

The UK Renegotiation: What has it really achieved?

A Legal Analysis of:
The Renegotiation with the European Union:
Legal Status, "Ever Closer Union", and
What are the Protections Provided for the
UK's Financial Services Sector

Ву

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Executive Summary

Key points:

- The Renegotiation does not change the EU Treaties. The only way to alter the EU Treaties is to go through the specific amendment process. This process involves ratification by every Member State which requires referenda in some Member States. The Renegotiation promises some limited Treaty changes at an uncertain future date but whether those Treaty changes will be delivered is uncertain.
- The Renegotiation is in law an agreement by the Heads of Government favouring a particular interpretation of the Treaties. This agreement (called a "Decision") operates under general international law and is not a legal act under the EU Treaties producing binding and specified legal effects like a Directive etc. This interpretation favoured by the Heads of Government will however be "taken into consideration" by the European Court of Justice. But the European Court of Justice is not bound to follow and apply this interpretation, evidenced by the fact that it has chosen to depart from an earlier "Decision" taken on precisely the same legal basis.
- The Renegotiation does not bind the European Court of Justice. The UK Government's claims that the summit deal is "legally binding" are therefore highly misleading as a matter of substance. It is only "legally binding" in the limited sense that the Heads of Government have agreed between themselves on their favoured interpretation of the Treaties. But the Heads of Government, even acting jointly, cannot by this mechanism bind the EU's supranational institutions, most importantly the European Court of Justice but also the European Parliament, the Commission and the European Central Bank.
- The Renegotiation promises changes to EU secondary legislation but cannot guarantee delivery of those changes. The Renegotiation promises that the representatives of the Member States will vote for changes to EU Regulations on export of family allowances and in-work benefits. But this does not bind the European Parliament whose assent will also be needed for these changes to be passed into law, after the referendum is over.

- The Renegotiation does not make any concrete difference to the UK's sovereignty. The UK Government did not ask for the return of any powers to the UK and none have been returned.
- The words "ever closer union" do not create rights or impose legal obligations on the UK. Removing their application to the UK has no concrete legal consequence. The UK Government has not identified how the removal of these words would have changed the outcome of any past case at the European Court of Justice or how it will change the outcome of any future case.
- The new "Red Card" system will never in practice apply. It is unrealistic that a measure which successfully passes under Qualified Majority Voting could be knocked down by the Red Card system.

Economic Governance:

- The Renegotiation does not resolve the "Economic Governance" problem and does not adequately protect the UK's financial services sector or the ability of UK authorities to maintain financial stability in the UK. In the future, as the Eurozone proceeds to integrate further without the UK, it is likely that the Economic Governance problem becomes greater.
- The tensions underpinning the UK's relationship with the Eurozone remain. The Eurozone needs to integrate further. The plan for this has been adopted and is contained in the "Five President's Report". The Eurozone has a legislative majority in the Council of Ministers and can therefore pass any legislation related to financial services even if it is not in the UK's interests.
- To resolve the Economic Governance problem would require a fundamental overhaul of the EU Treaties. This has not been achieved. There is no acknowledgment in the Renegotiation that the EU is a multicurrency union. Jean-Claude Juncker said on the day the Renegotiation concluded: "Today's deal leaves no doubt that the euro is the currency of our Union".
- The Economic Governance principles in the Renegotiation are deliberately vague. Rather than clarify matters, they introduce a new uncertainty. Discrimination on the basis of currency is prohibited, except if there are objective reasons. Specific provisions within the single rulebook may be necessary, but the level-playing field must be preserved. Financial stability

in the UK is a matter for our own authorities, but this is without prejudice to the powers of the EU to take action.

- The Safeguard Mechanism to protect the economic governance principles is simply the power to call a meeting. It is clear that the Safeguard Mechanism does not change the legislative process or give the UK a veto.
- Over the years the UK has had various disputes with the EU related to Economic Governance including the fiscal compact, the financial transactions tax, short-selling, the location of euro clearing-houses and macro-prudential requirements of financial institutions. The terms of the Renegotiation would not have resulted in a different outcome in these disputes.

Section 1

The Legal Status of the Renegotiation

The Renegotiation does not bind the European Court of Justice. UK Government claims that the summit deal is "legally binding" are highly misleading as a matter of substance.

Legal Form

The Renegotiation is in the form of a "Decision" or agreement of the Heads of State or Government of the Member States meeting within the European Council.¹ Technically it is not a Decision of the European Council itself, since the European Council includes the President of the European Commission and the President of the Council as well as the Heads of Government. The Decision is not a recognised legal act of any EU institution: its status is solely that of an agreement reached between Heads of Government acting as representatives of their respective States, who have used a meeting of the European Council as the venue in which they have reached their agreement.

The Heads of Government have no power actually to alter the Treaties without going through the whole Treaty amendment process, which involves ratification by each Member State in accordance with its constitutional requirements. Such constitutional requirements can include referenda in some Member States and the Heads of Government cannot bypass these requirements and amend the Treaties themselves without going through the required formalities.

So what the Heads of Government can do is much more limited: they can agree on a particular "interpretation" of the Treaties within the range of their possible meanings. This is what the Renegotiation claims to have done. It does not claim to have actually altered the Treaties.

The Renegotiation is "binding" only in the very limited sense that the Heads of Government have reached an agreement between themselves on what is their favoured interpretation of the EU treaties on a number of points, and have also agreed between themselves to promote (1) some limited future Treaty changes, and (2) certain amendments to EU legislative instruments. They have also agreed between themselves that the "Decision" is not to be repealed or amended in the future without unanimous agreement.

¹ The "Decision" takes the form of a 17 page document which is published as Annex I to the Conclusions of the European Council of 18-19 February 2016.

But although the Heads of Government may have agreed <u>between themselves</u> on their favoured interpretation of the treaties and cannot back out of the agreement without the UK's assent according to their obligations under general international law, the agreement between Heads of Government is not the same as an amendment to the EU treaties nor is it a recognised legal act under those Treaties. A recognised legal act under the Treaties would for example be a Directive flowing from a formal legislative proposal by the Commission which is subsequently adopted after approval by the Council of Ministers and the European Parliament under the EU's ordinary legislative procedure. Such a Directive produces binding legal effects within the European Union's legal order and must be respected by the EU's institutions as well as by the Member States.

By contrast, the agreement between the Heads of Government is under general international law (and not under the EU treaty framework), and so it does not bind the EU's supranational institutions. As a matter of law it does not bind the European Commission, still less the European Parliament, and most importantly it does not bind the European Court of Justice. The agreed-upon interpretation will be "taken into consideration" by the European Court of Justice, but it is absolutely clear that that Court is not bound to follow and apply the interpretation preferred by the Heads of Government.

The Edinburgh Decision on National Citizenship

This is not just a theoretical point. It is graphically demonstrated by the fate of the similar Edinburgh summit agreement² in which the Heads of Government agreed that EU citizenship would not supersede national citizenship and that questions of citizenship would be settled "solely by reference to the national law of the Member State concerned".

In Case C-135/08 Rottmann (Grand Chamber, 2 March 2010) the European Court of Justice paid lip service to the summit Decision by saying it should be "taken into consideration", but then departed from it by holding that EU law governed the circumstances in which a person could be entitled to German citizenship because this would also affect his EU citizenship, which was now his "fundamental" status.

In our Supreme Court, Lord Mance (with the agreement of three other Supreme Court judges) expressed the view that the European Court of Justice's decision in Rottmann had been taken "in the face of the clear

² Also referred to in the same way as a "Decision", adopted on 12th December 1992 at the Edinburgh European Council meeting

language" of the Edinburgh Decision, as well as other declarations and indeed of the underlying treaties.³

It is therefore clear beyond doubt that the European Court of Justice will retain the ability to arrive at decisions which depart from the language of the Renegotiation as and when it chooses to do so.

Promised future Treaty changes

In addition to containing provisions which purport to interpret aspects of the Treaties, the Renegotiation also promises (at Section C, paragraph 1) that "the substance of" a recognition of the position of the UK regarding further political integration will be incorporated into the Treaties "at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States". This phraseology recognises the obvious fact that a group of politicians sitting round a table at a European Council meeting do not have authority to dispense with the legal requirements (1) in the Treaties themselves about how they can lawfully be amended, and (2) of their own national constitutions as to how such Treaty amendments are to be approved and ratified.

The procedure for amendment of the Treaties is set out in Article 48 of the Treaty on European Union. An amendment of the kind envisaged would not fall within the so-called "Simplified revision procedures" and accordingly would have to be passed under the "Ordinary revision procedure" in Article 48(2) to (5). The first step of the procedure (under Article 48(3) normally involves the European Council convening a Convention to examine the proposed amendments. This Convention is composed not only of representatives of the Member State Heads of Governments, but also of representatives of each national parliament and of the European Parliament and of the Commission. Therefore even if the representatives of the Heads of Government all want to approve the proposed Treaty change in accordance with what they have agreed at the summit, it is not certain that the Convention as a whole would approve them, or approve them in unmodified form.

That said, the Convention's views are not binding since it makes a recommendation to a conference of representatives of the governments of the Member States (an "IGC"). We will assume that the IGC would adopt the required treaty change on the basis that the government representatives at the IGC would comply with the agreement to revise the Treaties undertaken by their respective Heads of Government in the Renegotiation. If one or more

³ Pham v Home Secretary [2015] UKSC 19 at para 90.

governments did not do so, either by a blank refusal or more likely by watering down the text of the Treaty amendment into meaninglessness, it is completely unclear what judicial or other remedy the UK would have in view of the lack of legal status of the Renegotiation under the EU treaties.

But assuming that a Treaty amendment is agreed by the IGC in a form acceptable to the UK, this is where the real difficulties begin. This is because Article 48(4) states that Treaty amendments only come into force "after being ratified by all the Member States in accordance with their respective constitutional requirements". These constitutional requirements vary from State to State, but can involve ratification by the legislature by either ordinary or special procedures, and in some cases may require approval in a referendum. The Heads of Government who entered into the Decision promising these Treaty changes are simply not in a position to guarantee that the legislatures of their States at a future date, still less the people of their States in a referendum, will take the necessary constitutional steps to ratify the Treaty amendments.

We deal with the substance of this promised Treaty amendment in a later section of this paper, where we point out that (assuming it actually comes to be passed) it would achieve little or nothing of practical value in improving the UK's legal position or in curbing the activities of the European Court of Justice. That does not mean that it would not be politically contentious in other Member States, where it would be viewed as giving a special privilege to the UK in relation to the process of European integration. Indeed, the risks of it engendering resentment at special treatment for the UK and political opposition to ratifying it must have been enhanced by the UK government's greatly exaggerated claims about its significance. It is therefore, at best, far from certain that this promised Treaty amendment will actually come to be ratified when the next Treaty revision process takes place in the years ahead.

Promises of secondary legislation

The Decision or agreement of Heads of Government also promises certain changes to EU secondary legislation. In particular, it notes that the Commission will bring forward proposed amendments to two EU Regulations on exportation of child benefits and on a "safeguard mechanism" for in-work benefits, and promises that the representatives of the Member States will support these amendments in the Council of Ministers (Section D, paragraph 2). Assuming that the Member State representatives will do what their Heads

of Government have promised and support these measures, it does not follow that they will be passed into law. This is because the European Parliament is entitled to amend or totally reject these measures. Even if MEPs are lying low at the moment for fear of upsetting the British public in the referendum campaign, these measures will only be brought forward after the referendum is over and only if the UK votes to remain, in which case no such political restraint will continue to apply to the European Parliament. There is a tangible risk that these measures will be voted down by the Parliament altogether, and probably a higher risk that they will be mauled by wrecking amendments.

And even this leaves out of account the final hurdle. These measures are likely to be highly contentious and will therefore attract legal challenges. Those legal challenges will in the normal course find their way to the European Court of Justice. That Court is not bound to hold them valid or consistent with the EU Treaties, for example with the principle of non-discrimination on the grounds of nationality, just because the Heads of Government have approved them in this kind of agreement.

Conclusion as to "legally binding"

As we have explained, the so-called Decision is only legally binding in a very narrow sense, in that the Member State Heads of Government have bound themselves under general international law, not under the EU treaty framework, to favour certain interpretations of the Treaties and to support certain limited future changes to the Treaties and to EU secondary legislation. The problem is that the agreement between the Heads of Government does not bind the European Court of Justice when it comes to interpreting the Treaties and as regards future action does not and cannot national legislature and national electorates to approve the future treaty changes, the European Parliament to approve the EU legislative changes or bind the Court to hold them valid and not incompatible with the EU treaties.

The UK government has extolled the "legally binding" nature of the agreement between Heads of Government but has failed to explain or even acknowledge the limited effect which such an international law interpretative agreement outside the EU Treaty framework can have. Indeed, the UK government's claims have gone considerably further than is compatible with the actual legal position by suggesting that the agreement provides effective legal security for

actual delivery in legally effective and binding form of the content of the Decision. That it plainly does not.

Section 2:

The Renegotiation and Sovereignty: "Ever closer union"

"Ever Closer Union" will remain in the Treaty and the Renegotiation makes no substantive difference to the UK's legal obligations.

What is the Treaty reference to "ever closer union"?

The Treaty on European Union (originally known as the Maastricht Treaty⁴) refers to "ever closer union" in the second paragraph of its first Article: "This Treaty marks a new stage in the process of creating an **ever closer union** among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."

This phrase - "an ever closer union among the peoples of Europe" - is also included in the preamble to the Treaty on European Union and was in the preamble of the original Treaty of Rome signed in 1957. It is still there, now that treaty has been renamed as the Treaty on the Functioning of the European Union (TFEU).

None of these references to "ever closer union" are in parts of the treaties which create specific rights or impose specific obligations on Member States. It would therefore not be possible, for example, for the UK to be hauled before the European Court of Justice for having breached a Treaty obligation to work towards "ever closer union".

However, they do perform a function. They form part of the general 'mood music' or background against which the more specific provisions of the treaties are interpreted.

With these points in mind, we now turn to the Renegotiation which was negotiated at the European Council summit meeting on 18-19 February 2016.

The Renegotiation on "ever closer union"

As we have seen, the Renegotiation is embodied in an agreement between the European leaders which is described as a "Decision" of the Heads of State and Government meeting in the European Council.

⁴ 7th February 1992

With the parts of the Decision relating to "ever closer union", it does not matter how binding or non-binding they are because, as we shall see, none of the terms when read carefully produce a substantive change in the legal position of the United Kingdom.

The Decision begins by reciting some existing legal facts, in the recitals at the top of page 10.

- First, that the UK has a legal right never to join up to the euro against its will, an existing and clear legal right which is spelled out in the UK's monetary union opt-out Protocol No. 15 (NB: Protocols are a legally binding parts of the Treaties).
- Secondly, that under Protocol No. 19 the UK is not obliged to participate in the Schengen *acquis* and under Protocol No. 20 it is not obliged to remove its border controls and participate in the Schengen area.
- Thirdly, that it has a right under Protocol No. 21 to choose whether or not to participate in new measures under the EU's so-called "area of freedom, security and justice" and that under the Lisbon Treaty Protocol No. 36, it has chosen to opt out of a number of such measures.

It should be stressed that none of these are new rights for the UK and none of them have been "won" by David Cameron in his negotiations. The inclusion of references to these existing opt-out rights, which are not enlarged in any way, produces no legal effect.

The subject of "ever closer union" is addressed at Section C, headed "Sovereignty", paragraph 1, on page 16 of the Decision. This starts with the sentence: "It is recognised that the United Kingdom, in the light of the specific situation it has under the Treaties, is not committed to further political integration into the European Union."

The important word to note in this sentence is the word "recognised". This word means what it says: it is recognising the existing legal position and the existing posture of the UK regarding future Treaty changes, and does not claim to be changing anything.

The existing legal position is that the UK (in common with all other Member States) has an absolute right to agree to or to veto Treaty changes which involve further political integration. The UK cannot be compelled to agree to such Treaty changes, whether because of the words "ever closer union" in the

treaties or for any other reason. The sentence quoted above simply recognises the existing legal reality that the UK cannot be compelled to agree to such Treaty changes, and the political reality that it is not committed to further political integration (at least for now).

The following sentence of the summit Decision states that: "The substance of this will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States, so as to make it clear that the references to ever closer union do not apply to the United Kingdom."

This is a promise of a Treaty change at some indefinite time in the future. The European leaders gathered in the European Council cannot legally bind their own Member States to deliver a treaty change, since this depends upon fulfilling national constitutional requirements in each State. In some States this involves the need for a referendum and/or ratification by the legislature, and in some cases by special majorities or processes.

But leaving aside the non-binding nature of the promise of future treaty change which we have dealt with more fully in Section 1 above, the real point is that all that is promised is a Treaty change which will repeat "the substance of this"; that is the substance of the first sentence quoted above which simply "recognises" the existing legal position. So all that is promised is to write into the treaty an acknowledgement of the existing legal position. There is no promise at all to make a change to the Treaty which actually changes the legal position.

The summit Decision does not spell out the precise wording of the Treaty changes which would be made, and the precise wording could be very important. But assuming that the wording in some way declares that the references to "ever closer union" do not apply to the UK so that the UK is not committed to agreeing to further Treaty changes which deepen political integration, the words "ever closer union" would still remain there in the Treaty on European Union and in the preambles, still influencing the mind-set of the European Court of Justice.

It is hard to see how, when the European Court comes to interpret EU legislation or Treaty articles which apply to all Member States including the UK, it could put out of its mind the references to ever closer union. Certainly, there is nothing in the Decision which could possibly authorise the same piece of EU legislation being given two different meanings, a narrower one for the UK and a wider one for all other Member States.

"Ever closer union" and Interpretation of the Treaties

The above sentences are followed by some further paragraphs which relate to the way in which the phrase "ever closer union" can be used to interpret other provisions of the Treaties and EU legislation which contain operative rights and obligations. Close examination of the text reveals that these contain less than meets the eye.

There is no promise to change the Treaties to incorporate these particular provisions at Treaty level. A "Decision" of the leaders in the European Council such as this cannot contradict or change the Treaties, but is capable of being taken into account in interpreting them where their meaning is doubtful, as we explain by reference to the *Rottmann* case in Section 1 above.

First the "Decision" states (page 16 second paragraph) that the references to ever closer union "do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation", and that they "should not be used either to support an extensive interpretation of the competences of the Union or of the powers of its institutions as set out in the Treaties".

The problem with these sentences is that they are knocking down an Aunt Sally. This is not how the European Court has made use of the phrase in its case law in the past.

The most famous occasion when the ECJ made reference to the Treaty of Rome preamble containing the phrase "ever closer union among the peoples of Europe" was in Case 26/62 Van Gend en Loos, decided in 1963 before the UK joined the EEC, which established the fundamental doctrine that many Treaty provisions are directly effective as law inside member states.

The Court however did not refer in that case to the fact that it mentioned "ever closer union", but rather to the fact that the preamble "refers not only to governments but to peoples", in support of its conclusion that the Treaties are law which applies directly to people inside the Member States as well as to the Member States themselves.

Examination of judgments of the ECJ over the past fifteen years reveals that it very rarely refers to "ever closer union". It did so in its formal opinion on the EU's draft treaty of accession to the European Convention on Human Rights, Op 2/13, at paragraphs 166-167, where it pondered on the nature of EU law:

166. To these must be added the specific characteristics arising from the very nature of EU law. In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in Costa, EU:C:1964:66, p. 594, and Internationale Handelsgesellschaft, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490, paragraph 21, and 1/09, EU:C:2011:123, paragraph 65; and judgment in Melloni, C 399/11, EU:C:2013:107, paragraph 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in van Gend & Loos, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65).

167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.

The European Court's view therefore is that "ever closer union" is a concept which operates at a very deep level in supporting its conception of the nature of European Union law. It is not used as a crude tool to extend the scope of individual Treaty articles or regulations or directives, or to extend EU competences or powers of the EU institutions.

We have not been able to identify any ECJ case in which the phrase "ever closer union" has been used directly in either of the ways which these interpretative provisions would seek to contradict, that is as a "legal base for extending" or to "support an extensive interpretation" of competences or powers. These interpretative provisions therefore do not contradict or curtail any existing ECJ case law, which explains why the Commission and the Council legal service have been willing to see them included in the Decision. They are simply shooting at the wrong target.

However, the references to "ever closer union" will remain in the Treaty and in the preambles, and is hard to see how they will not continue to have subtle and indirect effects, as one but only one of the pointers to the continuing direction of travel of the EU which serve to confirm the pre-existing mind-set of the ECJ and the Commission.

The key practical question is whether this Decision would have changed the outcome of any past case in the ECJ, or would be likely to change the outcome of any future case. The UK Government have not identified any past case whose outcome would have been different, nor have we been able to. There is no reason to believe that any future case would be different.

Section 3:

The "Red Card" and National Parliaments

The "Decision" then contains some text which simply repeats and rehashes declarations and statements made at previous summits. Then in numbered paragraphs 2 and 3 it sets out a so-called "Red Card" system for national parliaments to "veto" draft EU measures.

The question of whether or not this part of the "Decision" is legally binding is beside the point, since there is no prospect of it having any effect in any real situation. Paragraph 3 states that the Council of Ministers will cease consideration of draft EU legislative acts when parliaments representing a 55% weighted vote of Member States send in a "reasoned opinion" stating that the proposed measure breaches the principle of "subsidiarity".

The first point is that this does not give a general veto to national parliaments, but only a right to object on the narrow and specific ground of "subsidiarity". This arcane and difficult doctrine does not permit objections on the ground that the EU has gone too far or that the measures are unnecessary, ill-conceived or damaging: it is limited to a narrow situation where the EU has adopted a policy objective, but it is argued that the particular policy objective may be better implemented at the national level.

Secondly and more importantly, it is impossible to foresee a situation in which this "Red Card" system would actually bite and make a difference. In the rare case of measures which require unanimity for adoption, the UK would be able to block the measure and the UK Government is obliged to block it by Parliamentary convention if the measure does not pass Parliamentary scrutiny.

In the more common case where a measure is to be passed under Qualified Majority Voting, it will only be passed in the first place if it is supported by 55% of the weighted votes of the Member States who represent 65% of the EU population. So a measure could only be passed on this hurdle, and then blocked under the proposed Red Card, if enough national parliaments were to 'rebel' against their governments to convert a 55% weighted vote/65% population majority into a 55% weighted vote the other way, with only 12 weeks to organise these negative opinions.

While national parliaments can theoretically disagree with the views of the national government, by and large national governments are supported by a working majority in the national parliament so such departures are rare. In

order for the "Red Card" system to make a difference even it theory, it would be necessary to convert a majority in favour of a measure of 55% (or more usually much greater) of national governments into a 55% majority of national parliaments against and do so, as we have stated, within the space of 12 weeks.

This point has not been missed by other commentators. Even taking into account exceptional situations such as minority governments where a parliament might disagree with a national government's vote in favour of an EU measure in the Council of Ministers and making other favourable assumptions, The Guardian's conclusion was: "In practice, we suspect the red card will be only ever be used once or twice over the next 20 years. It would therefore make very little difference to decision-making in the EU."

We suggest that "once or twice in 20 years" is a significant over-estimate, and that in practice it is never going to happen that 55% of national parliaments will disagree with a measure passed with the assent of 55% or greater of the national governments. This part of the summit Decision does not possess content that makes a difference in the real world.

Respecting Opt-out Protocols Requirements

Paragraph 4 of the "Decision" contains some paragraphs about the observation of the Treaty protocols, in particular opt-out Protocols Nos. 21 and 22. These paragraphs simply state that the rights and obligations of the Member States under the Protocols must be fully observed and that Member State representatives will ensure that the Protocols will apply to a measure when it falls within the scope of the parts of the Treaty to which the Protocols relate.

These paragraphs simply repeat, in non-binding form, the provisions of the Protocols themselves which are legally speaking an integral part of the Treaties and of the same legal status as the bodies of the Treaties. They are just a statement that "I will observe the law". It is hard to see what such statements will achieve: if the other Member States are willing to observe the law they are unnecessary, and if they are willing to breach it then the mouthing of such platitudes in non-binding form will not cure the situation.

Conclusion

It can be seen that the provisions of the summit Renegotiation on "ever closer union" and "sovereignty" are almost totally devoid of substance. For the most

⁵ http://www.theguardian.com/world/datablog/2016/feb/10/introducing-camerons-eu-red-card-limited-impact

part, they make no alteration of any kind to the existing legal rights and obligations of the UK but are simply reiterating the existing legal situation for purposes of political effect and not substance. Where they attempt to make a nuanced (and non-binding) interpretation of the concept of "ever closer union", they miss the real target, do not contradict or limit any existing European Court of Justice case law, and it is not possible to see how they would actually affect the outcome of a real case in a real situation.

Section 4:

The Renegotiation and Economic Governance: What Real Protection is Provided for the UK's Financial Services Sector or the ability of UK Authorities to Maintain Financial Stability?

Introduction

The UK Government's Report to Parliament claims that the Renegotiation "confirms that the financial services sector will be able to thrive even as the Eurozone continues to deepen its integration" and that "the Responsibility for supervising the financial stability of the UK remains in the hands of the Bank of England and other UK authorities". The Bank of England's Letter to the Treasury Select Committee claims that the Renegotiation "addresses the issues the Bank identified as being important, given the need for further integration of the euro area, to maintaining its ability to achieve its objectives." In this article we demonstrate that the principles on economic governance and the related safeguard mechanism contained within the actual text of David Cameron's Renegotiation do not adequately protect the UK financial services sector or the ability of UK authorities to maintain financial stability in the UK.

The aim of the Renegotiation was to resolve the so-called economic governance problem. In this article we therefore begin by describing the economic governance problem and considering concrete examples of how this problem has manifested itself in recent years. We then examine the principles on economic governance and the related safeguard mechanism contained within the Renegotiation and consider the extent to which they resolve the economic governance problem. We also summarise our analysis in a table at the end of this article.

The economic governance problem

Within the context of the UK's membership of the EU, there are a number of tensions underpinning the regulation of the UK's financial services sector and the ability of UK authorities to maintain financial stability in the UK:

(i) The Eurozone requires further fiscal and financial integration to function as a stable currency union

The Eurozone sovereign debt crisis and the related banking and financial crisis led to the creation of a new set of EU structures and measures aimed

^{6 &}lt;a href="https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502302/54284_EU_Series_No1_PRINTREADY.pdf_paragraphs">https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502302/54284_EU_Series_No1_PRINTREADY.pdf_paragraphs
2.20 and 1.6

⁷ http://www.bankofengland.co.uk/publications/Documents/other/treasurycommittee/other/governorletter070316.pdf

⁸ European Summit Conclusions Feb 2016 (PDF)

at furthering economic and monetary union, to make the Eurozone function better. These include, in particular, the Fiscal Compact, the Banking Union and the Bank Recovery and Resolution Directive, together intended to break the so-called "negative feedback loop" between banks and sovereign member states.

While some progress has been made, the structural changes required to make the Eurozone financially stable are far from complete and significant further changes are envisaged, notably those in the Five Presidents' Report, which proposes specific measures in relation to the Eurozone's economic, fiscal, financial and political unions (including new Eurozone competitiveness authorities, a new Eurozone treasury, a greater central steer by the Eurogroup presidency, consolidated external representation of the Eurozone and a greater role of the European Parliament in relation to the Eurozone).

George Osborne has described this process as the "remorseless logic" of monetary union¹⁰ and the current policy of the UK Government is to support it. 11

(ii)There is a risk that the UK will become increasingly marginalised outside the Eurozone

The UK and Denmark are the only EU Member States with permanent optouts from the euro. Currently there are 19 Eurozone Member States and seven other EU Member States with an obligation to join the euro, though it is uncertain when this will occur. From 31 March 2017, when transitional voting arrangements in the Council of Ministers fall away and the qualifying majority voting procedures in Treaty of Lisbon apply, the Eurozone will have a permanent entrenched qualified majority in the Council of Ministers, allowing the Eurozone to pass legislation under the ordinary legislative procedure (which covers, among other things, single market regulation and financial services regulation) even if all non-Euro Member States disagree.

Osborne has described this risk: "there is a danger that the euro members could start to use their collective voting weight in the EU to effectively write the rules for the whole EU by Qualified Majority Vote. Under the Lisbon Treaty the Eurogroup on its own will have sufficient votes to pass any financial services legislation for the whole of the EU."12

The City of London functions both as a global financial centre and also as the Eurozone's financial centre

10 http://www.ft.com/cms/s/0/e357fe94-b2ec-11e0-86b8-00144feabdc0.html#axzz41SjEzSCG

https://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en

 $[\]underline{https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502302/54284_EU_Series_No1_PRINTREADY.pdf_paragraph$ 2.12
12 https://www.gov.uk/government/speeches/extracts-from-the-chancellors-speech-on-europe

From the perspective of the UK, financial services and the City of London require a regulatory framework that reflects the importance of the financial services sector to the UK economy and the fact that the City of London is a global financial centre. To quote Osborne: "The City of London is not, as some of our continental friends kid themselves, in competition with Paris and Frankfurt. It is in competition with places like Hong Kong, Singapore, and New York. That's why it was important that we secured some important institutional changes to protect the UK and ensure we have safe, competitive financial services."¹³

From the perspective of the Eurozone, financial services and the City of London ought to be subject to a regulatory framework to reflect the fact that the City of London is the Eurozone's financial centre. To quote Christian Noyer, former governor of the Central Bank of France: "We're not against some business being done in London, but the bulk of the business should be under our control. That's the consequence of the choice by the UK to remain outside the euro area."14

In many areas of financial services regulation, the interests of the UK and the interests of the Eurozone are broadly aligned, however in some areas they directly conflict. As the Eurozone integrates further, there is an increased risk that the UK and the Eurozone have different preferences over how financial services in the UK should be regulated and who should have ultimate responsibility for financial stability in the UK.

(iv) The UK is inside the single market but outside the Eurozone. There is no effective mechanism in the EU Treaties for separating single market regulation from Eurozone regulation

The UK's participation in the single market means that the majority of the legislation applying to the financial sector in the UK is determined at EU level. 15 Since the financial crisis, EU legislation has sought a markedly higher degree of regulatory and supervisory harmonisation across Member States, achieved by a greater use of directly applicable EU Regulations and a greater use of maximum harmonisation instruments, limiting national discretion.

Individual legislative acts relating to financial services generally have a dual purpose: (i) deepening economic and monetary union for the Eurozone (a purpose that is not relevant for the UK and which may harm the UK) and (ii) deepening the single market (a purpose that is relevant to the UK).

¹⁴ http://www.ft.com/cms/s/0/736bd72a-3c9a-11e2-a6b2-00144feabdc0.html#axzz41SjEzSCG

15 http://www.bankofengland.co.uk/publications/Documents/speeches/2015/euboe211015.pdf (page 6)

¹³ https://www.gov.uk/government/speeches/extracts-from-the-chancellors-speech-on-europe

Osborne has described this problem: "What is becoming clearer, as Eurozone integration increases, is that we are now at a point where we are stretching the EU institutional architecture to its limits. We risk going beyond what is legally possible or politically sustainable. The European Treaties are not fit for purpose. They didn't anticipate a European Union where some countries would pursue dramatically deeper integration than others." 16

Together, these tensions give rise to the economic governance problem.

Examples of the economic governance problem

The economic governance problem is not merely theoretical, it is also real. To illustrate it, we have set out some of the most note-worthy examples of how it has manifested itself in recent years:

(1) UK veto of the Fiscal Compact

In 2011 David Cameron vetoed the Fiscal Compact,¹⁷ partly because it did not contain safeguards for the UK financial services sector. The Fiscal Compact is an intergovernmental treaty that now covers every EU Member State other than the UK, Croatia and the Czech Republic, which requires that Eurozone Member States guarantee that their national budget be in balance or surplus. In his subsequent address to Parliament, Cameron noted: "London is the leading centre for financial services in the world. And this sector employs 100,000 in Birmingham, and a further 150,000 in Scotland... We were simply asking for a level playing field for open competition for financial services companies in all EU countries, with arrangements that would enable every EU Member State to regulate its financial sector properly." ¹⁸

Though the UK did not sign the Fiscal Compact and therefore as a matter of law it is an intergovernmental treaty rather than part of EU's *aquis*, there are question marks over whether as a matter of fact the UK's veto has had any effect. The European Commission appears to be the body responsible for enforcing the Fiscal Compact, which purports to be partially justiciable in the European Court of Justice. The Fiscal Compact showed that the EU Treaties are not fit for purpose: even though the Eurozone needed further integration there was no mechanism for doing this inside the EU Treaty structure without harming the UK. This episode demonstrated the need for a fundamental overhaul of the EU Treaties and, at a minimum, the creation of a "multi-currency union".

 $^{^{16}\} https://www.gov.uk/government/speeches/extracts-from-the-chancellors-speech-on-europe$

 $^{^{17}\} http://ec.europa.eu/economy_finance/economic_governance/sgp/legal_texts/index_en.htm$

 $^{^{18}\} https://www.gov.uk/government/speeches/pms-statement-on-the-european-council$

(2) UK opt-out of the Banking Union; double majority voting at the EBA

According to a speech in 2012 by Vítor Constâncio, ECB Vice-President, the Banking Union is "a transfer to the European level of the regulatory and institutional framework responsible for safeguarding the robustness and stability of the banking sector". The UK Government decided to opt-out of Banking Union on the basis that it is a function of monetary union rather than the single market and it would reduce the ability of UK authorities to supervise British banks. On the banks.

Banking Union comprises a Single Supervisory Mechanism, under which the European Central Bank carries out key supervisory tasks for banks in EU member states participating in the Banking Union and a Single Resolution Mechanism, under which all banks within the Single Supervisory Mechanism are subject to a single resolution process in the event that they fail. Banking Union is underpinned by the single rulebook (a set of legislative texts that all financial institutions in the EU, not just those in the Banking Union, must comply with).

The EU agency responsible for creating the single rulebook in banking is the European Banking Authority (EBA). In order to ensure that the Eurozone does not use its entrenched majority to make rules in its own interests at the EBA, the UK negotiated a double-majority voting mechanism at the EBA²¹ designed to ensure that EBA decisions are at least approved by a plurality of countries outside the Banking Union as well as a plurality of countries inside the Banking Union. Once the number of countries outside the Banking Union falls to four or fewer, the double majority mechanism falls away and the measure can be passed provided one country outside the Banking Union assents.

This double-majority voting mechanism applies to the adoption of EU technical standards and guidelines, but does not change the weighted-majority rules in the ordinary legislative procedure governing how EU regulations and directives are adopted and therefore it only protects the UK in a limited way. The think-tank Open Europe has argued that the interests of non-Eurozone Member States need further protection in the Council of Ministers and proposed legislative solutions akin to the double-majority voting mechanism.²²

 $^{20}~http://www.politics.co.uk/comment-analysis/2012/06/15/george-osborne-s-2012-mansion-house-speech-in-full and the comment-analysis and the$

¹⁹ http://www.ecb.europa.eu/press/key/date/2012/html/sp120907.en.html

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010R1093-20140819&from=EN/Article 44

 $^{^{22}} http://2 ihmoy 1 d3v7630 ar9 h2rsglp.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/Open-Europe-Briefing-Safeguarding-the-rights-of-non-Eurozone-states.pdf$

(3) UK legal challenge to the cap on bankers' bonuses

The Capital Requirements Directive, which implements into EU law key Basel III bank capital reforms, contains provisions capping bankers' bonuses, on the basis that "Remuneration policies which encourage excessive risk-taking behaviour can undermine sound and effective risk management."²³ Osborne argued in the Council of Ministers that the cap could harm the City of London²⁴ and have the perverse effect of driving up base salaries and adding rigidity to the banking system, but was outvoted 26-1 and unable to block it.

The UK challenged the bankers' bonus cap provisions in the European Court of Justice on a number of grounds, but withdrew the challenge after Advocate General Jääskinen rejected each ground, noting: "Because this part of the remuneration impacts directly on the risk profile of financial institutions, it can affect the stability of financial institutions, and in consequence that of the financial markets of the EU."²⁵

The cap continues to be criticised in the UK both by industry bodies²⁶ and by the Bank of England, noting that it could have undesirable side-effects for financial stability as it limits the scope for remuneration to be clawed back.²⁷

The conflict between UK authorities and the EBA in applying the bonus cap continues. On 29 February, the UK's Prudential Regulatory Authority and Financial Conduct Authority published a joint statement on their compliance with the EBA's December 2015 guidelines on sound remuneration policies, indicating that they disagree with the EBA on its interpretation of the proportionality principle in relation to the bonus cap for smaller firms.²⁸ Commissioner Lord Hill has since confirmed that the Commission is looking again at the application of the bankers' bonus cap. It is uncertain how this disagreement will be resolved.

(4)UK legal challenge to the power of ESMA to ban short-selling

The Short Selling Regulation, conceived in the aftermath of the Eurozone crisis to combat perceived financial speculation, bans naked short sales of shares and sovereign debt in the EU and gives various emergency powers to

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d553f07a57c987483f8f7a9871 bb768308.e34KaxiLc3qMb40Rch0SaxuObNr0?text=&docid=159945&pageIndex=0&doclang=EN&mod e=req&dir=&occ=first&part=1&cid=634920 para 110

²³ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0036&from=EN Recital 62.

²⁴ http://www.bbc.co.uk/news/business-21661089

http://uk.reuters.com/article/eu-banks-bonuses-idUKL5E8GFG9W20120515

²⁷ http://www.bankofengland.co.uk/publications/Documents/speeches/2015/euboe211015.pdf

²⁸ http://www.fca.org.uk/news/sound-remuneration-policies-statement

curb short-selling to the European Securities and Markets Authority (ESMA), potentially against the wishes of the UK.²⁹

The UK challenged the powers that were conferred on ESMA before the European Court of Justice, arguing that they gave ESMA too much discretion and that the conferral of power was therefore unlawful. The European Court of Justice dismissed the UK's challenge in a somewhat opaque judgment.³⁰ Alexandria Carr of Mayer Brown has said the judgment was "influenced as much by political as legal factors".³¹

Open Europe has argued³² that this judgment raises a number of wider implications about how the European Union regulates financial services, noting that it potentially sets a precedent for the transfer of powers to an EU agency under the Article 114 of Treaty on the Functioning of the European Union. This is the so-called single market article, which creates a general power to pass measures "which have as their object the establishment and functioning of the internal market". Legislation decided under this article is subject to a qualified majority vote, meaning the UK does not have a veto, and, as explained above, the Eurozone is able to pass measures even against the opposition of all non-Eurozone Member States from 2017 onwards. This judgment could allow the use of Article 114 to be stretched to further the needs of the Eurozone rather than the single market, thereby giving the EU the legal space to pursue integration for the Eurozone, without needing to open the EU Treaties to renegotiation.

(5)UK legal challenge to the ECB requirement for euro clearing houses to be located in the Eurozone

In 2011 the European Central Bank published a framework concluding that infrastructure (including certain central counterparties) that settle eurodenominated transactions should be legally incorporated in the Eurozone.³³ The ECB's rationale was that a financial, legal or operational problem affecting such infrastructure could have serious consequences for financial stability in the Eurozone and it was therefore necessary for the Eurozone to ensure it had ultimate managerial and operational control and responsibility over all core functions.

https://www.ecb.europa.eu/pub/pdf/other/eurosystemoversightpolicyframework 2011 en.pdf? 549 a 3e 62689 d 6849 d a 89463 c 2acb 9369 d 6969 d

 $^{^{29}\} http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:en:PDF$

 $^{^{30}~}http://www.bailii.org/eu/cases/EUECJ/2014/C27012.html$

 $^{^{31} \} http://www.ft.com/cms/s/0/68cbcb64-834c-11e3-aa65-00144 feab7 de.html \#axzz41 SjEzSCG$

³² http://openeuropeblog.blogspot.co.uk/2014/01/ecj-rules-against-uk-in-landmark-short.html

The UK issued proceedings on a number of grounds, including that the ECB lacked competence to impose a location requirement in respect of central counterparties and also that the ECB's location policy infringes the provisions of the EU Treaties relating to the single market. The General Court of the EU (the junior court attached to the European Court of Justice) held against the ECB on the first ground, but indicated that it would be open to the EU to empower the ECB to impose such requirements by adopting the necessary legislation.³⁴ The General Court did not consider the second ground, so the question of whether or not the policy unlawfully discriminated against clearing houses and countries outside the Eurozone remains unanswered.

Following this judgment, it appears that the specific dispute about clearing houses was resolved through an agreement between the ECB and the Bank of England,³⁵ under which the central banks agreed enhanced arrangements for information exchange and extended the scope of their standing swap line in order to facilitate the provision of multi-currency liquidity support by both central banks. However, this agreement did not resolve the wider question of whether or not the European Central Bank or other EU institutions can require financial infrastructure related to dealings in euro-denominated financial instruments to be located in the Eurozone.

(6)UK legal challenge to the EU financial transaction tax

This measure is not proceeding as an EU or Eurozone measure, but rather as a measure adopted by a sub-set of EU Member States under the 'enhanced cooperation' provisions of the EU Treaties.³⁶ These provisions allow Member States using enhanced cooperation to make use of EU institutions. In 2013 the European Commission tabled a proposal for a Directive applying to the participating EU Member States to tax certain financial transactions partly "to create appropriate disincentives for transactions which do not enhance welfare or the efficiency of financial markets" and "to contribute to the overall objective of stability in the EU in the aftermath of the financial crisis".³⁷

The UK Government's position is that the tax will be extra-territorial in nature and also "disproportionately impact the UK economy given that the UK has the largest financial sector in EU with the City of London being its most significant international trading centre." In 2014 the UK lost a legal

³⁴ http://www.bailii.org/eu/cases/EUECJ/2015/T49611.html

http://www.bankofengland.co.uk/publications/Pages/news/2015/044.aspx

³⁶ Treaty on the Functioning of the European Union, Articles 326 - 334

 $^{^{37}\} http://ec.europa.eu/taxation_customs/resources/documents/taxation/com_2013_71_en.pdf$

³⁸ http://www.parliament.uk/documents/lords-committees/eu-sub-com-a/FinancialTransactionTax/FTTGovResponse.pdf

challenge relating to the financial transaction tax on a technicality (since the final shape of the tax is unknown and subject to further negotiations) leaving open the UK's ability to mount a second challenge once the form of the Directive has been agreed and its implications are clearer.³⁹

At the time of writing there is considerable uncertainty about the future of the EU financial transaction tax, though the participating Member States intend to agree open issues by the end of June 2016.⁴⁰ To date, the enhanced cooperation procedure has been infrequently used by the European Union. Under Article 330 to the Treaty on the Functioning of the European Union, all Member States may participate in deliberations relating to enhanced cooperation measures, though only participating Member States may vote. The press has widely reported that the UK is not present at the negotiations concerning the EU financial transaction tax, which appear to be highly secretive.⁴¹

The EU financial transaction tax raises some wider questions about economic governance. Given that the participating Member States do not include the entire Eurozone (and indeed, some Eurozone Member States such as Ireland and Luxembourg have indicated their opposition to it) and that the UK would not be impacted by virtue of its currency but rather by virtue of the size of its financial sector regardless of the UK's currency, it is hard to see how any principles that seek to protect the UK on the basis of currency will be of any use. It is also worth noting that though the tax purports to apply anywhere in the world, non-EU countries will be strongly incentivised not to enforce it (in view of the adverse effects on their own financial services sectors), but EU non-participating Member States such as the UK may effectively be required to enforce it or provide information needed for its enforcement.

(7) The ability of UK authorities to require UK banks to be better capitalised than other EU banks

During the 2012 negotiations in the Council of Ministers over the Capital Requirements Directive, which implements into EU law key Basel III bank capital reforms, there was a public spat between Osborne and Michel Barnier, then the EU Commissioner responsible for the internal market.⁴² Osborne's position was that the UK should be able unilaterally to require its

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 $http://curia.europa.eu/juris/document/document.jsf; jsessionid=9ea7d0f130d5f7fe20ce94bb4358acb4afdcc16ed3d9.e34KaxiLc3eQc40LaxqMbN4OchaNe0?text=&docid=151529&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=61906^{40}http://www.consilium.europa.eu/en/meetings/ecofin/2015/12/08/$

 $^{^{41} \} http://www.ft.com/cms/s/0/d8a5d630-d529-11e3-9187-00144 feabdc0.html \#axzz41 SjEzSCG feared from the complex of the$

⁴² http://uk.reuters.com/article/uk-eu-banks-idUKBRE8411KH20120502

banks to raise minimum capital requirements beyond the level set out in the CRD whereas France and other countries argued that this would distort competition and the level-playing field.

The Bank of England has, in the context of its financial stability objective, argued that: "As host to a large, internationally integrated financial sector, it is right that the UK should be held to robust minimum standards. However, the UK may also need to go further and adopt tighter regulatory standards than are appropriate for smaller, more domestically-focused financial systems" and specifically argued that the maximum harmonising nature of the CRD could constrain the ability of national authorities in the UK to support domestic financial stability.

(8)Overall responsibility for UK financial stability

Subsequent to the global financial crisis, the UK government introduced wholesale changes to the UK regulatory landscape through the Financial Services Act 2012, including the creation of the Financial Policy Committee, the Prudential Regulatory Authority and the Financial Conduct Authority, together responsible for macroprudential regulation and supervision, financial stability and financial conduct. The Bank of England has stated: "Financial stability is ultimately a national responsibility. The Bank of England is charged with ensuring UK financial stability and is accountable to the UK Parliament. The UK taxpayer is the ultimate backstop of the UK financial system." ⁴⁴

The EU also introduced wholesale changes to the EU regulatory landscape, including creating the European Systemic Risk Board, which is "responsible for the macroprudential oversight of the financial system within the European Union in order to contribute to the prevention or mitigation of systemic risks to financial stability".⁴⁵ Though the ESRB does not itself have legal personality, it is able to enforce its recommendations and warnings via the European System of Financial Supervision which also includes the European Supervisory Agencies, which can make binding laws.

There is a risk that the UK and the EU authorities might not always agree in relation to measures to take to ensure financial stability and in such a circumstance it is not clear which authorities have ultimate authority. In the event of a legal dispute, UK authorities would be bound to follow the judgment of the European Court of Justice.

⁴³ http://www.bankofengland.co.uk/publications/Documents/speeches/2015/euboe211015.pdf page 81

⁴⁴ http://www.bankofengland.co.uk/publications/Documents/speeches/2015/euboe211015.pdf page 5

⁴⁵ https://www.esrb.europa.eu/about/tasks/html/index.en.html

(9) Use of the EFSM to bail-out Greece

At the height of the Greek debt crisis in July 2015, the European Commission proposed to use the European Financial Stability Mechanism, the EU-wide rescue fund in which the UK participates, to provide emergency financing to Greece.⁴⁶ Osborne had previously argued that the principle whereby the UK should not have to bail-out the Eurozone was already established.⁴⁷

Later, in his speech to the German BDI conference, Osborne said: "This is exactly what was attempted in July, when, out of the blue, in flagrant breach of the agreement we'd all signed up to, and without even the courtesy of a telephone call, we were informed we would have to pay to bail out Greece."

This is an example of the Eurogroup using their entrenched qualified majority to make legislative decisions without consulting the UK.

(10) Capital Markets Union and a single European capital markets supervisor

In 2015 the European Commission launched a set of proposals for a new European Capital Markets Union aimed at building a true single market for capital across the entire European Union.⁴⁹ While the UK government has welcomed the Capital Markets Union, there remain some fundamental differences of opinion between the UK's position, on the one hand, and the position of the European Central Bank and the European Commission, on the other, with regards to the need for a single European capital markets supervisor.

Harriet Baldwin MP, Economic Secretary to the Treasury, has argued: "I've outlined some of the many positive measures from the action plan, and it's very clear to the UK that a new supervisory body would add no benefit to those processes." The European Central Bank's position is: "Ultimately, the roadmap towards a genuine CMU underpinned by a high level of financial integration and a single rulebook should thus include a single capital markets supervisor as a final destination." The Five Presidents' Report also suggests that the Capital Markets Union should ultimately lead to a single European Capital Markets Supervisor. At the time of writing the European Commission's current CMU Action Plan contains no plan to create a new single capital markets supervisor, but further steps along this road are likely.

⁴⁶ http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/2015-07-14_commission_proposal_357_en.pdf

https://www.gov.uk/government/speeches/extracts-from-the-chancellors-speech-on-europe

⁴⁸https://www.gov.uk/government/speeches/let-britain-and-germany-work-together-as-partners-for-a-european-union-that-works-better-for-all-of-us-says-chancellor

 $^{^{49} \,} http://ec.europa.eu/finance/capital-markets-union/index_en.htm$

https://www.gov.uk/government/speeches/harriett-baldwin-on-the-european-commissions-action-plan-for-a-capital-markets-union

⁵¹https://www.ecb.europa.eu/pub/pdf/other/150521_eurosystem_contribution_to_green_paper_building_a_cmuen.pdf?d45301c62386a193f81154659fe87345

These examples show the complexity of the economic governance problem and how it has manifested itself in a range of different conflicts between the UK and the rest of the European Union.

The principles and the safe-guard mechanism in the Renegotiation

As part of the Renegotiation, Cameron sought to address the economic governance problem by negotiating:

- (i) a number of 'legally binding' economic governance **principles**; and
- (ii) a safeguard mechanism to ensure that the principles are respected and enforced.

Cameron's objectives are set out in his 10 November 2015 letter to Donald Tusk.⁵² The views of the Bank of England are set out in their October 2015 report entitled *EU membership and the Bank of England*.⁵³ The principles were to include, *inter alia*, that the EU has more than one currency, that there should be no discrimination and no disadvantage for any business on the basis of the currency of their country, that financial stability and supervision in the UK is a key area of competence for national institutions like the Bank of England and that any issues that affect all Member States must be discussed and decided by all Member States.

In this section we consider the principles and the safeguard mechanism that are contained within the Renegotiation and the extent to which they meet the objectives of the UK Government and the Bank of England. We also consider the wider implications for the financial services sector in the UK and the ability of UK authorities to maintain financial stability.

The principles are contained within Section A to the Decision of the Heads of State or Government and the safeguard mechanism is contained within a draft Decision to be adopted by the Council of Ministers, which is annexed to the Decision of the Heads of State or Government.

Multi-currency union principle

Cameron's letter to Donald Tusk requested "recognition that the EU has more than one currency" and The Bank of England paper also referred to the need to "recognise that the EU has multiple currencies with multiple risks".

The UK's opt-out from the euro was never in doubt, already being established unconditionally in Protocol 15 to the Treaties and this repeated in the Renegotiation. However, far from agreeing a general principle that the EU is a multi-currency union, the Decision of the Heads of State or Government simply

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⁵² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf

⁵³ http://www.bankofengland.co.uk/publications/Documents/speeches/2015/euboe211015.pdf

states in the recitals: "Accordingly, for as long as the said derogations are not abrogated or the said protocols have not ceased to apply following notification or request from the relevant Member State, not all Member States have the euro as their currency." In our view the words "for as long as" imply that the existing opt-outs are still considered by the EU to be temporary in nature. The Renegotiation falls far short of an explicit acceptance that the European Union is a multi-currency union on a permanent basis and instead amounts to a restatement of the status quo.

Both the UK Government's Report to Parliament and the Bank of England's letter to the Treasury Select Committee selectively quote the final part of the recital "not all Member States have the euro as their currency" without quoting the first part, claiming that the Renegotiation explicitly recognises that the EU has more than one currency. The Bank of England's letter states: "In line with the Bank's Report, the Settlement formally recognises that there are multiple currencies in the EU, acknowledging that 'not all Member States have the euro as their currency". Differently, Jean-Claude Juncker, President of the European Commission stated after the conclusion of the Renegotiation: "Today's deal leaves no doubt that the euro is the currency of our Union". ⁵⁴ It is extremely regrettable that the precise wording of the Renegotiation is so vague that it allows different people to interpret it in directly contradictory ways. In our view Juncker's interpretation is correct and the UK Government and the Bank of England's interpretation is misleading.

The creation of a formal multi-currency union, while necessary to protect the UK's interests, would require a significant re-write of the EU Treaties. For example, Article 3 of the Treaty on European Union (containing the EU's objectives) states: "The Union shall establish an economic and monetary union whose currency is the euro". This would need to be amended to state, for example: "The Union shall establish an economic and monetary union whose currency is the euro for some Member States, to co-exist with those Member States whose currency is not the euro." There is a risk that because the official currency of the EU remains the euro, the interests of the Eurozone override the interests of the UK in the event that their interests diverge.

Non-discrimination principle

The first principle provides: "Discrimination between natural or legal persons based on the official currency of the Member State, or, as the case may be, the currency that has legal tender in the Member State, where they are established is prohibited. Any difference of treatment must be based on objective reasons."

While the principle of non-discrimination based on currency is claimed by the UK government to be a victory for Cameron, it is uncertain how useful this

⁵⁴ http://ec.europa.eu/news/2016/02/20160219_en.htm

principle will be, given that the EU Treaties already prohibit discrimination on the grounds of nationality.⁵⁵ Unfortunately, there is now a specific acknowledgement that there can be different treatment, if it is based on "objective reasons".

Both the UK Government's Report to Parliament and the Bank of England's letter to the Treasury Select Committee applaud the non-discrimination principle but do not mention the "objective reasons" carve-out. The UK Government's Report to Parliament claims: "This principle of non-discrimination against businesses in countries not using the euro is a vital protection for the UK. It is designed to respond to cases where the UK's economic position in the Single Market could have been undermined by decisions that the Eurozone wanted to take. For example, the European Central Bank's policy that clearing houses dealing in significant volumes of euros should be located in the Eurozone would have effectively created a two-tier Single Market..." In our view there is a significant risk that if the European Central Bank's competences were extended, it could use this principle and argue that there is an "objective reason" for clearing houses dealing in the euro to be located in the Eurozone, using the reasons in its original framework. There is no guarantee that the European Court of Justice would find that respecting the internal market (which would be the UK position) would take priority over respecting the objective reason of financial stability (which would be the European Central Bank's position). The principle, as adopted, does not strengthen the UK in such a situation and the specific reference to "objective reasons" as a justification for discrimination on the grounds of currency weakens it.

New obligation of UK not to impede legal acts linked to Eurozone

The first principle also provides: "Legal acts, including intergovernmental agreements between Member States, directly linked to the functioning of the euro area shall respect the internal market, as well as economic and social and territorial cohesion and shall not constitute a barrier to or discrimination in trade between Member States. These acts shall respect the competences, rights and obligations of Member States whose currency is not the euro. Member States whose currency is not the euro shall not impede the implementation of legal acts directly linked to the functioning of the euro area and shall refrain from measures which could jeopardise the attainment of the objectives of economic and monetary union."

The first two sentences quoted above simply repeat existing provisions in the EU Treaties. The only part of this principle which appears to go beyond the existing provisions in the EU Treaties, or at least interprets them in a way which may extend the obligations that they impose, is the third sentence which

⁵⁵ Treaty on the Functioning of the European Union, Article 18.

purports to impose a legal obligation on the UK not to impede future legal acts linked to the Eurozone. This is *prima facie* unbalanced. The UK (as a Member State) now has a potentially extensive obligation in relation to future legal acts. The Eurozone (either as separate Member States or as an entity) has no such equivalent obligation in relation to the interests of the UK and it is hard to see how this benefits the UK. A balanced provision would have imposed an obligation on the Eurozone Member States not to impede legal acts relating to the functioning of the UK's currency and to refrain from measures which could jeopardise the attainment of the UK's objectives in retaining its currency.

Moreover, while it is the current policy of the UK Government to support the integration of the Eurozone and this is supported by the Bank of England, this is of itself contentious. Mervyn King, former governor of the Bank of England has argued that the Eurozone ought to break up.⁵⁶ Boris Johnson MP has also argued "I don't understand why we continually urge the Eurozone countries to go forward with this fiscal and political union when we know in our hearts that it is anti-democratic and therefore intellectually and probably morally wrong."⁵⁷ Even assuming a general policy of continued support for the integration of the Eurozone, there may be specific Eurozone measures which negatively impact the UK's financial services sector or the ability of UK authorities to maintain financial stability. It is strange that the UK has assumed a unilateral and unbalanced obligation not to impede Eurozone legal acts, even when they may conflict with the UK's own interests.

Banking union and the UK opt-out

The second principle states that the UK has an opt-out of the Banking Union, which is a restatement of the status quo. Unfortunately the principle does not put in place any arrangement to ensure that the UK's interests are protected on a long-term basis at the EBA, when the existing rules on double majority voting no longer apply or seek to extend the double majority voting system to other areas of European Union law-making.

Single rulebook and the flexibility principle

The second principle goes on to provide: "The single rulebook is to be applied by all credit institutions and other financial institutions in order to ensure the level-playing field within the internal market. Substantive Union law to be applied by the European Central Bank in the exercise of its functions of single supervisor, or by the Single Resolution Board or Union bodies exercising similar functions, including the single rulebook as regards prudential requirements for credit institutions or other legislative measures to be adopted for the purpose of safeguarding financial stability, may need to be conceived in a more uniform

⁵⁶ http://www.cityam.com/235580/former-bank-of-england-governor-mervyn-king-says-the-eurozone-is-doomed-to-fail

⁵⁷ http://www.theguardian.com/politics/blog/2012/dec/04/boris-johnson-europe-speech-live-blog

manner than corresponding rules to be applied by national authorities of Member States that do not take part in the banking union. To this end, specific provisions within the single rulebook and other relevant instruments may be necessary, while preserving the level-playing field and contributing to financial stability."

This principle seeks to enshrine a new flexibility into the single rulebook, as argued by the Bank of England: "As home to the world's leading international financial centre, it is vital that UK authorities are able to apply the highest standards and have the flexibility to take action to address particular financial stability risks. The scale, complexity and degree of global activity of the UK financial system are unmatched in the European Union." It is clear from the Bank of England Report that the primary reason that the UK requires rule flexibility is because of the size of the UK's financial services sector and the particular risks that this entails for financial stability. Unfortunately the flexibility principle contained within the Renegotiation is predicated entirely on the UK not being within the Eurozone or Banking Union rather than the real reason: the specific financial stability challenges in the world's leading financial centre.

It should be noted that the final version of the Renegotiation is significantly less flexible than the earlier draft, which stated: "To this end, different sets of Union rules may have to be adopted in secondary law, thus contributing to financial stability." It was widely reported in the press that this change in text reflected a compromise made in view of the objections of the French government, who were opposed to any regulatory difference between French banks and British banks and therefore wanted the ensure that the flexibility principle would not undermine the level-playing field.⁵⁹

While an acknowledgement of the need for flexibility is welcome, because the precise reason why it is required has not been identified and because the way it interacts with the level-playing field has not been clearly delineated, it will not resolve the problems it is designed to resolve. There will therefore likely continue to be a tension between the desire for a level-playing field, argued for by the Eurozone and EU institutions, and the desire of the UK Government and UK authorities to have flexible rules. Given that the process for enacting legislation has not altered, the extent to which the flexibility principle benefits the UK is uncertain and the deciding say in who wins in any future disagreement during the legislative process will rest with the Eurozone because of its inbuilt legislative majority. Because the wording of this principle is so vague, the extent to which the UK could rely on this principle at the European Court of Justice is very uncertain.

⁵⁹ http://www.ft.com/cms/s/0/57172270-d402-11e5-969e-9d801cf5e15b.html#axzz41SjEzSCG

⁵⁸ http://www.bankofengland.co.uk/publications/Documents/speeches/2015/euboe211015.pdf page 6

Both the UK Government's Report to Parliament and the Bank of England's letter to the Treasury Select Committee welcome the flexibility principle. The Bank of England's discussion of this principle emphasises the possibility of the UK using the flexibility principle to raise macro-prudential requirements in the UK above EU minimum levels: "This tailored approach would allow for non-euro area member states, like the United Kingdom, to have the flexibility necessary to meet its needs to safeguard financial stability, including setting requirements above the minimum standard, if needed to manage financial stability appropriately. This would be precisely the flexibility the Bank sought in its Report given its responsibilities to oversee the prudential aspects of the UK's very large and complex financial sector. This flexibility could be achieved in practice, for example, by having regulatory rules composed of Directives that set minimum standards for non-euro area member states (thereby ensuring a level playing field within the single market) and a directly applicable regulation that would impose a higher level of uniformity (while still meeting the minimum standard) across the euro area only."

In our view this is wishful thinking. It is already the case that the Capital Requirements Regulation theoretically allows a Member State to adopt a more stringent national regulatory measure appropriate for safeguarding financial stability provided that the principles of the internal market are respected, though the process to achieve this is complex and it is clear from the Bank of England's Report that it does not provide sufficient flexibility. The view of EU institutions is that maximum harmonisation is the preferred way of achieving a level-playing field, as set out within the recitals to the CRR: "For reasons of legal certainty and because of the need for a level playing field within the Union, a single set of regulations for all market participants is a key element for the functioning of the internal market. In order to avoid market distortions and regulatory arbitrage, minimum prudential requirements should therefore ensure maximum harmonisation."60 It is unlikely that EU institutions will change this view. On 9 March 2016, Ignazio Angeloni, Member of the Supervisory Board of the ECB, gave a speech entitled "Banking union and the United Kingdom in the Single Market" in London. Given the timing of this speech, its subject matter and its location it is noteworthy that there were no references to the flexibility principle. Instead the focus was on the need for a level-playing field: "The implementation of the Basel standards and the rules on capital buffers are not fully consistent around the globe, and this may distort the level playing field for internationally active institutions. Even at the EU level there is legal ambiguity on how to treat Pillar 2 requirements... Since [the maximum distributable amount threshold trigger affects the pricing of bank's AT1 capital instruments and the possibility to pay variable remuneration, the level playing field is at risk." This

⁶⁰ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0575&from=EN Recital 9

view, that a level playing-field requires maximum harmonisation to avoid differential pricing and cross-border arbitrage in financial products or a perception among market participants that non-UK banks are weaker than UK banks, continues to be the view of EU institutions and Eurozone banks.⁶¹

No bail-outs of the Eurozone

The third principle states that the UK has an opt-out from bail-outs of Eurozone sovereign debt and banks, which is a recognition of the current political agreement. The degree to which this principle reinforces the UK's legal position as compared with the current political agreement is unclear, given that the Renegotiation cannot and does not purport to alter the EU Treaties. It is likely to be "taken into account" by the European Court of Justice when interpreting the EU Treaties, but does not bind the European Court of Justice's interpretation. In this particular case, we cannot see how the principle as stated can alter the actual legal status of the EU Treaties or other instruments under which the UK is legally liable to contribute to Eurozone bail-outs. The principle does provide that "appropriate mechanisms to ensure full reimbursement will be established" in such a situation and, depending on the nature of such mechanisms, these may strengthen the UK's position.

While this prospective legal strengthening of the existing political agreement is welcome, given that the UK was in fact already indemnified for the Eurozone using the EFSM to bail-out Greece, this principle is unlikely to make a practical difference.

Responsibility for macro-prudential regulation and financial stability

The fourth principle states: "The implementation of measures, including the supervision or resolution of financial institutions and markets, and macro-prudential responsibilities, to be taken in view of preserving the financial stability of Member States whose currency is not the euro is, subject to the requirements of group and consolidated supervision and resolution, a matter for their own authorities and own budgetary responsibility, unless such Member States wish to join common mechanisms open to their participation. This is without prejudice to the development of the single rulebook and to Union mechanisms of macro-prudential oversight for the prevention and mitigation of systemic financial risks in the Union and to the existing powers of the Union to take action that is necessary to respond to threats to financial stability."

This principle seeks to clarify who is ultimately responsible for financial stability in the UK. The Bank of England's 2015 Report indicated that it should ultimately be UK authorities who are responsible: "Financial stability is ultimately a national responsibility. The Bank of England is charged with ensuring UK financial

⁶¹ https://next.ft.com/content/d2dc4078-d0da-11e5-986a-62c79fcbcead

stability and is accountable to the UK Parliament. The UK taxpayer is the ultimate backstop of the UK financial system."

Unfortunately this principle does not satisfactorily answer the question of who is ultimately responsible for macro-prudential regulation and financial stability in the UK, it simply confirms that there are currently overlapping areas of competence between the UK and the EU. The precise delineation of responsibilities between UK authorities and EU bodies remains unclear. Because the UK functions as the Eurozone's financial centre, any threat to financial stability in the UK is likely also to pose a simultaneous threat to financial stability in the EU as a whole. To the extent that the UK government disagrees with EU institutions over measures to take in relation to such threats there is no guarantee that the European Court of Justice would find in favour of the UK and recent cases indicate the opposite. The "without prejudice to" wording in the second sentence means that the UK's responsibilities are subject to the EU's responsibilities. The word "existing" in that sentence indicates that the UK cannot reopen current disagreements (such as bankers' bonuses or ESMA's powers in relation to short-selling) as under EU law these powers currently exist at EU level.

It is regrettable that the UK Government's Report to Parliament made no attempt to explain how the UK's powers in relation to financial stability and the EU's powers interact. The Bank of England's letter to the Treasury Select Committee states discusses the powers of UK authorities and EU bodies in relation to financial stability, but does not explain how this principle helps the UK in the event that UK authorities or EU bodies disagree in areas where their competences overlap or how this principle changes the status quo: "The Settlement will not alter the powers of the EU institutions, agencies and bodies. However it will guide how these powers are used. For example the economic governance principles establish that euro area member states may require a greater degree of uniformity than is needed in Member States that are not part of the Banking Union. This principle should guide the decisions made by the European Commission prior to adoption of future banking legislation and the discussions in the EBA."

Discussions affecting all EU Member States involving the UK

The fifth principle states: "The informal meetings of the ministers of the Member States whose currency is the euro, as referred to in Protocol (No 14) on the Euro Group, shall respect the powers of the Council as an institution upon which the Treaties confer legislative functions and within which Member States coordinate their economic policies. In accordance with the Treaties, all members of the Council participate in its deliberations, even where not all members have the right to vote. Informal discussions by a group of Member States shall respect the powers of the Council, as well as the prerogatives of the other EU institutions."

This principle appears to be designed to avoid a re-run of a situation similar to the decision by the Eurogroup to use the EFSF to bail-out Greece without consulting the UK, i.e. the Eurogroup using their entrenched qualified majority to make decisions on their own. As a matter of law, this principle restates the status quo. As a matter of practical reality, it is hard to see if this principle will really benefit the UK given that the Eurogroup will continue to meet without the UK, knowing during their discussions that they have a legislative majority. Even if the UK is present at the formal legislative process, this principle does not help the UK if the Eurogroup has already agreed an informal consensus.

The safeguard mechanism

The safeguard mechanism builds on the so-called "Ioannina Compromise", which enables Member States in the minority where the Qualified Majority Voting threshold is achieved by a relatively small margin, to insist that the Council do all in its power to reach, within a reasonable time and without prejudicing legally prescribed time limits, a satisfactory solution that addresses their concerns. Legal effect has been given to this procedural device under the power of the Council of Ministers to regulate its own procedures, but these procedural devices cannot purport to deny the Treaty right of a qualified majority of Member States to pass a measure if that is their wish.

Under the Renegotiation, a similar procedure would be adopted to allow for the interruption of the decision-making process on legislative acts relating to the Banking Union or the integration of the Eurozone which apply to the UK, however, these acts will not always be easy to define. The UK is able to trigger the mechanism by opposing the legislative act in question, based on a reasoned case that it failed to respect the principles.

The safeguard mechanism specifically states: "While taking due account of the possible urgency of the matter and based on the reasons for opposing as indicated under paragraph 1, a request for a discussion in the European Council on the issue, before it returns to the Council for decision, may constitute such an initiative. Any such referral is without prejudice to the normal operation of the legislative procedure of the Union and cannot result in a situation which would amount to allowing a Member State a veto."

The safe-guard mechanism therefore essentially gives the UK the right to call for a meeting of the European Council in the event that in the UK's view any of the principles are breached. While this may have some political value, its legal value is very limited. The UK will already have been outvoted in the Council of Ministers in relation to any such act and the European Council discussion does

⁶² http://eur-lex.europa.eu/summary/glossary/ioannina_compromise.html

⁶³ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009D0857&from=EN

not change either the timing or the voting mechanics of the legislative procedure and specifically does not give the UK a veto.

Conclusion

Regrettably, the Renegotiation does not resolve the economic governance problem. In relation to most of the practical examples that the economic governance has thrown up in recent years, the combination of the principles and the safeguard mechanism does not change the status quo and will not lead to a different outcome when similar issues arise in future. The principles are so vague and open to interpretation that they risk more disagreement and litigation. The fundamental tensions underpinning the economic governance problem remain unsolved: to solve them would require a substantial overhaul of the EU Treaties and there appears to be no political appetite for this presently. In the future, as the Eurozone proceeds to integrate further, it is likely that the economic governance problem will become greater and this may harm the UK's financial services sector and the ability of UK authorities to maintain financial stability.

In 2014 George Osborne warned: "Ultimately I don't think we will be able to maintain this approach of patching things up as we go along with contorted legal innovations and short term fixes. We are taking a great risk with the future economic security of Europe if we do so. Instead of make-do-and-mend, we should make the Treaties fit for purpose." In our view the Renegotiation is simply another contorted legal innovation and does not make the EU Treaties fit for purpose. It falls far short of a fundamental renegotiation of the UK's relationship with the European Union.

 $^{^{64}\} https://www.gov.uk/government/speeches/extracts-from-the-chancellors-speech-on-europe$

Appendix I

Summary of Issues Relating to the Economic Governance Problem

Problem	Current position	Position under the	
		Renegotiation / wider issues	
Treaty status of the euro as the currency of the EU	 EU Treaties presume that the euro is the currency of the EU, subject to limited derogations and optouts for some Member States Fiscal Compact created outside EU Treaties, though uses EU institutions 	 The Renegotiation does not create a multi-currency union EU Treaties not fundamentally reformed, therefore Eurozone may continue to use intergovernmental treaties, short-term fixes to deepen Eurozone integration 	
UK opt-out of Banking Union, double majority voting at EBA	 UK negotiated an optout of Banking Union UK benefits from double-majority voting at EBA, but position will change when there are fewer than five non-Banking Union Member States UK does not benefit from double-majority voting in Council of Ministers 	 The Renegotiation does not change the status quo in relation to Banking Union or double majority voting at the EBA The Renegotiation does not protect the UK's position at EBA when double-majority voting expires, or extend double-majority voting expires for new financial services legislation Despite principle 2, the legislative process is unchanged, therefore UK may be unable to get a flexible rule in circumstances where Eurozone want levelplaying field 	
UK legal challenge to cap on bankers'	UK lost challenge at ECJ (on grounds of financial stability)	The Renegotiation does not change the status quo in relation to the cap on	

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bonuses	 BoE and UK Government maintain this could harm UK financial stability FCA/PRA disagree with EBA on extent bonus cap applies to small firms 	 bankers' bonuses Despite principle 2, the legislative process is unchanged, therefore UK may be unable to get a flexible rule for future similar EU measures in circumstances where Eurozone want maximum harmonisation
UK legal challenge to the power of ESMA to ban short-selling	 UK lost challenge at ECJ ESMA able to restrict short-selling in UK, potentially against UK's interests 	 The Renegotiation does not change the status quo, principles 2 and 4 unlikely to help UK EU still able to use single market treaty Article to grant extensive new powers to EU agencies and use single market legislative basis to further interests of Eurozone
UK legal challenge to the ECB requirement for euro clearing houses to be located in the Eurozone	 UK won challenge at ECJ (on grounds that ECB lacks competence) Euro clearing houses can be located in UK 	 The non-discrimination principle repeats the status quo under the Treaties, but it now weakened by being made specifically subject to "objective reasons", effectively allowing discrimination against noneuro Member States If ECB is granted wider competences, principle 1 would not protect UK, if ECB has an objective reason (e.g. financial stability)
UK legal challenge to the EU financial transaction tax	 UK lost first legal challenge (on a technicality) Participating Member States continue to work on FTT, which could harm UK's 	 FTT does not relate directly to Eurozone or Banking Union, therefore not impacted by Renegotiation If FTT is put in place it could harm the UK's financial services sector

The ability of the UK to require its banks to be better capitalised than other EU banks	• Legislation underpinning bank capital is largely "maximum harmonising", limiting the ability of UK to	 FTT more damaging to UK than other global financial centres as UK would be compelled to enforce extraterritorial aspects of tax under enhanced cooperation mechanism The Renegotiation introduces the flexibility principle, though uncertain how this will fit with the level-playing field principle Despite principle 2, the
	require higher standards BoE maintains that lack of flexibility could harm UK financial stability	legislative process is unchanged, therefore UK may be unable to get a flexible rule in circumstances where qualified majority want maximum harmonisation
Overall responsibility for UK financial stability	 BoE maintains that UK financial stability is a national matter, ESRB maintains it has responsibility for EU financial stability (no clear delineation of responsibilities) Risk that in the event of conflict, ECJ will uphold right of EU institutions to take measures, even if they are opposed by the BoE 	 The Renegotiation broadly repeats the status quo, there continues to be no clear delineation of responsibilities Despite principle 4, it is clear that UK responsibility for financial stability is subject to EU responsibility
Use of the EFSM to bail-out Greece	 EFSM used to bail-out Greece despite a political agreement that non Eurozone Member States should not be liable Eurogroup used 	 Principle 3 gives some legal weight to political agreement that non-Eurozone Member States should not be liable for Eurozone bail-outs Despite principle 5, in

	entrenched majority to agree a legislative proposal that impacts the UK without consulting the UK	practical terms Eurogroup still able to reach consensus positions without consulting the UK
Capital Markets Union and a single European capital markets supervisor	 Current CMU proposals do not include a single European capital markets supervisor ECB and Five Presidents' Report argue for a single European capital markets supervisor, UK argues against this Risk that ESMA (or other EU agency) is given powers to be a single European capital markets supervisor (UK could be outvoted in the Council and lose at the ECJ based on short-selling case) 	 The Renegotiation does not change the status quo If the EU in the future wants CMU to have a single supervisor, the UK will not be able to use any of the principles to stop this