the Commercial Portfolios in the European Commission for the UK and attempt to secure the others for UK allies. |

This report assumes that the UK continues to remain a member of the EU and renegotiates the terms of membership. Thereby this chapter does not explore the trade options an independent UK could consider, such as North Atlantic Free Trade Area (NAFTA) membership.

The UK should aim to achieve all of the five proposals listed above, which should be cumulatively reinforcing. Proposal one will allow the UK to build a cohesive non Eurozone bloc, enshrine a multi-tier Europe, and to stop the more protectionist EU member states preventing the UK expanding its EU trade opportunities. Proposal two will catalogue the non tariff barriers to further intra EU trade and allow researchers to estimate their impact and serve as a focus for future EU negotiations on Single Market regulation. Proposal three is for the UK to be more litigious in defending access to the Single Market from proposals for Eurozone integration that may harm it. Proposal four seeks to establish national parliaments' authority over EU trade deals. It seeks to build a more flexible European Union whose members are free to group together to conclude trade deals with non EU states or to opt out of such deals as their democratically elected national politicians decide. This proposal undermines the existing Common Market and the Common External Tariff. It stops the more protectionist EU states from holding up trade deals with non EU states. It may not be possible to achieve this objective. The more protectionist EU states will wish to prevent exports from non EU states accessing their market tariff-free through another EU state. To prevent this they would either need to apply rules of origin tariffs or restrictions within the EU market or block these moves to undermine the Common Market. Proposal five is for the UK and her allies to secure commercial portfolios in the European Commission. This measure is necessary to shape the type of EU legislation that is proposed and reduce the number of proposals which are hostile to UK interests.

**What is the situation regarding trade policy?**

The EU is not a free trade area; it is a Customs Union with a Common External Tariff and a Single Market. The European Commission describe how "*trade policy is an exclusive power of the EU – so only the EU, and not individual member states, can legislate on trade matters and conclude international trade agreements*."[26] The EU's exclusive trade powers include goods, services, foreign direct investment and commercial aspects of intellectual property. They are contained in Article 207 Treaty on the Functioning of the European Union (TFEU), Article 218 sets out how trade agreements are negotiated and Articles 290, 291 and 294 provide for the adoption of delegated and implementing acts to allow the trade deals to be implemented.[27]

The European Commission has the right to initiate trade negotiations subject to European Council approval. International agreements are adopted by the European Council after the European Parliament has given consent. The Lisbon Treaty gave the European Parliament an enhanced role in approving trade deals. Open Europe, a think tank, describe how "*although the Parliament does not pre-authorise the negotiating mandate or have the power to ask for specific amendments to agreements, as it has to vote on final trade deals as a whole, it does now have considerable influence in negotiations derived from its potential veto of final agreements. The Commission must also keep the Parliament informed of the progress of talks.*"[28]

Below are the four stages of a trade agreement as outlined by the European Commission:

| | **Trade deal steps** |
|---|---|
| 1 | *"The Commission recommends that the Council authorise it to open negotiations and adopt negotiating directives to guide the Commission.* |
| 2 | *If the Council authorises the negotiations, the Commission must, throughout the process, regularly inform 2 committees of progress in the negotiations – the Trade Policy Committee, made up of Member State representatives, and Parliament's INTA committee.* |
| 3 | *After the agreement is initialled by negotiators, the Commission proposes that the Council sign the agreement (where necessary, it can also propose the agreement be provisionally applied).* |
| 4 | *But the agreement is not formally ratified until Parliament has given its consent [by simple majority]. So the Council must then adapt a second decision on the formal conclusion of the agreement."*[29] |

**How important is the EU market to Britain?**

The European Union is the largest market for UK goods. The European Union is the largest importer in the world with 16.1 per cent of world imports (2011), the largest exporter with 14.9 per cent of world exports (2011) and the largest recipient of foreign direct investment

[26] European Commission, *Trade, Policy making*

[27] European Union, *Treaty on the Functioning of the European Union Article 207*

[28] Open Europe, *Trading Places: Is EU Membership still the best option for UK trade?*, Stephen Booth and Christopher Howarth, June 2012, P22

[29] European Commission, *Policy Making Factsheet: How International trade agreements are signed*, 14 June 2011

with 241.7 billion Euro compared to 226.9 billion for the USA.[30] In 2005 HM Treasury estimated "*that trade between member states was boosted by 38% by membership of the union, with only 5% of trade diverted from non-member countries"* and *"a positive 'Single Market effect' of 9%.*"[31] Suggested benefits of EU membership include the UK's ability to push for liberalisation in EU countries; firms that invest in the UK can access the Single Market, the biggest market in the world and benefit from having one single set of regulations which allows easier access to EU markets. EU enlargement in the last two decades gave the UK access to fast growing eastern European markets. Further enlargement, on a scale to compare with the accession of countries such as Poland and the Czech Republic, looks unlikely to occur soon. Continued access to the Single Market is a key UK objective but its relative importance is set to decline. UK firms will need to reorient their trade to high growth non-EU markets who are now the priority. The importance of the EU in UK trade relations is set to decline.

**How significant are trade tariffs?**

Import tariffs are still significant both in increasing the cost of UK imports and in hampering UK exporters in accessing non EU markets. The EU Common External Tariff increases the cost of UK imports particularly agricultural imports such as dairy products and fruit and vegetables where the tariff can reach 156 per cent.[32] Meanwhile the average tariff faced by EU exporters among the "*FTA* [free trade agreement] *partners is almost three times higher (4.8%) than the tariff partners face on the EU market (1.7%). Malaysian tariffs are 13 times higher than ours. Tariffs in India and Mercosur are about two to three times higher than in the EU.*"[33] However, they are less important then they once were as they "*have on average gone down in China, from 19.6 % in 1996 to 4.2 % in 2009; from 20.1 % to 8.2 % in India; and from 13.8 % to 7.6 % in Brazil*."[34] Non-tariff barriers such as labour policy, health and safety, environmental regulations and accounting practices are becoming more important. These differences may be a cover for protectionism but they can also reflect local democratic choices. The UK should support the right of other nations to apply differing regulatory standards in a competitive environment. There does not need to be a single EU policy on non tariff barriers (NTBs).

**What are non tariff barriers?**

Non tariff barriers are those regulatory and policy differences between countries which have a detrimental impact on inter state trade including both imports and exports. They can include quotas where the quantity of imports or exports of specific items are restricted, customs and administrative procedures such as import licensing, food safety standards including labeling regulations, public procurement practices such as whether there is a home country bias in awarding contracts, which professional qualifications a nation chooses to recognise which affect foreign firms ease of operating in a state, health & safety standards, state subsidies for domestic producers and exchange and investment controls etc.

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[30] European Commission, *The European Union Trade Policy 2013*, P6

[31] UK Government, *EU Membership and Trade*, P7

[32] Open Europe, *Trading Places: Is EU Membership still the best option for UK trade?* Stephen Booth and Christopher Howarth, June 2012, P25

[33] European Commission, *Commission staff working document, External sources of growth: Progress report on EU trade and investment relationship with key economic partners*, July 2012, P7

[34] European Commission, *Commission staff working document, External sources of growth: Progress report on EU trade and investment relationship with key economic partners*, July 2012, P4

The OECD in *Looking Beyond Tariffs: The Role of Non Tariff Barriers in World Trade* recognises that the fact that "*NTBs are not subject to comprehensive reporting requirements*" means "*systematically collected data are not available*" and thus while there is "*considerable anecdotal evidence*" they are "*significant impediments*" this information is not comprehensive.[35] The European Commission has tried to address this by creating a market access database to record non tariff barriers under examination in EU trading partners. Proposal two is for the UK to create a market access database detailing the non tariff barriers that frustrate inter EU trade. This list and any estimation of the associated costs of these policies will help inform moves for greater liberalisation and serve as the basis for enhanced cooperation deals between more liberal EU states as proposal one advocates. The more protectionist EU states can abstain from such deals but will not be able to prevent the UK and other states concluding them.

**How significant are non tariff barriers?**

Within the EU, non tariff barriers are more detrimental than tariff barriers, which do not exist for intra EU trade. Open Europe highlights how the Single Market remains underdeveloped with intra EU trade in manufactured goods is 70 per cent less as a percentage of GDP than the equivalent between US states.[36] Non tariff barriers are also evident in trade with Japan where "*despite the huge size of the Japanese market, EU companies come up against serious non-tariff barriers in the form of discriminatory regulations, unique standards, anti-competitive behaviour, weak corporate governance and discriminatory public procurement practice. Japan has one of the lowest import penetration rates of any country in the OECD (6% — one fifth of the OECD average.) Likewise, it has the lowest level of inward foreign direct investment (FDI) in the OECD*."[37]

In EU trade negotiations with Singapore, issues relating to financial services were left outstanding. Singapore applies a tariff of zero on average. Non tariff issues are of greater importance in trade negotiations. If the UK were negotiating on its own behalf financial service issues would be the priority.

With America, "*given the low average tariffs (under 2%), the key to unlocking this potential lies in tackling non-tariff barriers. These consist mainly of customs procedures and behind-the-border regulatory restrictions. They come from diverging regulatory systems as regards technical regulations, conformity assessment procedures, sanitary and phyto-sanitary (SPS) restrictions and security provisions*."[38] The EU-US High Level Working Group for Growth and Jobs was set up at the 2011 EU-US Summit to attempt to make progress in this area. The Department for Business, Innovation and Skills estimates that an EU-US trade deal could increase UK national income by £4 billion - £10 billion per annum, primarily through the

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[35] OECD Trade Policy Studies, *Looking Beyond Tariffs: The Role of Non Tariff Barriers in World Trade*, 2005, P11

[36] Open Europe, *Trading Places, Is EU Membership still the best option for UK trade?*, Stephen Booth and Christopher Howarth, June 2012, P17

[37] European Commission, *Commission staff working document, External sources of growth: Progress report on EU trade and investment relationship with key economic partners*, July 2012, P12

[38] Ibid, P13

elimination of non tariff barriers.[39] Negotiations to conclude a US-EU deal have been held up by the French government's insistence on the need for a cultural exception to allow EU states to protect their film industries, but are now making progress and could soon be concluded after a temporary exclusion was agreed in this area.[40]

Free trade agreements covered "*less than a quarter of EU trade before 2006; concluding on-going negotiations with Canada, Singapore, India and other ASEAN states would bring this figure up to half; and moving forward with the US and Japan would bring it up to two-thirds*."[41] This external trade agenda "*could boost the EU's GDP by 2% or more than €250 billion*" and create an estimated two million jobs in the EU.[42] The EU is not realising its potential in expanding trade and this is set to get worse because of the new role for the EU Parliament.

**Is the EU erecting new non tariff barriers to trade liberalisation?**

Yes, the European Commission describes how "*trade is no longer just about tariffs*," it is also about "*standards*", "*licensing practices*", "*domestic taxes*" and "*investment*." Trade "*is no longer just about trade*," it is also about the "*environment*", "*human rights*" and "*labour rights*."[43] The EU-South Korea Free Trade Agreement, operational as of July 2011, is "*the first FTA concluded by the EU to include a comprehensive chapter on trade and sustainable development, which puts a particular emphasis on the commitments of both sides to adhere to internationally recognised standards in the area of labour and environment*."[44]

The Treaty on the Functioning of the European Union states that the EU "*shall ensure consistency between the different areas of its external action and between these and its other policies*" which means EU trade policy must address issues such as development, environmental, social and human rights objectives.[45] Human rights are described by the EU as "*essential elements*" within Free Trade Agreements and the EU take a view as to whether states with which it trades are respecting the "*fundamental values*" as included within the UN Universal Declaration of Human Rights.[46] These developments are detrimental to UK interests. They undermine the main value of trade, which is that individuals and countries that have different cultures and customs can still engage in productive and mutually beneficial exchange based on consent. Trade should not necessitate non EU nations having to adopt Western standards or values.

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[39] Department for Business, Innovation and Skills, *Estimating the economic impact on the UK of a transatlantic trade and investment partnership (TTIP) agreement between the European Union and the United States*, May 2013, P47

[40] The Los Angeles Times, *The Week Ahead: EU-U.S. talks, Japan nukes, Snowden scandal*, Carol J Williams, 8 July 2013

[41] European Commission Memo, *Concluding trade deals could boost EU's GDP by 2 per cent*, 20 July 2012

[42] European Commission Memo, *Concluding trade deals could boost EU's GDP by 2 per cent*, 20 July 2012

[43] European Commission, *The European Union Trade Policy 2013*, P20

[44] European Commission, *Commission staff working document, External sources of growth: Progress report on EU trade and investment relationship with key economic partners*, July 2012, P12

[45] Treaty on the Functioning of the European Union – Treaty of Lisbon Amendments

[46] Open Europe, *Trading Places, Is EU membership still the best option for UK trade?* Stephen Booth and Christopher Howarth, June 2012, P26

**A looser EU with a more flexible trade policy?**

The European Free Trade Association (EFTA) is a grouping of four states: Norway, Switzerland, Iceland and Liechtenstein. These countries have been able to negotiate quicker and more extensive trade deals than the EU. Individually, they have 24 free trade agreements with 33 countries.[47] The simpler negotiations resulted in a free trade agreement with South Korea in 2006 as opposed to 2011 for the EU. Iceland, a nation with a GDP of $13 billion, a population of 300,000 and with its main exports including fish and aluminium, concluded a free trade agreement with China in April 2013.[48] Switzerland signed a free trade agreement with China in July 2013.[49]

If the UK were to leave the EU it could negotiate membership of the North American Free Trade Agreement and a free trade agreement with the EU. The UK's trade arrangements with third countries would not be held up by the need to accommodate non UK interests such as the Portuguese textile industry, the Italian leather industry and French farming concerns. If we remain within the EU then proposal four seems appropriate. This would replace the current co-decision role of the European Parliament in trade arrangements with a requirement for national parliaments to approve trade deals. The rejection of a trade deal by one EU member state should not prevent other EU member states that have approved the trade deal from proceeding. Trade deals would proceed on the basis of an agreement between the countries that approved the trade deal and the non EU trade partner. This will require the abolition of the Common External Tariff and changes to the Common Market that will allow the more protectionist states to apply rules of origin to other EU members. This would fundamentally change the whole nature of the EU. It may not be accepted by all EU members but it should be a UK aim. This proposal will restore democratic control to UK trade relations.

**How did the Lisbon Treaty affect trade policy?**

The Lisbon Treaty introduced three major changes which could affect efforts to liberalise trade. First, greater powers for the European Parliament as "*co-legislator with the Council on trade matters*" so "*all basic EU trade legislation (on e.g. anti-dumping, trade preferences) must pass through the Parliament (the "ordinary legislative procedure") before being adopted or amended by the Council*."[50] All trade agreements must be approved by the EU Parliament to be ratified. The Commission must transmit documents and report regularly on the status of trade negotiations to the European Parliament.

Second, an extension in Qualified Majority Voting to cover most trade issues except where it could impede a state's ability to deliver social, educational and health services or protect linguistic diversity.

Third, an extension in the powers of the EU to conclude trade deals in commercial aspects of intellectual property and foreign direct investment.[51] Before Lisbon, the UK could engage in bilateral deals with non EU countries to agree investment deals, but now this must be done at the EU level. The proposal to empower national parliaments and to create a more flexible EU trade policy, recognising national differences within the EU, runs counter to the current

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[47] European Free Trade Association, *This is EFTA 2013*, March 2013, P13

[48] Civitas, *The minnow and the whale – Britain doesn't need EU "clout"*, Jonathan Lindsell, April 2013

[49] Reuters, *China, Switzerland sign free trade agreement*, 6 July 2013

[50] European Commission, *Policy Making - What did the Lisbon Treaty change?* , 14 June 2011, P2

[51] Idem

policy which seeks to empower common EU institutions including the EU Commission and EU Parliament *vis à vis* EU member states.

**The danger of continuing with a common EU trade policy which requires the approval of the EU Parliament**

Future UK trading relations may be hampered by attempts by EU Parliamentarians to pressure foreign states to adhere to European social policies. Open Europe specifically cites three factors which could influence the benefits of EU trade liberalisation going forward. These are:

-if internal EU trade liberalisation stalls,
- if the EU becomes more protectionist in response to the Eurozone crisis
- and/or the EU prevents the UK achieving freer trade with non EU states or curtails the scope of free trade agreements.

The importance of the emerging markets has grown since "*a recent decline in the volume of goods exports to the eurozone as a result of the crisis has increased the share of UK exports to the rest of the world*."[52] The IMF estimates that "*90% of global economic growth by 2015 is expected to be generated outside Europe, a third of it in China alone*."[53] Open Europe describes how "*Spain, Italy, France and Germany together account for 22% of the UK's goods and services exports – an area forecast to grow at under 2% a year up to 2050. However, India and China together account for only 3.75% of total UK goods and services exports yet are predicted to grow at between 6% and 8%*."[54]

The challenge for the UK is to increase the value of exports to non EU states in absolute terms, not just to see it rise by default as exports to the Eurozone fall. The Institute of Directors and All Party Parliamentary Group on Trade and Investment report *Ice Skates to Argentina: IoD Member Export Trends 2012-13* stated that IoD members exported more to Spain than to China and more to Belgium than to India. Prior to UK membership of the EU, in 1960, six of the top ten markets for UK exports were beyond the European continent (USA, Australia, Canada, India, New Zealand, South Africa) now only one is (USA). Worryingly, 71 per cent of current UK non exporting companies surveyed by the IoD had no plans to export in the future.[55] The UK faces twin trade problems of an EU which is slow in negotiating trade deals with non EU states and domestic firms reluctant to export outside safe developed markets.

**What leverage does the UK have to force a change in our trading position?**

The UK has advantages many other nations lack in negotiating a new system of trade arrangements with the EU. These include the size of the UK internal market, which is one of the top ten economies in the world, our role as the effective financial capital of the world and our large trade deficit. The deficit is largely goods-based and with the EU. The EU has a clear interest in maintaining similar trade arrangements with the UK given the current trade imbalance. Open Europe describes how in goods "*the UK has run an ever growing deficit starting in the 1980s but rapidly increasing in the years after 1997, reaching nearly £100 billion in 2011. Services exports have, by contrast, been a UK success story rising to over*

[52] Open Europe, *Trading Places*, Booth and Howarth, P10
[53] European Commission Memo, *Concluding trade deals could boost EU's GDP by 2 per cent*, 20 July 2012, P2
[54] Open Europe, *Trading Places*, Booth and Howarth, P11
[55] Institute of Directors, *Ice Skates to Argentina: IoD Member Export Trends 2012-13*, April 2013, P10

*£70 billion, helped by a strong financial services sector*."[56] Failure to secure an appropriate trading relationship with the EU would impose significant costs on both the EU and the UK. However, EU firms are benefitting considerably more from the existing trade arrangements. UK membership of the EU preserves EU firms' access to our market. Expanding the EU services market for UK firms will increasingly be a condition of continued EU membership.

**A UK which is more litigious? – enforcing the Single Market through EU institutions**

The UK will need to become more litigious in defending its interests. Proposal three says that the UK should be proactive in taking other EU member states to the European courts to determine whether they honour their treaty obligations under the Single Market or conclude deals that threaten UK access to the Single Market. Open Europe advocates greater UK use of the European Court of Justice (ECJ) to "*police the single market and strike down any mission creep regarding financial services"* including challenging the "*use of Treaty articles for ends they were not designed for"* and to *"litigate to prevent eurozone protectionism."*[57] For example, the UK is taking the European Central Bank (ECB) to court for its proposals on Eurozone securities clearing.

The UK may need to resort to the European Court of Justice in other policy disputes to protect UK access to the Single Market. Threats to the UK financial service industry, given its importance to the UK economy, could be viewed as a threat to the 'fundamental structures' and 'state functions' of the UK state under Article 4(2) TEU of the EU Treaties. Law Professor Damian Chalmers at the London School of Economics believes this treaty article could be used to protect the UK financial services industry. This is due to its predominance and importance to the UK economy. In terms of tax revenue, job creation and growth the City could be a "*fundamental structure*" in both a "*political*" and "*constitutional*" sense."[58] See chapter two for further measures to protect the position of the City of London and UK financial services.

**A new diplomatic strategy to anglicise EU institutions**

As proposal five explains the UK should not view EU institutions as in any sense an enemy. They are a forum in which the UK and its European allies should organise themselves to secure relevant EU policy portfolios. As Chinese philosopher Sun Tzu declared in *The Art of War*, a skilled tactician can ensure that particular outcomes became all but certain without conflict. If the UK could staff EU institutions with sympathetic individuals it would not then need to fight so many proposals that were damaging to UK interests. These proposals would not be created as the personnel would not create them.

The UK needs to ensure effective representation on the EU Trade Policy Committee and a commercial portfolio in the European Commission when these positions become available in 2014. The UK should cede the position of 'High Representative for Foreign Affairs and Security Policy' (HR), trading it for one of the Commission's economic positions such as enterprise, the internal market, trade or competition. Securing some or all of the other economic portfolios for UK European allies on these matters such as the Swedes, Czechs, Dutch, Irish or Finnish would be wise. The UK should also properly *"staff the UK's*

[56] Open Europe, *Trading Places*, Booth and Howarth, P12

[57] Open Europe, *Continental Shift: Safeguarding the UK's financial trade in a changing Europe*, Stephen Booth, Christopher Howarth, Mats Persson, Vincenzo Scarpetta, December 2011, P29

[58] Ibid, P34

*Permanent Representation to the EU and also nominate to the European Commission to a level and grade comparable to those of other EU countries, with particular focus on officials with experience from and knowledge of the financial sector"* because *"the UK has less than half the EU staff you would expect given its population."*[59] The Foreign Office seems to recognise the need to prioritise commercial diplomacy and better UK appointments within the EU. Foreign Secretary William Hague has announced that he will strengthen the Foreign & Commonwealth Office Economics Unit and train diplomats in commercial diplomacy.[60] Under the previous government, Baroness Ashton was thought to be the fourth choice of former Prime Minister Gordon Brown for the role of EU High Representative. The FCO, in a leaked report, implied she was not experienced enough for the role.[61] The EU needs to be more than a place where UK Quangocrats are sent to spend their last few working years.

**Enhanced Cooperation and the non Eurozone bloc**

The UK also needs to be more proactive in shaping EU Affairs rather than simply reacting negatively to badly designed EU policies. The UK should use the power of enhanced cooperation, which allows nine or more EU member states to agree a greater level of harmonisation, as I advocate in proposal one. The UK could conclude a separate deal with the more liberalising states in policy areas where UK efforts to complete the Single Market are being frustrated by the more protectionist EU member states. These flexible arrangements could be adapted by signatory states. EU members should be able to join and leave without prejudicing their wider involvement in EU institutions and agreements. This would create a more flexible and dynamic EU where competing regulatory regimes based on local democratic preferences was allowed to emerge.

[59] Ibid, P29

[60] Confederation of British Industry, *Speech by the Foreign Secretary The Rt Hon William Hague MP at the CBI Annual Conference on 'The Business of Diplomacy'*, 21 November 2011, P8

[61] Daily Mail, *Foreign Office red-faced after leaked memo says EU chief Cathy Ashton is not up to the job*, Daniel Martin, 15 November 2011

# Chapter Two - City Regulation

| | **Proposal** |
|---|---|
| **1** | Initially request a delay in the implementation of the new voting rules for the EU that reduces the voting power of the non-Eurozone bloc. The UK should aim to abolish these new rules if possible. |
| **2** | Urge the creation of a non Euro group with a double voting clause to make sure financial regulations which affect access to the Single Market have to be approved by both groups. This bloc should be formally recognised in EU institutions. |
| **3** | Introduce an 'emergency brake' to allow the UK or any other EU member state to refer new financial regulations up to the European Council, where national governemnts enjoy the power of veto |
| **4** | Argue for the creation of a European Impact Assessment Board to cost the impact of financial legislation on the EU economy and those of the EU member states |

The UK should seek to achieve all of the four aims listed above. Proposal one is necessary to ensure that the UK is not put in a position where it has limited influence over financial regulation because the UK and its allies lack sufficient votes to block damaging regulation. Proposal two will help create a permanent non Eurozone bloc with an institutionalised presence in the EU, so this grouping can serve as a base of allies for UK negotiators to build upon. Proposal three will allow the UK to protect its financial services industry, recognising the unique importance of this sector both to the UK and EU economy. Proposal four will highlight the costs of EU regulation prior to implementation so as to help shape smarter EU regulation.

**The City of London is a European Asset**

Protecting financial services has to be a priority for UK policymakers. Open Europe describes how "*if the UK did not export financial services it would have to choose between having an overall deficit of over £70bn a year (clearly unsustainable), radically reducing its imports or creating a new world class industry.*" They stress that "*financial services account for at least 10% of UK GDP*" and the UK "*should concentrate its political capital*" there. The UK accounts for "*36% of the EU's wholesale finance industry and a 61% share of the EU's net exports of international transactions in financial services*."[62] The UK originated more cross-border bank lending than any other country in 2011 (18 per cent of the world total), the UK insurance market is the largest in Europe and the third largest in the world, 80 per cent of EU hedge fund assets are UK-managed and the UK foreign exchange market is the largest in the world. EU proposals to set an automatic cap on bankers' bonuses and impose an EU-wide financial transaction tax, to ban short selling and limit transactions in euro-denominated financial products exclusively to Eurozone-based clearing houses, endanger the UK financial service industry. EU0wide regulation can lead to the imposition of EU policies ill-designed for the UK market, hampering the UK's ability to compete in the non EU growth markets for financial services. The UK needs to lead a public relations

[62] Open Europe, *Continental Shift – Safeguarding the UK's financial trade in a changing Europe*, December 2011, Stephen Booth, Christopher Howarth, Mats Persson Vincenzo Scarpetta with additional analysis by Europe Economics, P5

campaign portraying London as a European asset, utilising UK staff working in Brussels to make the case.

**A European market that is of declining importance to the City of London**

London serves as an entry point to the EU's Single Market in financial services but the importance of the European Market is decreasing as "*in 2005, the five largest EU economies accounted for 27% of global banking assets. In 2050, that will have decreased to 12.5%. Meanwhile, the BRIC countries' share of these assets will have increased from 7.9% in 2005 to 32.9% in 2050*."[63] EU financial regulation is now less concerned with securing financial services growth than with reducing such activity. The EU is developing a more rigorous rules-based system to legislate what can and cannot be done.

The UK approach, exemplified by the Vickers Commission, is to empower regulators to exercise their judgement to react flexibly to situations as they develop. The UK needs to build alliances to protect the financial services industry because if the London financial cluster didn't exist "*the cost of financial services in the EU would rise 16% and EU GDP would be €33bn lower in the short term, €23bn lower over the medium term, with the loss of 100,000 jobs*."[64] EU authority now covers the "*capital requirements, definitions of that capital and the risk-weighted assets in relation to which the requirements are measured, payment of salaries and bonuses to bankers, where and how derivatives are traded, how banks should fail and die in an orderly fashion without taxpayer support, special rules for systemically important institutions: these and other matters are inserted into law and practice by EU legislation, proposed by the Commission and enacted by the Parliament and the Council*."[65] UK discretion in this area is severely limited.

**The new Eurozone threat to the UK's financial services industry – new voting rules**

The UK will have less influence over financial regulation after the introduction of the new EU voting rules as the Eurozone bloc will have a majority of the votes. Under the new voting rules, coming into force in 2014, the City of London/UK will have only 12 per cent of votes in the European Council of Ministers and 10 per cent of the votes in the European Parliament. In contrast France, which *"accounts for 20% of the EU's market in agriculture … enjoys a veto over the EU's long-term budget and therefore retains substantial control over the sizeable EU subsidies received by its farmers*."[66] The risk is that the Eurozone begins to vote as a caucus on financial services regulation. The UK can delay the implementation of the new voting rules until 2017 but after that the Eurozone will have the required 65 per cent of EU population needed to pass a law. Open Europe believes this new voting system begins to challenge the basis on which the UK consented to EU financial regulation, which was that the UK had more influence over regulation given the size of its financial sector - the risk of being overruled on something fundamental was small and the Single Market was creating new trading opportunities for the UK. The UK must seek a delay in the implementation of the new voting rules as suggested in proposal one in this chapter.

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[63] Open Europe, *Trading Places,* Booth and Howarth, P4

[64] Open Europe, *Continental Shift – Safeguarding the UK's financial trade in a changing Europe*, December 2011, By Stephen Booth, Christopher Howarth, Mats Persson Vincenzo Scarpetta with additional analysis by Europe Economics, P7

[65] E!Sharp, *Off on a Sonderweg?* Jonathan Faull, Director General of DG Internal Market and Services at the European Commission**,** December 2011

[66] Open Europe, *Continental Shift ,* Booth et al., P3

**The new Eurozone threat to the UK's financial services industry – Eurozone countries concluding deals which reduce UK access to the Single Market**

A European Central Bank Policy Briefing in 2011 proposed a *"location policy"* to apply *"all CCPs* [Central Counterparties] *that hold on average more than 5% of the aggregated daily net credit exposure of all CCPs for one of the main euro-denominated product categories."*[67] This means "*that CCPs that exceed these thresholds should be legally incorporated in the euro area with full managerial and operational control and responsibility over all core functions, exercised from within the euro area*."[68] A Central Counterparty Clearing House is a body which facilitates trading in equities or derivatives by identifying the parties to a transaction and their obligations and ensuring the required transfer of funds and securities occurs, i.e. the settlement. It is beneficial to buyers and sellers as it assumes the credit risk. The effect of a location policy would be to force non-Eurozone based CCPs to relocate to the Eurozone. Stockholm based Nasdaq OMX, London based LCH Clearnet and Ice Clear Europe, and Chicago based CME would all fall foul of this policy.[69]

The argument made for requiring CCPs to be located in the Eurozone is that these bodies may require access to European Central Bank-provided liquidity in the event of a crisis. It is the subject of legal challenge by HM Treasury at the European Court of Justice on the basis that "*this decision contravenes European law and fundamental single market principles by preventing the clearing of some financial products outside the euro area.*"[70]

**The new Eurozone threat to the UK's financial services industry – Eurozone countries concluding deals which affect UK companies' ability to do business in the EU**

The UK must ensure that the Financial Transaction Tax (FTT) is not applied to UK based transactions or to UK transactions involving a company based in another EU member that are denominated in Euros. The European Parliament in 2011 voted to ask the European Commission to look into the introduction of a Financial Transaction Tax.[71] In February 2013, 11 members of the EU, including France and Germany, agreed to introduce a FTT by January 2014. The European Commission now says it will apply from "*towards the middle of 2014*."[72]

The UK needs to position itself to attract any financial business currently occurring in these states that will be adversely affected by this new tax. The European Commission does not quantify the potential cost of relocation that the tax would cause, i.e. businesses moving to countries without the tax. The tax would impose a 0.01 per cent levy on transactions involving derivatives agreements and a 0.1 per cent levy on all other types of financial transactions which would mean that between 62 and 72 per cent of EU revenue would then be raised in the UK. There is no financial burden sharing agreement to cap the UK contribution. A similar tax imposed by the Swedish government in the 1980/90s resulted in

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[67] European Central Bank, *Eurosystem Oversight Policy Framework*, July 2011, P10

[68] Idem

[69] Risk.Net, *How the CCP location debate helped split the EU*, Michael Watt, 10 January 2012

[70] The Guardian, *UK takes ECB to court to save City's Euro trading*, Jill Treanor, 14 September 2011

[71] CBI, *CBI comments on EU vote on financial transaction tax*, 8 March 2011

[72] The Telegraph, *Brussels quietly delays FTT by six months*, Chief Business Correspondent Louise Armitstead, 25 June 2013

over 50 per cent of the trade volume moving to London instead. Bond and futures trading volume declined by 85 per cent and 98 per cent respectively.[73]

The European Commission's Impact Assessment of the Financial Transaction Tax estimate that it would lead to between 478,000 and 812,000 job losses because of increases in the cost of business capital.[74] A version of the tax was introduced by Italy in March 2013 and led to a reduction in share trading, and the French FTT introduced in August 2012 has raised half the projected income.[75] The UK possesses the ability to veto this measure as it can veto EU wide tax proposals. Currently "*the vast majority of EU financial services regulation is based on the EU Treaties' single market articles, where Qualified Majority Voting (QMV) and co-decision with the European Parliament applies, meaning that MEPs and national ministers must both agree before a proposal can become law. The European Commission's proposal for an EU FTT is an exception to this rule because decisions on taxation remain under unanimity, giving the UK a veto.*"[76] However, other EU members can proceed under the provision for enhanced cooperation and the UK needs to ensure their moves to implement this policy do not damage UK access to the Single Market.

**The new Eurozone threat to the UK's financial services industry – The creation of new EU super regulators in contrast to the UK approach to regulatory discretion**

Three new EU financial supervisory authorities (ESAs) have been set up since January 2011: the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA). A European Systemic Risk Board (ESRB) was created to make risk assessments but does not have power to impose its decisions on member states. The ESAs' rule decisions are made on the basis of a simple majority, except in a limited number of technical cases where QMV applies, and ESMA is empowered to *"temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets."*[77] In contrast, the UK has adopted a new system of regulatory discretion rather than a rule-based approach and the Vickers Commission has emphasised bank capital requirements in excess of EU regulatory standards. This represents a clear threat to UK sovereign control of decision making and the ability of UK electors to hold their representatives to account for the decisions made. Open Europe in their pre 2010 UK General Election briefing described how "*as virtually all decisions on financial regulation and supervision are decided in the EU by Qualified Majority Voting, the parties actually have very little room for manoeuvre once in government*."[78]

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[73] European Commission, Commission Staff Working Paper Impact Assessment, *Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC*, September 2011, P8-9

[74] UK Parliament, European Scrutiny Committee, *Taxation: A Financial Transaction Tax*, October 2012

[75] The Telegraph, *Brussels quietly delays FTT by six months*, Chief Business Correspondent Louise Armitstead, 25 June 2013

[76] Open Europe, *Continental Shift – Safeguarding the UK's financial trade in a changing Europe*, December 2011, Stephen Booth, Christopher Howarth, Mats Persson Vincenzo Scarpetta with additional analysis by Europe Economics, P7

[77] Article 9(5) of Regulation (EU) No 1095/2010

[78] Open Europe, *Briefing note, In Brief: The parties positions on key EU policies*, 21 April 2010, P9

**The new Eurozone threat to the UK's financial services industry – Solvency II rules – a test case in the costs of regulatory overreach?**

The Solvency II rules on insurance and pension funds will be effective as of January 2014. The Institute of Economic Affairs (IEA) describe how *"Solvency II outlines the capital requirements for all insurance companies within the EU at two levels: the Minimum Capital Requirement (MCR) and the Solvency Capital Requirement (SCR). The MCR is a minimum capital threshold below which insurers can no longer write new business, while the SCR is the target level of capital that insurance companies should maintain"* and "*between the two capital levels are a series of triggers and escalation actions to be taken by the insurance company in question and the local regulator.*"[79]

Unfortunately, European Economic Area (EEA) sovereign bonds issued in the local currency have a 0per cent capital charge. This means that Greek, Portuguese, Spanish and supranational bonds issued by the European Investment Bank (EIB) are considered risk free. This *"bias towards sovereign debt means that any increase in allocations here will result in less money flowing into other parts of the market"* and *"under Solvency II, the capital charge applied to credit is proportional to both its rating and its duration…. Therefore, lower-rated bonds and longer-duration bonds are less attractive*." [80] This makes it difficult for insurance firms to invest in infrastructure projects to support the economy when, in particular, "*life insurance companies – the largest segment of the insurance sector – have limited liquidity requirements and, therefore, have been keen providers of longer-term capital to the economy*,"[81] The European Commission estimates the cost of implementing this regulation alone at 3 billion Euro. A Confederation for British Industry study indicates a higher cost of £350 billion on UK businesses and that it would "*hit long-term growth by a potential 2.5% GDP, slash 180,000 jobs and cut the value of pensions*."[82]

**How can the UK respond? - The UK 'Emergency Brake' on new financial regulation**

Proposal three in this chapter is for the UK to negotiate an emergency brake for the UK on EU legislation relating to financial services. This policy is advocated by the EU Fresh Start Project Group of Conservative MPs. They include as two of their five proposed EU Treaty changes "*an emergency brake for any Member State regarding future EU legislation that affects financial services*" and "*a new legal safeguard for the single market to ensure that there is no discrimination against non-Eurozone member interests*."[83] This approach is also favoured by Open Europe. They describe how the UK could seek "*political assurances among EU allies and partners that the UK will not risk further loss of influence over financial services as the eurozone integrates further*," should "*strengthen the 10 non Euro EU Members*," and "*seek UK specific guarantees on financial services, which could be legally rooted in EU treaties*."

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[79] Institute of Economic Affairs, *A Well Intentioned Folly: The Macroeconomic Implications of Solvency II*, Amarendra Swarup, October 2012, P19

[80] Ibid, P20-21

[81] Ibid, P17

[82] Confederation for British Industry, *The Economic Impact for the EU of a Solvency II-inspired funding regime for pension funds*, 2012

[83] Fresh Start Project, *Manifesto for Change: A new vision for the UK in Europe*, January 2013, P3

These proposals would face "*fierce political opposition*" from some other EU member states.[84] Open Europe also proposes a new 'Single Market Protocol' via EU Treaty change *"to commit the EU to a pro-growth, outward looking and proportionate regulatory regime while safeguarding the UK from decisions taken solely by the eurozone for all 27 member states."*[85] This could include a 'double lock' which recognises the UK's prominence in this matter and gives the UK the ability to refer laws it deems disproportionate to the European Council where it has a veto. Prime Minister David Cameron seems to support this approach and has advocated a Protocol to protect the UK financial sector from EU financial regulation relating to the Euro crisis.

**How likely is it that the UK will be able to negotiate an 'emergency brake' clause?**
France negotiated an arrangement similar to the brake clause proposed for the UK in the 1960s. Called the 'Luxembourg Compromise', it was negotiated by General Charles De Gaulle, who viewed the introduction of Qualified Majority Voting as a reduction in the sovereignty of France and refused to participate in European Council meetings in 1965 and 1966. Consequently, the following was agreed: *"Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community."*[86] The French have since invoked the Luxembourg Compromise on agricultural matters to prevent them being overruled on agriculture but doubts remain on its applicability to other EU members, its continued relevance and the UK's ability to negotiate something similar. The Europa website, which summarises EU legislation on behalf of the EU institutions, under its definition of the Luxembourg Compromise says "*the Luxembourg Compromise remains in force even though, in practice, it may simply be evoked without actually having the power to block the decision-making process.*"[87]

Although not under the Luxemburg Compromise, Germany has been ready to challenge the European Union to protect its manufacturing industry, which fills a similarly vital role to the German economy that the agricultural sector does to the French economy or financial services to the UK economy. The state of Lower Saxony has a 'golden share' in Volkswagen from when the firm was privatised in 1960 which allows it to veto a proposed sale. The European Court of Justice has ruled this illegal. In response to a query about whether Lower Saxony would comply, its Prime Minister David McAllister asked, *"Doesn't Europe have better things to do?*"[88] This matter continues to be disputed between Lower Saxony and the European Commission. An advisor to the European Court of Justice, in a non binding

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[84] Open Europe, *Continental Shift – Safeguarding the UK's financial trade in a changing Europe*, December 2011, By Stephen Booth, Christopher Howarth, Mats Persson Vincenzo Scarpetta with additional analysis by Europe Economics, P27
[85] Open Europe, *Continental Shift – Safeguarding the UK's financial trade in a changing Europe*, December 2011, By Stephen Booth, Christopher Howarth, Mats Persson Vincenzo Scarpetta with additional analysis by Europe Economics, P4
[86] Europa Summaries of EU Legislation, Glossary, *Luxembourg compromise*
[87] Idem
[88] Open Europe, *Continental Shift – Safeguarding the UK's financial trade in a changing Europe*, December 2011, By Stephen Booth, Christopher Howarth, Mats Persson Vincenzo Scarpetta with additional analysis by Europe Economics, P9

opinion, indicated that the ECJ should rule that Germany had complied with the court's ruling. The European Commission maintains that Germany has kept the illegal government blocking majority. A decision is expected in the next few months.[89] Protecting UK interests may require a more cavalier attitude to EU law than Britain's current approach, which has been accused of 'gold plating' EU decisions.

**How can the UK respond? – The EU Impact Assessment Board and strengthening the non Eurozone group?**

Proposal four in this chapter is for the UK to push the creation of a "*strong, independent European Impact Assessment Board*" as advocated by Open Europe. This should be capable of sending proposals back to the European Commission if there is inadequate evidence for why the action needs to be done at a European level.[90] Providing authoritative figures on the potential cost of EU regulation prior to implementation will help non-Eurozone countries resist Eurozone members' efforts to restrict non-Eurozone members' ability to access the Single Market on equal terms.

The UK needs to nurture a cohesive non-Eurozone grouping. Developing a coherent non Euro member group requires extending the right for the remaining EU non Euro members to keep out of the Euro. Currently, among the non members, only the UK and Denmark have the right not to join the Euro. In addition, Euro members should have the right to leave the currency. The political consensus appears to be that the UK should support EU integrationist measures designed to strengthen the Euro, given its existing membership. In contrast, the UK should encourage the weaker Euro members to leave the Euro to strengthen the voting power of the UK led non Euro bloc and prevent the more damaging possibility of a disorderly Euro collapse. The non-Eurozone members also need to be given an official status within the EU. Non Euro EU members should be given "*the same right as the euro states to have an informal meeting chaired by the President of the Council, currently Herman van Rompuy, within the EU secretariat*" which would involve amending Protocol 14 of the EU Treaties that created the Eurozone group finance ministers meeting.[91]

**The dangers of drift – what happens if the non Euro bloc is not formalised**

Jonathan Faull, Director General of DG Internal Market and Services at the European Commission, implicitly recognises the importance of the UK nurturing the non Euro group because "*the eurozone countries are moving (some would say slouching) towards a system of coordinated economic decision-making. The other nine non-euro member states will not want to be isolated. Nordic and Central and Eastern European countries are often allies with the UK in EU affairs. The emphasis in that sentence is on "in EU affairs". They are unlikely to follow the UK to the sidelines*."[92] He stressed the dangers of a less integrationist approach, stating that "*even assuming that a case could be made for uncoordinated national regulation in financial services with the UK picking and choosing among EU rules, is that really the*

[89] Automotive News Europe, *Germany has complied with ruling on VA Law, EU Court Advisor says*, 29 May 2013

[90] Open Europe, *The Case for European Localism*, Anthony Browne and Mats Persson, September 2011, P16

[91] Open Europe, *Continental Shift – Safeguarding the UK's financial trade in a changing Europe*, December 2011, By Stephen Booth, Christopher Howarth, Mats Persson Vincenzo Scarpetta with additional analysis by Europe Economics, P31

[92] E!Sharp, *Off on a Sonderweg?* Jonathan Faull, December 2011

*approach the UK wants to encourage in the EU's single market? Does it want other countries to have emergency brakes, vetoes or opt-outs in core single market policies?*"[93]

The answer to this question is – yes – Britain should support the right of other EU members to be part of a more flexible Europe with a level of integration they are comfortable with. The UK must build an alliance of similar minded states with which to conclude agreements and craft them into a viable and enduring voting bloc.

**What if UK actions in the EU still can't protect the UK financial services industry?**
If necessary, the UK could pass a law asserting the UK's supremacy in areas of financial regulation. The European Commission under Article 258 TFEU or another member state under Article 259 TFEU could choose to take the UK to court for the infraction. Open Europe suggests the *"UK's failure to comply with the ECJ ruling would result in the Commission taking the UK back to court and asking the ECJ to impose a lump sum or penalty payment on the UK in the shape of a fine. The maximum fine that can currently be imposed on the UK is €703,104 a day or €256.6m (£225.6m) a year."*[94] Open Europe does not know what would happen if the UK refused to pay the fines.

[93] Idem
[94] Open Europe, *Continental Shift: Safeguarding the UK's Financial Trade in a changing Europe*, Stephen Booth, Christopher Howarth, Mats Persson, Vincenzo Scarpetta, December 2011, P34

# Chapter Three - Employment Rights

| | **Proposal** |
|---|---|
| **1** | Negotiate a general rule that an opt-out or a carve-out of a policy area, once secured for an individual nation, will persist even if a subsequent administration chooses to opt in to a policy area |
| **2** | Prioritise securing an opt-out from particular employment protection laws, including the Transfer of Undertaking Protection of Employment Directive, to allow employment laws to be based on local democratic preferences |
| **3** | Secure a carve-out from the TFEU articles that formally constituted the 'Social Chapter' – Articles 151-161 TFEU - as they now exist in EU Treaty and protections from the application of the Charter of Fundamental Rights in judicial decisions at the UK and EU level |

The UK should aim to achieve all three of the proposals listed above. The proposals are made without stipulating how a UK free to decide policy in this area should act. A Conservative majority government may seek to weaken employment regulation to make it easier to hire and fire. A Labour majority government may seek to strengthen employment regulation to make it harder for unscrupulous employers to cheat workers or to prevent a 'race to the bottom' in terms of employment conditions. Whatever path the UK follows, it should be for democratically elected UK politicians to propose policy and be responsible for it at the ballot box.

Proposal one recognises that areas where an opt-out or carve-out has been secured are likely to be contentious in the nation opting out. A newly elected government should be able to re-opt out of policy areas where an opt-out was formally in force for that nation. Voters must retain the power to remove politicians who implement policies with which they disagree. Policy made at EU level lacks a democratic mandate. By binding future UK governments it also undermines the essential principle of UK parliamentary sovereignty that no government can bind its successor. Proposal two and three both seek to restore the right for UK governments to determine social policy within the UK.

**The democratic deficit - opt-outs/carve-outs, once they are surrendered, die**

In 1999 the Labour government ended the UK opt out of the social chapter and incorporated the Social Chapter into UK law through the Treaty of Amsterdam. Open Europe has studied the government's own Impact Assessments and estimated that EU social law currently costs UK business and the public sector £8.6 billion a year.[95] This estimate is of policy and administrative costs and not opportunity costs or the cost of EU regulations in this policy area introduced before 1998. In the 2010 UK General Election the Labour party said it would not seek to renegotiate EU powers over social and employment policy, the Conservatives pledged to renegotiate EU *"social and employment legislation with our European partners to return powers that we believe should reside with the UK, not the EU"*[96] and the Liberal

[95] Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?*, Stephen Booth, Mats Persson and Vincenzo Scarpetta, November 2011, P2

[96] Open Europe, *Briefing note, In Brief: The parties positions on key EU policies*, 21 April 2010, P9

Democrats supported changes to the Working Time Directive but not further changes. German Finance Minister Wolfgang Schäuble told Chancellor George Osborne to forget any attempts to use the eurozone crisis to repatriate EU social and employment laws.[97] Repealing or amending EU measures in this area will require negotiations with all 27 member states and the European Parliament. Consequently the UK must push to ensure that opt-outs/carve-outs from specific policy areas once secured by a country must remain an option for that nation. This measure would respect internal policy differences within nations, prevent a ratchet effect with EU legislation where transfers of competences are a one way process and restore some measure of parliamentary sovereignty to the UK.

**The cost of an EU social policy to purely domestically oriented UK firms. (the majority of UK firms)**

Preserving access to the EU Single Market provides a single set of regulation that benefits UK exporters to the EU and provides certainty for external investors looking to access the EU Single Market through investment in Britain. However, Open Europe in 2010 based on analysis of 2,300 impact assessments calculates that EU regulation has also imposed costs of £124 billion on the UK economy since 1998. The cost-benefit ratio of EU regulation compares poorly with UK regulation, with the former creating £1.02 in benefits for every £1 cost and the latter producing £2.35 of benefits for every £1 in cost between 1998 and 2009.[98] To "*over 70% of* [the UK economy]" which "*is dependent only on UK domestic demand*" and thereby does not avail itself of the opportunities in the EU market, this represents a cost with little corresponding benefit.[99]

The government should be careful not to assume that trade and economic growth are the same. The Confederation of British Industry reveals that whereas "*twenty-one per cent of growth in the 1970s* [was] *driven by Trade and Investment. From 1997- 07 this fell to -0.1 per cent. In other words, trade and investment made a net negative contribution to growth*."[100] The Office for National Statistics in May 2013 showed this trend was continuing as net trade had "*a negative contribution to GDP growth, as it did in the previous quarter*" with the decline in exports (0.8 per cent) exceeding the decline in imports (0.5 per cent).[101] The government views trade as a positive contributor to growth but the evidence shows a more complex impact

**What approach should the UK favour? A more Neo Liberal Model**

The Institute of Directors specify that employment law should be more about "*setting out basic rights and obligations, rather than a whole series of detailed prescriptions*" and that it is "*a mistake to think that there should be an EU legislative model for every different kind of employment arrangement*" because "*it is competition, not regulation that is the best*

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[97] The Guardian, *David Cameron told by Berlin: drop demands for repatriation of powers*, 19 October 2011

[98] Open Europe, *Still out of control? Measuring eleven years of EU regulation*, Second Edition, Sarah Gaskell and Mats Persson, June 2010, P1

[99] Open Europe, *Continental Shift – Safeguarding the UK's financial trade in a changing Europe*, Stephen Booth, Christopher Howarth, Mats Persson Vincenzo Scarpetta with additional analysis by Europe Economics, December 2011, P28

[100] Confederation of British Industry, *Creating Confidence: A New Approach to Industrial Policy*, June 2012, P2

[101] The Office for National Statistics, *GDP and the Labour Market, 2013 Q1, May GDP Update*, 23 May 2013

*guarantee of high standards*." Higher levels of labour market regulation are associated with higher levels of unemployment and "*an extensive 'floor of rights' already exists – provided through existing EU employment Directives. Measures such as the Equal Treatment Directive, the Working Time Directive, the Parental Leave Directive and the Information and Consultation Directive provide a complex web of rights that covers many (although not all ) workers*."[102]

The type of regulations Open Europe would like to change include the following: the *"obligation to conduct risk assessments for low-risk firms"* which would be curtailed, the end of moves to expand EU health and safety law with regard to the self employed and the scrapping of the Working Time Directives [WTD] "*on-call time and compensatory rest rules"* and exempting firms that negotiate wages on an individual basis from the AWD [Agency Worker Directive]. A provision in the Working Time Directive allows member states to exempt parts of the public sector from it, and the UK Coalition Agreement suggests both ruling parties are open to using it.

The Small Business Act introduced by the European Commission "*proposes exempting smaller firms from some rules and requirements, for example accounting standards. This could be extended to involve a general exemption from the main bulk of EU social law, which does not have essential cross-border importance (which would be the majority), for firms with less than 250 employees.*"[103] Cutting the costs associated with employment and social regulation by 50 per cent could result in between 60,000 and 140,000 new UK jobs depending on how the benefits of deregulation are split between increased employment and increased productivity.[104] Proposal three in this chapter is for the UK to opt out of Articles 151-161 TFEU to allow UK politicians to be democratically accountable for policy in this area.

**The impact of the Transfer of Undertakings regulation on government outsourcing efforts**

Directives governing business changes in ownership and/or control are particularly problematic. Proposal two advocates that the UK opt-out of the Transfer of Undertakings (Protection of Employment) Regulations [S.I. 1981/1794] ("TUPE") which came into force on 1 May 1982. This enforced Council Directive 77/187/EEC ("the Acquired Rights Directive") of 5 March 1977, now Council Directive 2001/23/EC of 12 March 2001. It states that "*after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer*" and the purchasing firm must continue to respect any collective agreement concluded by the previous management.[105] Costs of legal advice on a TUPE transfer of a single employee can start at

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[102] Institute of Directors, *Modernising Labour Law to meet the challenges of the 21st century*, 30 March 2007, P4

[103] Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?*, Stephen Booth, Mats Persson and Vincenzo Scarpetta, November 2011, P12

[104] Ibid, P2

[105] Official Journal of the European Communities, *COUNCIL DIRECTIVE 2001/23/EC*, 12 March 2001 ('On the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses')

£1,500 plus VAT and up to £10,000.[106] Current providers often deliver patchy information on TUPE-related issues such as employment terms and conditions and pending actions, limiting the number of providers confident to bid. This frustrates the efforts of those in the Charitable and Small and Medium Sized Enterprises (SME) sector to assume control of Statutory Services. It makes it more likely that larger providers such as Capita and Serco will be the only entities capable of bidding to provide these services.

**An independent UK social policy need not be 'neo liberal' - the trade union movement can mobilise for the alternative as trade union blacklisting is an area where the labour movement would benefit from repatriation**

Some EU based employers produce or access databases that contain information on trade unionists' past activities. They do this to ensure they do not employ such individuals in their firms. In 2009 the Information Commissioners Office seized a Consulting Association database of 3,200 construction workers used by 44 companies to keep out of employment particular trade union or health and safety advocates.[107] In 2010 the previous Labour government brought in legislation to tackle blacklisting which prevented employers or employment agencies refusing employment to individuals due to their trade union activities. It did not cover those who raised health and safety concerns or who were ill. In January 2013 the Labour Party called for an inquiry into the blacklisting that occurred and for this to result in further proposals to stop it occurring in future.[108] If employment regulations were repatriated, the scope for a future Labour administration to bar firms that participated in blacklisting from accessing public contracts and criminalising the practice could be enhanced. Currently such moves would fall foul of European law and could be subject to legal challenge as Scottish local authorities were recently warned by a partner at Dundas & Wilson, a leading law firm.[109]

**Why has the trade union movement become supportive of EU harmonisation of employment law?**

Significant rights have been achieved through EU institutions. This area is now an EU preserve and the UK's ability to set its own policy is severely curtailed. In '*Europe and your rights at work*' the Trades Union Congress [TUC] describes the achievements that EU Regulations have ensured. These include equal pay, gender non-discrimination, business changes rights to transfer terms and conditions to new employer, maternity and paternity rights, equal treatment for part time and fixed term workers with their full time counterparts, paid holidays, working week limit, establishment of European Works Council's right to worker representatives consultation and representation, health & safety legislation and posting of workers regulations specifying the posted worker should receive equal rights as workers from the host country. The European Court of Justice ruled that pensions are part of pay. Employers have been prevented from offering employees incentives to surrender their collective representation rights. Each of these provisions could be adopted by a British administration after this policy has been repatriated but these policies exist now because the EU introduced them.

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[106] The Guardian, *TUPE needs better leadership and more effective sanctions,* Fiona Shell and Gemma Brown, 16 January 2012

[107] The Observer, *Blacklisted building workers hope for day in court after ruling*, Daniel Boffey, 3 March 2012

[108] BBC, *Labour demands blacklisting inquiry*, 23 January 2013

[109] Scotland on Sunday, *Legal risk to boycotting blacklisters*, Dominic Jeff, 14 July 2013

**The trade union movement doubt that UK controlled employment protections would be higher than the existing EU average**

Frances O'Grady, leader of the Trades Union Congress, believes proposals to withdraw from EU employment legislation are about reducing employment rights. She says "*what [David Cameron] is trying to do isn't just opt out of social Europe, he wants to undercut it*", and "*there's one set of workers' rights David Cameron can't touch. Those are the rights provided for by social Europe – paid holidays, health and safety, equal treatment for part-time workers and women, protection when a business is sold off, and a voice at work. The prime minister wants to repatriate those rights, and not because he thinks he can improve them. Cameron wants to make it easier for bad employers to undercut good ones, drive down wages, and make people who already work some of the longest hours in Europe work even longer. To do that he needs agreement from the rest of Europe*."[110]

The trade union movement opposes repatriation because, as the TUC state: "*Where have many of the most significant advances for British working people in recent years come from? The answer is Europe*."[111] They continue, "*but it may be asked: could not these measures have been introduced in Britain acting on its own? Well, in some cases which transcend national borders, such as European Works Councils, clearly not. But, even for those measures that hypothetically could have been introduced in Britain unilaterally, not all have been strongly supported by UK governments (of whichever party). In many cases they have been seen instinctively in Whitehall as either redundant or offensive. That has been the reality. This attitude has been in part based on arguments (or myths) about international competition that, in practice, can often best be responded to at the European level*." Also "*the fact that they are EU laws means they deliver rights which will endure – member states cannot unilaterally repeal or weaken them as they can with their own laws*." These rules "*could only be repealed if the Commission was to make such a proposal and the Parliament and full Council agreed to it (which is virtually impossible)*."[112] Essentially the TUC argument recognises that a democratic majority in the UK Parliament cannot revoke EU decisions in this policy area while the UK remains party to these provisions.

**How can democratic freedom be restored? - The permanent opt out/carve-out**

Proposal one in this chapter seeks to give countries that negotiate an opt-out/carve-out from an area of legislation the permanent right to re opt-out in cases where the political parties disagree on an issue and a party favouring the opt-out/carve-out is elected. Dr David Green of Civitas in *What Have We Done? The surrender of our democracy to the EU* makes the case for competing regulatory regimes within the EU, stating that "*a competitive market allows consumers to compare companies; and in the same way national independence allows comparison between national systems, including their regulatory regimes*." The danger of the EU is that its institutions "*are calculated to isolate decision-makers from public pressure*"

[110] The Guardian, *TUC boss: Cameron will seize your EU employment rights to weaken them*, Rajeev Syal, 28 January 2013

[111] TUC, *Europe and your rights at work*, With an overview by David Lea and Stephen Hughes, April 2006, P6

[112] Ibid, April 2006, P9

and thereby the "*the vital element of freedom is lacking: the power to depose the rulers and trigger a general election by a simple majority vote*."[113]

There is no reason to believe that a repatriation of social policy would lead to an automatic reduction in employee rights. Greater rights for workers are popular with those in employment, even if they may reduce the level of employment in the overall economy. Campaigns to reduce holiday entitlements, paternity and maternity leave, and to make it easier to fire workers, could endanger the broader popularity of EU reform. Repatriating this policy area should be a UK objective but the economic benefits of repatriation will be reduced by the need to replicate many of these rights at a national level. Previously, the UK was successful in gaining an opt-out from this policy area; the UK has achieved concessions in this policy area before. However, this is one area of EU legislation which is popular among the UK public. Eurosceptics should tread carefully if they seek to build a broad coalition for EU reform. Trade unionists should be confident of their ability to pressure UK policymakers to replicate EU social law at a national level and, in the case of a Labour Party administration, perhaps even exceed existing employment rights.

**How would the UK negotiate a carve-out? A new protocol to exclude the UK from social and employment legislation**

The UK could, as Open Europe suggests, seek an "*opt-out exempting the UK from Articles 151-161 TFEU, which constitutes the 'social policy' title of the Treaties*." This would establish "*a new protocol, similar to that which excludes the UK from all articles in the EU Treaties that relate to the third stage of European Monetary Union (EMU),* [which] *could exempt the UK from Articles 151 to 161 and any legislation or decisions adopted on the basis of these articles.*"[114] This would strip the ECJ of the power to review the opt-out, to hear appeals on this subject and to make decisions based on these articles and the UK Charter of Fundamental Rights. To safeguard the existence of the protocol the UK may need to be barred from European Council votes on proposals relating to these articles and UK members of the European Parliament barred from votes on these articles.[115] This would weaken the voice for less labour market regulation in the EU among our competitors, potentially cementing the UK advantage in this policy area. I would term this a full carve-out rather than an opt-out. This carve-out removes the UK entirely from this field of EU decision making. Opt-outs can be creatively undermined as they relate to specific policies rather than broad policy areas.

**Why should we seek an opt-out from the Temporary Agency Workers Directive (TUPE) and Working Time Directive (WTD)?**

Securing an opt-out from TUPE with respect to public services should be a key priority. If private sector entities cannot alter pay, conditions or employment for a designated period following the transfer of control, fewer firms will bid to take control of public services and savings in any restructuring will be curtailed. The Working Time Directive imposes a cost of £2.6 billion per annum and the Temporary Agency Workers Directive costs "*nearly £2*

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[113] Civitas, *What Have We Done? The surrender of our democracy to the EU*, Dr David G. Green, April 2013, P4

[114] Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?* Stephen Booth, Mats Persson and Vincenzo Scarpetta, November 2011, P20

[115] Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?* Stephen Booth, Mats Persson and Vincenzo Scarpetta, November 2011, P20

*billion a year*" according to EU Fresh Start.[116] A 2011 study by law firm Allen & Overy, which surveyed the Human Resources departments of 200 medium and large UK businesses, found that 33 per cent of them would terminate temporary workers' roles before they reached the 12 week qualifying period, to prevent the increased costs of equal treatment with full time workers. A report from the Royal College of Physicians notes problems caused by the Working Time Directive including poor training for junior doctors, junior doctors working unsupervised, consultants having to cancel appointments at short notice due to statutory rest periods, and low consultant cover on evenings and weekends.[117] The cost of these regulations are real - doctors receiving inadequate training and supervision, patients receiving inferior access to healthcare and opportunities for temporary work reduced or the period it is available for cut short.

**What leverage does the UK have to achieve this? The UK could veto future EU Treaty changes until concessions are secured**

Open Europe recommends that the UK could veto future EU Treaty changes and use this as leverage to seek repatriation or opt-outs. The UK could seek a legal protocol to exempt the us from EU social policy, which would be included in EU Treaties, with the right to refer disputes over its application to the European Council where unanimity applies. Decisions on social policy are currently taken by qualified majority voting (QMV) in the Council of Ministers. The European Parliament has co-decision rights. Specific carve-outs (a carve-out is the process of adding an exception or removing a particular policy area from a general policy) and opt outs (opt outs allow an individual member state to not participate in a part of an agreement which remains applicable to the other EU members e.g. joining the Euro) can be undermined as the European Institutions, including the European Courts, "*have substantial powers to interpret the Treaties and* [sic] *its protocols in unpredictable ways*" and "*EU social policy has become increasingly hard to define as it now overlaps with the single market in general*." The fear is that the UK could be outvoted or overruled by the ECJ. Therefore securing an opt-out from specific proposals would "*require vast amounts of time and political capital but with no guarantee that achieved gains would survive*."[118]

**If necessary, a Conservative majority administration could legislate at a national level through an Act of Parliament to repatriate employment legislation and challenge the EU to act**

The Fresh Start Group proposes as one of their five envisaged EU Treaty Changes that "*the EU should repatriate competence in the area of social and employment law to Member States. Several EU members are already finding their attempts at structural reform are hampered by inflexible EU bureaucracy, and we should work with them to negotiate change. Failing that, we should seek an opt-out for the UK from existing EU social and employment law, and an emergency brake for any Member State regarding future EU legislation that affects this area*."[119] While EU Regulations are directly applicable in EU member states, EU Directives require transposition into domestic law. European Court of Justice rulings influence the interpretation of EU Regulations and Directives. Even if EU social and

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[116] EU Fresh Start, *Manifesto for change: A new vision for the UK in Europe*, January 2013, P20

[117] Royal College of Physicians, *Parliamentary briefing: Medical workforce: New Deal and European Working Time Directive,* July 2011

[118] Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?*, Stephen Booth, Mats Persson and Vincenzo Scarpetta, November 2011, P 3, 15

[119] Fresh Start Project, *Manifesto for Change: A new vision for the UK in Europe*, January 2013, P3

employment law is repatriated, the UK legislative acts that transposed the Directives would also need to be repealed or amended according to the wishes of the UK Parliament. The Social Chapter itself cannot be re-opted out of as the Social Chapter no longer exists independently. The EU's social and employment policy is now contained in Articles 151 to 161 in the Treaty on the Functioning of the European Union.

An Act of Parliament to remove EU authority over UK social and employment policy would be more problematic. The European Commission or a member state could take the UK to court under Articles 258 and 259 TFEU and the ECJ could award a fine in the form of a lump sum or daily penalty payment. The maximum fine is £225.6 million a year or 703,104 Euro a day. Open Europe also specifies that "*the ECJ also has an "accelerated procedure" at its disposal that it can use to deal with cases of an urgent nature*."[120] Whether this would warrant such a response is unclear.

**Why the stress on a carve-out rather than a simple opt-out? The dangers of a repeat of the Charter of Fundamental Rights problems**

Without a full carve-out from EU Social Policy and the jurisdiction of the ECJ for that policy area as recommended in proposal three there could be a repeat of situation regarding the protocol negotiated by the UK and Poland to curtail the creation of new rights in the Charter of Fundamental Rights. The House of Commons European Scrutiny Committee recognised that it "*still seems doubtful to us that the Protocol has the effect that the courts of this country will not be bound by interpretations of measures of Union law given by the ECJ and based on the Charter."*[121] The other Treaty obligations of the EU require the UK courts to "*if the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, the duty to interpret the measure in accordance with that ruling arises, not under the Charter, but under the UK's other Treaty obligations. Nothing in the Protocol appears to excuse the UK from this obligation."*[122] An example of the effect of this is the ECJ decision to scrap the derogation in EU Gender Directive for the insurance industry to charge men and women different premiums as "*in its ruling, the ECJ drew heavily on the Lisbon Treaty's Charter of Fundamental Rights. Despite the UK allegedly having an opt-out from the Charter, the ruling has full effect in the UK*."[123] The Protocol has not protected the UK from EU encroachment in this area.

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[120] Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?* Stephen Booth, Mats Persson and Vincenzo Scarpetta, November 2011, P23

[121] House of Commons, Select Committee of European Scrutiny Third Report, July 2007 http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/1602.htm

[122] Ibid

[123] Open Europe, *Repatriating EU social policy,* Booth et al., P15

# Chapter Four - Common Agricultural Policy (CAP)

| | **Proposal** |
|---|---|
| **1** | Offer each member state a reduction in EU contributions equal to the payments each that member state receives under CAP. This would preserve the existing balance between net contributors and net beneficiaries of the CAP. Essentially it would mean that every current net beneficiary of the CAP would receive an EU rebate. |
| **2** | Repatriate agricultural policy to the EU member states to allow EU members to decide policy according to national democratic preferences |
| **3** | Incorporate safeguards to protect the more protectionist EU member states' right to preserve existing mechanisms of state support domestically |
| **4** | Accept the continued unfairness of the UK's funding under CAP being cemented into EU policy for preservation of the UK rebate and greater flexibility over CAP expenditure in the UK |

The UK should seek to achieve all of the four proposals above, which should be mutually reinforcing. Proposal four says the UK should accept the continuation of its fiscal transfers to countries with a larger or more efficient agricultural sectors as the price of securing proposal two, which is the repatriation of agricultural policy. I have not suggested that the UK aim to restore sovereign control over agricultural policy *and* aim to end the system of cross subsidisation inherent in the existing CAP. Many nations are financial net beneficiaries of the CAP. A proposal to end the financial transfers in the CAP would end in defeat. One of the net beneficiaries would veto the proposal. By repatriating agricultural policy the UK will be able to choose its own approach and hopefully invest more in crop development, diversifying rural incomes and building a more productive agricultural sector. Proposal one explains the mechanism through which repatriation can be achieved. This proposal would preserve the inter-state financial transfer system that the CAP facilitates. It would convert the payments made to net recipients of CAP funding into individual rebates. This would help take the focus off the UK rebate in future EU budget negotiations, as the UK would be one among many EU states to receive a rebate from EU contributions. Proposal three supports the common theme of this report, which is the restoration of the democratic right of different nations within the EU to pursue different policies, in this case the right of some states to choose to subsidise the agricultural sector more than others.

**A founding and enduring EU policy which will not easily be reformed**

The CAP was the first common policy adopted by the European Community under the Treaty of Rome in 1957 and began operation in 1962.[124] A key reason for its creation was to provide secure food supplies for Western Europe in the event of a Russian blockade, a key threat during the Cold War. It is the largest component part of the EU budget amounting to over 55 billion Euro per annum. The OECD describes the objectives of the CAP as "*to increase agricultural productivity by promoting technological progress*", "*to ensure a fair standard of living for the agricultural community*", "*to stabilize markets*", "*to assure the availability of*

[124] Civitas, *EU Facts: Common Agricultural Policy*, 22 January 2013

*supplies*" and "*to ensure supplies reach consumers at a reasonable price*."[125] Open Europe identifies the following additional objectives of the CAP: "*improving the quality of Europe's food, guaranteed food safety", "the well-being of rural society", "ensuring that the environment is protected for future generations", "providing better animal health and welfare conditions"* and *"doing all this at minimal cost to the EU budget*". In more practical terms the programme serves to transfer money to countries with large and economically unproductive agricultural sectors.[126]

Reforms in 2003 unhooked payments from current production but introduced a time limited series of payments based on historic production. The CAP is split into two Pillars: Pillar 1 comprises around 80 per cent of CAP spending and is comprised of direct payments to farmers and landowners (Single Payment Scheme) and the Pillar 2 is known as Rural Development and *"aims to promote economic, social and environmental development with rationale similar to the EU's Structural and Cohesion funds - but with a specific focus on rural areas - and accounts for 20% of total spending. Pillar 1 is delivered directly through the EU budget, while Pillar 2 is subject to co-financing from the EU and national governments."*[127] Civitas describes how "*since 2005 farmers are no longer subsidized, but instead receive a lump-sum called the Single Farm Payment (SFP) and are encouraged to produce in response to consumer demand. Instead of payments being made to control how much farmers produce, they are paid for their role as guardians of the countryside.*"[128] Management of this system is somewhat chaotic - the TaxPayers' Alliance identifies how "*€16.8 million was set aside for cases the Commission might lose in the European Court of Justice if it was found guilty of mismanaging the CAP in 2008*."[129] This provision highlights official awareness of the programme's short comings.

The CAP also includes a Common External Tariff on agricultural goods and purchases of agricultural goods. This is used to support the management of EU agricultural production as "*if surplus food is produced then the EU intervenes in the market either by subsidizing export of the product at below cost price; by storing it, creating the EU 'food mountains'; selling it later; or destroying it. Such exports are generally dumped on poor countries, especially in Africa. The CAP also seeks to control production by setting quotas on how much a farmer can produce then paying them not to produce more*."[130] The Common Agricultural Policy substitutes a government led demand management system in agricultural for what would otherwise be a relatively free market in agricultural goods.

**EU enlargement has made the CAP more resilient**

The Department for the Environment, Food and Rural Affairs observe that "*the CAP represents over 40% of EU budget expenditure and is the most expensive of EU policies, much of this expenditure represents poor value for money. We want to see agriculture*

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[125] OECD, *Evaluation of Agricultural Policy Reforms in the EU*, 2011, P23

[126] Open Europe, *More for Less: Making the EU's farm policy work for growth and the environment*, Christopher Howarth, Anna Kullmann, Pawel Swidlicki, February 2012, P6

[127] Open Europe, *More for Less*, Howarth et al., P4

[128] Civitas, *EU Facts: Common Agricultural Policy*, 22 January 2013

[129] TaxPayers' Alliance, *FOOD FOR THOUGHT: How the Common Agricultural Policy costs families nearly £400 a year*, Dr Lee Rotherham, January 2009, P15

[130] Civitas, *EU Facts: Common Agricultural Policy*, 22 January 2013

*becoming competitive without reliance on subsidies*."[131] Agriculture represents 0.7 per cent of the UK's gross value added compared to the 1.7 per cent EU wide average. EU enlargement between 2004 and 2007 added 12 member states, increasing the number of farms by 140 per cent, the number of farmers by 100 per cent, and the agricultural area by 40 per cent, but agricultural production increased by less than 20 per cent.[132] Enlargement brought in a large number of inefficient farms in countries that are net beneficiaries of the CAP. Open Europe shows how *"despite the Commission's claims that the CAP has fallen from around 70% of the budget in the 1970s and 80s, to 40% today, this is not because of a fall in the absolute amount of subsidies paid out – which have remained largely constant - but because other areas of the budget have expanded more in comparison."*[133] Attempting to reform the agricultural policy of all EU states in a more free market direction would involve the expenditure of a huge amount of political capital to little obvious benefit to the UK national interest.

**The CAP increases UK food costs and welfare bills**

The TaxPayers' Alliance, in a 2009 report *Food for thought: How the Common Agricultural Policy costs families nearly £400 a year*, itemises the cost of this policy. They reach a total of £10.3 billion nationwide, which is equivalent to "*£398 per household*" adding "*around £7.65 per week to family food bills*" which is "*over one per cent of average household, post-tax income*." In 2009 this cost was composed of £5.3 billion in increased food prices at the till, £317 million increased social welfare costs, £264 million in regulatory burdens, £5 million in the duplication of food agencies and a £4.7 billion UK share of the CAP budget . Deducting the double counting of sugar and agricultural levies in the EU budget, which amounts to £336 million, this creates a cost of £10.3 billion per annum. The Institute for Economic Affairs say the CAP has the same effect as a food tax, increasing food prices by 17 per cent on average (as of 2013).[134]

**A more market based agricultural policy is needed but this should be introduced at the national level**

The OECD recognises that "*there is no obvious rationale for farm income support provided on the basis of current or historical production-related criteria*." The system of "*payment entitlements based on past references can increase costs for new entrants and slow structural adjustment. Rules regarding tradability of quota and payment entitlements differ by member states*." The OECD believes "*there is a much stronger economic case for public investment in services that benefit the sector overall, and allow potentially competitive suppliers to improve their productive performance*."[135] Farmers should be responsible for managing risk with government providing "*information and training to help improve the ability of farmers to manage high probability and low impact events*". Medium risks could be "*managed*

[131] Department for Environment, Food and Rural Affairs, *Common Agricultural Policy Reform*, Archived Content

[132] OECD, *Evaluation of Agricultural Policy Reforms in the EU*, 2011, P23

[133] Open Europe, *More for less: Making the EU's farm policy work for growth and the environment*, By Christopher Howarth, Anna Kullmann, Pawel Swidlicki, February 2012, P8

[134] Institute of Economic Affairs, *Abolish the CAP, let food prices tumble*, Kristian Niemietz, 18 January 2013

[135] OECD, *The European Union's Common Agricultural Policy (CAP) post-2013*, October 2011

*through specific markets (with or without government support), such as cooperative arrangements, production contracts, insurance, and futures contracting*."[136]

*Guardian* columnist George Monbiot points out that in the UK the CAP mainly benefits large landowners. OECD figures show that the UK experience is not atypical and a majority of CAP payments go to larger firms with support by farm size "*unequally distributed in the EU27 as the 25% of largest farms receive 74% of all support … in 2007*."[137] Mr Monbiot contrasts the cutting of welfare benefits for the poor with the UK opposition to capping payments to large landowners. He terms it the "*modern equivalent of feudal aid*."[138] Two EU proposals for capping include a proposed limit of 300,000 Euro per annum per farmer and reducing the rate received per hectare above a certain rate - 150,000 Euro has been proposed.[139] Recipients of the Single Farm Payment must keep the land in a 'Good Agricultural and Environmental Condition.' This entails the "*avoiding the encroachment of unwanted vegetation on agricultural land*." Monbiot highlights how this subsidy system ensures a barren landscape as grazing strips the vegetation wildlife needs to flourish. He believes that "*without subsidies, almost all hill-farming would cease*" but does not recommend cancelling all subsidies. He cites the *State of Nature* Report produced by the Royal Society for the Protection of Birds which found that 65 per cent of wildlife species in lowland semi-natural grassland and heathland for which they had data were in decline.[140] Friends of the Earth have criticised the European Commission proposals for CAP reform published in 2011[141] for the continued support for factory farming and food exports and the failure to mitigate the climate changing emissions from farming.[142]

Civitas highlights how current reform proposals include "*an income insurance scheme for farmers, with 2/3 of farmers' earnings now provided by direct payments from the CAP*."[143] The payments based on historic payments enshrine the UK's position as a net contributor to the budget. Civitas estimates that "*processing farmers' CAP payments is expensive (in 2009, the average cost of processing an SFP claim in the UK was £742, even for payouts as small as £5).*"[144] The TaxPayers' Alliance identifies that *"£5.2 million (€6.5 million) was spent on satellite surveillance, showing the scale of the management system*."[145] Open Europe reveals that under Pillar 1 payments (direct payments to farmers and land owners) *"Defra estimates farmers only spend between 0.5% and 2.5% of the subsidy received on complying with the environmental obligations attached to it.*"[146] According to the OECD, in Europe only 16 per

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[136] Ibid
[137] OECD, *Evaluation of Agricultural Policy Reforms in the EU*, 2011, P14
[138] The Guardian, *Europe's €50 billion bung that enriches landowners and kills wildlife*, George Monbiot, 26 November 2012
[139] The Guardian, *Farming subsidies: this is the most blatant transfer of cash to the rich*, George Monbiot, 1 July 2013
[140] Royal Society for the Protection of Birds, *State of Nature*, May 2013
[141] European Commission, *Legal Proposals for the CAP after 2013*, October 2011
[142] UK Parliament, House of Commons Library Note, *Agriculture- CAP Reforms*, Science and Environment Section, Christopher Barclay, 20 June 2012, P8
[143] Civitas, *EU Facts: Common Agricultural Policy*, 22 January 2013
[144] Ibid
[145] TaxPayers' Alliance, *FOOD FOR THOUGHT: How the Common Agricultural Policy costs families nearly £400 a year*, Dr Lee Rotherham, March 2009, P15
[146] Open Europe, *More for less: Making the EU's farm policy work for growth and the environment*, Christopher Howarth, Anna Kullmann, Pawel Swidlicki, February 2012, P15

cent of CAP funding went to Pillar 2 payments towards making the agricultural and forestry sectors, the environment and countryside more competitive.[147] The CAP subsidises tobacco production while the Community funds schemes to prevent smoking and help smokers quit.

The existing system is expensive to administer, frustrates efforts to modernise the sector and disproportionately benefits larger producers who do not need the level of support offered and often don't spend it all on the designated tasks. Considerable savings could be achieved for the UK by repatriating policy in this area but how can this be done?

**Is 2013 the year to contemplate repatriation of the CAP for the UK?**

In 2013 the CAP is set to be renewed. UK leaders have been keen to use the existence of the CAP to divert attention from the UK's rebate. Previous UK Prime Minister Tony Blair said in 2005 that *"we can't discuss the British rebate unless we discuss the whole of the financing of the EU, including that 40% of the budget goes on agriculture which employs only 5% of the people.*"[148] Following the reduction in the UK rebate agreed by the previous Labour administration, the UK's net contribution to the EU budget is increasing from just under 4 billion in 2006 to over 8 billion in 2014 (per annum). The UK is a major net contributor to the CAP. Open Europe specifies that "*the UK remains a big loser from the CAP. Between 2007 and 2013, the UK will contribute £33.7bn to the CAP and get back £26.6bn; a net contribution of £7.1bn. Per hectare, the UK receives £188, compared to for example France, Germany and the Netherlands which receive £236, £251 and £346 respectively.*"[149] The TPA identify a series of ways the UK does badly out of the CAP. They identify how "*the UK has about as much farmland as Germany, but gets six tenths of its level of grants*", "*the UK has about a seventh more farmland than Italy but gets a fifth less money*" and "*France gets the lion's share of the grants, with approaching a fifth of the whole CAP budget*."[150]

**What can the UK do about this?**

I believe that the UK could secure a deal that would allow it to repatriate the proportion of contributions she gets back from the CAP in the form of payments to farmers, and have it added to the rebate, whilst continuing to pay the existing membership contributions to the EU (proposal one in this chapter). As part of this deal the UK would be given full sovereignty over UK agricultural policy (proposal two in this chapter).

Open Europe outlines some alternative options for the UK: the UK could negotiate an opt out of the CAP similar to its opt outs over the Schengen area and the Euro; the UK could withdraw from the CAP as part of a comprehensive renegotiation of UK relations with the EU and if necessary the UK could continue to contribute to the EU budget for rural development outside the EU budget as Norway does. Open Europe reveals how the UK has "*moved further than other states in using a mechanism called Article 86 to divert funding from the SPS [Single Payment Scheme] into the rural development fund (so-called modulation)"*. This is currently limited to 5 per cent of direct payments but under the 2012

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[147] OECD, *Evaluation of Agricultural Policy Reforms in the EU*, 2011, P11-12

[148] Open Europe, *More for less: Making the EU's farm policy work for growth and the environment*, By Christopher Howarth, Anna Kullmann, Pawel Swidlicki, February 2012, P5

[149] Open Europe, *More for less: Making the EU's farm policy work for growth and the environment*, By Christopher Howarth, Anna Kullmann, Pawel Swidlicki, February 2012, P3

[150] TaxPayers' Alliance, *FOOD FOR THOUGHT: How the Common Agricultural Policy costs families nearly £400 a year*, Dr Lee Rotherham, March 2009, P12

European Commission proposals an increase in this limit seems likely.[151] If full repatriation cannot be achieved, securing a concession which allows the UK to greatly increase payments made through the rural development fund and modify payments made to UK farmers would be a viable fallback position.

**Who are the UK's potential allies?**

Britain is not the only net contributor to the CAP. Between 2007 and 2013 Germany, Italy, the Netherlands, and Belgium were also significant net contributors. France, Sweden, Luxemburg, Finland, Denmark and Cyprus were marginal net contributors. France seeks to preserve the level of payments made to French farmers under the CAP. The French Junior Minister for EU Affairs, Bernard Cazeneuve, threatened to veto the EU budget if it contained further reductions, saying that "*France would not support a multi-annual budget that does not maintain the funds of the Common Agricultural Policy*."[152] With regard to Germany, "*the dislike of the CAP among the German elite is partly motivated by material interests as Germany is the major net contributor to the EU budget*" and "*with a redistribution of CAP and cohesion funds to the new member states written on the wall, many fear a significant deterioration in the German net position*."[153]

The European Centre for International Political Economy (ECIPE) describes the UK as the leader of a gang including Denmark, Sweden, the Netherlands and Malta whose support for CAP reform "*can be expected to be firm*."[154] The UK can agree a deal with France and Germany that preserves the payments but returns sovereignty over policymaking to the UK. The potential opponents will include the new members of the EU that are part of the Visegrád Group (Czech Republic, Hungary, Poland and Slovakia), so seek redistribution of CAP subsidies to their benefit. They are seeking increased payments under the CAP, and these would be financed from a reduction in the payments made to long standing EU members. These new EU members would not support an end to the CAP but may support an agreement which preserves their right to subsidise their agricultural sectors more, as I suggest in policy proposal three in this chapter.

**How would an independent UK Agricultural Policy be different?**

Proposal two in this chapter advocates the repatriation of agricultural policy but does not dictate what form it should take. The TaxPayers' Alliance (TPA) believes the government "*could force reform along one of several lines designed to save some or most* [wasted CAP] *money. Even running exactly the same policy from Whitehall would save taxpayers one billion pounds a year*" through reductions in the amount spent subsidising foreign farmers (excluding savings in bureaucracy and fraud).[155] Alternatively, "*following the example of New Zealand, the system could be entirely abolished. This would save taxpayers and consumers over £10 billion a year and would certainly provide a major boost to world trade*

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[151] Open Europe, *More for less: Making the EU's farm policy work for growth and the environment*, By Christopher Howarth, Anna Kullmann, Pawel Swidlicki, February 2012, P6

[152] Daily Mail, *France threatens to reject EU budget if there are cuts to Common Agricultural Policy*, 31 October 2012

[153] ECIPE Working Paper No 3/2011, *A Guide to CAP Reform Politics: Issues, Positions and Dynamics*, Valentin Zahrnt, 2011, P15

[154] ECIPE Working Paper No 3/2011, A Guide to CAP Reform Politics, P16

[155] TaxPayers' Alliance, *FOOD FOR THOUGHT: How the Common Agricultural Policy costs families nearly £400 a year*, Dr Lee Rotherham, March 2009, P18

*talks, benefiting the UK economy as a whole*."[156] The middle option would be to reduce the levels of subsidy which would "*deliver valuable savings for consumers (a proportion of up to £10 billion in savings) but would, to some extent, be painful for farmers over the medium term*."[157]

The UK could use the saved funds to invest in crop research and development, the diversification of farm incomes and a reduction of subsidies. This would encourage a more productive UK agricultural sector to emerge. This would contrast with the existing system, where the provision of "*income support irrespective of whether any meaningful economic activity takes place on a farm"* often acts as *"an outright disincentive for farmers to modernise, in turn locking in unviable business models and hurting Europe's competitiveness.*"[158] The UK would be in a position to end the subsidies to *"Land owners* [who] *now receive a large share of the income support, irrespective of whether or not they are actual farmers. Landowners, as opposed to farmer households, now pick up over 40% of the subsidies, double the amount compared to a decade ago."*[159] The European Commission 2009 Scenar 2020-II study estimates that without the subsidies, land use will fall by 6 per cent between 2007 and 2020 and agricultural wages will rise at half the current predicted rate.[160] Ending the Common Agricultural Policy across Europe would be beneficial but this is more likely to occur when protectionist states can see the success of liberal measures. These policies can only be pursued at the national level following repatriation of this area of policy making.

**The need to compromise and accept the immovable - the UK's position as a net contributor to the CAP, the Common External Tariff on agricultural goods and the existence of EU agricultural Quangos in this policy area will persist**

UK policy on the Common Agricultural Policy has been mistaken. Attempts to reform the CAP and reform the agricultural sector Europe-wide will not succeed. It is also wrong to advocate reforms to increase democratic accountability and flexibility in areas where the UK resents EU legislation, but then attempt to force other EU states to reform their agricultural sectors along UK lines. Negotiating a compromise that would protect the rights of EU states to implement existing subsidies at a national level, but granting all EU states a rebate equivalent to their total payments under the CAP, would allow for the UK to develop its own agricultural policy. Each state would now get a rebate. If agricultural policy was repatriated the UK would be free to invest more in research and development, the diversification of farm incomes and less in supporting inefficient farms.

Tariffs on foreign agricultural imports increase food prices. Purchase of domestic production to maintain high food prices and its subsequent dumping on undeveloped African markets, requiring the UK to provide development aid for those countries, is clearly morally wrong. Reducing UK development aid payments and tariffs for non EU agricultural producers makes policy sense, but this would involve undermining the Common External Tariff. The tariffs on

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[156] Ibid, P4
[157] Ibid, P18
[158] Open Europe, *How to make the EU's farm policy work for jobs, growth and the environment*, February 2012, P14
[159] Ibid, P14
[160] European Commission, *Update of Analysis of Prospects in the Scenar 2020 Study: Preparing for Change*, December 2009, P78-83

food imports from countries without special arrangements with the EU range between 18 and 28 per cent, compared to the 3 per cent average tariff paid on manufactured goods.[161] The Cairns Group condemned the milk subsidy, saying that "*by resorting to export subsidies again, as it did last year for pork and did previously for wheat, the EU continues to shield its producers from market forces, at the expense of unsubsidized producers in other markets. It is of particular concern that farmers in many developing countries, which cannot afford to engage in subsidy wars, stand to suffer most from increased distortions in world agricultural markets*."[162] Open Europe estimates the savings of ending CAP and the associated tariffs in this area "*and the reinvestment of the money into more productive areas of the economy, could be worth a boost in output equivalent to €139bn, or 1.1% of EU GDP. Britain would experience a boost in output of €14.2bn or the equivalent of 135,000 fulltime and part-time jobs*."[163] However, this approach will not be approved by all EU states. It is not a realistic policy demand. The UK must continue to argue for lower agricultural tariffs as long as it remains within the EU.

The UK could attempt to repatriate its contribution to the maintenance of EU 'Quasi Autonomous Non-Government Organisations' (Quangos) in the area of agricultural policy. Quangos are bodies which stand at arms' length to central government; they are funded by the government but not directly controlled by it. The European Food Safety Authority (EFSA) duplicates the work of national bodies such as the Food Standards Agency (FSA). However, opening up the funding and placement of EU Quangos could increase the numbers of countries opposed to the more important reform of repatriating farm payments. Basing EU quangos in particular EU states is a key means of securing those states' support for spending in those areas. By proposing the abolition of such bodies the UK might motivate a state to veto efforts to repatriate policy in this area.

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[161] Open Europe, *More for less: Making the EU's farm policy work for growth and the environment*, By Christopher Howarth, Anna Kullmann, Pawel Swidlicki, February 2012, P10

[162] The Cairns Group, *Cairn Groups Ambassadors call on EU to reverse recent decision on export subsidies*, 27 January 2009

[163] Open Europe, *More for less: Making the EU's farm policy work for growth and the environment*, By Christopher Howarth, Anna Kullmann, Pawel Swidlicki, February 2012, P3

# Chapter Four - Common Fisheries Policy (CFP)

| | **Proposal** |
|---|---|
| **1** | Seek repatriation of UK fishing waters and establish an exclusive economic zone within 200 miles of the UK coast or at an equidistant point in respect of other nations' claims to the same |
| **2** | If this cannot be achieved the UK should seek a reversal of the Factortame Decision, to allow the UK to discriminate in favour of its own citizens when assigning the national quota for fish. |
| **3** | If the existing system continues then the UK should lobby for more rigorous inspections to prevent Spain in particular from cheating the system and an end to European subsidies for the construction of new vessels. |
| **4** | To secure this the UK should be willing to intervene in European financial discussions designed to secure bailout funds for respective countries. The UK may also need to consider using its position as the second largest net contributor to the EU budget, with an average net contribution of between £9.5 billion per annum, to pressure for change by delaying EU contributions. |

The four proposals contained above are mutually exclusive. The preferred aim is proposal one, which is to achieve the repatriation of the UK fishing waters (up to the 200 mile limit) so the UK Parliament could determine fishing policy to preserve fish stocks and build a stronger UK fishing industry. However, this may not be achievable. Proposal two represents a more moderate policy aim, which should be pursued if negotiators determine that full repatriation is unfeasible. This proposal assumes the continuance of EU authority over fishing policy but seeks to reverse the Factortame Decision so that only UK ships can access the UK national fishing quota as set by the EU. Policy proposal three complements proposal two - it assumes that the Common Fisheries Policy persists but targets abuse by particular countries and ends the system of EU subsidy for trawler construction, which primarily benefits competitors such as Spain. If proposal one were to be achieved, both proposals two and three would not be necessary. If the UK was successful in regaining control of its territorial waters it could decide fisheries policy independently and police access to UK waters accordingly so the EU quota system would not exist. Proposal four is a means of achieving either proposal one, or both two and three. This proposal states that the UK needs to recognise its leverage thanks to the EU financial crisis and our position as a net contributor to the EU budget, which gives the UK scope to pressure our EU partners to accept these policy changes.

**What is the Common Fisheries Policy?**

The CFP makes EU territorial waters a common resource exploitable by fisherman from across the EU. It removes national control of territorial waters. This is controversial because the UK possesses particularly rich fishing waters. Our EU membership entails the common ownership of the UK's waters. United Kingdom Independence Party (UKIP) research shows that former Prime Minister Edward Heath, who negotiated UK entry to the European Economic Community (EEC), believed making British coastal waters a common European

Union resource was "*a price worth paying*" for UK membership. The TPA argues that the EU negotiating team in recently released documents saw that "*in the wider UK context, they [fishing interests] must be regarded as expendable*."[164] This meant that UK waters were to be shared by other (and future) member states with equal access to EU fishermen and women to formerly national waters beyond a coastal 12 mile territorial limit. Open Europe analysis of the UK Party Manifestos in the 2012 General Election showed Conservative and Labour Party support for reform of the Common Fisheries Policy to "*encourage sustainable practices, give communities a greater say over the future of their fishing industries, and bring an end to the scandal of fish discards"* and to *"push for fundamental reform"* respectively.[165] The Liberal Democrats did not mention the CFP in their manifesto but elsewhere have pledged to *"give local fishermen and other stakeholders a real say in the management of their own regional waters."*[166] None of the three major parties promised the restoration of UK sovereign control of UK territorial waters.

**How does the Common Fisheries Policy work?**

A fish quota system was introduced in 1983. The TPA writes that the Fisheries Council, which decides the fishing quotas in a bartering session at the end of the year, enables *"EU countries that do not have an interest in the North Sea, or indeed even a coast, take part in the voting. As such, they can vote tactically to pay off favours in other EU Council business*."[167]

Employment in the UK fishing industry fell by a third from 18,000 employees to 12,000 between 1997 and 2007.[168] Global Vision and the TaxPayers' Alliance estimate that the Common Fisheries Policy has cost 97,000 UK jobs overall - 88,000 in onshore dependent industries and 9,000 in fishing. The European Commission describe the three different mechanisms the EU have applied to manage fishing:

1) Fishing effort limitations which "*restrict the size of the fleet and the amount of time it can spend fishing*",

2) Catch limits which "*restrict the quantity of fish that can be taken from the sea before they must stop fishing*"

3) Technical measures which "*regulate how and where fisherman can fish*."[169]

Seven Regional Advisory Councils were created between 2004 and 2008, five of which are based on geographic areas, to give "*fishermen, vessel owners, processors, traders, fish farmers, women's fisheries groups, environmental and consumer organisations and others – a vehicle through which to feed recommendations into CFP policy developments*" but "*they are not part of the formal decision making process*" and "*the Commission is not under any legal obligation to consult them*."[170] They must include representatives of at least two member states and two thirds of representatives from the fisheries sector.

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[164] TaxPayers' Alliance, *The Price of Fish: Costing the Common Fisheries Policy*, Dr Lee Rotherham, Foreword by Professor David Bellamy, January 2009, P8

[165] Open Europe, *Briefing Note: IN BRIEF: THE PARTIES POSITIONS ON KEY EU POLICIES*, 21 April 2010, P10

[166] Idem

[167] TaxPayers' Alliance, *The Price of Fish*, P9

[168] The Telegraph, *Labour 'threw away UK fishing industry'* David Harrison and Jasper Copping, 25 November 2007

[169] European Commission, *Fishing rules*

[170] European Commission, *Common Fishery Policy – Factsheets*

European Union control has failed to preserve sustainable fishing grounds. French fish quotas now exceed UK quotas in the English Channel.[171] The Communities Fisheries Control Agency, created in 2002, is based in Spain. The UK does not appear to have been a beneficiary of EU control of what would be UK territorial waters. The TPA reveals that higher fish prices increase social security payments by £269 million per annum because "*since joining the CFP, fish has become approaching twenty times more expensive*."

**Without the restoration of national control there is no effective voice for the creation of sustainable fishing grounds**

Norman Tebbit correctly identifies that "*the hard fact is that whilst many people and organisations have an interest in taking fish, no one other than governmental organisations has any obligation to increase the number of fish in the sea. The fishing industry takes no interest in increasing stocks*."[172] EU Commissioner for Maritime Affairs and Fisheries Maria Damanaki describes how "*in the EU, too many stocks are overfished and catches are only a fraction of what they used to be in the 90s and are still dipping year after year*…T*he US, Australia, New Zealand and Norway are already way ahead of us in adopting modern, sustainable policies that deliver good results for the industry and the oceans*." Around "*72 per cent of Europe's fish stocks are believed to be overexploited, compared with 32 per cent worldwide*."[173]

Guardian columnist George Monbiot describes the EU's fisheries management system as "*a disaster*." He cites a European Commission paper which acknowledged that "*the cost of fishing to the public budgets exceeds the total value of the catches*" in several member states.[174] Celebrity Chef Hugh Fearnley-Whittingstall set up the FishFight to end the practice of discards, where fisherman are required not to land fish they have caught in excess of their quota, which causes them to throw lower value dead fish back into the sea. His petition gained 850,000 UK signatures.[175] He also advocates the creation of Marine Conservation Zones. Both the Council of Ministers and the European Parliament have now approved an end to the policy of discards. Austin Mitchell, Labour MP for the constituency of Grimsby which has a large fishing industry and Chair of the All Party Parliamentary Fisheries Group, said in the House of Commons on 15 March 2012 that "*this is the time to repatriate powers, and power over fisheries is the power we should repatriate*." He condemned the CFP as "*a very centralized policy – it is Gosplan, Soviet Union-style planning for fishing. It applies one-size-fits-all regulations for varied waters and fleets, and dictates to fishermen instead of working with them*."[176]

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[171] UKIP, *A Sustainable British Fishing Industry, A Fishing Policy for an Independent Britain, A Policy Statement*, 2010, P2

[172] The Telegraph, *How fish are disappearing from British waters – thanks, of course, to the EU*, Norman Tebbit, 17 July 2011

[173] The Independent, *UK 'should be made to restock fishing waters'* Lewis Smith, 9 June 2011

[174] The Guardian, *These are not the mariners of old but pirates who make bureaucrats blanch*, George Monbiot, 1 June 2009

[175] Hugh's Fish Fight - http://www.fishfight.net/discards/

[176] House of Commons Debate, 15 March 2012, c.431

**How the EU game works - UK fishing grounds have become a chip that non fishing states can trade for concessions in other policy areas**

The TaxPayers' Alliance identifies the key problems with the Common Fisheries Policy as follows: "*communal management without particular responsibility", "a quota system based on lobby and barter", "a culture in Whitehall of managing inevitable decline", "a reluctance to end the CFP as this would signal an EU failure or retreat", "political ambition in Brussels to drive for an integrated EU fleet system [and] governments operating as disinterested (UK) or self-interested (others) stakeholders*."[177] As with UKIP, the TPA acknowledge that the UK "*could have followed the example of Canada, Iceland, Norway and others and expanded its own territorial waters as international law permitted. It couldn't, because those fell to common management under the CFP*."[178] They estimate the cost of the loss of these waters at £2.11 billion. National governments have control of inner waters up to 12 miles under Council Regulation EC No 2371/2002, but this derogation needs to be renewed every 10 years by a Qualified Majority Vote or control passes to Brussels. This 12 mile limit was recently extended until 2022.

**When is a UK national quota not a 'national' quota?**

**The Factortame Decision**

The Factortame case showed the futility of the national quota system. The UK government was forced to pay compensation of £55 million to fishermen from Spain that purchased UK-registered ships to take advantage of the UK quota. The UK had tried to stop them on the basis of nationality, which is illegal under EU rules.

David Cameron declared the decision of the EU Fisheries Council to prohibit discards by 2020[179] and the emphatic vote in the European Parliament (the final vote was won by 502 votes to 137) as a sign of UK influence.[180] Currently "*more than 1m tonnes of healthy fish are annually thrown back dead into the sea by fishermen – due to EU rules, or in order to maximise their profits*."[181] This ban on discards and the requirement to land all fish caught is welcome.[182] However, the transferable fishing concessions based on multi annual plans continue to empower non fishing states to decide the catch and allocation in UK waters, and foreign fisherman to take advantage of UK fishing quota allocations.

**Paying for foreign competitors to construct new craft to better compete with UK fisherman and for UK fishermen to decommission their boats**

The EU offers grants to fishermen wishing to upgrade their craft. Bizarrely, "*because of the terms of the Fontainebleau Rebate, the Treasury objected to* [the] *UK claiming its share of the grant, as it would end up repaying 71 per cent of the EU award for UK vessels back to Brussels. The end result was that other countries, particularly the Spanish under MAGP IV, did pay and claim, and so the UK (a net contributor to the EU budget) has indirectly*

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[177] TaxPayers' Alliance, *The Price of Fish: Costing the Common Fisheries Policy*, Dr Lee Rotherham, Foreword by Professor David Bellamy, January 2009, P6

[178] Idem

[179] European Commission, Maria Damanaki, *Discard Ban: EU Fisheries Council takes decisive stance*

[180] The Guardian, *MEPs vote to ban discards in historic reform of fishing policy*, Fiona Harvey, 6 February 2013

[181] The Guardian, *Fishing discards process thrown overboard by EU*, Fiona Harvey, 13 June 2012

[182] European Commission, *Reforming the Common Fisheries Policy: Building a Brighter Future for Fish and Fisherman*

*subsidized its competitors, but not its own citizens*."[183] This situation exists because there is a link between the winning of EU grants and the size of the UK rebate. Grants under the former reduce payments under the latter to account for the fact 'EU' money is being spent in the UK.

European Commission figures show that under the European Fisheries Fund, Spain received 1.13 billion Euro between January 2007 and December 2013, Poland received 734 million Euro, Italy 424 million Euro, Portugal 246 million Euro, France 216 million Euro, Greece 207.8 million Euro and Germany just under 156 million Euro. By contrast the UK received just under 138 million Euro, making it the 9th largest recipient of funds.[184] DEFRA note that "*the fishing industry are not supportive of voluntary payments to third country fisheries*" under the European Maritime and Fisheries Fund, which replaces the European Fisheries Fund from January 2014.[185]
The United Kingdom Independence Party believe it is "*madness to pay British trawler owners to decommission and at the same time pay large subsidies to Spanish owners to build big, modern fishing vessels*."[186]

The UK fishing fleet continues to decline. The TPA report highlights how "*British boat owners have not been able, or inclined, to reinvest in their platforms. So comparatively, the British fleet has become on average older, smaller, and less powerful (in terms of engine capacity) than its competitors. This is a vicious circle, as the larger and more souped-up foreign vessels have a larger claim on national catch shares when TAC have been bartered, because they can catch more, and hold more, in a shorter time. Hence, the UK's share of the overall catch has dwindled by default*."[187] The UK catch has declined: "*In 1973, 1,110,096 tonnes of fish were landed from British vessels; by 2006 that had dropped 44.5% to 615,780 tonnes*."[188] The UK has become a net importer of fish since 1984, with almost £1 billion in imports in 2006.

**Options for reform – should the UK push for the repatriation of UK fishing grounds?**
This is the preferred policy outcome. It is advocated by the United Kingdom Independence Party in their Policy Statement *A sustainable British fishing industry: A fishing policy for an independent Britain*, which advocates the repatriation of control of the UK national waters including the creation of an exclusive of an exclusive Economic Zone (EEZ) up to the 200 mile international limit, or to a point equidistant to a neighbouring state less than 400 miles away. They also advocate the abolition of all quotas and discards.

As the TaxPayers' Alliance identifies, the UK could trigger an alternative: "*Under the 1976 Hague Preferences, the UK and Ireland can unilaterally modify their national share in certain waters. Whitehall historically refrains from using it, as it is concerned about*

[183] TaxPayers' Alliance, *The Price of Fish*, Dr Lee Rotherham, P26
[184] European Commission, *European Fisheries Fund, Fact Sheet*, 2013, P2
[185] DEFRA, *Government response to the informal consultation on the European Maritime and Fisheries Fund*, 21 September 2012, P12
[186] UKIP, *A sustainable British fishing industry: A fishing policy for an independent Britain*, Policy Statement, P7
[187] TaxPayers' Alliance, *The Price of Fish*, Dr Lee Rotherham, Foreword by Professor David Bellamy, January 2009, P16
[188] Ibid, P13

*upsetting foreign governments*."[189] UKIP however advocate restoration of national control of UK waters. They acknowledge this will "*be disputed by all EU countries and particularly by Spanish, French, Dutch and Belgian fishermen. In order to avoid an economic crisis in European fishing communities, UKIP would advocate a transition period of, say, five years, during which time foreign fishing boats with a proven history of fishing in the British EEZ could be licensed to continue, providing they observed our rules with regard to 'no fish' areas, types of net and mesh sizes, MSS and days at sea regulations*."[190] The value of repatriating national waters is estimated at an additional £2 billion per annum. UKIP analysis shows that the UK catch amounts to "*only 13% by value of the quota species catch. This 13% equates to about 20% of the total catch in British waters and is still worth £500 million a year, which means that we are giving away to EU interests about £2 billion a year in fish, plus the value added costs of boat-building and repair, fish processing, employment and ancillary services, in total about £2.5 billion*."[191]

By abolishing the quota system, UKIP suggest the UK could institute a policy to require "*all commercial species of fish caught, regardless of size or species, to be landed and recorded in order to compile meaningful figures to establish a Maximum Sustainable Yield (MSY) and to plan accordingly establishing Minimum Landing Sizes (MLS) for all commercial species and ensuring that only fish above the MLS are offered for sale. All undersized fish to be confiscated and processed into either fish meal or fertiliser, proceeds from the sale of which will go towards administrative costs*." They would also introduce a system similar to the 'set aside' scheme under CAP, with '*No Take Zones*' to allow fish to spawn and overfished areas to rejuvenate. Foreign fishing boats with a record of fishing in UK waters could continue during a transition period of five years "*provided they observe British rules*" but "*licences would not be offered to foreign boats in receipt of EU subsidy and foreign boats would not be licensed to fish in UK territorial waters (12-mile limit)*."[192] Fishing in UK waters after the transition period would be subject to the UN Convention on the Law of the Sea.

**Options for reform – proposals two and three – reverse the Factortame Decision and secure agreement that UK fishing quotas can be given exclusively to UK fishermen**

A more plausible reform – while the UK remains an EU member – is to reform the EU national quota system, which is being abused. The Factortame decision meant that the UK fishing quota was meaningless because it did not grant fishing rights to UK fisherman. The UK should seek a reformed system where national quotas can be awarded to a nation's citizens. We should also seek more rigorous inspections to prevent other nations from cheating the system. A 2007 EU Court of Auditors Report found that catch data were unreliable, so quota systems could not be enforced, inspection systems were lacking and there was little evidence that infractions were properly punished. Cheating on current quotas is prevalent -in Spain the TPA note that "*none of the catches by vessels under 10 metres in length were taken into account by quota monitoring, even though such vessels accounted for a substantial part of the national fleet*."[193] This should be combined with an end to European subsidies for the construction of new vessels, which is currently serving to extend UK

[189] Ibid, P10
[190] UKIP, *A sustainable British fishing industry*, Policy Statement, P6
[191] UKIP, *A sustainable British fishing industry: A fishing policy for an independent Britain*, Policy Statement, P3
[192] Ibid, P4
[193] TaxPayers' Alliance, *The Price of Fish*, Dr Lee Rotherham, , P18

taxpayer subsidy to foreign operators to build new and better boats to compete with UK fishermen.

**How much of a priority should this be? The problems of restoring national control of UK waters while remaining in the EU**

Restoration of the UK's fishing grounds is problematic if the UK remains an EU member. The UK could hold up EU bailout packages to ensure EU acquiescence to repatriation of UK fishing waters. Spain is a major beneficiary of the common waters policy and is likely to need EU funds to maintain its membership of the Euro. The UK may also need to consider using its position as the second largest net contributor to the EU budget, with an average net contribution of between £9.5 billion per annum,[194] to press for change by delaying contributions. It is also possible to use the threat of unilateral restoration of national control of UK waters to secure changes within the existing system but the UK would need to be prepared for a fight over an industry, which constitutes a small percentage of UK GDP. There is also the question of how a UK that had control of its national waters would enforce its policies. Deploying the UK navy to prevent European fishermen accessing UK waters would potentially create a crisis in which the UK would have few European allies.

[194] The Telegraph, *Britain's bill for EU membership has more than tripled over the last 10 years*, Bruno Waterfield , July 31 2013

# Chapter Five - National Borders and Immigration

| | **Proposal** |
|---|---|
| **1** | Secure the right to restrict welfare payments that would otherwise be made to nationals from new accession countries, perhaps on an interim basis until they can demonstrate a record of tax contributions to the UK government |
| **2** | Revoke the Long Term Residents Directive to ensure that individuals resisting deportation do not obtain a right to remain in the UK simply because of their success in frustrating efforts to deport them, especially when combined with the right to a family life |
| **3** | Secure the UK's right to deport non EU foreign nationals that pose a threat to national security to non EU states, even if they face mistreatment or worse on their return |
| **4** | Deport individuals that pose a threat to UK security in defiance of the European Court of Human Rights, as Italy has done, until an agreement can be reached that formalises this practice |

The UK should seek to achieve all four of these policy proposals, which are mutually reinforcing. Proposal one aims to ensure that the UK attracts migrants that make a financial contribution to the nation, and to restore and strengthen the contributory element of welfare. Proposal two seeks to deal with immigrants who have no right to remain in the UK, but through constant appeals manage to delay their deportation until they qualify to remain in the UK because they have been in the UK for a long period. This amounts to playing the system. It is a betrayal of all immigrants who abide by the rules. Proposal three aims to address a fundamental wrong in current UK policy, the elevation of the human rights of known terrorists and people who preach war against the British state above UK citizens' right to safety. If individuals claim asylum or seek to migrate to the UK, they will not be allowed to remain if they endanger national security. If an individual preaches war against UK citizens s/he loses the right to UK protection. Proposal four ensures that UK democratic institutions and not unelected foreign courts can decide who is allowed to remain in the UK. By restoring democratic control of UK borders, citizens can hold politicians to account for any failure to deport threats to national security.

**An unworkable system which prevents the operation of an effective UK immigration policy with appropriate restrictions**

EU policy, including the incorporation of the (once separate) European Convention of Human Rights (ECHR) into EU law affects the UK's ability to determine its own immigration and border policy in four ways:

First, EU freedom of movement provisions enable EU citizens (other than those from countries subject to temporary movement restrictions) the right to move to and settle in the UK. They also restrict the UK's ability to discriminate against EU nationals in the provision of welfare and social services, making the UK a more attractive destination to nationals from poorer EU states. I advocate a link between tax contributions to the UK government and the provision of welfare payments by the UK government.

Second, provisions of the European Convention on Human Rights prevent the UK deporting foreign nationals to countries where they may face torture or the death penalty, regardless of any threat such nationals may pose to UK security. This policy has been enhanced through judicial interpretations, ranging from a requirement to protect against direct and probable threats to the safety of the applicant, to those that are more general and possible. The UK is required to offer a home to individuals that advocate attacks on UK targets if deportation would risk their safety.

Third, EU rules give non EU nationals resident in the UK the right to permanent residence after five years residence.

Fourth, provisions of the European Convention on Human Rights such as the Right to a Family Life clog up the UK immigration system with appeals. The system has been abused to delay deportation until the point that the applicant can claim long term residence.

Not coincidentally, immigration into the UK in the past decade has reached record levels.

**The EU accession countries and the new potential immigration wave**

The UK government has refused to offer an estimate of the number of migrants from Bulgaria and Romania that could come to Britain from 1 January 2014 onwards. The Foreign Office asked the National Institute of Economic and Social Research (NIESR) the likely scale of Bulgarian and Romanian freedom of movement to the UK.[195] They believed that "*any numerical estimates of potential migration to the UK are likely to be inaccurate and misleading*."[196] It found that "*in terms of characteristics of those who migrate from Bulgaria and Romania to elsewhere in the EU, most are young, aged under 35, with men and women in roughly equal numbers. EU2 migrants in EU member states are concentrated in a relatively small number of sectors: working in construction, in accommodation and catering and in private households in work such as care and cleaning*."[197] These sectors represent half of all immigration from Bulgaria and Romania but only 14 per cent of local employment in the EU15 countries, but it was "*reasonable to speculate that the profile and employment patterns of Bulgarians and Romanians in the UK will change once restrictions on their employment are lifted*."[198]

In 2007, Bulgaria and Romania's year of accession, Finland, Sweden, the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Poland, Slovenia and Slovakia all opened their borders to the new EU members. By August 2012, 10 EU countries continued to restrict Bulgarian and Romanian access to their labour market including Austria, Belgium, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Spain and the UK. UK restrictions on Bulgarian and Romanian immigration imposed in 2007 were renewed in 2008 and 2011 - "*on both occasions on the basis of advice from the independent Migration Advisory Committee, which drew attention to the prevailing economic situation and the uncertainty as to other*

[195] The Telegraph, *Migrant report was suppressed, says Labour*, Christopher Hope, January 2013

[196] National Institute for Economic and Social Research, *Potential impacts on the UK of future migration from Bulgaria and Romania*, Heather Rolfe, Tatiana Fic, Mumtaz Lalani, Monica Roman, Maria Prohaska and Liliana Doudeva, April 2013, P44

[197] NIESR, *Potential impacts on the UK of future migration from Bulgaria and Romania*, Rolfe et al., P.iv

[198] Ibid, P.v

*Member States' decisions*."[199] These conditions continue to prevail, but both countries' populations will be able to migrate to the UK from 1 January 2014. The UK currently ranks fourth as a destination for Romanians and sixth as a destination for Bulgarians, but according to the NIESR study, "*currently, Bulgarian and Romanian citizens are among the most mobile in the EU.*"[200] To understand how opening borders to Romania and Bulgaria may work the UK has the experience of Polish accession to draw upon.

**What was the experience with the previous EU accession countries?**

Migration Watch reveal that over three million immigrants have arrived since 1997 and net migration quintupled from 50,000 in 1997 to 250,000 in 2010. The NIESR reveal that the lessons from EU8 immigration are that services "*were not well prepared*" and the response was not "*well-coordinated nationally*." The "*migration impacts are felt most where services are already stretched*" and "*the greatest impact has been on demand for translation and interpretation services*." Migration from the EU2 "*is likely to place added pressure on the lower-end of the Private Rented Sector (PRS)*" as "*demand, including from other migrants, is growing faster than supply and rents are rising*."[201] Migrants are also often more appealing to private landlords as they "*may be willing to tolerate lower standards of accommodation and overcrowding and will also pay rent directly to the landlord rather than via housing benefit (Rugg and Rhodes, 2008). Some migrants may also sub-let in order to reduce housing costs (Spencer et al, 2007).*"[202] Schools are also affected as "*schools receiving the highest numbers of migrant children are in some of the most deprived areas and also experience high levels of churn because they are less desirable to parents*."[203]

Westminster City Council in July 2013 appealed for help from the Romanian government to deal with Romanian immigrants sleeping rough in Hyde Park which is costing the taxpayer £500,000. Police and immigration officers also had to clear a shanty town that had emerged on a former football ground in Hendon.[204]

**The welfare benefits issue and immigration**

The Prime Minister has formed a "*Ministerial Cabinet committee to examine the rules on migrants' access to benefits*".[205] The European Commission has threatened the UK with legal action over its 'right to reside' test, which EU citizens have to pass to access UK benefits including child benefit, child tax credit, state pension credit, jobseeker's allowance and employment and support allowance. Migration Watch estimate that the population of the UK will grow by seven million in the next 15 years of which five million is due to immigration. Included in the five million increase will be the estimated 50,000 Romanians and Bulgarians predicted to migrate to the UK each year every year for the next five years.

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[199] Ibid, P2
[200] Ibid, P5
[201] Ibid, P35-6
[202] Idem
[203] Ibid, P41
[204] Daily Mail, *'Come and clean up your own mess': London council demands Romania sends its police to help with travellers turning capital's streets into 'open sewers'*, Martin Robinson, 15 July 2013
[205] The Telegraph, *250,000 Bulgarians and Romanians 'to head to UK'*, Wesley Johnson, Home Affairs Correspondent, 17 January 2013

Analyzing the incentives for citizens of the EU2 to move to the UK, they contend that a family on the average wage in Romania has a wage level which is one quarter of the wage of a similar family in the UK on only the minimum wage. A single person in Romania on minimum wage would have an income of £55 per week, accounting for the cost of living, compared to £254 for a similar person in the UK. They show that "*take home pay (including benefits) for a single worker is four or five times higher and for families eight or nine times higher than at home, after taking account of differences in the costs of living. This incentive is roughly double that available to Polish workers in 2012.*"

With Bulgarians the financial incentives are even greater. A "*single adult Bulgarian on the minimum wage at home has take home pay of £49 per week after cost of living is accounted for, the average Brit on minimum wage has take home pay of £254 or five times as much*." With Bulgarian families on the minimum wage at home they "*would have a weekly income of £62 after cost of living is taken into account but the equivalent UK family would have nine times this amount at £543*." Migration Watch believe the "*economic benefit of migrating to the UK for Romanians and Bulgarians are twice the amount for Polish migrants*."[206]

In 2012, Bristol City Council lost a case involving a Romanian immigrant who claimed she was eligible for housing benefit as her role selling the Big Issue was form of self employment and thus she was in work as the rules require.[207] Clearly both the new accession countries have a significant incentive to move to the UK. This may be increased when we consider that the UK has relatively flexible labour markets in which new entrants can obtain work without significant bureaucratic obstacles. The solution is to implement proposal one in this chapter, which urges the government to establish greater links between the receipt of welfare benefits and tax contributions made. This should apply both to UK and foreign nationals.

**Why can't the UK act to further restrict immigration?**

With regards to non EU migration, many non European states operate practices which can be viewed as oppressive. Human rights law is increasingly a means of circumventing immigration policies by establishing an absolute right for individuals to stay based on the conditions in their home countries. This approach undermines UK efforts to operate a selective immigration policy that imports the skilled people the UK wants and keeps out the unskilled and low skilled workers the UK does not need. The Charter of Fundamental Rights in Article 19 (2), following the ECHR, prohibits extradition to a state where there is a serious risk of being subjected to death, torture or other inhuman or degrading treatment.

This policy requires that the UK allow individuals who pose a threat to UK security and communal harmony to remain in the UK if their country of origin would mistreat them. Proposal four in this chapter advocates that the UK defy the European Court of Human Rights and deport individuals that pose a threat to UK security, regardless of any perceived threat of mistreatment that they face in their home countries. Outside of the ECHR and without signing in to a harmonised EU policy, the Refugee Convention would allow the UK to deport foreign citizens that pose a threat to UK security, even in cases where they faced mistreatment, as advocated by proposal three in this chapter. Clearly the UK would not want to deport peaceful people that do not promote hatred to their home countries if those countries would torture them. However, this important principle should not extend to a

[206] Migration Watch, *Incentives for Romanian and Bulgarian emigration to the UK*, February 2013
[207] The Telegraph, *Romanian Big Issue seller wins right to housing benefit*, 18 January 2012

British obligation to allow indefinite leave to remain to citizens from any developing country where living conditions are poor, the government is corrupt or particular groups are discriminated against. Such a principle would give hundreds of millions, if not billions of individuals, the right to settle in the UK, which is undesirable.

**Long Term Residents Directive**

Proposal two in this chapter advocates that the UK seek to revoke the Long Term Residents Directive. This "*grants both asylum seekers and applicants for other forms of international protection entitlement to long-term residents' status after 5 years, so that they will enjoy the same rights as other long-term third country residents, including the right of free movement into other Member States*."[208] This creates an incentive to log constant groundless appeals until the applicant gains a right to stay by virtue of having avoided deportation for a sufficient amount of time. The President of the Queen's Bench Division, Sir John Thomas, promised in November 2012 to name and shame immigration solicitors who lodge last minute groundless appeals to prevent removals - their senior partners would be summoned before court. This was after the courts faced an "ever-increasing large volume" of such applications, often filed on the day of removal. [209] The Chief Inspector of the UK Border Agency discovered a 150,000 backlog of cases where migrants had been refused permission to stay in the UK but their whereabouts were unknown, and a backlog of 16,000 unexamined applications to remain in the UK, some dating back to 2003.[210]

The Home Affairs Select Committee found that in cases where the whereabouts of refused applicants was unknown, the UK Border Agency assumed they had left the country.[211] In the third quarter 2012 the total backlog of cases was 312,726 but this number could not be relied upon because the Committee found that for six years the UK Border Agency "*repeatedly supplied it* [the Home Affairs Select Committee] *with incorrect information about the size of the asylum backlog and the checks being carried out to try and trace applicants in the controlled archives*."[212] Due to this backlog in cases the Home Affairs Select Committee recommended in its "*Fourth Report of 2010-12, in cases where severe delays in decision-making have been the fault of the Government and not the applicant, and where the passage of time has made evidence harder to find or has led to the applicant's being better integrated into British society, there is an argument in favour of granting the applicant leave to remain*."[213]

Migration Watch note that the incorporation of the Charter of Fundamental Rights into EU law "*allows the ECJ to rule that Member States have improperly implemented EU law in any policy area, if it breaches provisions of the CFR [Charter of Fundamental Rights]*."[214]

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[208] Migration Watch, *European Asylum and Immigration Policy: Developments Since 2010*

[209] The Law Gazette, *'Without Merit' immigration appeals rounded on*, Catherine Baksi, 15 November 2012

[210] The Guardian, *UK Border Agency has backlog dating back 10 years, inspector finds*, Home Affairs Editor Alan Travis, 23 January 2013

[211] UK Parliament, Home Affairs Select Committee, *Backlogs continue to plague the Border Agency as it is found to have misled the Committee over the controlled archives*, 25 March 2013

[212] Idem

[213] UK Parliament, House of Commons Home Affairs Committee, The work of the UK Border Agency (July-September 2012) *Fourteenth Report of Session 2012-13*, 19 March 2013, P24

[214] Migration Watch, *European Asylum and Immigration Policy: Developments Since 2010*

The Article 8 right to a family life in the European Convention on Human Rights is a qualified right and not an absolute right. [215] It can be overridden by considerations such as public safety. Unfortunately the UK has taken an expansive view of this provision (see Chapter Nine). The EU is also seeking greater powers in this area. The Dublin Mechanism, whereby EU states can return asylum seekers to their point of entry to the EU, was suspended with regard to Greece due to fears over mistreatment of refugees.

Open Europe believes that "*within the next few years, the Commission is set to propose measures for the harmonisation of treatment of asylum seekers and possibly the creation of a European Asylum Support Office, to assist member states in coping with a rise in asylum seekers*."[216] They outline how "*proposals are also in the pipeline for a burden-sharing provision to ease the stress on border member states, such as Malta and Italy, under which member states 'redistribute' asylum seekers amongst themselves, possibly in accordance with their population size. The proposal could also include fiscal transfers to compensate member states that accept a large number of asylum seekers. The proposals have already received the backing of the European Parliament."*[217] Preventing these suggested changes and enshrining national control of national border and immigration policy must be a UK priority. The UK receives fewer asylum applications than countries such as Belgium, France, Germany, Italy, Sweden and a lower proportion of applications compared to population than EU states that border non EU states such as Greece, who in 2011 received asylum applications equal to around a third of the UK total[218] but has a population just under one sixth the size (Greek population of 11 million and UK population of 63 million, both 2011 figures)[219]. Any policy to redistribute asylum seekers across Europe that is not about returning them to their first port of call is likely to see more asylum seekers being sent to the UK.

**How can the UK tackle the immigration problem?**

The UK has a clear incentive to withdraw from the European Convention on Human Rights. Unfortunately the EU is a signatory of the ECHR and through the Charter on Fundamental Rights incorporates the ECHR provisions into decisions concerning EU policy. The UK can unilaterally withdraw from the ECHR and remain a member of the EU. This will only be effective if the UK continues to opt-out of measures to give the EU competence over immigration or asylum policy. The UK would be choosing to decide its own immigration policy. The major political parties are divided on granting the EU powers over immigration and asylum. In the 2010 General Election both the current coalition parties had diametrically opposed views. Open Europe describes how the Liberal Democrats were in favour of *"a co-ordinated EU-wide asylum system to ensure that the responsibility is fairly shared between member states*."[220] The Conservatives were opposed to burden-sharing between member states on EU asylum, opposed to harmonising policies on legal migration with other EU

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[215] The Telegraph, *They say it's impossible to cut immigration. They're wrong*, Alasdair Palmer, 29 December 2012

[216] Open Europe, *Briefing note, In Brief: The parties positions on key EU policies*, 21 April 2010, P5

[217] Idem

[218] European Commission, *Number of (non-EU-27) asylum applicants in the EU and EFTA Member States and their age distribution*, 2011

[219] Office of National Statistics, *Population Homepage*

[220] Open Europe, *Briefing note, In Brief: The parties positions on key EU policies*, 21 April 2010, P6

countries and opposed to common EU criteria for handling asylum applications.[221] Labour opted out of an EU Directive specifying common standards for treating asylum seekers.

Alternatively, the UK could remain in the ECHR but could disregard ECHR decisions which threaten our national security and deport individuals in defiance of the court's judgements. The court's capacity to punish the UK is severely limited. It is reliant on the UK accepting the court's judgements. Other EU countries such as Italy have adopted this approach, as demonstrated by the case of Essid Sami Ben Khemais, a Tunisian deported by the Italian government in June 2008 despite an ECHR ruling that he should remain in Italy until his claim that he would tortured on his return to Tunisia was examined. On return he was retried by a military court and sentenced to two terms of eight and 11 years, to be served consecutively. The Italian government justified his deportation on the grounds that the Tunisian government assured them he would not be tortured and would receive a fair trial. In February 2009 the ECHR ruled his deportation a breach of Article 3.[222]

In August 2009 Ali Ben Saffi Toumi was deported from Italy, having been found guilty of being a member of a terrorist organisation. The response in the latter case, as described by Douglas Murray in *The Spectator* magazine, was a letter of condemnation written by Herta Däubler-Gmelin, the Chair of the Council of Europe's Parliamentary Assembly Legal Affairs Committee, and Christos Pourgourides, the *rapporteur* on the implementation of Strasbourg Court judgments. It said: *'It is totally unacceptable to ignore binding interim measures ordered by the European Court of Human Rights. It is disgraceful, for a mature democracy like Italy, to have sent Ali Toumi back to Tunisia last Sunday… The Italian authorities have taken measures in flagrant disregard of the Court's orders. This intolerable behaviour must be condemned by the Council of Europe without delay.'*[223] The UK could and should deport individuals that pose a threat to our citizens regardless of the ECHR decisions as Italy appears to do.

**What potential allies does the UK have to reform immigration policy?**

Tensions between EU members concerning immigration are emerging. *The Economist* reports that when Italy was faced with a surge in migrants following the Arab Spring's original uprising in Tunisia, "*Italy had already issued national residence permits to the migrants … perhaps hoping they would exploit the passport-free Schengen area to slip across to countries like France, where many Tunisians have family. The French, however, pointed out that the Schengen rules grant freedom of movement only to those with proper passports and the means to support themselves. Others can be returned to the EU country in which they arrived. The French have already sent almost 2,000 North Africans back to Italy*."[224] Francois Holland commented that "*I don't think there will ever be zero immigration, there will always be legal immigration. Can we reduce the number? That's a debate*."[225] Spain reintroduced restrictions on Bulgarian and Romanian immigration for a period in 2011. *Der Spiegel* reveals that a report by the German Association of Cities said municipalities were no longer capable of dealing with the issues caused by migration. Association President

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[221] Ibid, P5-6

[222] Amnesty International, *Protect Detainees Against Abuses In Tunisia*, 29 June 2009

[223] The Spectator, *Ignore the European Court and deport Abu Qatada tonight*, Douglas Murray, 7 February 2012

[224] The Economist, *Italy and immigration: Take my migrants, please*, April 2011

[225] France24 International News, *Hollande calls limiting economic immigration 'essential'*, April 2012

Christian Ude called for additional financial support from the federal government. Guntram Schneider, labor minister for the state of North Rhine-Westphalia, warned in the *Frankfurter Allgemeine Sonntagszeitung* newspaper "*if countermeasures aren't finally taken, then the situation is going to intensify come Jan. 1, 2014*."[226]

Other EU members are unable to send migrants back to Greece under the Dublin Mechanism because of the official treatment of immigrants in Greece. The European Commission "*had proposed that states be authorised to close borders for five days in case of migratory pressure, but would have to seek permission from Brussels for longer periods*." Instead the new rules allow a state within the Schengen area to reimpose border controls for six months, renewable for another six, "*when the control of an external border is no longer ensured due to exceptional circumstances.*" Austrian Interior Minister Johanna Mikl-Leitner said that "*the situation on the Greek-Turkish border shows that we need a very clear action mechanism in the Schengen area*."[227] Migration Watch highlight how "*the Greek government announced plans to erect a 128 mile wall along its Turkish border as a barrier to the immigrants. Greece's treatment of these immigrants and the handling of their applications have been criticized by the UN, Amnesty International and Human Rights Watch. A number of Member States, including the UK and Netherlands, have already stopped using their right under the Dublin Regulation to send asylum applicants back to Greece. Early in 2011 the European Court of Human Rights in Strasbourg ruled in effect that under present conditions other Member States should not send asylum applicants back to Greece*."[228] A solution needs to be found which preserves national control of immigration policy and allows European countries to make decisions that prioritise the economic and security interests of their citizens.

**What should the UK seek to obtain from any EU negotiation?**

First, the UK should seek the absolute right to deport non EU citizens regardless of concerns for their safety in cases where they pose a threat to national security or community harmony. This should begin with the deportation of foreign 'hate preachers' resident in the UK, if necessary in contravention of ECHR rulings but preferably through either amending the ECHR and the Charter of Fundamental Rights (CFR), or if necessary, removing the UK from the ECHR jurisdiction and securing further protections from the jurisdiction of the CFR.

Second, the UK should establish a firm link between the tax contributions individuals made to the UK state and welfare benefits received. This should prevent the immigration of Bulgarian and Romanian citizens for purely welfare-based reasons . Lobbying EU countries experiencing both budget constraints and high levels of youth unemployment in Western Europe to support these restrictions could meet with success.

Third, if the UK does not fully opt out of the Charter of Fundamental Rights and withdraw from the ECHR, then the UK should attempt to gain derogation from the provision to respect the 'right to a family life' with specific regard to immigration and asylum cases. The UK should also derogate from the Long Term Residents Directive. The Independent Review of the United Kingdom's extradition arrangements recognises that "*as the law currently stands it is possible for a person who has failed to resist extradition in the court process to raise*

[226] Der Spiegel Online, *The Flood? Western Europe Fearful of Eastern Immigration*, Stefan Simons and Carsten Volkery, February 2013

[227] France24, *EU agrees short-term border closures to block immigrants*, June 2012

[228] Migration Watch, *European Asylum and Immigration Policy: Developments Since 2010*

*human rights issues with the Secretary of State prior to their surrender from the United Kingdom"* and this is *"a source of delay, sometimes for months and even years*."[229] Abu Hamza obtained "*Rule 39 relief which in effect means that he cannot be extradited unless and until his application to the Strasbourg Court is dismissed*."[230] He has subsequently been deported after a long delay.

[229] *A Review of the United Kingdom's Extradition Arrangements* (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010), Rt Hon Sir Scott Baker, 30 September 2011, P291
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

[230] *A Review of the United Kingdom's Extradition Arrangements* (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010), Rt Hon Sir Scott Baker, 30 September 2011, P309
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

# Chapter Six - Foreign & Security Policy

| | **Proposal** |
|---|---|
| **1** | End the UK's efforts to prevent the formation of a single unified Eurozone voice in foreign affairs in exchange for policy concessions by the Eurozone members in other policy areas |
| **2** | Trade UK support on foreign policy issues for the support of EU member states on policy issues of greater importance to the UK. |
| **3** | End UK support for the EU funding of organisations that engage in political campaigning because of its effect on UK relations with those states |
| **4** | Prevent the EU taking foreign policy positions which affect our trading relations with non EU member states, committing UK forces to military conflict, or undermining or eliminating independent UK foreign policy representation in international bodies |

The UK should seek to achieve all four of the policy proposals outlined above, which are mutually reinforcing. Proposal one recognises that UK efforts to prevent the development of a multi speed EU and the formation of a more integrated core Europe is a mistake. The UK and its allies need not be a part of 'core Europe', but we can trade our support for the development of an integrated Euro core. We can prevent further EU integration so EU member states which desire further integration will have to trade policy concessions that the UK desires. Proposal two recognises that UK foreign policy support is a valuable commodity. The UK should be willing to trade our support for reciprocal support for UK policy aims, including repatriation of agricultural policy and protection of the City of London. Proposal three recognises the potential for NGOs to impact UK relations, with other nations and the current EU funding for favoured NGOs to pursue their policy objectives. I believe that NGOs should fund their own political campaigns, and the EU should not be interfering in the sovereign affairs of EU member states or non EU states except in areas where such authority has been freely given. Proposal four seeks to preserve the UK's position as an independent actor on the world stage. It highlights 'red lines' on the development of EU capabilities in this area that must be defended and not violated.

**An area of UK success due to a strategic miscalculation by the previous administration**

The EU High Representative of the Union for Foreign and Security Policy is UK citizen Catherine Ashton. She formed and leads the European External Action Service (EEAS), which replaced the Delegates of the Commission. Her functions include "*chairing the Council, managing the CFSP [Common Foreign & Security Policy] and, within the Commission (of which he or she becomes Vice President) running the Commission's external relations responsibilities*."[231] Under the CFSP, the general principles of policy are agreed in the European Council. The Council of Ministers adopts "joint actions" to address specific situations, and "common positions" which set general guidelines to which the national states must conform on a general topic. The CFSP requires unanimity among the 27 EU member states but Qualified Majority Voting applies to decisions applying a common position or joint action which has already been agreed by the European Council.

[231] The European Movement UK, *The EU's Common Foreign & Security Policy*, May 2012

The previous UK administration sought the foreign policy portfolio. This allowed the appointment of Frenchman, Michel Barnier, as EU Commissioner for the Internal Market and Financial Services. This was described by then French President Nicolas Sarkozy as a *"defeat for Anglo Saxon capitalism*" and was a strategic error which needs to be corrected in future appointments.[232] The UK has had a greater influence in shaping the EU's position on issues not vital to the UK but is subject to policy proposals on city financial regulation unsympathetic to our liberal economic preferences. An example is the financial transaction tax (FTT) and which poses a clear threat to our national economy. YouGov polling in November 2012 found that only 23 per cent of Britons consider the UK to be influential in the EU compared to 59 per cent of Germans.[233] The UK's political weakness within the EU may be the reason for the greater euroscepticism in the UK.

**An elite concentration on human rights issues which most UK citizens do not prioritise**

Research by the Chatham House think tank revealed a fundamental separation between the Liberal Democrats' foreign policy priorities,those of their Conservative coalition partners, and the UK population's: "*65% of Liberal Democrats believe that UK foreign policy should be based at least in part on ethical considerations*" compared with 37 per cent of the general public while "*64% of Conservatives favour a foreign policy based on a keen pursuit of the national interest*" . 47 per cent of the general public agree that "*the national interest alone should drive UK foreign policy*" while "*the vast majority of opinion-formers – 65% – regard ethical considerations as more important*."[234] Both the British public and the UK elite "*express a continued attachment to the UK's status as a great power*" but the former views the armed forces as the nation's greatest asset and the elite view soft power institutions such as the BBC World Service as our greatest asset. There was also "*little general public support for the government's policies to tackle climate change or promote democracy and human rights*."[235] The public has a more realist interpretation of foreign policy priorities and a greater emphasis on the national interest.

None of these views appear to have benefitted from UK leadership of the EU's foreign affairs policy. The European Commission reveals that "*the promotion of human rights in third countries is also a priority of the EU. This was reaffirmed by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy in a joint Communication on 'Human rights and democracy at the heart of the EU external action', adopted on 12 December 2011 as well as in two Communications on the EU's development policy*."[236] The EU also has designs on a single EU seat at the United Nations to replace the UK and French seats. In October 2007 Lord Malloch Brown, then Deputy General Secretary of the UN, told Brussels diplomats that the EU was heading towards representation by a single seat within the UN institutions. He said, "*I think it will go in stages. We are going to see a growing spread of it institution by institution. It is not going to happen with a flash and a bang*." He added that he hoped that it would happen "*as quickly as possible. I'm a huge fan*

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[232] The Telegraph, *EU supremo Michel Barnier says he believes in the City*, Senior City Correspondent Helia Ebrahimi, 14 January 2010

[233] YouGov, *Brit and German opinion on the EU*, November 2012

[234] The Chatham House Yougov Survey 2012, *Hard Choices Ahead, British attitudes towards the UK's International Priorities*, Jonathan Knight, Robin Niblett and Thomas Raines, July 2012, P2, 28

[235] Ibid, P6

[236] European Commission, *2011 Report on the Application of the EU Charter of Fundamental Rights, P11*

*of it*."[237] Preventing the development of a single EU seat at the UN is also a key UK objective to preserve an independent UK voice in foreign affairs and the UK should resist efforts to cede UN representation to EU representatives in that forum.

**A UK public both indifferent to the EU and hostile to further integration**

Among the general public, "*57% would prefer either a less integrated EU or complete British withdrawal. Only 12% support British participation in a more integrated European Union*."[238] When asked to say words and phrases the public associated with the EU, the following were most popular: 'bureaucracy' (46 per cent), 'loss of national power' (41 per cent), and 'waste of money' (32 per cent), lack of border security (28 per cent) and undermining our national culture (28 per cent) and corruption (27 per cent). The positive words all receive lower ratings: 'freedom to study, work and live anywhere' (25 per cent), 'free trade' (17 per cent), 'cultural diversity' (12 per cent) and 'peace and security' (12 per cent). While appreciating the freedom of movement the EU gave UK citizens, "*60% of [UK] respondents felt that too many people from elsewhere in the EU were coming to work in the UK*."[239] The Eurobarometer poll of public opinion undertaken by the European Commission showed the UK public to be apathetic about the benefits of EU membership.[240] Given that few UK citizens identify with the EU and the governments' efforts to promote democracy, human rights and an ethical dimension to foreign policy, the UK can trade its foreign policy support for other nations' support of our hard policy objectives to repatriate key competences such as City regulation and agricultural policy. The UK should assume a new position of defending EU nations' right to national sovereignty, defending no particular policy approach, but instead the right of all EU nations to choose their own approach.

**An evolving EU role in foreign affairs**

The European Movement UK describes how "*the Single European Act of 1986 brought foreign policy co-ordination into the Treaty framework for the first time. The Maastricht Treaty of 1992 transformed it into the CFSP and integrated its small secretariat, hitherto provided by diplomats seconded from Member States, into the General Secretariat of the Council of Ministers*."[241] The Lisbon Treaty aimed to expand the powers of the EU through "*the creation of a de facto EU Foreign Minister and an EU diplomatic service, the introduction of majority voting into foreign policy, a single legal personality for the EU, enhanced cooperation, a new "hard core" in defence, a mutual defence commitment, a commitment to move towards a common defence, a requirement to consult with other EU members on foreign policy actions, and a terrorism solidarity clause*."[242] Despite UK objections, the EU Foreign Affairs Minister can chair regular meetings of EU foreign ministers, has taken over the resources of the European Commissioner for External Affairs, and can appoint envoys. The EU now has a 'legal personality'. This means it exists as an independent legal force and can sign up to agreements on behalf of its membership.

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[237] UK Parliament, *Memorandum from Open Europe*, 2008

[238] The Chatham House Yougov Survey 2012, *Hard Choices Ahead, British attitudes towards the UK's International Priorities*, Jonathan Knight, Robin Niblett and Thomas Raines, July 2012, P8

[239] Ibid, P10

[240] European Commission, *Standard Eurobarometer 78*, *Public Opinion in the European Union*, Autumn 2012

[241] The European Movement UK, *The EU's Common Foreign & Security Policy*, May 2012

[242] UK Parliament, *Memorandum from Open Europe 2008* - compiled during Lisbon Treaty Negotiation period

'Enhanced cooperation' is available for nine or more states to integrate further making use of the EU institutions. Decisions are made by unanimity. Once common EU positions are established, EU members are obliged not to act in a way that undermines or conflicts with those positions. Consequently the UK's ability to adjust its foreign policy as circumstances develop is constrained in those areas where a common EU position has been established.

**Desire for further integration in foreign policy issues among the Eurozone members**

Proposal one in this chapter is for the UK to end its opposition to the creation of an integrated European core with its own foreign policy approach. 11 of the 27 EU nations have published a joint report calling for further EU integration in foreign policy. This would include a pan European Foreign Ministry, majority voting on foreign policy issues (ending the UK veto), a European army, a single market for EU defence industries, a directly elected European president, a single European visa, a police force to take charge of border control and the creation of a new parliamentary sub-chamber for the 17 countries of the eurozone. Not all 11 countries supported the creation of a European army. Germany, France, Italy, Spain, Poland, the Netherlands, Belgium, Denmark, Austria, Portugal and Luxembourg were all signatories. The document sought to "*at least prevent one single member state from being able to obstruct initiatives*."[243] The powers of the European External Action Service would be expanded to include the policy areas of development, energy, trade and enlargement, which are currently held by the European Commission. Pierre Vimont, the Secretary General of the European External Action Service, has complained privately that London had blocked a total of 96 EU statements since the establishment of the European External Action Service as of December 2011 alone.[244] Nevertheless, Thomas Risse of the University of Berlin shows that the EU has managed to agree a considerable number of common positions despite UK opposition: "*There have been more than 1,000 common strategies, common positions, and joint actions under the Common Foreign and Security Policy (CFSP) since 1993, and more than 2,000 foreign policy statements made by the EU Council and Presidency between 1995 and 2008.*"[245]

**What approach should the UK take in foreign affairs?**

Proposal two in this chapter is for the UK to trade its new acceptance of accelerated Eurozone integration for real policy gains in other policy areas. At the same time the UK must constrain the ability of the EU to make binding commitments on behalf of the UK that affect UK trade and investment. Foreign policy should not be a priority area for the UK. This should be an area the UK uses to serve its broader purposes to retain control of UK borders, financial regulation and agricultural policy. Proposal four in this chapter recommends that the UK not cede powers that prevent the UK continuing to operate an independent foreign policy this should not prevent the UK allowing Eurozone members to cede their authority to a central European body. The UK must oppose all measures which would seek to undermine or replace the UK's independent diplomatic representation or to control UK armed forces. However, we should allow other EU members to combine these capacities outside of NATO.

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[243] The Guardian, *EU heavyweights call for radical foreign and defence policy overhaul*, Ian Traynor, 18 September 2012

[244] Der Spiegel, *Blocking Tactics: UK Infuriating Partners by Obstructing EU Foreign Policy*, 5 December 2011

[245] London School of Economics and Political Science *Europe in an Asian Century* – Chapter - *Identity matters: Exploring the ambivalence of EU Foreign Policy*, October 2012, P38

This would be a significant concession in return for decisive concessions on financial services, agriculture, UK borders or the fisheries policy.

**The 'civil society' groups that act as an EU funded echo chamber**

Proposal three in this chapter relates to how the EU funds groups to engage in campaigning for political causes both in the EU and in non EU states. This distorts political debate within the UK and potentially damages UK international relations – it should cease. The European Commission admit that "*the EU gave financial support to civil society actions and national policies to combat discrimination, promote equality and improve redress as regards racist speech and crime*."[246] This is worrying.

The UK should seek a prohibition on EU funding for Non Governmental Organisations (NGOs) involved in political activity. In '*Sock puppets: How government lobbies itself and why*' the Institute of Economic Affairs (IEA) details how "*unpopular causes are made to look like mass movements and minority views are put centre-stage in a distorted re-imagining of civil society. It is telling that so many state-funded charities campaign for causes which are viewed with ambivalence, if not hostility, by the electorate. Foreign aid, climate change, sin taxes, temperance, anti-smoking, 'sustainable development', radical feminism and support for the EU are causes which the political elite believe are under-represented in civil society, but they do not draw from this the obvious conclusion that an absence of voluntary activism is indicative of public indifference*."[247] They cite the example of the Health Poverty Action, which relies on the EU and the Department for International Development for the majority of its funding, and was campaigning for a tax on financial transactions dubbed the 'Robin Hood Tax'. Another example is the 'War on Want' group, which was an opponent of the EU's 'strategy of unfettered free trade' - but the EU was its single largest donor including funding its website![248]

The report shows that, of the 10 largest environmentalist non profit organisations in the EU, only Greenpeace is not funded by the EU ( due to its refusal to accept funding). The remaining groups lobbied to raise a bar limiting the EU to providing more than 50 per cent of their income. This was replaced with a new limit of 70 per cent of annual income from EU funding.[249] These nine groups receive 8 million Euro from the EU per annum. The danger is two fold. First, both the EU and the government should not be using taxpayer funds to finance lobbying. Second, efforts to do this have distorted debate, making fringe views seem mainstream and crowding out the public's views, which often differ to those of EU funded NGOs. Political campaigns should be funded by an engaged citizenry. A failure to raise sufficient funds is more symbolic of a lack of public support than evidence of any market failure in political fundraising.

Funding NGOs in non EU states poses a broader challenge for UK diplomats. Under the European Instrument for Democracy and Human Rights (EIDHR) the EU has funded NGOs to campaign for human rights in non EU states since 2006. For the period 2007-2013 the EIDHR had a budget of £1.1 billion and can "*fund non legal entities*" and "*intervene without*

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[246] European Commission, *2011 Report on the Application of the EU Charter of Fundamental Rights*

[247] Institute of Economic Affairs, IEA Discussion Paper No.39, *Sock Puppets: How government lobbies itself and why*, Christopher Snowdon, June 2012, P34

[248] Ibid, P21

[249] Ibid P23

*the agreement of governments of third countries*."[250] This has included spending 500,000 Euro on funding Murder Victims' Families for Human Rights to campaign in the United States against the death penalty, 200,000 Euro for the Death Penalty Information Centre in the United States to conduct opinion polling on how to craft the anti death penalty message, 300,000 Euro for the US based National Coalition To Abolish The Death Penalty to aid groups campaigning for its abolition in Texas and Virginia, almost 400,000 Euro for the Witness to Innocence Program to campaign against the death penalty in the US, 700,000 Euro for the American Bar Association to seek a nationwide moratorium on executions and 520,000 Euro for an organisation called Reprieve to support EU citizens on death row in America.[251] In Brazil almost 70,000 Euro was provided to support the '*indigenous prisoners in Matto Grosso of the southern region*" and 51,000 Euro to promote indigenous land rights.[252] In China the BBC World Service Trust was given almost 680,000 Euro to organise a series of workshops to improve television coverage of women, disabled people and ethnic minorities in Western China, 76,000 Euro was given to "*draw the public's attention to protecting the traditions and cultures of Chinese North-West ethnic minorities*" and millions of Euros have been spent opposing the death penalty.[253] In Russia almost 95,000 Euro was provided to the Lawyers for Constitutional Rights and Freedoms Autonomous Non Commercial Organisation to eliminate legal obstacles to freedom of the press and almost 85,000 Euro for the Russian-Chechen Friendship Society to advocate human rights in Chechnya.[254] In the European state of Georgia disbursements included 75,000 Euro for The Rugby Supporting League to "*improve the social environment of the target region and re-train the younger generation by largely apolitical means*."[255]

Each of these schemes may do very worthy work, but involving the UK in disputes over land ownership in Brazil, the human rights situation in the Russian sovereign territory of Chechnya and minority rights in western China poses potential problems for the UK's commercial and diplomatic relationships with these states.

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[250] European Commission, Development and Cooperation – Europeaid, *European Instrument for Democracy & Human Rights*

[251] European Commission, *The European Instrument for Democracy and Human Rights (EIDHR) Compendium 2007-2010, The Abolition of the Death Penalty Worldwide*, October 2010

[252] European Commission, *EIDHR Activities by location 2000-2006, Compendium by Location*, P88-89

[253] Ibid, P117-128

[254] Ibid, P537-564

[255] Ibid, P216

# Chapter Seven - European Arrest Warrant (EAW)

| | **Proposal** |
|---|---|
| **1** | Pull out of the European Arrest Warrant and trade UK mutual recognition agreements with EU countries on a bilateral basis in exchange for support for UK policy preferences in agriculture and financial services |
| **2** | Preserve the right of the Home Secretary to intervene in the deportation process to ensure respect for the democratic wishes of the British people |
| **3** | Establish under EU human rights law an absolute protection from prosecution of current and former diplomatic and military personnel of non EU countries visiting the UK, to prevent damage to diplomatic relations with countries such as Sri Lanka and Israel |
| **4** | Refine the rules regarding the deportation of foreign nationals to eliminate (A) the need to check that the state to which the individual is being deported will not re-deport them to a third country and (B) the need to dictate the terms of that individual's trial and confinement conditions |

The UK should seek to achieve all four of these policy proposals. Proposal one says the UK should withdraw from the European Arrest Warrant permanently. It should be replaced by bilateral deals with EU states. As shown in the text below, other states make greater use of the EAW than the UK does. They may be willing to trade policy concessions in other policy areas to secure the continuation of arrangements for extradition similar to the EAW, but concluded on a bilateral basis. Proposal two is an attempt to counter the elite obsession with removing democratic oversight of UK policy on deportations. As a right of centre thinker I think that this democratic oversight is essential to securing proposal three which ensures that deportation policy does not unduly damage UK relations with foreign states, and proposal four which is designed to make it easier to deport individuals that threaten UK security.

Left of centre readers should see the benefits of the restoration of democratic control of deportation policy. Currently the UK will allow the extradition of any UK citizen accused of a serious crime by any EU state, including those states marred by corruption, and will allow UK citizens to be detained in appalling conditions while awaiting trial. There is no UK judicial oversight over such extraditions. Supporting proposals one and two to restore democratic control and oversight to deportation policy does not imply left of centre support for my more controversial proposals.

**What were the key characteristics of the European Arrest Warrant?**

The Extradition Act 2003 divided the world into Category 1 and Category 2 countries. Category 1 countries are subject to the Council Framework Decision (13 June 2002) on the European Arrest Warrant (EAW)'s surrender procedures between member states.

Key characteristics of the Framework Decision were its imposition of a time limit on extradition, which provides no exception for home nationals on citizenship grounds, and mutual recognition by judicial authorities of warrants from EAW states without an inquiry into the facts. Under Article 2.2 of the framework decision on the EAW and the surrender

procedures between member states, there are 32 criminal offences which *"are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European Arrest Warrant."*[256] The 32 offences are: participation in a criminal organisation; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotics and weapons; corruption; fraud; money laundering; counterfeiting and piracy; environmental crime; facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in hormonal substances, human organs; kidnapping; hostage-taking; racism and xenophobia; organised and armed robbery; illicit trafficking in cultural goods; swindling; racketeering and extortion; forgery; illicit trafficking in radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircraft/ships; sabotage.[257]

Category 2 countries are not in EAW with which the UK maintains bilateral deals. Category 2 territories are further divided into those territories which need to provide a *prima facie* (face value) evidential case, and those not required to do so, as designated by the Home Secretary. The UK is not merely asked to ascertain that the country a person is being deported to is safe, but is responsible for any subsequent deportation to a third country, and must ascertain that the sentence is to be served in the country seeking the extradition.

**A policy area in a state of flux where the government is yet to decide on the appropriate course**

In September 2012 the Home Secretary announced she was considering the UK opting out of 135 EU law and order measures including the European Arrest Warrant.[258] The UK is in the process of negotiating some opt-ins to these measures on an individual basis. Decisions about which measures to fully opt out of must be made by 31 May 2014. The government took advantage of a five year transitional period in which, six months before its expiry, the UK could notify the European Council that it does not accept the powers of the Commission and the jurisdiction of the Court of Justice in respect of matters falling within Title V of the TFEU (and thereby the still active measures in that section), will no longer apply to the UK. As of 31 May 2014 any measures the UK has not opted out of become subject to the jurisdiction of the European Court of Justice and the European Commission will gain the right to mount infraction proceedings against the UK for any failure to comply with these provisions. Deputy Prime Minister Nick Clegg has declared that the EAW should be "*reformed not abandoned*" and fears that without it "*Britain could become a safe haven for Europe's criminals*."[259] The Independent Review of the UK's Extradition Arrangements categorises the value of extradition as "*the principle that it is in the interest of all civilised communities that offenders should not be allowed to escape justice by crossing national borders and that States should facilitate the punishment of criminal conduct. It is a form of*

[256] Europa, 2002/584/JHA: *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision*, June 2002

[257] Idem

[258] The Guardian, *David Cameron and Nick Clegg at odds over European Arrest Warrant*, Nicholas Watt, 28 September 2012

[259] Huffington Post, *Nick Clegg warning to Tories over European Arrest Warrant Withdrawal*, 4 March 2013

*international cooperation in criminal matters, based on comity (rather than any overarching obligation under international law), intended to promote justice*."[260]

**The danger the EAW poses to UK diplomatic relations with non EU states involved in controversial acts**

A key problem with this approach is where prosecutors in other EU states use this legislation to request the extradition of statesmen and women and former diplomats of certain countries for alleged offences against their nationals. Also cases wherein NGOs use human rights law to pursue foreign diplomats in the UK courts endanger UK foreign relations. Examples include the UK experience with the Chilean former leader Augusto Pinochet, Israeli officials[261] and Sri Lankan officials.

Augusto Pinochet was held under house arrest in the UK between 1998 and 2000 while an arrest warrant issued by Spanish judge Balthasar Garzón was considered. This was prior to the introduction of the EAW and under the Extradition Act of 1989. Controversy surrounded the case as Lord Hoffman, a judge deciding if, as a former head of state, Mr Pinochet could be tried, also had contacts with Amnesty International. Amensty was campaigning against Pinochet. Judge Garzón, who had requested the extradition, had run for election for the PSOE (a Spanish Socialist Party) for Spain's Congress of Deputies.[262]

Westminster Magistrates' court issued an arrest warrant for former Israeli Foreign Minister Tzipi Livni over alleged war crimes committed in Gaza in 2009, causing the cancellation of her visit.[263] UK-based Tamil activists applied to Horseferry Road Magistrates' court for an arrest warrant against the Sri Lankan President's bodyguard Chagi Gallage on his visit to the UK in 2010.[264]

The UK government amended the law in 2010 to ensure that the Director of Public Prosecutions, not a simple Magistrates' court, has to approve an arrest warrant on the grounds of universal jurisdiction. They also made changes to ensure that such arrest warrants only apply to officials of regimes involved in war crimes. Ensuring these safeguards persist, as an EU-wide justice realm develops, is essential if the UK is to deepen relations with emerging market nations whose human rights standards may not be ideal, and with nations involved in controversial security actions. It is not hard to imagine a European prosecutor requesting the extradition of a former diplomat or security figure from a state involved in an action in which citizens of the state the EU prosecutor was from were killed, and the difficulties this could cause the UK. Establishing a broad protection for foreign heads of state, diplomats and military personnel both current and former from prosecution under EU human rights law will prevent the damage to UK diplomatic relations that may otherwise result. The UK would of course continue to abide by international law with regard to foreign leaders current or former wanted by the international courts.

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[260] UK Parliament, *Independent Review of the United Kingdom's Extradition Arrangements*, presented to the Home Secretary 30 September 2011, P20

[261] Al Jazeera, *UK reassures Israel on arrest fears*, 5 November 2010

[262] The Telegraph, *Obituary – General Augusto Pinochet*, 11 December 2006

[263] The Guardian, *British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni* , Ian Black and Ian Cobain, 14 December 2009

[264] The Guardian, *Tamil activists apply for arrest warrant for Sri Lankan general*, Owen Boycott, 3 December 2010

**The elite obsession with reducing the democratic oversight of policy in this area, and why we need the Home Secretary to have more power over extradition policy**

An elite consensus exists that a reduction in the power of the Secretary of State for the Home Department (Home Secretary) to manage an extradition case is a good thing. The Independent Review of UK Extradition Arrangements declared that "*the fact that the surrender procedure is now effected almost entirely through judicial authorities appears to us to be an entirely positive development*."[265] The Joint Committee on Human Rights report *The Human Rights Implications of UK Extradition Policy* declared: "*We note the arguments for increasing the role of the Secretary of State in the surrender of persons to countries under Part 2 of the Extradition Act. We are not convinced that changes should be made and, in any event, any additional powers would need to be carefully circumscribed to avoid those subject to extradition requests becoming "political pawns*."[266] The Secretary of State is a 'public authority' for the purpose of the Human Rights Act 1998 (HRA). Section 6 (1) of the HRA says that pubic authorities must not act in a way incompatible with the European Convention on Human Rights (ECHR). Their actions can be challenged under Judicial Review.

Home Office Minister Jeremy Browne MP confirms that part of the Secretary of State's role is to confirm that there are no human rights bar to extradition of suspects to Category 2 countries. He said "*Ministers will still sign an extradition order for Part 2 countries (that is, countries not covered by the EAW), to confirm that there are no statutory bars to extradition once it has been approved by the District Judge. This covers issues such as the death penalty, and speciality (that is, ensuring people are only tried for the charges on which they have been extradited), onward extradition from a third country and transfer from the International Criminal Court*."[267] This act opens the Secretary of State up to being defeated if a judge doubts the assurances made by any nations with which the UK has reached Memorandums of Understanding about the individuals' treatment on return to that nation. Essentially the Home Secretary's role has been reduced to the point where one of their main responsibilities is to confirm the human rights of the potential deportee won't be harmed by deportation. In contrast, the Home Secretary should intervene to ensure that those whose residence in the UK is the result of or features criminality or deception should be a priority for deportation, whatever the circumstances of their home nation.

The Independent Review of the UK's Extradition Arrangements believe "*the Secretary of State's involvement should be further limited by removing human rights matters from her consideration as we believe they are more appropriately the concern of the judiciary*."[268] In October 2012 Theresa May agreed, indicating that a new 'forum bar' would be introduced to allow courts to decide if extradition would be a breach of a suspect's human rights.[269] If the

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[265] UK Parliament, *Independent Review of the United Kingdom's Extradition Arrangements*, P122

[266] UK Parliament, *The Joint Committee on Human Rights report – The Human Rights Implications of UK Extradition Policy*, 22 June 2011

[267] UK Parliament, *Crime and Courts Bill: Government Amendments For Commons Committee Stage, Extradition*, Session 2012-13, Jeremy Browne MP Minister of State, February 2013

[268] UK Parliament, *Independent Review of the United Kingdom's Extradition Arrangements, Presented to the Home Secretary* 30 September 2011, P16

[269] House of Commons, *Extradition and the European Arrest Warrant – Recent Developments, Home Affairs Section*, Alexander Horne, 6 February 2013

Home Secretary is prohibited from ordering an extradition, she must order the person's discharge. This is approach is wrong.

Democratic control of the extradition process is essential. This issue is also one of national security and public policy, not simply the rights of the individual resisting extradition. The Independent Review of the United Kingdom's Extradition Arrangements appears to have been dominated by the concerns of left of centre pressure groups including Fair Trials International, Justice, and Liberty who provided "*the most detailed and comprehensive criticisms*."[270] The interest of the broader UK population in deporting hate preachers, immigrants with few skills and those with ideological preferences hostile to UK harmony seems to have been underemphasised if not ignored. The Home Secretary's role should be preserved and enhanced as proposal two in this chapter recommends. The Home Secretary represents the interests of the broader UK population. They can be held accountable for the failure to deport individuals that pose a threat to UK security. Without the Home Secretary's role, the rights of the potential deportee can not merely begin to outweigh those of the broader community, but the community's rights can be ignored or marginalised.

**Experience with the European Arrest Warrant shows that other EU states are resorting to the EAW more often and in less serious cases**

The Big Brother Watch campaign group note in their report '*The case against the European Arrest Warrant'* that there is no state in the EU that has negotiated an opt-out from the European Arrest Warrant. Under the EAW, a warrant is issued in the requesting state. If issued to the UK, this is then considered by the Serious Organised Crime Agency (SOCA) which considers if it meets requirements under Part 1 of the Extradition Act 2003. Extradition to the requesting state must take place within 90 days. In 2009 the UK issued 220 EAWs, compared to 4,844 for Poland, 1,240 for France, 530 for the Netherlands and 1,900 for Romania. However, the UK received most requests with "*a total of 4,100 requests for the extradition of its citizens in 2009/10 – a total of 38.8% of the total number issued across the EU (not accounting for Bulgaria, Germany, Hungary and Italy)*."[271] France received only 967 requests. Between 2009 and 2012 requests from other EU states to extradite their own citizens rose fourfold. In 2011 1,355 people were sent for trial in other EU countries by UK courts under the EAW at a cost of £27 million to the UK.[272] The European Commission in 2006, two years after the EAW had become operational, found that the average time to extradite between EU members had dropped from nine months to 43 days.

Clearly the other EU member states are making greater use of this provision, indicating its value as a bargaining chip to secure concessions elsewhere. Consequently proposal one in this chapter is for the UK to agree to continue a form of the EAW but on a bilateral basis with states that make extensive use of this provision in return for their support on other EU policy issues.

**The value of an EAW without a harmonised EU justice system**

The value of the EAW is that it provides for respect for the different legal systems within the EU, as the decisions made in one country become enforceable even if the citizen travels to

[270] UK Parliament, *Independent Review of the United Kingdom's Extradition Arrangements, Presented to the Home Secretary* 30 September 2011, P119

[271] Big Brother Watch, *The Case Against The European Arrest Warrant*, Conor Burns MP, June 2012, P11

[272] The Telegraph, *The EU Arrest Warrant serves Britain badly*, Telegraph view, 14 October 2012

another EU state. The problem is if the other EU states use these powers to prosecute crimes of a political nature that the UK would not want to recognise. Big Brother Watch note the profound differences in European legal systems. They write "*it is perfectly legal to carry out an abortion in the United Kingdom while it is forbidden by law in Ireland. The use of soft drugs is tolerated by the Netherlands yet is considered an imprisonable crime in Finland. Euthanasia is legal in Belgium, yet someone assisting an individual in carrying out the procedure in the United Kingdom would potentially face murder charges for their actions*."[273] Big Brother Watch support a dual criminality safeguard which would prevent extradition unless the offence is also a crime in the UK. They note that "*the EAW works on the principal of judicial reciprocity, meaning that an order issued by a judge sitting in a court on Romania or Bulgaria must be considered by the British criminal justice system to carry the same weight as that of a British judge*."[274] This is how the European Commission explains mutual recognition: "*Once … a decision by a judge in exercising his or her official powers has been taken, that measure – in so far as it has extranational implications – would automatically be accepted in all other Member States and have the same or at least similar effects there.*"[275]

The UK has an interest in respecting the sovereignty of other EU states. Britons who knowingly commit offences in other EU states, even if they are not crimes in the UK, should not escape justice. The double criminality provision which limits extradition to offences recognised as such in both the requesting state and the state receiving the extradition request should itself be limited. The UK should not deport in cases which damage the political and religious freedoms of citizens resident in the UK, e.g. if there were a provision banning criticism of a religious practice in another EU state and a UK-based author published a book that sold in that state criticising that practice, the UK should not deport the citizen to face trial in that country. However, if a UK citizen has knowingly defied the law of a state, even a law that the UK does not have, for example running an illegal abortion clinic in Ireland, then the UK interest in refusing to deport would be limited.

The UK should conclude bilateral deals with EU states that currently are frequent users of the EAW with regard to the UK in exchange for their support in other policy areas with a limited dual criminality safeguard attached which reflects the rights of UK citizens. Conservative MP Dominic Raab explains how 60 of the policing and crime measures the UK is due to opt out of have some value to the UK. With regard to the EAW he believes that "*the UK should take this opportunity to maximise its negotiating leverage, after the block opt out, to press for modest reform to ensure that the EAW is used more proportionately and better safeguards innocent people from speculative charges, wrongful arrest, and manifestly tainted evidence as a condition of opting back in*."[276] He cites the cases involving UK citizens deported "*to face incompetent justice systems (as in the Colin Dines case), corrupt police (as in the Andrew Symeou case) and appalling prison conditions (as in the Symeou and Michael Turner cases).*"[277] The EAW pledges to deport UK citizens to countries where, according to

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[273] Big Brother Watch, *The case against the European Arrest Warrant*, June 2012, Conor Burns MP, P19
[274] Big Brother Watch, *The case against the European Arrest Warrant*, June 2012, Conor Burns MP, P8
[275] European Commission, *Mutual Recognition of Final Decisions in Criminal Matters*, Communication [2000] 495 BAD LINK
[276] Open Europe, *Cooperation Not Control: The Case For Britain Retaining Democratic Control over EU Crime and Policing Policy*, Dominic Raab MP, P5
[277] Open Europe, *Cooperation Not Control,* Dominic Raab MP, P6

Transparency International's Corruption Perception Index, corruption between 2000 and 2010 increased from a high base including Bulgaria, Hungary, Italy (69th) and Greece (80th).[278] He cites the work of NGO Fair Trials International, whose October 2012 review found that there had been a 250 per cent increase in violations of pre trial rights between 2007 and 2011.[279] He suggests that a modest reform of the EAW would be to make it more "straightforward" to deport someone to their home country than to a third country. He identifies that Denmark already participates in EU Justice and Home Affairs measures selectively and did not sign up to submit pre Lisbon crime and justice measures to the ECJ's jurisdiction.

**Is the European Arrest Warrant a precursor to a European Justice System?**

The danger is that the differences exposed between the different justice systems in the EU countries create a demand for a harmonised EU justice system that imposes the same standards in developing eastern European nations as in the UK. The Lisbon Treaty ensured criminal justice policy will be made in the form of regulations, directives and opinions, and the right to initiate legislation is shared between the European Commission and member states. The Treaty also provides for a European Public Prosecutor to be established in the office of Eurojust, which could prosecute financial crimes against the Union and serious crime which has a cross border effect. The UK has not opted in to any measures to establish a European Public Prosecutor and would be able to veto such a move. However, it is a member of Eurojust. Established in 2002, this body is controlled by the European Council and the Parliament which decides its "*structure, operation, field of action and tasks*" and can request that a member state's authorities begin investigations or prosecutions and resolving conflicts of jurisdiction.[280] Mutual recognition is a worthy policy goal but control of this policy area by the UK government is essential. The UK should be able to suspend cooperation if necessary. The EU Fresh Start Group proposes a wider aim as one of their five EU Treaty Changes, which is "*an opt-out for the UK from all existing EU policing and criminal justice measures not already covered by the Lisbon Treaty block opt-out*."**[281]**

**The UK interest in respecting the national interests of other EU states**

The UK does have a national interest in respecting the legal sovereignty of other nations and assisting them in the extradition of individuals who have committed crimes. The Fugitive Offenders Act 1967 already included provisions so that "*extradition could be refused on the ground either that the request was made with a view to prosecuting or punishing the fugitive on account of his race, religion, nationality or political opinions, or that he might if returned be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions*."[282] There is no political offence exception in the European Arrest Warrant. In some member states an EAW can be issued by non-judicial authorities such as public prosecutors. There is a need for democratically elected

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[278] Transparency International, *Corruption Perceptions Index 2011*

[279] Fair Trials International, *Defence Rights in the EU*, October 2012

[280] UK Parliament, *Independent Review of the United Kingdom's Extradition Arrangements, Presented to the Home Secretary* 30 September 2011, P111

[281] Fresh Start Project, *Manifesto for Change: A new vision for the UK in Europe*, January 2013, P3

[282] UK Parliament, *Independent Review of the United Kingdom's Extradition Arrangements, Presented to the Home Secretary* 30 September 2011, P45

politicians to have a role in the process. However, decisions must be subject to review to ensure that individuals are not being requested for extradition based on political prejudices.

**An end to efforts to harmonise how justice systems operate worldwide but the preservation of essential protections for all those that don't pose a threat to UK security**
The UK should resist the recommendation of the Joint Committee on Human Rights that the government should *"take the lead in ensuring there is equal protection of rights, in practice as well as in law, across the EU"* and for national courts to have to interpret national laws in light of the Framework.[283] The Secretary of State should be given the discretion to extradite to countries that use the death penalty without the provision of assurances that it will not be used. This should be subject to judicial confirmation that the individuals subject to deportation pose a threat to UK national security or communal harmony.

The UK should seek changes to the rules affecting non EAW states that fall under Category 2, to limit the assurances the UK must seek before enforcing a deportation. The UK should respect the human rights of citizens under its care but this should not extend to a provision that the UK must ascertain that countries seeking extradition will not re-deport the foreign national, or that the justice and penal system in the country the individual is being deported to conforms to UK standards in cases where that individual is a threat to UK security.

[283] UK Parliament, *Independent Review of the United Kingdom's Extradition Arrangements, Presented to the Home Secretary* 30 September 2011, P318

# Chapter Nine - Human Rights

| | **Proposal** |
|---|---|
| 1 | Withdraw from the European Convention on Human Rights, secure an opt out from the Charter of Fundamental Rights and abolish the Human Rights Act |
| 2 | Create a British 'Bill of Rights', containing many of the same rights as the ECHR but with one final Court of Appeal located in London |
| 3 | Make all rights in the new British Bill of Rights qualified and allow for the Bill to be altered by Parliament preserving parliamentary sovereignty |

The UK should pursue all four proposals listed above which are mutually reinforcing. Proposal one is not designed to abolish human rights. Many of the principles contained within the European Convention on Human Rights, the Charter of Fundamental Rights and the Human Rights Act are worthy and would need to be replicated within the British Bill of Rights as suggested in proposal two. The British Bill of Rights would be designed to complement the UK's common law system, to respect parliamentary sovereignty, and could be amended after a debate among UK citizens and a vote of their elected representatives. Proposal three recognises the need for more flexibility in the application of human rights. The Bill of Rights should act as a signaling mechanism to highlight when rights are being infringed. It should serve to stir debate and draw public attention to whether the infringement is necessary. The democratic authority to override certain rights should remain. A concerned and engaged citizenry is the best safeguard of human rights, whereas inflexible application of human rights documents can actually serve to discredit them.

**A web of Human Rights Treaties binds Britain and this has evolved slowly**

The UK signed up to the European Convention on Human Rights (ECHR) in 1953, UK citizens have had the right of individual appeal to the Strasbourg Court since 1965 and the Convention was incorporated into UK law with the Human Rights Act of 1998. The EU is now a signatory to the ECHR and has drafted a Charter of Fundamental Rights which allows the citizen to contest rights in EU law (but not to contest national legislation) at the European Court of Justice and the European Court of Human Rights. The United Kingdom now has three courts dealing with rights: a Supreme Court in London, the European Court of Human Rights based in Strasbourg and the European Court of Justice based in Luxemburg. The EU has two agencies dedicated to human rights (the EU Agency for Fundamental Rights and the Institute for Gender Equality) plus a Commissioner for Fundamental Rights.

The European Convention of Human Rights and the jurisdiction of the European Court of Human Rights used to be separate issues to the UK's relations with the EU. The institutions were separate and though the membership of both overlapped, membership of the EU did not necessitate adherence to the jurisdiction of the former. With respect to EU law this is no longer the case, as resolution of the UK's problems with the ECHR will affect the UK's relations with the EU.

**How does the European Charter of Fundamental Rights affect the UK?**

Both the UK and Poland negotiated a protocol that confirmed that with respect to their two countries the Charter of Fundamental Rights did not create new rights, so its affect would

appear reduced. The protocol says that *"the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms."*[284] However, the House of Lords EU Select Committee states that *"ultimately, the interpretation of the Protocol is a matter for the courts and, in both the national and EU contexts, we do not think it is possible at this stage to predict precisely what courts would decide if faced with the task of interpreting the Protocol's language."*[285]

House of Commons Library research highlights that "*HRA [Human Rights Act] Section 2 requires a UK court determining a question linked to a Convention right to "take into account" any relevant European Court case-law and to interpret and develop domestic law to be compatible with the European Court's developing jurisprudence*."[286] The European Commission, in their 2011 Report on the Application of the EU Charter of Fundamental Rights, found that "*the Court of Justice of the European Union has increasingly referred to the Charter in its decisions: the number of decisions quoting the Charter in its reasoning rose by more than 50% as compared to 2010, from 27 to 42. National courts when addressing questions to the Court of Justice (preliminary rulings) have also increasingly referred to the Charter: in 2011, such references rose by 50% as compared to 2010, from 18 to 27*."[287] Consequently the protocol does not prevent the courts using the Charter of Fundamental Rights to decide cases, and thereby it is applicable in the UK due to the general duty to interpret national legislation in line with EU legislation.

**The Charter of Fundamental Rights and the history of EU social rights**

The Charter includes 'Social Rights' which are contentious in the UK. The rights contained in the Social Chapter, from which the previous Conservative government obtained an opt-out, were incorporated into UK law in 1998. They are now included in the Charter of Fundamental Rights and Articles 151-161 TFEU. Social Rights cover the "*free movement of workers, employment and remuneration, improvement of working conditions, social protection, freedom of association and collective bargaining, vocational training, equal treatment for men and women, information, consultation and participation of workers, health protection and safety at the workplace, protection of children, adolescents, elderly persons, and disabled persons*."[288] The European Commission can inform member states of infractions, and can act in the case of violations of the Charter. Any attempts to resurrect the pre-1998 UK opt out from the provisions of the old Social Chapter would require a UK amendment to the Charter of Fundamental Rights. Policy changes affecting social rights contained within the Charter would be illegal and challengeable before the European Courts without this change.

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[284] European Commission, Official Journal of the European Union, *PROTOCOL ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION TO POLAND AND TO THE UNITED KINGDOM*, 17 December 2007

[285] House of Lords, *Select Committee on European Union Tenth Report*, February 2008

[286] House of Commons Library, *The UK and Reform of the European Court of Human Rights*, Vaughne Miller and Alexander Horne, 27 April 2012

[287] European Commission, *2011 Report on the Application of the EU Charter of Fundamental Rights*

[288] Europa, *Summaries of EU Legislation, Fundamental Rights within the European Union*

**Why should this be a cause for concern? Is it a move towards a European justice system?**

The Charter of Fundamental Rights further cements the ECHR in EU states. Lord Chief of Justice Lord Judge argued that, "*should the UK take the option of withdrawing from the Convention it should also seek to negotiate a genuine opt out from the EU's Charter of Fundamental Rights and guarantees that any rulings from the European Court of Human Rights on EU legislation are not applicable to the UK.*"[289] The European Commission Staff working document on application of the EU Charter of Fundamental Rights in 2011 found that "*the Charter prohibits the removal, expulsion or extradition to a State where there is a serious risk that a person would be subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment*."[290] The European Court of Justice ruled on the criminalising of irregular stays and found that "*these rules preclude national law from imposing a prison term on an irregularly staying third-country national who does not comply with an order to leave the national territory. In a further case, the Court found that EU rules preclude national legislation imposing a prison sentence on an irregularly staying third-country national during the return procedure*."[291] The European Commission has "*launched a public debate on the right to family reunification of third country nationals living in the EU. The outcome of this consultation will shape whether any concrete policy follow up is necessary (e.g. modification of the rules, interpretative guidelines or status quo)*."[292] Preventing these efforts to remove UK sovereign control of our borders must be the main priority of any UK government in EU negotiations.

Combined with the introduction of a European Arrest Warrant, the EU appears to be constructing a unified legal and justice system. The Commission revealed that the Lisbon Treaty was "*a first step in the efforts to put in place a coherent and consistent EU Criminal Policy by setting out how the EU should use criminal law to ensure the effective implementation of EU policies*."[293] The intersection of criminal justice and human rights is most apparent in the issue of rights for prisoners, where the ECHR have ruled that the UK blanket ban on prisoners voting is illegal. The court's ruling that prisoners should be given the right to vote would still be a problem if the UK withdraws from the ECHR, as the UK would still be subject to EU law. The UK would be open to prisoner appeals at the ECHR or ECJ with regard to EU and local elections because of the Charter of Fundamental Rights.

**The danger of an unelected court exceeding its authority to make decisions on public policy rather than the law**

Policy Exchange, a think tank, explain in '*Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK',* that the problem with the Convention is not the principles themselves but, as retired senior judge Lord Hoffman puts it, "*interpretation by the courts of the high-minded generalities of the written instrument*." He explains the problem behind an activist court is that "*international institutions which are set up by everyone become in practice answerable to no one, and courts have an age-old*

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[289] Open Europe, Briefing note: *Prisoners' right to vote: the blurred line between the European Convention on Human Rights and the European Union*, February 2011, P9

[290] European Commission, *Staff working document on application of the EU Charter of Fundamental Rights in 2011*, P47

[291] Ibid, P48

[292] Ibid, P57

[293] Ibid, P84

*tendency to try to enlarge their jurisdictions. And so the Strasbourg Court has taken upon itself an extraordinary power to micromanage the legal systems of the member states of the Council of Europe (or at any rate those which pay attention to its decisions) culminating, for the moment, in its decision that the UK is not entitled to have a law that convicted prisoners lose, among other freedoms, the right to vote*."[294] While the Human Rights Act (HRA) gave individuals the right to take cases based on the ECHR to British courts, the individuals making such appeals also retained the right to challenge those decisions before the European Court in Strasbourg. This resulted in multiple judges being given the opportunity to engage in what Policy Exchange refers to as "*creative*" interpretations of human rights law.

Prime Minister David Cameron outlined UK frustration with "*how the Court is working*" and identified the risk of the European Court of Justice "*turning into a court of 'fourth instance*" which would give "*an extra bite of the cherry to anyone who is dissatisfied with a domestic ruling, even where that judgement is reasonable, well-founded, and in line with the Convention.*"[295] He also said that "*not enough account is being taken of democratic decisions by national parliaments*" and that the court "*should not see itself as an immigration tribunal*."[296] He expressed frustration about the deportation of foreign terrorist suspects, saying "*in Britain we have gone through all reasonable national processes……including painstaking international agreements about how they* [UK resident non UK citizen hate preachers] *should be treated……and scrutiny by our own courts……and yet we are still unable to deport them*." He urged that "*where an issue like this has been subjected to proper, reasoned democratic debate……and has also met with detailed scrutiny by national courts in line with the Convention……the decision made at a national level should be treated with respect*."[297] It is essential, if the UK is to remain in the ECHR, that the UK obtains an agreement on the 'margin of appreciation'. This means that certain types of cases should be reserved for the UK courts, and the power of the European Courts to overrule the UK courts on these issues should be reduced

**Decisions made by the unelected European Courts which seem to suggest they are already exceeding their authority to make decisions about UK public policy**

Sir Nicolas Bratza, former President of the European Court of Human Rights, in testimony before the House of Commons Human Rights Committee, described the need for the court to "*be seen to be protected from political pressures*."[298] However, European Courts have not shied away from involving themselves in political issues. In the case of *Vintner and Others v the United Kingdom*, the ECHR ruled in July 2013 that the UK could not operate whole life

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[294] Policy Exchange, *Bringing Rights Back Home, Making Human Rights Compatible with parliamentary democracy in the UK*, Michael Pinto-Duschinsky, Foreword by the Rt Hon Lord Hoffman PC, Edited by Blair Gibbs, 2011, P7

[295] The Guardian, *Cameron's speech on the European court of human rights in full*, David Cameron, 25 January 2012

[296] House of Commons Library, *The UK and Reform of the European Court of Human Rights*, Vaughne Miller and Alexander Horne, 27 April 2012

[297] Number 10, *Speech on the European Court of Human Rights*, 25 January 2012

[298] UK Parliament, Uncorrected Transcript of Oral Evidence, Joint Committee on Human Rights, *Human Rights Judgements*, Sir Nicolas Bratza and Erik Fribergh, 13 March 2012

sentences without the possibility of release or parole.[299] In *Hirst v the UK (No 2)* the ECHR ruled that the UK government could not operate a blanket ban on prisoners voting.[300]

Both the European Court of Justice and the European Court of Human Rights have made rulings which have curtailed the Dublin Mechanism.[301] These judgements stated that asylum seekers must not be transferred to another EU state if the state transferring the asylum seeker is aware of deficiencies in the receiving state's asylum procedure and /or reception conditions, and that those deficiencies amount to inhuman or degrading treatment.[302] The European Court of Justice invalidated the derogation to EU gender equality legislation to allow differentiation between men and women in insurance premiums. The European Commission intervened on the issue of Hungarian media law to require the Hungarian government, which was elected in 2010 with a two thirds majority in the Hungarian Parliament, to change the media law to comply with EU law. Despite revisions to the law to comply with some of the Council of Europe's concerns, the news media council which grants licenses for radio stations etc remains staffed with government appointees.[303] They are also monitoring the application of social security rules in member states.[304] This could impact the UK's ability to impose residency tests on non British EU nationals in receipt of UK benefits. Dr Lee Rotherham, in his report for the TaxPayers' Alliance, *Britain and the ECHR*, estimates the costs of implementing the decisions of the ECHR at £2.1 billion per annum with a wider 'compensation culture' feeding off the court's decisions costing the UK £7.1 billion per annum with a cumulative cost of £25 billion up till 2010.[305]

**UK politicians being allowed to implement such decisions without a parliamentary debate**

Lord Hoffman voiced UK fears in his speech on '*The Universality of Human Rights*' in which he said the European Court of Human Rights *"considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe."* He believed that *"detailed decisions about how it* [the UK legal system] *could be improved should be made in London, either by our democratic institutions or by judicial bodies which, like the Supreme Court of the United States, are integral with our own society and respected as such."*[306] In contrast, the Human Rights Act allows ministers to bypass the UK parliament. In cases where a declaration of incompatibility has been made, a minister under Article 10.2 of the Human Rights Act may bypass parliamentary scrutiny and order an amendment to legislation through statutory instrument rather than primary legislation. Ministers can amend or repeal UK primary legislation to make it compatible with the ECHR without consulting Parliament.

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[299] The Law Gazette, *Whole life imprisonment breaches human rights, rules Strasbourg*, Kathleen Hall, 9 July 2013

[300] BBC News Online, *Council of Europe warns over UK's prisoner vote option*, 10 December 2012

[301] European Parliament, Library Briefing: Library of the European Parliament, *Transfer of asylum-seekers and fundamental rights*, 30 November 2012

[302] European Commission, *Staff working document on application of the EU Charter of Fundamental Rights in 2011*, P8

[303] The New York Times, *Hungarian News Media Fight Laws of Silence*, Dan Bilefsky,19 March 2013

[304] European Commission, *Staff working document on application of the EU Charter of Fundamental Rights in 2011*, P6

[305] TaxPayers' Alliance, *Britain and the ECHR*, Dr Lee Rotherham, December 2010, P3

[306] Policy Exchange, *Bringing Rights Back Home, Making Human Rights Compatible with parliamentary democracy in the UK*, Michael Pinto-Duschinsky, Foreword by the Rt Hon Lord Hoffman PC, Edited by Blair Gibbs, 2011, P12

These powers are often referred to as 'Henry VIII powers',, referring to the *Statute of Proclamations* of 1539 which gave the decisions of the monarch the force of Acts of Parliament. The Fabian Society has condemned the proposed extension of these powers, which are now exercised by ministers rather than the monarch, by the UK Coalition government in other areas.[307] The House of Lords persuaded the Coalition government to drop proposals to use such powers to abolish or merge public bodies without parliamentary scrutiny in the Public Bodies Bill.[308]

**Can the UK be in the EU and withdraw from the ECHR?**

Proposal one in this chapter is for the UK to withdraw from the ECHR, the Charter of Fundamental Rights and the jurisdiction of the European courts. The UK could withdraw from the ECHR under Article 58, giving six months' notice. Being a signatory of the ECHR is a pre-condition for countries joining the EU, but not a condition of remaining in the EU. By unanimous vote the remaining EU countries can suspend the UK government's EU voting rights if they identify a "*serious and persistent breach*" of EU values, but UK withdrawal from the Convention would not be a breach of these values in itself. The UK would need to develop and nurture at least one ally within the 27 EU members to vote against UK expulsion.

If the UK would prefer to amend the ECHR this is more difficult. Decisions to amend the European Convention on Human Rights have to be approved by all 47 Council of Europe member states by means of an amending protocol. The Convention does include a series of derogations which can suspend qualified rights in a "*time of war or other public emergency*" as contained in Article 15. However, some rights are unqualified. Member states cannot derogate from Articles 2 (the right to life) except in lawful acts of war, Article 3 which prohibits torture and inhuman and degrading treatment, Article 4 (1) which prohibits slavery and forced labour and Article 7 which states there should be no punishment without law.[309] Dominic Raab MP argues that the definition of torture and inhuman treatment is so broad that it can include "*grossly defamatory remarks and extreme and continuous police surveillance*."[310] Given the political situation in the majority of developing countries, this interpretation potentially gives billions of people the right to remain in the UK if they first manage to travel here.

**If we pull out of the ECHR and secure an opt-out from the Charter of Fundamental Rights, how will rights be protected within the UK?**

There is nothing to prevent the UK instituting a Bill of Rights with a final court of appeal based in the UK. This approach would allow the amendment of the Bill as required by political developments based on democratic debate in the UK. The rights of this Bill could all be qualified or augmented to allow issues of national security to be given greater priority. This would be a pragmatic solution which preserves the signaling mechanism that the ECHR

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[307] Fabian Society, Next Left (blog), *The coalition's use of Henry VIII powers to weaken Parliament*, Sunder Katwala, 17 November 2010

[308] The Guardian, *The House of Lords is keeping ministers' Henry VIII powers in check*, Joshua Rozenberg, 9 March 2011

[309] House of Commons Library, *The UK and Reform of the European Court of Human Rights*, Vaughne Miller and Alexander Horne, 27 April 2012

[310] Civitas, *Strasbourg in The Dock: Prisoner Voting, Human Rights & The Case for Democracy*, Dominic Raab, April 2011, P14

provides, alerting the authorities to possible violations and focusing public concern without binding the UK government and preventing them undertaking national security operations essential to preserving peace and harmony in the UK.

The UK government has appointed a Commission to consider the creation of a British Bill of Rights. The UK Coalition Agreement between the Conservative and Liberal Democrat Parties in 2010 said they would ensure that the proposed new British Bill of Rights "*incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties*."[311] Proposal two in this chapter is for the UK government to pass a British Bill of Rights, incorporating many of the rights contained in the ECHR and Charter of Fundamental Rights but with a final appellate court located in the United Kingdom. Proposal three is to ensure that the rights this Bill establishes can be amended by the UK Parliament and that the rights contained in the Bill are applied in a flexible manner.

**Can the UK remain within the ECHR but revoke the right of appeal to the Strasbourg court?**

Withdrawing from the ECHR and securing an opt-out from the Charter of Fundamental Rights are essential to restore UK sovereignty in this area and I would recommend this approach. However, some may prefer to reform the system first. Under Protocol 11 of the ECHR, the UK can no longer leave the jurisdiction of the Strasbourg Court and remain formally in the ECHR. However, Policy Exchange believes that the UK could establish "*the Supreme Court in London as the final appellate court for human rights law. In that case, the UK would continue to incorporate the European Convention on Human Rights into its domestic law*." This may prevent other EU Members finding the UK in breach of human rights values and voting to suspend the UK's voting rights.

The UK government could also seek to establish a hierarchy of issues with some cases reserved for national courts' consideration as indicated by the Brighton Declaration. This document contained UK proposals to curtail the power of European Courts and was formally adopted in April 2012.[312] It contained a new rule to enshrine subsidiarity and a 'margin of appreciation' so European Courts cannot examine cases that are "*identical in substance to a claim that has been considered by a national court*", unless that national court's interpretation of the Convention is manifestly ill-founded. This seems to confirm the reasoning in the case of *Handyside v United Kingdom* where the Court explained that "*the machinery of protection established by the Convention is subsidiary to the national system safeguarding human rights"* but this margin of appreciation for national authorities went *"hand in hand with [...] European supervision*."[313] It also reduced the time allotted to make appeals from six to four months.[314] Joshua Rozenberg, a British legal journalist, believes the time limit reduction "*reflects the speed of communications compared with 60 years ago and is unlikely to deter serious applications*."[315] However, Sir Nicolas Bratza, President of the

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[311] Policy Exchange, *Bringing Rights Back Home, Making Human Rights Compatible with parliamentary democracy in the UK*, Michael Pinto-Duschinsky, Foreword by the Rt Hon Lord Hoffman PC, Edited by Blair Gibbs, 2011, P12

[312] Government website, *Brighton Declaration*, 20 April 2012

[313] The Council of Europe, *The Margin of Appreciation – Introduction*

[314] BBC News Online, *UK presses for European human rights convention changes*, 29 February 2012

[315] The Guardian, *Draft Brighton Declaration is a Breath of Fresh Air*, Joshua Rozenberg, 19 April 2012

European Court of Human Rights, thought the Brighton Declaration would "*not change the way we do our jobs*."[316] This statement seems to indicate a fundamental unwillingness of the President of the Court to acknowledge the UK's desire for subsidiarity. It suggests that efforts to secure a 'margin of appreciation', where the Court accepts that the implementation of the ECHR principles will differ between countries based on national culture and customs, will ultimately be fruitless and full withdrawal from the ECHR is preferable, as suggested by proposal one in this chapter.

**What reforms to the ECHR should the UK seek if we remain within the ECHR?**
Policy Exchange outlines a series of aims for UK negotiators who seek to reform the ECHR. These are contained below:

- First, to secure a rebalancing of the allocation of judges from one for each state to a system that reflects the population size of member states.
- Second, in terms of judicial interpretation the Court should be encouraged to adhere to a strict constructionist stance rather than the idea of the Convention as a living document for judicial interpretation when making its decisions. The constructionist stance means that judgements will be based on a literal reading of the text that forms the law and that judgements will be limited to what that text stipulates – it does not allow judges to creatively interpret the law to expand their jurisdiction or powers or to modernise the law by updating it in ways not approved by elected bodies.
- Third, the court should let each nation make its own decision about the balance between the Article 8 'right to privacy' and the Article 10 'right to free expression', to reflect national differences.
- Fourth, the court should agree clear rules on the margin of appreciation so it concentrates on the most serious cases. This should include stricter procedures for vetting judges to check they are qualified. Parliament should also repeal Section 3.1 of the HRA which requires legislation to be given effect in a way compatible with convention rights.[317]
- Fifth, a proposal not contained in the original Brighton Declaration would be to assign to the Council of Ministers decisions over whether a court decision should be referred to the European Courts. Unanimous agreement would be required in the Council - the UK could then exercise a veto. Currently the burden of proof of whether subsidiarity should reign lies with the European Commission. In July 2010 there was a backlog of 120,000 cases before the ECHR and delays of up to six years in hearing cases.[318]

[316] House of Commons Library, *The UK and Reform of the European Court of Human Rights*, Vaughne Miller and Alexander Horne, 27 April 2012
[317] Policy Exchange, *Bringing Rights Back Home, Making Human Rights Compatible with parliamentary democracy in the UK*, Michael Pinto-Duschinsky, Foreword by the Rt Hon Lord Hoffman PC, Edited by Blair Gibbs, 2011, P61
[318] Ibid, P43

# Conclusion

The UK must set clear and realistic goals in the renegotiation process. She retains the right to leave the EU if not satisfied. Negotiation will involve tradeoffs. The UK will need to make some concessions as well to achieve policy gains. Running through my proposals, there are two key themes. Firstly, that the UK should seek the repatriation of powers to enable policy decisions to be made by democratically elected politicians rather than appointed officials, and that this process involves respecting other EU nations' right to use these new powers to make decisions with which we may disagree. Secondly, that the UK government should not use UK power to pursue 'ethical' goals that are not based on clear UK interests. There should be a greater diplomatic stress on achieving goals related to the preservation and enhancement of UK hard power capabilities, including the position of London as the pre-eminent world financial centre, and expanding the commercial opportunities for UK firms. We need not involve the UK in matters concerning the internal policy of other states.

British diplomats should be prepared to be in a minority. They will endure unpopularity to achieve these policy gains. During the negotiations UK diplomats should stress the considerable benefits the EU derives from UK membership and consider how these can be used to pressure our partners. A UK withdrawal may encourage other members to leave and undermine that institution. The difficulties faced by the Eurozone present an opportunity to pressure EU partners to accommodate UK requests which should not be missed. Our partners also want policy concessions. Eurozone member states are seeking closer union, and the creation of a core Europe with a common foreign, security and economic policy. UK support for these measures can be purchased at a price. This report details some of the policy changes the UK will seek in return. This process is not one way. The UK has the capacity to frustrate our EU partners' efforts to build 'an ever closer union' if they reject our proposals to build a more flexible EU. Both Eurosceptics and Europhiles should wish PM David Cameron well in his efforts to remodel Britain's relationship with the EU into a looser arrangement with which our population is comfortable. Hopefully the reforms mentioned in this report may aid that process.

# Bibliography

1. Big Brother Watch, *The case against the European Arrest Warrant*, June 2012, Conor Burns MP
2. Civitas, *EU Facts: Common Agricultural Policy*, 22 January 2013
3. Department for Environment, Food and Rural Affairs (DEFRA), *Common Agricultural Policy Reform*, Archived Content
4. DEFRA, *Government response to the informal consultation on the European Maritime and Fisheries Fund*, 21 September 2012
5. Fresh Start Project, *Manifesto for Change: A new vision for the UK in Europe*, January 2013
6. Europa, *Summaries of EU Legislation, Fundamental Rights within the European Union*
7. European Commission, *Commission staff working document, External sources of growth: Progress report on EU trade and investment relationship with key economic partners*, July 2012
8. European Commission, *Common Fishery Policy – Factsheets*
9. European Commission Memo, *Concluding trade deals could boost EU's GDP by 2 per cent*, 20 July 2012
10. European Commission, *Fishing rules*
11. European Commission, *Guide to fisheries policy: A user's guide*, December 2008
12. European Commission, *Policy Making Factsheet: How International trade agreements are signed*, 14 June 2011
13. European Commission, *Policy making factsheet: What did the Lisbon Treaty change?* 14 June 2011
14. European Commission, *Reforming the Common Fisheries Policy: Building a Brighter Future for Fish and Fisherman*
15. European Commission, *Staff working document on application of the EU Charter of Fundamental Rights in 2011*
16. European Commission, *Standard Eurobarometer 78*, *Public Opinion in the European Union*, Autumn 2012
17. European Commission, European Economy, Economic Papers 456, *The economic impact of the Services Directive: A first assessment following implementation*, Josefa Monteagudo, Aleksander Rutkowski and Dimitri Lorenzani, June 2012
18. European Commission, *The European Union Trade Policy 2013* European Commission, *Trade, Policy making*
19. Foreign and Commonwealth Office, *Review of the Balance of Competences between the United Kingdom and the European Union*, July 2012
20. House of Commons, *Extradition and the European Arrest Warrant – Recent Developments, Home Affairs Section*, Alexander Horne, 6 February 2013
21. House of Commons Library, *The UK and Reform of the European Court of Human Rights*, Vaughne Miller and Alexander Horne, 27 April 2012
22. Institute of Directors, *Modernising Labour Law to meet the challenges of the 21st century*, 30 March 2007
23. Institute of Economic Affairs, *A Well Intentioned Folly: The Macroeconomic Implications of Solvency II*, Amarendra Swarup
24. Migration Watch, *European Asylum and Immigration Policy: Developments Since 2010*

25. Migration Watch, *Incentives for Romanian and Bulgarian emigration to the UK*, February 2013
26. National Institute for Economic and Social Research, *Potential impacts on the UK of future migration from Bulgaria and Romania*, Heather Rolfe, Tatiana Fic, Mumtaz Lalani, Monica Roman, Maria Prohaska and Liliana Doudeva, April 2013
27. OECD, *Evaluation of Agricultural Policy Reforms in the EU*, 2011
28. OECD, *The European Union's Common Agricultural Policy (CAP) post-2013*, October 2011
29. Open Europe, *Briefing note, In Brief: The parties positions on key EU policies*, 21 April 2010
30. Open Europe, Briefing note: *Prisoners' right to vote: the blurred line between the European Convention on Human Rights and the European Union*, February 2011
31. Open Europe, *Continental Shift – Safeguarding the UK's financial trade in a changing Europe*, December 2011, Stephen Booth, Christopher Howarth, Mats Persson Vincenzo Scarpetta with additional analysis by Europe Economics
32. Open Europe, *Europe and elections*
33. Open Europe, *More for less: Making the EU's farm policy work for growth and the environment*, Christopher Howarth, Anna Kullmann, Pawel Swidlicki, February 2012
34. Open Europe, *Repatriating EU social policy: The best choice for jobs and growth?*, Stephen Booth, Mats Persson and Vincenzo Scarpetta, November 2011
35. Open Europe, *Trading Places, Is EU Membership still the best option for UK trade?*, Stephen Booth and Christopher Howarth
36. Policy Exchange, *Bringing Rights Back Home, Making Human Rights Compatible with parliamentary democracy in the UK*, Michael Pinto-Duschinsky, Foreword by the Rt Hon Lord Hoffman PC, Edited by Blair Gibbs, 2011
37. TaxPayers' Alliance, *FOOD FOR THOUGHT: How the Common Agricultural Policy costs families nearly £400 a year*, Dr Lee Rotherham, March 2009
38. TaxPayers' Alliance, *The Price of Fish: Costing the Common Fisheries Policy*, Dr Lee Rotherham, Foreword by Professor David Bellamy, January 2009
39. The Chatham House Yougov Survey 2012, *Hard Choices Ahead*, *British attitudes towards the UK's International Priorities*, Jonathan Knight, Robin Niblett and Thomas Raines, July 2012
40. Trade Union Council, *Europe and your rights at work*, With an overview by David Lea and Stephen Hughes, April 2006
41. UKIP, *A sustainable British fishing industry: A fishing policy for an independent Britain*, Policy Statement
42. UK Parliament, *Independent Review of the United Kingdom's Extradition Arrangements, Presented to the Home Secretary* 30 September 2011
43. UK Parliament, *Memorandum from Open Europe 2008* - compiled during Lisbon Treaty Negotiation period
44. UK Parliament, *The Joint Committee on Human Rights report – The Human Rights Implications of UK Extradition Policy*, 22 June 2011