

JEZ EU CAN'T



**The European Union and the legality
of Labour Party policy**

BY JOHN MILLS AND BRENDAN CHILTON

**Labour
LEAVE**

The Labour campaign to Leave the EU



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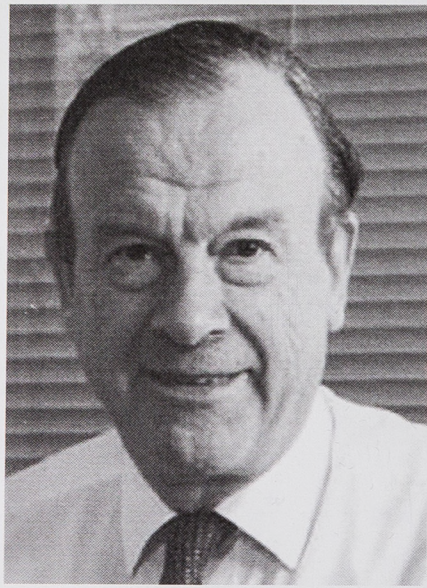
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Foreword by John Mills



The Labour Party elected Jeremy Corbyn as our Leader by a huge majority. Much of his appeal came from a wish by large number of party members, new and old, to see a break with more recent trends and to see a return to Labour's more traditional policies and values. Moves in this direction in turn entailed a number of policy commitment, all of which the polls show have a strong body of support among the electorate. These include public ownership of the railways, ending privatisation in the NHS, public ownership of the energy companies, greater rights for trades unions and cracking down on tax avoidance. There is, however, a

major problem. All these policies, as this short pamphlet explains, fall foul of the rules we have to follow as members of the European Union.

Labour Leave believes that these heavy constraints on what a Labour government would be able to do when re-elected add strongly to the case to be made that the Party's policy of campaigning for the UK remaining in the EU irrespective of the outcome of the current negotiations is a mistake. The reality is that large numbers of Labour supporters – and perhaps even more significantly, many of those who have voted Labour in the past but who switched to other parties at the last general election – share the view that our current terms of EU membership are not satisfactory.

They are concerned about the very heavy financial net cost of our membership, lack of control over our borders, the damage done by the Common Agricultural and Common Fisheries Policies, and there being too much legislation from Brussels instead of from Westminster. They also do not want "ever closer union" and they certainly do not want to be part of the United States of Europe which the Eurozone is going to have to put in place if the Single Currency is to survive. Now, in addition, we are faced with the prospect of a democratically elected government not being able to implement key policies on which the Labour Party would like to have manifesto commitments as key parts of its campaign.

Is this scaremongering? We do not think so. This pamphlet looks at each of the commitments set out above, to see what the difficulties would be from an EU standpoint in getting them implemented. It turns out that in each case there are obstacles which are likely to be insuperable. Is this really where we want to be?

We think not. We believe that the Labour Party ought to be able to formulate policies which it wants to see implemented and that, if it secures the endorsement of the electorate in a general election, it should be able to put these policies into effect without being told by any supra-national body that this cannot be done. This is why we call upon you and other Labour Party members to campaign with us to leave the EU and then to renegotiate the relationship which we believe the vast majority of the UK electorate would like to see established. This would consist of a free trade agreement and co-operation on an inter-governmental basis on all the many matters on which we have a common interest with our European neighbours, but not with the UK becoming part of a federal European state. We believe that this is what most people in the UK want and that this is what we ought to be campaigning to achieve.

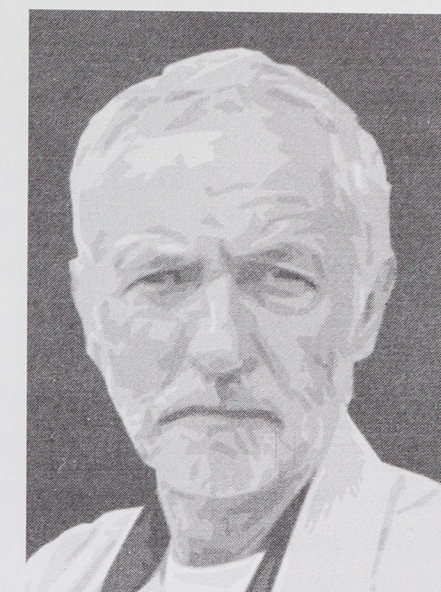
If Labour wants to implement the radical policies on which our Leader was elected this is the way we will have to go.

Labour Leave campaign

- The **Labour Leave** campaign has been established to make the Labour case for leaving the European Union. We are a separate legal entity and a separate campaign but we are supporting the **Vote Leave** campaign to maximise our chances of leaving the European Union.
- **Labour Leave** does not believe that David Cameron will produce the fundamental changes the United Kingdom needs as a member of the European Union. **Labour Leave** does not believe that Jeremy Corbyn's vision of a social Europe can be achieved while we remain inside the European Union. **Labour Leave** believes that there are millions of Labour voters and supporters who want to see a strong Labour campaign to leave the European Union.
- The **Labour Leave** campaign is working closely with the **Labour Euro-Safeguards** campaign to secure a vote to leave the European Union in the coming referendum.
- We believe it is an enormous political error for the Labour Party to be wholly united behind campaigning to remain in the European Union. This decision will discourage the millions of Labour voters who left Labour for UKIP and the Conservatives from returning to Labour. Labour needs those voters to return if we are to stand a chance of forming the next government.
- Since the leadership election, Labour has embarked on a radical journey with the election of Jeremy Corbyn as Leader of the Labour Party. Many of Jeremy's policies cannot be implemented under our current terms of membership due to existing EU legislation. Jeremy Corbyn has an enormous mandate from a growing Labour Party to pursue his agenda, but he will be stopped in his tracks by the EU.
- If the British people elect a Labour government under a Jeremy Corbyn premiership they would expect to see his policies implemented in government. The Labour Party would also expect to see the policies it has agreed at Conference to be implemented. That is the basis upon which decisions are made in this country. Our membership of the European Union stands in the way of that democratic process because its own legislation stands in opposition to the policies of the Labour Party.

Introduction

Jeremy Corbyn committed the Labour Party to discussing a number of high profile policies during his leadership campaign in 2015. These included bringing the railways, the NHS and energy companies back into full public ownership, greater rights for trade unions, and cracking down on tax avoidance by big business.



These five key pledges would be extremely hard to achieve under current EU law, and may soon become entirely illegal if the single market is 'completed'. The UK under Jeremy Corbyn would be at risk of being sued by big business and the European Commission for billions of pounds which could otherwise be spent on public services if it remained in the EU. Alternatively a government led by Jeremy Corbyn would run the risk of quickly falling foul of the British people for being unable to deliver on any of its key manifesto commitments.

Therefore the Labour Party needs to put forward its own case for fundamental reform of our terms of membership of the European Union. If Jeremy Corbyn and the new leadership team are serious about implementing their reform plans, then the Labour Party must as a consequence seek a new relationship with the European Union. Labour cannot simply leave the terms of the renegotiation to be defined by the Conservatives.

Similarly, a blind commitment to EU membership come what may will make the public believe Labour isn't very serious about implementing its policies, as they cannot be implemented under our current arrangements with the EU. How can the Labour Party present a package to the electorate, which they know cannot be implemented under EU law?

This pamphlet will outline some of the key policy areas put forward by Jeremy Corbyn that are not compatible with our membership of the European Union.

1. Public ownership of the railways

Public ownership of the Railways has long been a policy advocated by the Trade Union movement, particularly the main Transport Unions. At the 2015 Annual Labour Party Conference, a motion was carried by the Conference supporting bringing the Railways back into public ownership. Many of those members and supporters who voted for Jeremy Corbyn did so precisely because he supported a publicly owned railway.

In his August 2015 policy document '*A People's Railway*', Jeremy Corbyn proposed 'an integrated publicly owned railway network that is run by the people for the people.' He promised a new Railways Act in 2020 to bring the railways back into public control.¹ At the Labour Party Conference this year the Shadow Transport Secretary, Lillian Greenwood MP, unveiled a plan to bring the railways back into public ownership. Despite Jeremy Corbyn's tremendous mandate and considerable support for this policy he would be unable to implement it.

An 'integrated publicly owned railway network' is illegal under EU law. Directive 2012/34/EU establishing a Single European Railway Area, provides that there must be a considerable degree of separation between track and rolling stock. This means that railways cannot be run for the people and by the people. They must be managed independently of government. Train companies must be run according to commercial principles. This will bring into question the government's ability to open and subsidise less well used lines in rural areas. The EU's directives favouring freight on large vehicles also diminishes the role of railways in delivering freight.²

Competition must be accepted in freight and international passenger services. Competition cannot be precluded in principle for major domestic passenger services.³ This Directive rather stands against the policy being advocated by Jeremy Corbyn which has been adopted by the Conference of the Labour Party.

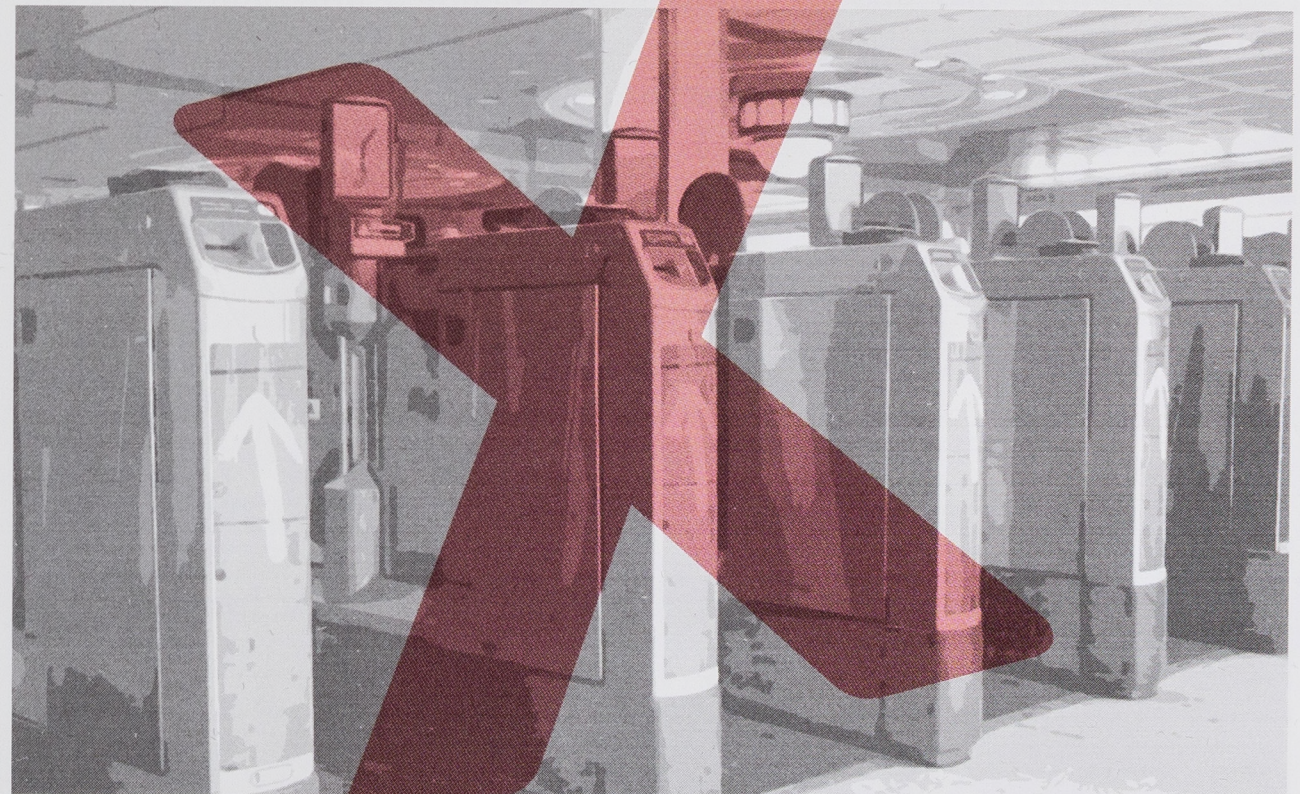
1 J Corbyn, '*A People's Railway*', (August 2015) https://d3n8a8pro7vhmx.cloudfront.net/jeremyforlabour/pages/153/attachments/original/1439891675/Railways_JeremyCorbyn.pdf?1439891675

2 <http://tuaeu.co.uk/wp-content/uploads/2015/08/Workers-Say-No1.pdf>

3 Parliament and Council Directive 2012/34/EU <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1443012425135&uri=CELEX:02012L0034-20121215>>

Lillian Greenwood has pledged to bring the railways back into public ownership once existing contracts for delivering services expire. However, the European Commission has proposed further measures to extend competition. If they are adopted and, as planned, enter into force in 2019, Jeremy Corbyn's policies for an integrated publicly owned railway run by the people will be entirely illegal under EU law. Total legal separation of the track and infrastructure will be mandatory. Competitive tendering of all major railway franchises according to EU public procurement law will also be compulsory. Every railway company in the EU will have a right to compete for all rail services, and to lease rolling stock for the purpose of doing so.⁴

Rail fares have increased by an average of 25% since 2010, so rail fares are rising faster than wages. Some passengers have seen their season tickets increase by 35%, and there have been stealth fare rises on some lines. Ticketing arrangements are very complicated and our fares don't compare well with other countries in Europe.⁵ Despite all of these problems associated with the existing model Jeremy Corbyn will not be able to implement his railway policies if Labour wins the 2020 General election.



4 <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205960%202013%20INIT>>; <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205985%202013%20INIT>>.

5 <http://actionforrail.org/where-now-for-labour-and-rail-public-ownership/#sthash.TtCMHQuj.dpuf>

2. Ending the privatisation of the National Health Service

The NHS was created by the 1945 Labour government and successive Labour governments have supported and protected the NHS. It is something the whole Labour movement is proud of and continues to be proud of. Labour governments from Wilson to Blair have had to rescue our NHS from the devastation Tory governments have inflicted upon it. But the real threat to our NHS comes from our membership of the European Union.

Jeremy Corbyn has stated that he wants to ensure that the NHS is 'completely publicly run and publicly accountable.'⁶ This policy has near absolute support within the Labour and trade union movement and is a very popular measure across the country. The UK's ability to make health policy is, however, increasingly constrained by EU law and as a result Jeremy Corbyns plans may not be as straight forward as introducing a policy that ensures our NHS is completely publicly managed and publicly accountable.

For example, the Patients' Rights Directive 2011/24/EU (codifying earlier case law of the Luxembourg Court) makes detailed provision about the ability of patients to seek treatment elsewhere in the EU.⁷ This Directive encourages a market approach to healthcare provision not just in the UK, but across the EU. One of the areas which is becoming of increasing concern amongst the British public is the issue of Health Tourism. This Directive actively encourages the Health Tourism Industry, which concerns many voters in the United Kingdom.

Removing the private sector from the NHS will be very difficult to reconcile with certain fundamental principles of EU law, including the freedom to provide services, EU public procurement, competition and state aid law.⁸ This is admittedly an area of considerable legal complexity, meaning that conclusions cannot be stated with complete certainty. Leaked legal advice to the Department of Health in November 2006 on this topic (when EU law

⁶ M Wilkinson, 'What does Jeremy Corbyn stand for?', *The Daily Telegraph*, (24 September 2015) <<http://www.telegraph.co.uk/news/politics/labour/11775739/jeremy-corbyn-policies.html>>

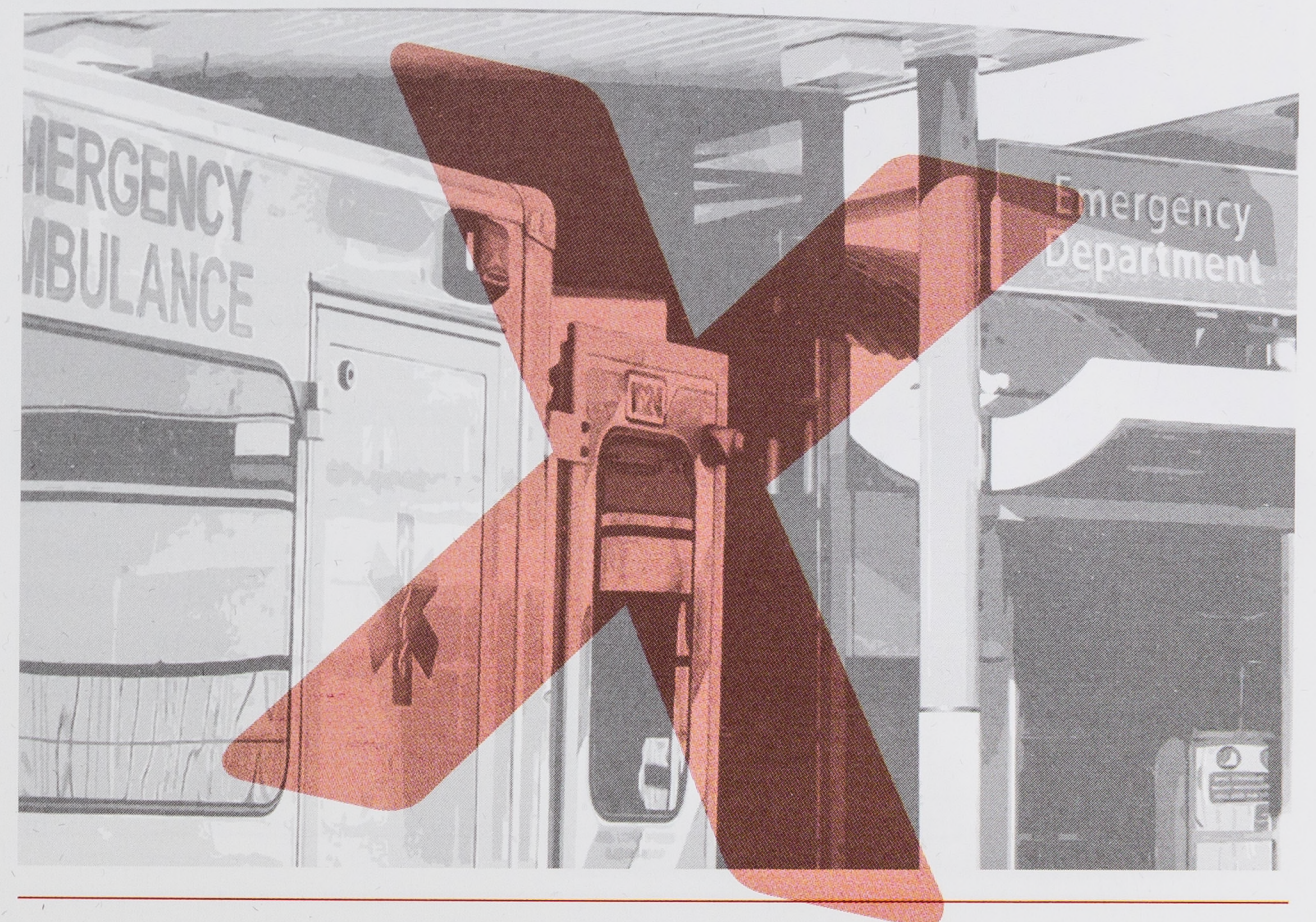
⁷ Parliament and Council Directive 2011/24 EU <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1443180214494&uri=CELEX:02011L0024-20140101>>.

⁸ TFEU, arts 56, 101-102, 107-109; Parliament and Council Directive 2014/24/EU <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024>>; National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2003 SI 2013/500; Public Contracts Regulations 2015 SI 2015/102.

was less developed) ran to 44 pages. Therefore it is not entirely clear whether Jeremy Corbyn can prevent private sector involvement in future NHS procurement, let alone reversing any existing private sector involvement.

This legal advice suggested that private companies could have the right under EU law to sue the NHS for 'abuse of a dominant position' or 'collusion' in the single market, and that GPs constitute economic 'undertakings', making them subject to EU competition law. It concluded that the Department of Health and the NHS will 'continue to be exposed to the risk of investigations, possible damages actions and even, in serious cases, fines under [EU] competition law.' It also questioned whether NHS trusts' 'exemption from corporation tax' was compatible with EU law, stating that 'the State aid rules may apply to the grant of funding and other benefits from State resources to public healthcare bodies.' So we could even see NHS trusts being forced to pay corporation tax in the future and find ourselves in a situation where the British government is restricted in terms of the funding it can provide to the NHS.

EU law constitutes a serious obstacle to the return of the NHS to public ownership. Any attempt to do so while the UK remains in the EU will be



challenged in the UK and EU courts by well-funded private healthcare companies, who stand to lose lucrative contracts as a result. If such challenges succeed, companies might win damages out of the NHS budget and the UK could be fined by the European Commission and Luxembourg Court for attempting to return the NHS to the public sector. This potentially could cost the NHS millions of pounds in complicated legal battles which will result in resources being diverted from patient care into managing court cases.

This danger will only increase if the EU's proposed Transatlantic Trade and Investment Partnership (TTIP) is agreed to. Many across the Trade Union movement are deeply concerned about TTIP and strongly oppose its measures. The GMB Union motion on the EU Referendum which was passed at the Labour Party 2015 Annual Conference, stated, "Conference recognises that the erosion of social rights and the undemocratic TTIP proposals will bring conflict to the heart of the referendum debate."⁹

3. Public ownership of the energy companies

Before the General Election, Ed Miliband committed the Labour Party to implementing an energy price freeze, which was popular with the public, especially those facing high winter fuel bills. Jeremy Corbyn has moved the Labour Party on from this position.

On 7 August 2015, Jeremy Corbyn stated:

'I would want the public ownership of the gas and the National Grid ... [and] I would personally wish that the big six were under public control, or public ownership in some form... energy should be publicly owned, whether that's at community, municipal or national level'.¹⁰

This policy would encounter serious obstacles under existing EU law. Two EU directives (2009/72/EC and 2009/73/EC) on the 'internal market' in natural gas and electricity constrain the ability of the British Government to undertake radical reform of the energy market.¹¹ Both commit member states to competitive markets and give customers the right to change their supplier, with that provider's assistance, within three months. Therefore, it is virtually impossible to bring the big six energy companies into public ownership as there would be one owner and provider. Non-household customers have the right under these directives to contract simultaneously with several suppliers.



⁹ <http://www.gmb.org.uk/newsroom/labour-party-on-eu-referendum>

¹⁰ K Stacey, 'Jeremy Corbyn backs nationalising "big six" energy suppliers', *Financial Times*, (7 August 2015) <<http://www.ft.com/cms/s/0/f72d0ee6-3c4f-11e5-bbd1-b37bc06f590c.html#axzz3mM96o4an>>

Member states are also required to 'unbundle' transmission systems and transmission systems operators. This will allow for third party access to the distribution system to be progressively rolled out by 2017. An incoming Labour government under Jeremy Corbyn in 2020 would therefore be faced with a policy being introduced across the European Union that would not be up for discussion, and with which a Labour government would have to comply.

EU law is likely to move further against Corbyn's policies in the future. In his September 2015 State of the Union Address, the President of the European Commission, Jean-Claude Juncker promised an 'Energy Union', allowing 'a wider choice of products and services.'¹² Without reform of these Directives and a reversal of statements made by EU figures; Jeremy Corbyn's policies, supported by the Labour party and broadly by the Trade Union movement will not be implemented.

11 Parliament and Council Directive 2009/72/EC <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0072>>; Parliament and Council Directive 2009/73/EC <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0073>>.

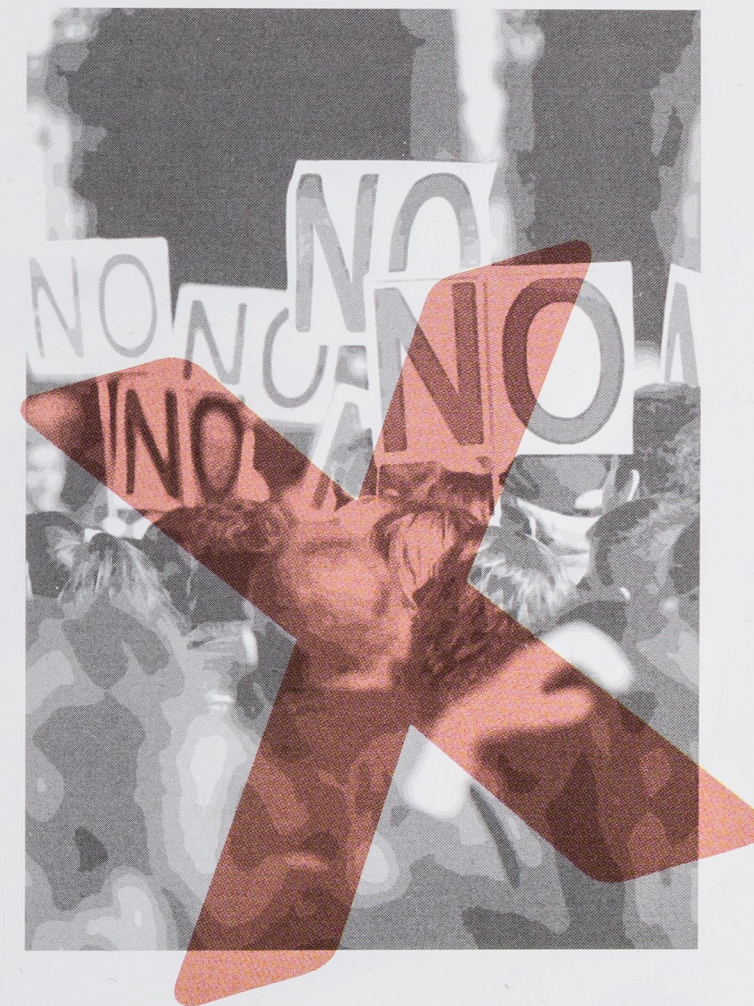
12 Jean-Claude Juncker, 'State of the Union 2015: Time for Honesty, Unity and Solidarity', (Strasbourg, 9 September 2015), <http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm>

4. Greater rights for trades unions

In July 2015, Jeremy Corbyn promised to reverse laws passed by the Thatcher Government which restrict the rights of trade unions.¹³ Since then, the Conservative government have introduced the Trade Union Bill, which goes further and unnecessarily restricts the rights of Trade Unions in the UK. Labour MP's voted against the Bill and have pledged to reverse the changes under the next Labour government.

However, restrictions on the right to strike under EU law could not be unilaterally repealed by a future Labour Government. In a series of judgments in the last decade, the European Court of Justice has held that the rights of companies to establish themselves and to provide services in other EU member states have 'direct effect' against trade unions.¹⁴ The result has been to restrict workers' ability to take industrial action to prevent social dumping, where companies undercut jobs and services by moving elsewhere in the EU. It is now for the courts, rather than for the unions, to judge whether or not a strike is necessary.¹⁵

This means the courts have become politicised as a direct result of EU interference are not necessarily sympathetic towards the Unions cause. The Commission, the IMF and the European Central Bank have directly intervened in wage



13 L James, 'We'll All Scrap Tory Strike Law', *Morning Star*, (1 July 2015) <<http://www.morningstaronline.co.uk/a-3234-Well-All-Scrap-Tory-Strike-Law#.VgUi2dVhBc>>

14 Treaty on the Functioning of the European Union (TFEU), arts. 49 & 56; *International Transport Workers' Federation v Viking Line ABP* (Case C-438/05) [2008] 1 CMLR 51; *Laval v Byggnads* (Case C-241/05) [2008] 2 CMLR 9.

15 *Viking Line*, at 1415.

negotiations and in several EU countries who have received bailouts collective bargaining is not permitted.

Furthermore, such strikes may not occur where a court holds that its objectives are '[in]sufficiently precise and accessible' to the employer.¹⁶ The EU favours employers over unions and its actions to date demonstrate that point. Its measures are undemocratic and bring into question the neutrality of the courts.

These restrictions on the rights of workers go further than any existing requirement imposed by the British Parliament. Since they derive from the Luxembourg Court's interpretation of the EU treaties, they could only be reversed by treaty change. If the British Trade Union movement want to see a change in this position and a better deal for Trade Unions generally, then the United Kingdom's membership of the EU must come to an end.

¹⁶ *Laval*, at 264.

5. Cracking down on tax avoidance

In July 2015, Jeremy Corbyn pledged that he would discourage tax avoidance, and in so doing, would collect a further £20 billion per year by 2020.¹⁷

This policy will be constrained by companies' right to freedom of establishment in EU law. The Luxembourg Court has held that tax rules, which discriminate against foreign companies establishing branches in the UK are *prima facie* contrary to EU law, and fall foul of the freedom of establishment even if adopted to prevent the risk of tax evasion.¹⁸ It is ultimately for the Luxembourg Court, and not the British Parliament, to rule on whether measures designed to reduce tax avoidance are necessary and 'proportionate'.

And in 2014, for example, the Luxembourg Court ruled that certain provisions of the Income and Corporation Taxes Act 1988, designed to restrict 'wholly artificial' arrangements and tax havens, which limited



¹⁷ J Corbyn, 'The Economy in 2020', (22 July 2015), <https://d3n8a8pro7vnm.cloudfront.net/jeremyforlabour/pages/70/attachments/original/1437556345/TheEconomyIn2020_JeremyCorbyn-220715.pdf?1437556345>

¹⁸ *Commission v France* [1987] 1 CMLR 401; *R v IRC, Ex parte Commerzbank AG* [1994] QB 219.

certain companies' ability to claim 'group consortium relief', could not be justified under EU law.¹⁹ According to the *Financial Times*, this case allowed a single company to offset over £1 billion in losses against the tax bills of its other UK businesses.²⁰ The British Parliament and government is therefore subservient to EU institutions on combating tax avoidance. That subservience exists in an EU framework which makes it exceptionally difficult to combat tax avoidance.

The Luxembourg Court has frequently nullified UK tax law on the grounds that it infringes the rights of big business under EU law. According to court documents, at stake in the recent *FII Group Litigation*, which the UK lost, were 'several billion pounds sterling'.²¹ The Court has also stated that it is legitimate for companies to establish themselves in one member state allowing them to establish subsidiary companies in a second member state, with the sole motive of evading the second's more restrictive laws on company incorporation.²²

Jeremy Corbyn's options would be severely constrained by the expansive 'rights' that EU law gives big business.

Labour's Shadow Chancellor John McDonnell has pledged a review of a range of organisations of the state.²³ The biggest organisation that requires a fundamental review is the European Union. As we have explored through this pamphlet, many of the progressive measures the Labour leadership wish to adopt cannot be advanced while we remain members of the European Union.

19 *Felixstowe Dock and Railway Co Ltd v Commissioners for HM Revenue & Customs* [2014] 3 CMLR 31.

20 V Houlder, 'Mobile group Three in EU court win over £1bn UK tax', *Financial Times*, (1 April 2014) <<http://www.ft.com/cms/s/0/e411057a-b991-11e3-b74f-00144feabdc0.html#axzz3ma6cKNgl>>

21 *Marks & Spencer plc v Halsey* (HM Inspector of Taxes) [2006] Ch. 184, CJEC; *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2014] AC 1161, 1178 CJEU.

22 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [2000] Ch. 446, CJEC.

23 http://www.huffingtonpost.co.uk/2015/09/19/labour-to-review-tax-legislation-says-john-mcdonnell_n_8163018.html

Conclusion

The only way to ensure that these five key Labour Party policies can be implemented without costly and time-consuming legal challenge, and potentially billions of pounds of losses to public services, is to achieve fundamental treaty change or to vote to leave the EU in the upcoming referendum.

It is clear that David Cameron cannot achieve the fundamental change this country needs. An incoming Labour government in 2020 will not be able to implement its programme for reform. This is because successive British governments have handed over power and influence to unaccountable EU institutions and remote officials without the consent of the British public.

The Labour Party is rooted in democratic traditions. Its history is based on the struggles of working people striving to achieve better standards for the common good. The European Union has become an anti-democratic and anti-socialist institution standing in the way of the ambitions of the leadership of the Labour Party.

The European Union is completely at odds with the leadership and policies of the Labour Party. Labour Leave fully supports the pledge made by Jeremy Corbyn during the Labour leadership campaign that the Labour Party should debate its position towards our membership of the European Union at a Special Conference of the Party. We strongly urge the Labour leadership to fulfil this pledge.

Labour Leave also urges the Labour leadership to allow a free vote for Labour Members of Parliament and members of the Party, as well as the right for all to campaign on either side of the referendum campaign. The Labour Party is a democratic party and should support the right of its members to campaign as they feel on this fundamental issue, which goes beyond party politics.

We urge all members of the Labour Party, supporters and affiliates as well as our friends in the Trade Union movement and Socialist societies to join Labour Leave and join with a strong Labour campaign to leave the European Union.

Labour LEAVE

www.labourleave.org

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