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EU Referendum: summary and analysis of the new Settlement for the UK in the EU

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Summary

Introduction
Member States meeting as the European Council on 17-19 February 2016 agreed a new Settlement for the United Kingdom within the European Union. The Settlement consists of seven texts: a Decision and a Statement of Heads of State or Government and five Declarations.

After the Settlement was concluded, in accordance with sections 6 and 7 of the *European Referendum Act 2015*, the Government published three reports: The best of both worlds: the United Kingdom's special status in a reformed European Union, Alternatives to membership: possible models for the United Kingdom outside the European Union and The process for withdrawing from the European Union.

Is the Settlement 'legally binding and irreversible'?
It is not a binding EU treaty or EU law in itself. Most legal opinions consider the first part of it, the Decision of Heads of State or Government, to be a binding treaty under international law, largely because the parties to it have declared that they intend it to be legally binding. But even if the Decision binds the parties under international law, it does not bind the EU institutions, and is not necessarily legally enforceable under either EU or domestic law. It could be problematic if either the Court of Justice of the EU or a domestic court found an inconsistency between the Decision and the EU Treaties.

The Decision probably cannot be reversed without the consent of the UK. But it cannot guarantee all of the outcomes envisaged in it. This is because some depend on factors outside the control of the parties to the Decision, such as national referendums on Treaty change.

The Preamble of the Decision
This refers to the Prime Minister's letter of 10 November 2015, notes the existing UK opt-outs, exemptions, qualifications and opt-in arrangements concerning the Euro, Schengen, border controls, police and judicial cooperation in criminal matters, and the Charter of Fundamental Rights, and also the European Council Conclusions of June 2014, which acknowledged that in the context of the UK's proposed reforms the concept of "ever closer union" allows for different paths of integration for different countries.

Economic Governance
Section A of the Decision is about Economic Governance. Its principles are that there should be no discrimination against non-eurozone countries (such as the UK) because they are outside the eurozone. Non-eurozone countries will not impede further integration in eurozone matters and will not face financial losses due to eurozone 'bail-outs'. Discussion of matters that affect all EU Member States, such as Eurogroup matters, must involve all EU Member States, including non-eurozone members. The Bank of England will remain responsible for supervising the financial stability of the UK.

Competitiveness
Section B concerns Competitiveness. The Decision confirms the aims of the single market and free movement of people, goods, services and capital. The EU and member States "must enhance competitiveness" and take steps to lower the regulatory burden on businesses. The Commission will review the EU acquis for compliance with subsidiarity and proportionality and will consult national parliaments.

The Commission will introduce by the end of 2016 a new burden review mechanism (building on the Regulatory Fitness Programme), will monitor progress against the targets set and report to the European Council every year. The EU remains committed to an "ambitious trade policy".

Sovereignty

Section C is about sovereignty. The UK will not be committed to further political integration in the EU and the concept of "ever closer union" will not apply to the UK.

National parliaments will have 12 weeks in which to object to a legislative proposal on subsidiarity grounds. There will be a 'red card' procedure: 55% of national parliaments will be able to prevent further discussion in the Council of EU legislative proposals, where they believe power should lie with national legislatures.

The UK will retain its opt-out and opt-in arrangements in measures on policing, immigration and asylum policy, and national security will remain the sole responsibility of the UK Government.

Social benefits and free movement

Section D concerns social benefits and free movement. It refers to clarifications of the interpretation of current EU rules, including that Member States may take action to prevent abuse of rights or fraud, such as marriages of convenience, and that in assessing the potential threat of an individual's behaviour, Member States may take into account the individual's past conduct and act on preventative grounds. The Commission and Member States will improve efforts to prevent abuse and fraud. It acknowledges the UK's position on restricting free movement rights with future EU enlargements.

The free movement rights of non-EU family members of EU citizens will be restricted by amendments to the free movement directive. Another EU law amendment will provide an 'emergency brake' to limit full access to in-work benefits by newly arrived EU workers if a Member State is experiencing an "exceptional situation" (the UK already meets the criteria for this). A third amendment will give all Member States an option to index exported child benefits to the conditions of the Member State where the child resides.

Implementation

In addition to the above changes to EU legislation, parts of sections A and C of the Settlement (economic governance and sovereignty) will need to be incorporated into the EU Treaties at the next opportunity for Treaty revision.

1. European Council Conclusions

At the December 2015 meeting of the European Council, Member States agreed to work together closely to find "mutually satisfactory solutions" in the four areas set out in the Prime Minister's letter to European Council President Donald Tusk on 10 November 2015.

On 17-19 February 2016 the Heads of State or Government of the EU Member States, meeting within the European Council, considered - among pressing issues such as the situation in Syria and the migration crisis at the EU's borders - draft texts submitted by the European Council President Donald Tusk on 2 February 2016 to address the UK's EU membership concerns.

Agreement was reached on 19 February and David Cameron, satisfied with the outcome, announced that "the Government's position will be to recommend that Britain remains in a reformed European Union".[1]

The texts agreed are in Annexes to the European Council Conclusions, 19 February 2016, and the package is called the 'New Settlement for the United Kingdom within the European Union'.

The European Council Conclusions also provide an overview of the texts that were agreed and some supplementary information, but this is not part of the formal Settlement.

Summary

According to the Conclusions:

- The Settlement consists of seven texts: a Decision and a Statement of Heads of State or Government and five Declarations.
- The Decision contains the key elements of the new Settlement for the UK. It is declared by the Conclusions to be a legally binding international agreement and will come into effect if the UK notifies the Council that it intends to stay in the EU.
- The Decision can only be amended by unanimous agreement of all 28 EU Member States.
- The Settlement is declared to be compatible with the EU Treaties and will not need to be ratified by Member States.
- Aspects of the Settlement will need to be ratified as Treaty changes at an opportune moment in the future.
- The four European Commission Declarations concern specific parts of the Decision of Heads of State or Government. They set out how the Commission will carry out those parts of the Decision within its responsibilities, including through the

1 Commons statement, 22 February 2016.

introduction of new EU laws. The Declarations supplement the Decision. They express political beliefs and intentions but are not legally binding.

Comment

This part of the European Council Conclusions is not the text of the Settlement itself, but records the background to and the nature of the agreement reached, which is appended to the Conclusions in Annexes. European Council Conclusions are not legally binding but are politically binding.

The Conclusions assert that the Decision is legally binding and only amendable by common accord of the Member States. The legal status of the Settlement is discussed in detail in section 2 below.

After the Settlement was concluded, in accordance with sections 6 and 7 of the *European Referendum Act 2015*, the Government published three reports which considered the Settlement, options for the UK outside the EU and the withdrawal process under Article 50 of the *Treaty on European Union* (TEU):

- The best of both worlds: the United Kingdom's special status in a reformed European Union
- Alternatives to membership: possible models for the United Kingdom outside the European Union
- The process for withdrawing from the European Union.

2. 'Legally binding and irreversible'?

Summary

A central requirement for the Prime Minister was that the Settlement should be legally binding and irreversible. The EU Member States have declared that the first part of the Settlement, the Decision of the EU Heads of State or Government, is legally binding. But the combination of international law and EU law makes this a very complex issue, and there are elements capable of supporting each side of the debate.

The Decision is not a binding EU treaty or EU law in itself. Most legal opinions consider it a binding treaty under international law, largely because the parties to it have declared that they intend it to be legally binding. If this is correct, it would bind the parties (the governments of EU Member States) but not the EU institutions. However, the wording and form of the Decision are more like those of a non-binding agreement. Alternatively it might be somewhere in between: an agreement that is binding in a 'weak' sense because under both international law and EU law it must be taken into account when interpreting the EU Treaties.

But even if the Decision is accepted as legally binding under international law, it is not necessarily legally enforceable under either EU or domestic law.

The Court of Justice of the EU could not enforce the Decision, although it would have to take it into consideration when interpreting the EU Treaties, and might for instance be asked to consider whether secondary EU legislation envisaged by it was compatible with the EU Treaties. Of course if in future some provisions of the Decision were incorporated into the EU Treaties, the Court of Justice could enforce those provisions. The UK's domestic courts could not enforce the Decision itself unless it was given direct effect in the UK, and even then they would be still bound by the EU Treaties. It could be problematic if either the Court of Justice or a domestic court found an inconsistency between the Decision and the Treaties.

The Decision probably cannot be reversed without the consent of the UK. But it cannot guarantee all of the outcomes envisaged in it. This is because some depend on factors outside the control of the parties to the Decision, such as national referendums on Treaty change.

2.1 The Prime Minister's proposed reforms

The Prime Minister has consistently said that a settlement agreement would need to be 'legally binding and irreversible'. His November 2015 letter setting out the areas where he was seeking reforms said:

> I hope that this letter can provide a clear basis for reaching an agreement that would, of course, need to be legally-binding and irreversible – and where necessary have force in the Treaties.

The Government's *Best of both worlds* document states that the Decision is indeed both legally binding and irreversible:

> 2.129 This Decision is legally-binding under international law and will take effect if the British people vote to remain in the EU. The Decision would be registered as a treaty with the United Nations. Its legally-binding status has been confirmed by the Council Legal Service and is expressly recognised by all the Member States and the European Commission in the European Council Conclusions

> that were adopted at the same time as the International Law Decision on 19 February 2016.
>
> 2.130 It is also irreversible: the decision was agreed by all of the Member States, and cannot be amended or revoked unless all Member States, including the UK, agree. This position has again been expressly recognised by all of the Member States and the European Commission in the European Council Conclusions adopted at the same time as the International Law Decision, and has been confirmed by the Council Legal Service. The Government is clear that the UK will not agree to a request to amend or withdraw this decision. This gives us a complete lock on it, ensuring it remains in place as part of the foundation of our membership of the reformed EU.

These assertions have however been questioned.

2.2 Is the Decision a treaty?

Introduction

The first part of the Settlement is a 'Decision of the Heads of State or Government, meeting within the European Council'.[2] What legal status does this Decision have?

It is not a Decision of the European Council as an EU institution, so it is not EU law. Nor is it an EU Treaty.

But it could be a binding intergovernmental treaty under international law, even though it is not in customary treaty form. Or it could be a non-legally binding agreement (often referred to as a Memorandum of Understanding, or MOU).

Although in wording and form this Decision is more like an MOU, the parties' statement that it is legally binding would carry significant weight. Registering it with the UN does not make it a treaty.

Definition of a treaty

The 1969 Vienna Convention on the Law of Treaties (which the UK has ratified) defines a treaty as:

> an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation[3]

The Decision is clearly 'an international agreement concluded between States in written form'.

But the question of whether it is 'governed by international law' is trickier. To answer it, one needs to look at whether the parties intended to create obligations under international law. The wording of the instrument itself and the circumstances of its conclusion can indicate

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2 The Statement and Declarations are not legally binding, although the Declarations may have legal effect in influencing the interpretation of the EU Treaties: Note by European Scrutiny Committee Legal Adviser - outcome of the renegotiation, 22 February 2016, fn7

3 Article 2(1)(a)

this, but ultimately it would be for an international court or tribunal to determine.

Wording of the Decision

Although no specific form or wording is required under the law of treaties, there is a convention that some words imply an intention to be bound (treaty) and others indicate the opposite (MOU). For example:[4]

Treaty	MOU
article, clause	paragraph
agree	decide, accept, approve
agreement	arrangement, understanding
enter into force	come into effect, come into operation
obligations	commitments
parties	participants, governments
preamble	introduction
shall	will

The Decision uses some 'treaty' words. For example, it says that the Heads of State or Government 'have agreed on the following Decision', and uses the word 'shall' nine times. The Council Legal Service's opinion on the draft Decision concluded that it was 'drafted in such a way that many of its provisions use legal terminology commonly used in order to provide for legal obligations'.[5]

But it uses more 'MOU' words. For example it refers to paragraphs and sections (instead of clauses or articles), and uses the word 'will' 27 times. Section E uses the phrase 'come into effect' rather than 'enter into force'. And the Decision omits most of the final clauses that are customarily included in treaties, as well as the 'testimonium' (the final, formal wording of a treaty beneath which the diplomatic representatives sign).

No signature or ratification

The Decision was not signed or ratified. But the Vienna Convention's definition of a treaty does not require this in order for it to be legally binding: Article 11 states that 'The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed' (my emphasis).

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4 From Anthony Aust, *Modern Treaty Law and Practice* (3rd edition, 2013) Appendix G, 'Treaty and MOU terminology: comparative table'

5 Para 10

Anthony Aust suggests that the 'agreed means' for showing consent to be bound do not need to be spelled out by the treaty:

> it is enough for it to be implicit in the text of the treaty or otherwise established, for example, by conduct. Thus, it is possible for a treaty to be concluded, without signature, and enter into force *instantly* for all the adopting states.[6]

The EU Council Legal Service's opinion on the draft Decision considered that it would be binding even without signature or ratification:

> In the present case, the final provision of the draft Decision in paragraph 2 of Section E does not require any formality for the parties to express their consent to be bound. It does not require any formality such as signing or notification of having accomplished a formal ratification or any other procedure in accordance with constitutional requirements.
>
> The only condition provided for the draft Decision to take effect is that the United Kingdom informs the Secretary-General of the Council that it has decided to remain a member of the European Union.
>
> Therefore, the common accord reached by the Heads of State or Government, on the day they adopt the draft Decision, will be the means by which the parties agree, in the words of Article 11 of the Vienna Convention, to give their consent to be bound by the Decision and the Decision will take effect on the date indicated in Section E, paragraph 2.

However, the constitutions of Member States might require some domestic procedure. For instance, Article 59 of Germany's basic law states that 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation' require federal legislation. In practice, this includes military alliances, treaties of guarantee, treaties on political cooperation, peace treaties, non-aggression pacts and treaties dealing with questions such as disarmament, neutrality and the peaceful settlement of disputes. The vast majority of important international agreements fall within this category. But the executive has considerable discretion over when to submit an international agreement to the Bundestag.

Title

It does not matter whether the instrument is called a treaty, an agreement, a decision, or anything else. Its title is not conclusive as to its legal effect.

Circumstances of its conclusion

Where the wording of an instrument is unclear, the circumstances of its conclusion can be a guide to whether or not it is intended to be legally binding.

The Decision itself does not state anywhere that it is legally binding. But the UK's stated wish that it should be so was not expressly objected to by the other governments. And the European Council Conclusions to

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6 Anthony Aust, *Modern Treaty Law and Practice* (3rd edition, 2013) p104

which it is annexed clearly specify an intention to create binding obligations:

> 3. Regarding the Decision in Annex 1, the Heads of State or Government have declared that:
>
> (i) this Decision gives legal guarantee that the matters of concern to the United Kingdom as expressed in the letter of 10 November 2015 have been addressed;
>
> …
>
> (iii) this Decision is legally binding, and may be amended or repealed only by common accord of the Heads of State or Government of the Member States of the European Union;[7]

This statement would at the very least carry significant weight.

EU practice

A 1996 survey of the (then 15) EU Member States identified what for them would distinguish a legally-binding instrument from a non-legally binding one. According to Anthony Aust, the 'key factor' for almost all of them was the intention of the states. Other points were that if an instrument was not intended to be binding it would be worded to reflect that intention and avoid mandatory language; it would omit treaty-type final clauses; and there would be no parliamentary procedure.[8]

Precedents

The Decision is in a similar form to the 1992 Edinburgh Decision (addressing Danish concerns about the Maastricht Treaty) and the 2009 Brussels Decision (addressing Irish concerns about the Treaty of Lisbon). Both Decisions were regarded as treaties by the parties, and registered with the UN, even though they were not drafted in customary treaty form and there was no explicit reference to the Edinburgh Decision being considered legally binding. Both were implemented as envisaged.

Anthony Aust suggests that the Edinburgh Decision did not require signature for political reasons:

> There can be circumstances when the use of an unsigned (or even uninitialled) instrument is preferable for political reasons. The [Edinburgh Decision] is not in customary treaty form, but is regarded by Member States as a treaty, and has been registered and published as such. Given the particular circumstances, some of the less confident leaders were reluctant to be seen signing it. They were skilfully advised that signature was not necessary.[9]

Professor Damian Chalmers, however, mentions a 'less happy precedent', where the European Parliament voted against a proposed Protocol to the EU Treaties on the application of the EU Charter of Fundamental Rights.[10] The Protocol had been promised to the Czech

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7 *European Council meeting (18 and 19 February 2016) – Conclusions,* EUCO 1/16, part 1

8 Anthony Aust, *Modern Treaty Law and Practice* (3rd edition, 2013) p36

9 Anthony Aust, *Modern Treaty Law and Practice* (3rd edition, 2013) p21

10 Professor Damian Chalmers, Written evidence to the House of Commons EU Scrutiny Committee, February 2016, para 17. See also Steve Peers, 'The final UK/EU

Republic in the conclusions of the European Council. However, after the negative European Parliament vote, a new Czech government withdrew the previous government's request.

Registration with the UN

The UK submitted the Decision for registration with the UN on 24 February 2016. A tweet from the Prime Minister on 24 February 2016 said 'I welcome the registration of our legally binding EU agreement @UN today. Shows its strength and importance.'

What are the legal implications of registration with the UN?

Article 102 of the UN Charter requires Member States to register with the Secretariat every treaty and every international agreement entered into by them, otherwise they cannot invoke the treaty or agreement before any organ of the UN. The terms 'treaty' and 'international agreement' have not been defined either in the Charter or in the UN General Assembly regulations on treaty registration.

Registration with the UN Secretariat is not intended to give an agreement any status it would not otherwise have:

> … the Secretariat follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration that so far as that party is concerned the instrument is a treaty or an international agreement within the meaning of Article 102. Registration of an instrument submitted by a Member State, therefore, does not imply a judgement by the Secretariat on the nature of the instrument, the status of a party or any similar question. It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status and does not confer on a party a status which it would not otherwise have.[11]

The UN Treaty Section will check that an instrument which is presented for registration is, on the face of it, a treaty – and it has occasionally refused registration.[12] Anthony Aust's research found very few instruments registered with the UN which were clearly MOUs, but he suggests that in borderline cases, the UN seems to err on the side of caution by registering the instrument.[13]

2.3 Is it an agreement interpreting the EU Treaties?

Introduction

The Decision could – at least in part – be considered an agreement interpreting the EU Treaties.

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renegotiation deal: legal status and legal effect', *EU law analysis blog*, 21 February 2016

11 Note by the Secretariat annexed to the General Assembly resolution of 10 February 1946 on registration of treaties and international agreements

12 Anthony Aust, *Modern Treaty Law and Practice* (3rd edition, 2013) p301

13 Anthony Aust, *Modern Treaty Law and Practice* (3rd edition, 2013) pp34 fn29, 47-48 and 301-3

An agreement interpreting a treaty could itself be a treaty, but does not have to be. It has even been suggested that this forms a third category of agreement that is binding in a 'weak' sense because, though not itself binding, it must be taken into account when interpreting the relevant treaty.

'Subsequent agreement between parties'

Article 31(3)(a) of the Vienna Convention requires that, when interpreting a treaty, 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' shall be taken into account. This 'subsequent agreement' could be a treaty, but it clearly does not have to be. Such agreements are rare.[14]

The Decision appears to fall within this definition, at least in part. Its preamble says that one of the intentions of the parties is to clarify certain questions 'so that such clarification will have to be taken into consideration as being an instrument for the interpretation of the Treaties'. The UK Government says that the Decision 'contains provisions that reflect an agreement between Member States about the meaning of the EU Treaties, for example, on national security remaining the sole responsibility of Member States'.[15]

Pavlos Eleftheriadis of the University of Oxford argues that an interpretative agreement is not a treaty but is 'legally binding … in the weak sense that, as a matter of international law it provides material that is relevant to the interpretation of existing treaties'.[16] However, the fact that an agreement must be 'taken into account', and is therefore likely to carry considerable weight, is not the same thing as saying that it must be enforced.

Interpretation or amendment?

The distinction between interpreting and amending a treaty is not always easy to draw. Anthony Aust, himself formerly Deputy Legal Adviser at the FCO, says that foreign ministry legal advisers are familiar with the question 'how can we modify a treaty without amending it?', and cautions that 'problems could be caused' if an interpretative agreement is used for something which really requires a formal amendment to the treaty.[17]

A newly-agreed interpretation could amount in effect to modification of the terms of a treaty. For instance, in December 1995 the EC Member States replaced treaty references to the ECU with the euro, not through treaty amendments but through an 'agreed and definitive interpretation of the relevant Treaty provisions' recorded in the Conclusions of the Madrid European Council.

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14 Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, 1984, p136
15 HM Government, *Best of both worlds: the United Kingdom's special status in a reformed European Union*, February 2016, para 2.136
16 Pavlos Eleftheriadis, 'The Proposed New Legal Settlement of the UK with the EU', UK Constitutional Law Blog, 13 February 2016
17 Anthony Aust, *Modern Treaty Law and Practice* (3rd edition, 2013) p214

But an interpretation which is contrary to the text of the EU Treaties would require the Treaty amendment provisions in Article 48 TEU to be followed. Although the general rule under Article 30(3) of the Vienna Convention is that a subsequent treaty impliedly repeals incompatible provisions of an earlier one between the same parties over the same subject matter, these rules are 'without prejudice' to an international organisation's own rules.

Whether or not the Decision is entirely within the possible range of interpretation of the EU Treaties is unclear. Its preamble says that the Decision is in 'in conformity with the Treaties'. The Council Legal Service's opinion on the draft Decision considered that the draft 'does not amend the EU Treaties' and 'is an act having legal consequences where it interprets Treaty provisions or foresees action requiring recourse to their procedures … with binding force' (para 13). But other commentators argue that some provisions do compete with the EU Treaties. Pavlos Eleftheriadis, for example, cites the provision on discrimination relating to the Eurozone.[18]

2.4 Who would it bind?

Governments not EU institutions

Under international law, if the Decision is a treaty it binds the parties to it (i.e. the governments of the EU Member States) but not non-parties.

Professor Steve Peers, of the University of Essex, argues that the Decision includes legal obligations for Member States as a matter of international law, which 'is fine as long as the particular obligations don't conflict with EU law':

> In the event of any conflict, the primacy of EU law means that the latter takes precedence over the renegotiation Decision. But is there any conflict? This is a substantive question, and in any event where the renegotiation Decision calls for EU secondary law measures to be adopted (the free movement legislation, the Eurozone Decision) the real question is whether those measures would themselves breach the Treaties if adopted.[19]

He concludes that the deal as a whole is binding, but that some elements need separate implementation and that its enforceability is limited:

> It follows from the above that the renegotiation deal is binding – and anyone who says otherwise (without clarification) is just not telling the truth. But there are two significant caveats to that: (a) parts of the deal, concerning the details of the changes to free movement law and Treaty amendments, still have to be implemented separately; and (b) there are limits to the enforceability of the deal.[20]

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18 Pavlos Eleftheriadis, 'The Proposed New Legal Settlement of the UK with the EU', UK Constitutional Law Blog, 13 February 2016, pp7-8

19 Steve Peers, 'The final UK/EU renegotiation deal: legal status and legal effect', *EU law analysis blog*, 21 February 2016

20 Steve Peers, 'The final UK/EU renegotiation deal: legal status and legal effect', *EU law analysis blog*, 21 February 2016

He gives a table listing his view of which elements of the renegotiation deal are binding, how enforceable they are and whether they need further implementation (and if so, what exactly this entails).

None of the EU institutions – the European Commission, European Parliament or Court of Justice of the EU – are parties to the Decision, so they are not bound by it as a matter of international law.

At times the Decision does refer to EU institutions. For example, Point 5 of section C says that 'the Union institutions will fully respect the national security responsibility of the Member States'. But this is probably an interpretation of the EU Treaties rather than a new obligation – Article 4(2) TEU states:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Some provisions of the Decision also seek to impose obligations on the EU member states when they act within the Council. The UK Government and the Council Legal Service consider that this is 'a binding obligation on the member states to act in a certain way'.[21]

Court of Justice?

Michael Gove, the Justice Secretary, has argued that 'the European Court of Justice is not bound by this agreement until treaties are changed'.[22]

In rebuttal, Jeremey Wright, the Attorney General, set out his opinion and that of government lawyers. In their view, the Court of Justice will need to 'take it into account' and there would be 'no real difference here between what the Court of Justice has to do in relation to treaties and what it has to do in relation to this agreement'.[23]

The Court of Justice is not bound by the Treaty under international law, because it is not a party to the Decision. Nor is it specifically given jurisdiction for dealing with disputes under the Decision (which it has been under other international agreements related to EU matters, including the 2012 intergovernmental Treaty Establishing the European Stability Mechanism):

> Section E of the Decision refers to bringing a dispute between Member States about the application of the Decision before the European Council. But unlike the fiscal compact Treaty, there is no provision on bringing a dispute before the CJEU, which could then impose fines. So despite the binding nature of the renegotiation

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21 Cathy Adams, Legal Director, FCO, oral evidence to the EU Scrutiny Committee, 10 February 2016, Q24

22 'EU reforms 'not legally binding' - Michael Gove', *BBC news online*, 24 February 2016

23 Transcript of interview with the Attorney General Jeremy Wright QC MP, 24 February 2016

> Decision, there is no clear mechanism for making it stick. This brings us back to the issue of trust…[24]

But – at least to the extent which the Decision interprets or 'clarifies' the EU Treaties – the Court of Justice is bound under EU law to 'take it into consideration'. This is set out in its 2010 judgment in the Rottmann case,[25] which related to the Edinburgh Decision. It also reflects Article 31 of the Vienna Convention (see above).

However, this does not necessarily mean that the Court of Justice will actually enforce the Decision, if it considered the Decision inapplicable to the case before it or contrary to the EU Treaties. In the Rottmann case, it is not at all clear the extent to which the Court of Justice gave effect to the Edinburgh Decision: its judgment applied EU law to an area which the Edinburgh Decision said was to be settled solely with reference to Member States' national law (nationality decisions).[26]

The UK courts have criticised the Rottmann case for lack of clarity, as well as for qualifying EU Member States' exclusive competence on national citizenship by an obligation to 'have due regard' to EU law.[27]

The Court of Justice of the EU, as the ultimate interpreter of the EU Treaties,[28] could rule on whether the Decision is a true interpretation of them. But because the Decision is not itself EU law, the basis on which a case could be brought are limited. Some possibilities are:

- A dispute between Member States 'which relates to the subject matter of the Treaties', if the parties make a 'special agreement' to give the Court of Justice jurisdiction.[29] The Decision meets the first of these requirements.[30] And although as noted above there is no 'special agreement' on jurisdiction in the Decision itself, the parties to a dispute could reach one in the future.
- A preliminary ruling requested by a domestic court on the interpretation of the EU Treaties in an area covered by the Decision.[31]
- An action alleging that an EU institution has failed to act, in infringement of the EU Treaties, in an area covered by the Decision.[32]

If the Court of Justice decided that there was an incompatible provision, there could be a serious legal problem. Under EU law the EU Treaties would presumably continue to take precedence because the Decision cannot amend them as it does not follow the amendment provisions of

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24 Steve Peers, 'The final UK/EU renegotiation deal: legal status and legal effect', *EU law analysis blog*, 21 February 2016

25 *Rottmann v Freistaat Bayern*, Case C-135/08, Judgment of the Court of Justice of 2 March 2010, para 40.

26 *Rottmann v Freistaat Bayern*, Case C-135/08, Judgment of the Court of Justice of 2 March 2010. See also Note by European Scrutiny Committee Legal Adviser - outcome of the renegotiation, 22 February 2016, fn2

27 See *R (G1) v Secretary of State* [2012] EWCA Civ 867 (4 July 2012) and *Pham v Secretary of State for the Home Department* [2015] UKSC 19 (25 March 2015)

28 Article 344 TFEU

29 Article 273 TFEU. See Sir Alan Dashwood QC, 'A "legally binding and irreversible" agreement on the reform of the EU', Henderson Chambers, 20 February 2016.

30 See Sir Alan Dashwood QC, 'A "legally binding and irreversible" agreement on the reform of the EU', Henderson Chambers, 20 February 2016

31 Article 267 TFEU

32 Article 265 TFEU

Article 48 TEU. The Decision, however, would still be in force, as the Court of Justice cannot nullify it. The Court of Justice would therefore have to decide between Article 48 TEU and the Decision.[33]

In practice, the Court of Justice may well look for an interpretation that is compatible with both the Decision and the EU Treaties:

> So, while some legal experts acknowledge a legal challenge is theoretically possible, the ECJ would give substantial weight to the fact all 28 member states had agreed both the deal and that it was compatible with the existing treaties.[34]

Of course, if elements of the Decision were subsequently incorporated into the EU Treaties or EU secondary legislation, the Court of Justice would be able to enforce them.

Domestic courts?

The Decision as it stands would not automatically bind the UK courts directly. So if was raised in a case, it could only have an indirect effect (for example to help interpret legislation).[35]

Some elements of the Decision would need domestic legislation. This legislation would of course bind the UK courts. But the UK courts are also bound by the EU Treaties, which are incorporated into UK law by the *European Communities Act 1972*, and are interpreted as having primacy over domestic law – even over legislation passed after the EU Treaties. In the event of a conflict, the UK courts must therefore apply the EU Treaties and their interpretation by the Court of Justice (unless the Act expressly and unequivocally derogated from EU obligations).[36]

The situation would be complicated if the UK decided to designate the Decision as an EU Treaty. Any treaty or international agreement entered into by the UK which is 'ancillary to' the EU Treaties can be designated as an EU Treaty by Order in Council under section 1(3) of the *European Communities Act 1972*. Designation means that the 1972 Act applies to an agreement as if it were one of the EU Treaties. It enables UK courts to recognise any direct effect arising from provisions of the agreement and gives a Minister the power to adopt UK subordinate legislation to implement the agreement in the UK. If the UK courts then found a conflict with the EU Treaties, this could be very challenging to resolve.

There is a separate question of whether the UK courts could decide a challenge against the Government over making the Decision. As with all international treaties and agreements, the UK Government made this Decision in the exercise of its prerogative powers. As Lord Kerr noted in

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33 Pavlos Eleftheriadis expands on this scenario in his article, 'The Proposed New Legal Settlement of the UK with the EU', UK Constitutional Law Blog, 13 February 2016, pp7-8

34 Clive Coleman, legal correspondent, 'Is Cameron's EU deal legally binding?', *BBC news online*, 24 February 2016

35 Lord Bingham of Cornhill, in his maiden speech in the House of Lords, set out this and five further ways in which treaties can have indirect effect in the UK: HL Deb 3 July 1996 c1465 ff.

36 See for example Pavlos Eleftheriadis, 'The Proposed New Legal Settlement of the UK with the EU', UK Constitutional Law Blog, 13 February 2016, pp8-9

2012, although the 1984 GCHQ case[37] opened up the possibility of judicial review of prerogative powers, 'the conduct of foreign affairs, including the making of treaties, is still considered to be beyond the reach of judicial review'.[38] Nevertheless, the High Court has envisaged the possibility of judicial review of at least the procedure to be followed when ratifying a treaty. In the 2008 case of Wheeler[39] Lord Justice Richards said that 'the limits of reviewability should be determined on a case by case basis':

> One issue [on which do we think it necessary to reach any decision] is the extent to which a decision to ratify a treaty is amenable to judicial review at all. That such a decision is not altogether outside the scope of judicial review is illustrated by the fact that s.12 of the European Parliamentary Elections Act 2002 makes statutory approval a condition precedent to the ratification of any treaty which provides for an increase in the powers of the European Parliament: Mr Sumption realistically conceded that a decision to ratify without such approval would be amenable to review. It may also be noted that the challenge in this case relates (at least in its avowed target) to the procedure followed in reaching the decision to ratify rather than to any potentially sensitive issue of policy involved in the decision itself. Nevertheless it seems to us that the limits of reviewability should be determined on a case by case basis if and when the need arises.[40]

Other EU Member States could potentially see domestic challenges as to whether the Decision (or the making of it) conflict with the EU Treaties or their national laws or constitutions. In some, including France, Germany and the Netherlands, some international treaties can automatically become part of domestic law without domestic legislation, and can even override any inconsistent domestic legislation.

2.5 From when would it be binding?

The Decision was 'agreed' on 19 February 2016, but provides that it 'shall take effect' on the date the UK informs the Council that it has decided to remain in the EU. Does this mean that the Decision is in force now or not yet?

The UK appears to consider that it is already 'in force', at least for the purposes of registration with the UN (see above). According to article 1(2) of the UN regulations on registration of treaties, registration cannot take place until the treaty or international agreement has come into force between two or more of the parties thereto, and, under article 5, registration requires a statement setting forth the date on which it came into force and the method by which it did so. The UK registered the

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37 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

38 *R (SG & Ors) v Secretary of State for Work and Pensions* [2015] UKSC 16, at para 237

39 *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin). This was the case brought by the business tycoon, Stuart Wheeler, against the Prime Minister and the Foreign Secretary, in which he sought a judicial review of the Government's refusal to hold a referendum on ratification of the Lisbon Treaty.

40 *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), per Richards LJ at para 55. This was the case brought by the business tycoon, Stuart Wheeler, against the Prime Minister and the Foreign Secretary, in which he sought a judicial review of the Government's refusal to hold a referendum on ratification of the Lisbon Treaty.

decision with the UN on 24 February 2016, with the date of entry into force noted as 19 February 2016 – the date on which it was agreed, rather than the date on which it would 'take effect'.

By way of comparison, the Brussels Decision was registered with the UN 10 months after it 'took effect' under Section D; and the date of entry into force was noted as the date when it took effect (not the date when it was agreed).

Under the Vienna Convention, some provisions of a treaty apply from the date it is agreed. Article 24 includes a description of the effects of adopting the text of a treaty:

> 4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

And Article 18 says that 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: … (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

2.6 Is it irreversible?

Neither the Decision nor the Conclusions claim that the Decision is irreversible.

The Decision itself has no specific provision for amendment or repeal, although the European Council Conclusions to which it is annexed state that 'this Decision … may be amended or repealed only by common accord of the Heads of State or Government of the Member States of the European Union'.

The general rule for treaties under Article 39 of the Vienna Convention is that they can be amended by 'agreement' between all the parties. This agreement does not itself have to be a treaty. There is also a residual provision in the Vienna Convention for some of the parties to a treaty to make an agreement modifying the treaty only as between themselves, if certain conditions are met (Article 41). The requirements of Article 48 TEU (on amending the EU Treaties) would clearly not apply to amending the Decision as it is not an EU Treaty.

Sir Alan Dashwood QC considers that the reform package is 'irreversible in practice',[41] and the Attorney General says that it is irreversible because it will require all 28 nation states to agree, and 'if we don't agree to change it, it doesn't change'.[42] The Foreign Secretary, Philip Hammond, told the European Scrutiny Committee that the Decision will be irreversible even without Treaty changes:

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41 Sir Alan Dashwood, 'Michael Gove is wrong: Cameron's EU agreement will be legally binding', *Guardian*, 25 February 2016

42 Transcript of interview with the Attorney General Jeremy Wright QC MP, 24 February 2016

> What is irreversible is the international law decision, which will be unanimously made by the 28, registered at the UN as an international legal decision with treaty status and could only be reversed by an equally unanimous decision, i.e. a decision that the UK has concurred in. I should be absolutely clear, lest we were to mislead any potential voters, that nothing in this package depends upon treaty change. It is very clear that it is self-standing. The international law decision is what gives the certainty and the irreversibility. What is being explored is options for incorporating these measures in the primary legislation of the European Union through treaty change at a point in the future. We have always said that that would be desirable, it would be preferable, but it is not essential in order to deliver the irreversibility. That is delivered through the international law decision.[43]

However, the Decision does not – cannot – give a legal guarantee that it will produce all the results envisaged.

For example, where it envisages changes to the EU Treaties, it expressly recognises that these are subject to Member States' constitutional requirements, such as approval or ratification and possibly in some cases a referendum.

Also the changes to EU secondary legislation envisaged by the Decision would be subject to the agreement of the European Parliament, which is not directly bound by the Decision. The Government is nevertheless confident that the leaders of the factions in the European Parliament agree to the Settlement.[44] An analysis from the European Parliamentary Research Service looks at the role of the European Parliament in this Decision.[45]

Furthermore, the uncertainties around potential inconsistencies between the Decision and the EU Treaties could in theory result in elements of the Decision effectively being reversed by the courts.

2.7 Opportunities for parliamentary scrutiny

The renegotiation Decision itself does not need national parliamentary approval, at least as a matter of EU law or international law. Whether some Member States' domestic law might require it is a separate question.[46]

In the UK, the Decision was deposited in Parliament by the Government, triggering the parliamentary EU scrutiny process. It will also be published in the FCO's Treaty Series.[47]

But it appears that the Decision will not be subject to the parliamentary approval requirements of the *Constitutional Reform and Governance*

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43 Philip Hammond, Foreign Secretary, oral evidence to the EU Scrutiny Committee, 10 February 2016, Q5

44 Philip Hammond, Foreign Secretary, oral evidence to the EU Scrutiny Committee, 10 February 2016, Q22

45 Eva-Maria Poptcheva and David Eatock, 'The UK's "new settlement" in the European Union: renegotiation and referendum', European Parliamentary Research Service, February 2016, p22

46 Steve Peers, 'The final UK/EU renegotiation deal: legal status and legal effect', *EU law analysis blog*, 21 February 2016

47 PQ 28381, answered 1 March 2016

Act 2011 (CRAGA). Even if the Decision meets CRAGA's definition of a treaty (which the Government considers it does),[48] these provisions apply only to treaties that are subject to ratification or any of the other similar processes listed in section 25. So a treaty that is not subject to ratification or similar does not have to be laid before Parliament for 21 sitting days, and the House of Common's power to effectively 'block' ratification by repeatedly objecting to it does not apply. The Government considers that the treaty provisions of CRAGA do not apply to the Decision, so the House of Commons could not 'block' it.[49]

Domestic legislation would however be required to implement several of the Settlement's provisions in the UK.

Also, if the Government wanted to designate the Decision as an EU Treaty under the *European Communities Act 1972*, then Parliament would have a role in relation to the designating Order.

48 PQ 28490, answered 1 March 2016
49 *ibid*

3. The Settlement

3.1 Preamble of the Decision

Summary

The Preamble refers to the Prime Minister's letter of 10 November 2015. It notes the existing UK opt-outs, exemptions, qualifications and opt-in arrangements concerning the Euro, Schengen, border controls, police and judicial cooperation in criminal matters, and the Charter of Fundamental Rights.

It also notes the European Council Conclusions of June 2014, which acknowledged that in the context of the UK's proposed reforms:

> … the European Council noted that the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further.

Comment

The preamble of an international agreement sets out the context in which the agreement was negotiated and concluded and in which the agreement's obligations must be interpreted. Under general rules of treaty interpretation, the preamble is not considered to be part of the legally binding or "operative" text of the agreement. But while some maintain that the preamble has no binding force, others maintain that preamble provisions can fill in gaps elsewhere in a treaty. It is generally recognised that the preamble cannot take precedence over an operative treaty provision with which it would be incompatible.

A preamble often recalls and refers to any related international agreements that may have provided the mandate for the negotiations or that the negotiators believe are relevant to the agreement. It may also include references to principles or concepts relevant to the international agreement, but which are not included as binding obligations in the operative text.

In noting the UK's "specific situation" within the EU and confirming the UK's existing exemptions and derogations from EU policies, the Preamble implies that the UK has already obtained a status which is different from other Member States.

The Preamble outlines the background to the new Settlement, such as David Cameron's letter to Donald Tusk of 10 November 2015, in which he set out his detailed proposals for reform, but it also sets the context of a Union wanting to pursue certain objectives, such as Economic and Monetary Union (EMU), a banking union for Eurozone Members and maintaining the principle of free movement.

The Preamble refers to the intention of the Decision to clarify "certain questions of particular importance to the Member States so that such clarification will have to be taken into consideration as being an instrument for the interpretation of the Treaties". This draws on the

Rottmann case in 2010,[50] in which the EU Court of Justice stated that the Edinburgh Decision of the Heads of State or Government was intended to clarify a specific issue (see above).

3.2 Economic Governance

Prime Minister's proposed reforms

In his November 2015 letter to Donald Tusk, David Cameron asked that the final agreement should include recognition that:

- The EU has more than one currency.
- There should be no discrimination and no disadvantage for any business on the basis of the currency of their country.
- The integrity of the Single Market must be protected.
- Any changes the Eurozone decides to make, such as the creation of a banking union, must be voluntary for non-Euro countries, never compulsory.
- Taxpayers in non-Euro countries should never be financially liable for operations to support the Eurozone as a currency.
- Just as financial stability and supervision has become a key area of competence for Eurozone institutions like the ECB, so financial stability and supervision is a key area of competence for national institutions like the Bank of England for non-Euro members.
- And any issues that affect all Member States must be discussed and decided by all Member States.[51]

Summary of Settlement provisions

Section A of the Decision, the Statement and draft Council decision

There should be no discrimination against people or businesses based in non-eurozone countries (such as the UK) because they are outside the eurozone; any difference in treatment must be based on "objective reasons".

Non-eurozone countries will not impede the implementation of new measures, such as further integration, related to the eurozone.

Non-eurozone countries will not face financial losses due to eurozone 'bail-outs'. Non-eurozone States will be reimbursed if the EU budget is used to support the Eurozone in crisis situations.

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50 Case C-135/08, Janko Rottmann v Freistaat Bayern, 2 March 2010, para. 40.

51 10 Downing Street, "EU reform: PM's letter to President of the European Council Donald Tusk", 10 November 2015

Discussion of matters that will impact all EU Member States must involve all EU Member States, including non-eurozone members such as the UK (even if they do not have a right to vote at those meetings). An example is some meetings of eurozone finance ministers (the Eurogroup).

The Bank of England and other UK authorities remain responsible for supervising the financial stability of the UK.

These principles will be incorporated into the EU Treaties when they are next revised.

David Cameron:

"Our new settlement safeguards the interests of countries like the UK, which are inside the free trade Single Market but outside the euro. Alongside recognition that the UK should not be forced to participate in measures that are for the Eurozone, this agreement secures the UK's special status with regard to economic issues with important protections for the UK in the EU's governance".

"This deal protects the UK's position at the heart of the Single Market but outside the Eurozone. It lays the basis for a lasting and fair relationship between the Eurozone and Member States that do not use the euro".

The best of both worlds: the United Kingdom's special status in a reformed European Union, February 2016.

Comment

The Government argues that while it supports post-crisis reforms and possible further integration of the eurozone, the interests of those not in the single currency area need to be protected against discrimination.

The Government states that this part of the deal "will make sure the UK is not penalised, excluded or discriminated by EU rules because we have chosen to keep the pound".52 As such, it believes that the renegotiation addresses and protects the interests of eurozone and non-eurozone Member States, by including explicit mention in the deal that "not all Member States have the euro as its currency" and that discrimination based on currency is prohibited, thereby protecting the "integrity of the Single Market".

The provision on non-eurozone countries not facing financial loss due to 'bail-outs' reiterates a previous agreement in summer 2015 that is already included in an EU regulation (following a short-term emergency loan backed by the EU budget given to Greece) that non-eurozone countries will not be financially liable for any future bailout of a eurozone country.53

In fact, the principle here expressly confirms what the Treaties already imply, e.g. in Article 4 Treaty on European Union on the equality of Member States before the Treaties.

Box 1: Issues involved: eurozone integration and impact on non-eurozone countries

The eurozone is comprised of 19 EU Member States. Of the nine non-eurozone Member States, only the UK and Denmark have explicit opt-outs for ever joining the euro (although in practice non-euro countries are not forced to join). The eurozone is governed by EU treaties and is not a distinct legal entity.[1]

The various eurozone debt crises since 2010 requiring bailouts of the governments of Greece (three times), Ireland, Portugal and Spain's banks have led to reforms designed to strengthen the eurozone and avoid future crises. This has involved the implementation of greater oversight of eurozone

52 HM Government, "The best of both worlds: the United Kingdom's special status in a reformed European Union", 22 February 2016

53 OJ L 210, 7 August 2015; Council of the EU press release, "EFSM revised to shield non-euro area countries from risk", 4 August 2015; for background see Commons Library briefing paper, *Greek debt crisis: background and developments in 2015*, Box 2 on page 24

members' budgets, stricter enforcement mechanisms for 'excessive' deficits and proposals for deeper integration. The UK Government supports these reforms so that long-term stability of the eurozone is enhanced.[1]

Given that deeper integration of the eurozone occurs within the EU's legislative framework, spillovers from these reforms could affect the non-eurozone countries and the functioning of the EU's Single Market. An example of this would be moves to integrate the banking sector in the eurozone.

In addition, the eurozone countries comprise a qualified majority that would allow them to vote through changes to EU laws if they acted as a single voting bloc, and possibly impact the functioning of the Single Market.[1]

These issues have led to the desire from the UK Government to implement safeguards. However, eurozone countries are not inclined to allow non-eurozone countries such as the UK a veto on reform measures intended to improve the functioning of the eurozone.[54]

The Leader of the Opposition, Jeremy Corbyn, welcomed the new safeguards for non-eurozone countries but criticised efforts to oppose EU-wide regulation of the financial sector:

> …we see the influence of Tory party funders on the Prime Minister's special status not for Britain but for City of London interests. It is the same incentive that caused his friend the Chancellor of the Exchequer to rush to Europe with an army of lawyers to oppose any regulation of the grotesque level of bankers' bonuses. It is necessary to protect the rights of non-eurozone states, but not to undermine EU-wide efforts to regulate the financial sector, including the boardroom pocket stuffing in the City of London.[55]

Some view this section of the reform package as the most important, as it addresses – though not necessarily resolves – a friction in the EU between eurozone and non-eurozone Member States. For example, the verdict of the *Financial Times'* European diplomatic editor is that "This is the most consequential part of the agreement, but also the hardest to interpret",[56] while *The Economist* summarised this part of the deal as follows:

> The most important change Mr Cameron wanted was a guarantee that the bigger euro-zone block could not gang up on non-euro countries. The 19-strong euro area, with votes weighted according to the size of countries, now has the power to legislate for the entire EU. He has secured agreement for enhanced observer status for non-euro countries in euro-zone meetings and an understanding that a non-euro country can appeal to an EU summit if it objects to decisions taken at such meetings.[57]

Open Europe, a pro-reform EU think tank, thinks the reforms to economic governance will allow the UK to better protect itself in future

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54 European Parliamentary Research Service, "The UK's 'new settlement' in the European Union: Renegotiation and referendum", 25 February 2016

55 HC Deb 22 February 2016, c26

56 Alex Barker, "Britain's EU deal: the results and the verdict", *Financial Times*, 20 February 2016

57 "Britain's EU reforms: A change of status", *The Economist*, 27 February 2016, p19

from eurozone-led policies, but notes that this part of the deal is subject to European Court of Justice jurisdiction:

> ***Verdict:*** Given the UK and non-Eurozone states were never going to get a veto on Eurozone proposals the mechanism is probably the best that could have been hoped for. It provides an additional hurdle for Eurozone states to overcome and adds to the political cost of trying to ride roughshod over the non-Eurozone states. The principles are quite wide ranging and if the UK can actively enforce them via the courts, then further account may well be taken of them when drawing up and implementing legislation. The fact that the UK can unilaterally trigger this delaying mechanism is a useful tool – unilateral recourse exists rarely in an institution defined by compromise, especially when it comes to the single market.[58]

Vote Leave, a campaign group advocating EU withdrawal, emphasises that the agreement does not allow the UK to veto "damaging new EU law", and argues that the new mechanism that allows a non-euro Member State to raise objections to an EU summit will be ineffective [emphasis is original text]:

> The agreement contains a new talking shop which will not allow the UK to veto damaging new EU law.
>
> - The ability of the UK to refer proposed EU laws to the European Council is stated to be '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 mechanism is expressed to have effect 'without prejudicing obligatory time limits laid down by Union law'.
> - **This means that the UK will not be able to block damaging new EU laws.** [59]

In an article in the *Financial Times*, UKIP's Douglas Carswell MP argues that the UK has made "further concessions" by agreeing not to impede future eurozone integration:

> Far from reversing the flow of power, buried away in the text of the deal it is clear that Britain has made further concessions. Through this deal, Britain has surrendered what leverage it might have had in future by agreeing "not to impede euro area" reforms. Good bye a big bargaining chip.
>
> As for safeguarding the City, this deal in fact makes it clear that we agree to submit to a single rule book for all credit and financial institutions within the single market.[60]

Other prominent figures in favour of leaving the EU have made similar points (see box 2 below for background on this issue). For instance, Iain Duncan Smith has said that the Government had given away the UK's

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58 Open Europe, "What did the UK achieve in its EU renegotiation", Stephen Booth and Raoul Ruparel, 21 February 2016

59 Vote Leave, "Vote Leave briefing on the renegotiation", February 2016

60 Douglas Carswell, "There is no new "special status" for Britain in the EU", *Financial Times*, 20 February 2016

veto of further eurozone integration,[61] while Liam Fox argues that this will eventually mean:

> …Britain will be subject to laws, regulations and a budget set by the Eurozone countries as they seek to convert the Eurozone into a political union.[62]

Legal analysis for the European Scrutiny Committee makes the point that the language in the final document is complex:

> the wording in this section [of the agreement] is dense and complex, reflecting carefully nuanced and balanced political compromise between the Euro-ins and the Euro-outs [63]

Box 2: The veto and eurozone integration: existing obligations under the EU Treaties

The UK does not currently have a right of veto over EMU decisions. It has an opt-out from Economic and Monetary Policy and provisions specific to Eurozone States (Articles 136-138).

The UK – and any Member State - has a veto in connection with proposals for Treaty change. Treaty change requires agreement by unanimity under Article 48 of the Treaty on European Union (TEU). The veto, or threat of one, can be a powerful tool in Treaty amendment negotiations. It can also have unintended consequences. In 2011 the UK vetoed a proposed amendment the EU Treaties to enshrine stricter budgetary policies and closer economic policy co-ordination. As a result, the Member States, with the exception of the UK and the Czech Republic (and later Croatia), signed an intergovernmental (not EU) treaty to this effect called the Treaty on Stability, Coordination and Governance (TSCG).

It could also be argued that although the non-eurozone States are required not to obstruct further eurozone integration, the renegotiation doesn't add to current Article 4(3) TEU, which states (emphasis added):

> Pursuant to the **principle of sincere cooperation**, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and **refrain from any measure which could jeopardise the attainment of the Union's objectives**.

In other words, the UK and other non-eurozone States are already obliged not to jeopardise EMU, which is an EU aim set out in Article 3(4) TEU.

Meanwhile, Wolfgang Münchau writing in the *Financial Times* asserts that "This agreement adds to economic policy fragmentation [of the EU]."[64]

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61 "Cam's in her hans: Germany SABOTAGED David Cameron's EU renegotiation and he let them, IDS sensationally claims", *The Sun*, 10 May 2016

62 Liam Fox, "Fox on Friday: Without our veto we are powerless to halt the European superstate", Conservative Woman, 20 May 2016

63 Note by European Scrutiny Committee Legal Adviser - outcome of the renegotiation, 22 February 2016

64 Wolfgang Münchau, "Concessions to Britain will create a two-tier Europe", *Financial Times*, 21 February 2016

Banking Union

The Settlement is supplemented by a **Statement concerning the Banking Union**, which includes a draft Council decision on "specific provisions relating to the effective management of the banking union and of the consequences of further integration of the euro area".

The draft Council decision sets out a procedure by which non-Banking Union Member States can object to a decision being taken by Qualified Majority Voting (QMV), which would mean it being out-voted. If a Member State believes the principles of this part of the agreement on the eurozone and Banking Union are not being respected, a new mechanism will allow them to raise their concerns at the Council.

> The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the member or members of the Council …

The matter may also be referred to the European Council for discussion, but this does not mean that a single Member State has a veto.

Comment

The Government has been concerned about 'caucusing' by Eurozone States, whereby the Eurogroup, of which the UK is not a member, might discuss the single market and make decisions which are forced through against the will of a minority of non-eurozone states which disagree.

Professor Paul Craig questioned the need for the enhanced provisions, given the lack of evidence of caucusing by Eurozone States:

> The EU court can deal with this kind of discrimination. So far it hasn't had to, except for in one arguable case about banking.
>
> The worry about 'caucusing' presumes that euro-states will have common goals that are different from non-euro states. That assumption is questionable.[65]

The 'safeguard mechanism' in Article 1(2) of the draft decision is similar to the existing Ioannina Compromise (see Council Decision 2009/857/EC), in which, in decisions taken by QMV, the minority can insist on the Council doing all in its power to reach a satisfactory solution which addresses their concerns.

Alex Barker of the *Financial Times* thought the emergency brake was "a political threat, rather than a legal shield".[66]

The draft Council decision on eurozone governance can be adopted by the Council without a proposal from the Commission or EP consent, so it is highly likely to be adopted. Also, as Steve Peers points out, "Since the draft Decision would not amend the rules of the Treaty on the

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65 Full Fact, 22 February 2016.
66 FT, 20 February 2016.

adoption of legislation, but only provide for a delayed vote, it seems very unlikely that the CJEU would annul it".[67]

3.3 Competitiveness

Prime Minister's demands

- A target to cut total burden on business
- To fulfil commitment to free flow of capital, goods and services
- A clear long-term commitment to boost the competitiveness and productivity of the EU and to drive growth and jobs for all.

Summary of Settlement provisions

Section B, the European Council Declaration on competitiveness and a Commission Declaration on subsidiarity[68] and burden reduction.

The Decision confirms the aims of the single market and free movement of people, goods, services and capital. The EU "must enhance competitiveness" and Member States must make all efforts to "fully implement and strengthen the internal market".

The EU institutions and Member States must take "concrete steps towards better regulation" and to lower the regulatory burden on businesses, especially small- and medium-sized companies. Specific targets for burden reduction in key sectors should be established "where feasible".

The Commission will review the EU acquis for compliance with subsidiarity and proportionality. This will include consultation of national parliaments.

A new burden review mechanism is to be introduced by the European Commission (building on the existing Regulatory Fitness Programme). This involves an annual review of EU legislation and identifying unnecessary laws that could be revised or repealed in order to lower the regulatory burden on businesses. The Commission will monitor progress against the targets set and will report to the European Council every year.

The Commission makes a specific undertaking by the end of 2016 to propose a programme of work to review the EU's existing body of law.

There is also a commitment for the EU to "pursue an active and ambitious trade policy". The Single Market will be extended to remove remaining barriers to trade within the EU, particularly in key areas such as services, energy and digital.

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67 EU Law Analysis, 21 February 2016, The final UK/EU renegotiation deal: legal status and legal effect.

68 Subsidiarity is the principle which assumes that action is carried out at national level unless there are good reasons for it to be done at EU level.

Comment

Competitiveness is one of the less controversial elements of the Settlement, but there are questions as to how much can be achieved.

Commission President Jean-Claude Juncker made strengthening EU competitiveness a priority, introducing a Better Regulation Package and committing to introduce an Annual Burden Survey, assessing the costs and benefits of EU regulation and if possible quantifying the regulatory burden reduction or savings potential of proposals or legislative acts, to support its REFIT programme.

The Decision largely confirms existing pledges and commitments. Damian Green asked the Foreign Secretary what difference in practical terms the Decision would make. Philip Hammond acknowledged that the Juncker Commission was already trying to tackle failings in competitiveness, saying the "challenge … is to move beyond a relatively benign situation".[69]

Most commentary on this section of the renegotiation notes that while the declarations of intent to boost competitiveness are a positive development, the actual implementation will be more difficult. For instance, Open Europe summarised this view as follows:

> Positive changes could emerge if the Commission comes forward with concrete proposals on reducing the regulatory burden, better enforcing subsidiarity and improving the single market. The challenge will be implementation, but only time will tell if this actually happens. [70]

Dr Robin Niblett, Director of the Chatham House think tank, commented that there is nothing in the agreement that guarantees the EU will become more competitive:

> Will the EU be more competitive? There is nothing in the 19 February Decision of the Heads of State or Government or the related Declaration in Annex III which guarantees it. The text is full of exhortations to 'take concrete steps towards better regulation' and to lower 'administrative burdens and compliance costs', but the battle to turn these exhortations into reality had already been joined by the Juncker Commission 18 months ago. Despite a promising start, the results will not be clear for the next year or two, especially in terms of opening up the EU's markets for digital and other services. And the EU's trade deals, which are briefly listed as part of the reform package, will move forward at their own, mostly glacial pace, as they do for all countries.[71]

The Government, though, believes it has secured a firm commitment on economic reform:

> As a result of years of UK pressure, working closely with allies, the EU now has an ambitious agenda of economic reform. We have secured a firm commitment to drive that agenda harder over the coming years to help unleash the full potential of the Single Market and create growth and jobs. […]

David Cameron:
"We have secured a firm commitment to drive that agenda harder over the coming years to help unleash the full potential of the Single Market and create growth and jobs. The UK has also long argued for reduced bureaucracy and more help for our smallest businesses. Working with allies in the EU, we have helped steer the EU decisively towards an agenda focused on job creation, growth and better regulation".

The best of both worlds …
February 2016.

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69 Oral evidence to ESC, 10 February 2016.
70 Open Europe, "What did the UK achieve in its EU renegotiation", Stephen Booth and Raoul Ruparel, 21 February 2016
71 Dr Robin Niblett, Director, Chatham House, "Cameron's Incomplete Negotiation Complicates EU Vote", 23 February 2016

> Working with allies in the EU, we have helped steer the EU decisively towards an agenda focused on job creation, growth and better regulation. [72]

The Prime Minister expanded on this in his Statement to the House of Commons on the deal:

> …on competitiveness one of the biggest frustrations for British business is the red tape and bureaucracy, so we agreed there will now be targets to cut the total burden of EU regulation on business. This builds on the progress we have already made, with the Commission already cutting the number of new initiatives by 80%. It means that the cost of EU red tape will be going down, not up. [73]

Vote Leave, a campaign group advocating EU withdrawal, does not believe the pledges to enhance competitiveness can be taken seriously given previous EU competitiveness programmes failed to yield the expected results:

> The EU has made many similar promises about competitiveness before which have not materialised. Similar pledges today cannot be taken seriously.
>
> - In 2000, the European Council at Lisbon announced 'a clear strategic goal and agree[d] a challenging programme for building knowledge infrastructures, enhancing innovation and economic reform, and modernising social welfare and education systems…If the measures set out below are implemented against a sound macro-economic background, an average economic growth rate of around 3% should be a realistic prospect for the coming years' (Lisbon European Council, 23-24 March 2000)
> - The Lisbon Agenda is widely acknowledges to have been a failure, with economic growth in the Eurozone averaging 0.7% between 2000 and 2014 – less than a third of what was predicted by the European Council (Eurostat, 2 June 2015).[74]

In an article in the *Financial Times*, UKIP's Douglas Carswell MP makes a similar point:

> Once again, an official communique has been issued late at night in Brussels with ministers promising to try jolly hard to make the EU more competitive. Once again, there is nothing of substance to make such wishful thinking happen.
>
> Sixteen years ago, European leaders met to discuss what could be done to make the EU more competitive. The result was the Lisbon agenda, which claimed that it would make Europe the "most dynamic part of the global economy by 2010". The Lisbon agenda comprehensively failed. The idea that European leaders issuing yet another declaration is going to fix this problem is absurd. [75]

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72 HM Government, "The best of both worlds: the United Kingdom's special status in a reformed European Union", 22 February 2016.
73 HC Deb 22 February 2016, c22
74 Vote Leave, "Vote Leave briefing on the renegotiation", February 2016
75 Douglas Carswell, "There is no new "special status" for Britain in the EU", *Financial Times*, 20 February 2016

3.4 Sovereignty

Prime Minister's demands

- End Britain's obligation to work towards ever closer union "in a formal, legally-binding and irreversible way".
- Enhance the role of national parliaments in the EU, with a new arrangement where groups of national parliaments, acting together, can stop unwanted legislative proposals.
- Full implementation of EU's commitments to subsidiarity.
- Confirmation that EU will fully respect purpose of Justice and Home Affairs (JHA) Protocols in future proposals dealing with JHA matters, "in particular to preserve the UK's ability to choose to participate" (UK opt-in arrangement).
- National Security must be the sole responsibility of Member States.

Summary of Settlement provisions

Section C and the Commission Declaration on subsidiarity
The UK has a "specific situation" in relation to the EU. It will not be committed to further political integration in the EU and the concept of "ever closer union" will not apply to the UK.

EU Member States do not have to aim for a "common destination".

National parliaments will have 12 weeks (instead of the current eight) in which to send a Reasoned Opinion to the Commission objecting to a legislative proposal on subsidiarity grounds.

There will be a 'red card' procedure: 55% of national parliaments (currently the parliaments of 16 Member States) will be able to combine to prevent further discussion in the Council of EU legislative proposals, where they believe power should lie with national legislatures in accordance with the principle of subsidiarity.

The UK Government and Parliament will continue to decide whether to participate in measures on policing, immigration and asylum policy (the references to Title V of Part Three TFEU, Protocols No 21 and No 22).

National security will remain the sole responsibility of the UK Government.

Comment

David Cameron said in his Bloomberg speech in January 2013 and on subsequent occasions and policy papers that national parliaments are the basis for democracy in the European Union.

He pledged to tackle this "democratic deficit" as part of his reform programme and his proposal for a blocking mechanism ("red card") was suggested in the November 2015 letter.

David Cameron:

"We have secured agreement that the Treaties will be changed in the future so that the UK is carved out of 'ever closer union' and established a mechanism for decision-making to return from Brussels to the UK and other nation states, where this is most appropriate. This is all consistent with the UK's longstanding approach to our relationship with the EU: that it should be based on the practical pursuit of our national interest".

The best of both worlds … February 2016.

"Ever closer union"

The Decision acknowledges that the UK's existing special arrangements with the EU mean that it is not committed to "ever closer union". Its wording goes from a general recognition that "ever closer union" can be interpreted as not binding the UK to further political integration, to a promise to clarify that it does not apply to the UK at all.

The Decision confirms the June 2014 European Council Conclusions which stated:

> … the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further.

Sir Alan Dashwood commented that "A more comprehensive response to the reassurance sought on this issue in the 10 November letter could scarcely be imagined".[76] On the other hand, as Professor Sionaidh Douglas-Scott points out: "Saying that it no longer applies to the UK doesn't change anything about how the EU works, or the powers it has".[77]

Alex Barker commented that removing the UK from the aim of "ever closer union" was a "big symbolic demand" for the Conservative Government, but added that this had "limited legal value".[78] The Foreign Secretary Philip Hammond confirmed to the European Scrutiny Committee on 10 February that it had "symbolic significance" but also that the EU Court of Justice had referred to "ever closer union" in its rulings.[79]

Some commentators think this is a turning point for the EU. Wolfgang Münchau noted that this was the first time the EU had agreed to a two-tier Europe. "This is not an opt-out, an exemption or a derogation. This is not a Europe of variable speeds or variable geometry — expressions that have been used in the past to denote different degrees of integration. This is a formal exemption from the goal of ever-closer union".[80]

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76 A "Legally binding and irreversible" agreement on the reform of the EU, Sir Alan Dashwood QC, Henderson Chambers, 20 February 2016.
77 Full Fact, 17 February 2016.
78 Financial Times, 20 February 2016.
79 For information on the phrase and its place in the EU Treaties, see "Ever Closer Union" in the EU Treaties and Court of Justice case law, 16 November 2015.
80 Financial Times, 21 February 2016.

Stefani Weiss and Steven Blockmans also believe it could signal a significant change in the EU's direction:

> The recognition of the UK's exceptionalism and the explicit break with the mantra of 'ever closer union' does herald a more pliable European Union. The fact that the EU institutions will in future have to consider a category of states that does not adhere to the references of ever closer union may lead to a change in their approach to the initiation, adoption, implementation, interpretation and enforcement of new legislation. After all, an overly integrationist approach may leave them vulnerable to challenges by the UK.[81]

But is the Government's concern about the phrase unwarranted? Is it not about further political integration after all, but a reference to subsidiarity (the context is "ever closer union among the peoples of Europe")? An earlier draft of the final agreement clarified that Treaty references to ever closer union "are not an equivalent to the objective of political integration, even though such an objective enjoys wide support in the Union".

The "red card"

The Prime Minister has said that national parliaments, as the 'guardians' of democracy, should have a greater say in EU decision-making and should be able to "stop unwanted legislative proposals".[82] To date, yellow and orange card procedures[83] have not been used to great effect for national parliaments.[84] The Dutch *Tweede Kamer* suggested a new 'green card' which national parliaments trialled in June 2015 with a proposal on food waste.[85]

But all 'cards' fall short of a national veto on EU proposals.[86] The new 'red card' system would provide a way for a group of Member State parliaments to block progress on a proposal, but it does not allow national parliaments to veto EU laws. The Council could still proceed if changes were made to address the concerns raised by the 'red card' submission.

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81 The EU deal to avoid Brexit: Take it or leave, Stefani Weiss and Steven Blockmans, CEPS Special Report No. 131. February 2016.

82 Letter to Donald Tusk, 10 November 2015.

83 For an explanation of the yellow and orange card procedures, see European Commission, The Subsidiarity Control Mechanism.

84 For comment, see e.g. Commons paper 6297, National Parliaments and EU law-making: how is the 'yellow card' system working? 12 April 2012; Ian Cooper, LSE blog, 23 April 2015, The story of the first 'yellow card' shows that national parliaments can act together to influence EU policy.

85 See Lord Boswell of Aynho, Towards a "Green Card", 28 January 2015; House of Lords European Union Committee 9th Report 2013–14, The Role of National Parliaments in the European Union, 24 March 2014; Tweede Kamer, Ahead in Europe On the role of the Dutch House of Representatives and national parliaments in the European Union Final report, Rapporteurship on 'Democratic legitimacy' Final version, 9 May 2014; Danish Folketing, Twenty-three recommendations - to strengthen the role of national parliaments, January 2014.

86 For an analysis of what a red card should comprise, see Open Europe, Showing the EU the red card: Why national parliaments need to be put back in control, Pawel Swidlicki, 7 December 2015.

Under the 'red card' system national parliaments could submit, within 12 weeks from transmission of a proposal, a reasoned opinion stating that an EU draft legislative act violates the principle of subsidiarity. If the reasoned opinions represent more than 55% of votes allocated to national parliaments (at least 31 of the 56 available votes: two votes for each bicameral national parliament) there would be a "comprehensive discussion" of them in the Council. If the EU draft legislative proposal is not changed in a way reflecting the concerns of national parliaments in their reasoned opinions, the Council would discontinue consideration of that draft.

Currently national parliaments have only eight weeks in which to submit a reasoned opinion to the Commission, EP and Council. The consequences of the 'red card' procedure are also more significant: it is activated within the Council, which negotiates and adopts legislation, rather than in the Commission, which proposes it. It "binds stopping of the legislative procedure with whether the requests of national parliaments are met".[87]

The 'red card' would not be available for any kind of objection: it is limited to subsidiarity objections. The threshold is higher than existing thresholds for yellow and orange cards, and is arguably so high that there is almost certain to be a blocking minority in the Council in any event.

Response to the new mechanism has been mixed. Professor Dashwood thought that once in force, arguably, "the adoption of a legislative measure in defiance of the red card procedure will constitute an infringement of an essential procedural requirement, and hence grounds for the annulment of the measure under Article 263 TFEU".[88] But this is debatable.

Professor Derek Wyatt QC commented:

> Critics could argue that the red card is unlikely in practice to produce a different outcome from the normal voting rules.
>
> Against that, it might be said that this new arrangement would give national parliamentary bodies like the House of Commons an unprecedented right of direct intervention in the European law making process.[89]

National security

The Decision confirms that national security "remains the sole responsibility of each Member State". This is not new: Article 4(2) TEU already provides that national security is the sole responsibility of Member States. But the Decision also recognises the benefits of collective action on issues affecting all Member States.

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87 EU Law Analysis, 3 February 2016, The draft renegotiation deal: A genuine red card? Tusk's proposal and national parliaments, Dr. Katarzyna Granat

88 A "Legally binding and irreversible" agreement on the reform of the EU, Sir Alan Dashwood QC, Henderson Chambers, 20 February 2016.

89 Full Fact, 17 February 2016.

3.5 Free movement and social benefits

Put briefly, as per the Treaty on the Functioning of the European Union and Directive 2004/38/EC (the 'free movement' Directive), EU citizens' rights to live and work in another Member State are as follows:[90]

All EU citizens have a right to move and right of residence for up to three months: An EU citizen has an "initial right to reside" in another Member State for up to three months, as long as they do not become an "unreasonable burden" on the social assistance system of the Member State. They must be admitted by another Member State if they produce a valid passport or national identity card, unless exclusion is justified on the grounds of public policy, public security or public health.

EU citizens have a right of residence for longer than three months, subject to conditions: Those wishing to stay for longer than three months must fit into one of the following categories in order to have an ongoing "right to reside":

- a worker or self-employed person[91]
- a job-seeker (a person who is seeking employment and has a genuine chance of being employed)
- a self-sufficient person
- a student
- a family member accompanying or joining an EU national who satisfies one of the above criteria.[92]

They continue to have a right of residence whilst they fall within one of the above categories. Member States can investigate in specific cases where there is a reasonable doubt as to whether an individual satisfies the conditions for having a right to reside, but cannot carry out such checks "systematically".

EU citizens can acquire a right of permanent residence after five years: A "right of permanent residence" is acquired after five continuous years with a right to reside in the host Member State (or sooner in certain specified circumstances).[93]

A host Member State can expel an EU citizen/family member on the grounds of public policy, public health or public security. They can also remove them from the country if:

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90 Treaty on the Functioning of the European Union and Directive 2004/38/EC (transposed into UK legislation by the *Immigration (European Economic Area) Regulations 2006*, SI 2006/1003, as amended). Swiss and European Economic Area (EEA) nationals (Iceland, Liechtenstein and Norway) enjoy similar rights, due to agreements with the EU.

91 In certain circumstances, a person who is no longer working can retain "worker" or "self-employed" status - for example, if temporarily unable to work due to illness or accident, or due to involuntary unemployment: Directive 2004/38/EC, Article 7(3)

92 A more limited range of relatives are eligible for a right of residence as the family member of a "student" than for the other categories: Directive 2004/38/EC, Article 2(2), Article 7(4)

93 Directive 2004/38/EC, Article 17

- they never had or stopped having a 'right to reside' under the regulations, or
- their removal is justified on the grounds of abuse of rights.

EU law does not require that Member States allow EU migrants unrestricted access to **social benefits**.[94] Broadly speaking, a person who moves from one Member State to another has access to benefits in the host country if they are economically active, or are able to support themselves. Working EU migrants enjoy full free movement rights and are entitled to in-work benefits on the same basis as nationals of the host country. Social security coordination regulations also enable working EU migrants to claim "family benefits" from the state in which they work for their dependent children resident in another Member State (although payments may be reduced if family benefits are already being paid by the state where the child resides).[95]

EU migrants who are looking for work, especially those who have never worked in the host Member State, have much more limited access to benefits. EU migrants not looking for work, or unable to work because of sickness or disability, may have no access to benefits. Starting from 2014, the UK Government introduced a series of measures further limiting access to benefits for non-working migrants.[96] Recent judgments by the Court of Justice of the European Union have also clarified the situations where Member States may refuse social assistance to non-active EU migrants, and to migrants only entitled to reside in the host state because of their job-search.[97]

Prime Minister's demands

The Prime Minister's November 2015 letter to Donald Tusk set out the UK's demands for reform in the area of immigration and social benefits, namely:

- When new countries are admitted to the EU in the future, free movement will not apply to them until their economies have converged much more closely with existing Member States.
- Crack down on abuse of free movement, e.g. tougher and longer re-entry bans for fraudsters and those involved in sham marriages, stronger powers to deport criminals and stop them coming back, addressing the inconsistency between EU citizens' and British citizens' eligibility to bring a non-EU spouse to the UK, and addressing ECJ judgments that have made it more difficult to tackle abuse.
- EU citizens coming to Britain must live here and contribute for four years before qualifying for in-work benefits or social housing.
- End the practice of sending child benefit overseas.[98]

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94 See CBP-06847, People from abroad: what benefits can they claim?
95 Articles 67-69 of EC Regulation 883/2004; CBP-06561, Child Benefit and Child Tax Credit for children resident in other EEA countries
96 CBP-06889, Measures to limit migrants' access to benefits
97 Cases C-333/13 – Dano, 11 November 2014; C-16/74 - Alimanovic, 15 September 2015; C-299/14 - García-Nieto and Others, 25 February 2016
98 November letter to Donald Tusk.

The 2015 Conservative Party's 2016 General Election Manifesto had pledged to "tackle criminality and abuse of free movement". Specifically:

- "We will negotiate with the EU to introduce stronger powers to deport criminals and stop them coming back, and tougher and longer re-entry bans for all those who abuse free movement"
- "We want to toughen requirements for non-EU spouses to join EU citizens, including with an income threshold and English language test"
- "And when new countries are admitted to the EU in future, we will insist that free movement cannot apply to those new members until their economies have converged much more closely with existing Member States"

It contained some further commitments in respect of EU migrants' access to social benefits:

- "We will insist that EU migrants who want to claim tax credits and child benefit must live here and contribute to our country for a minimum of four years" and "a new residency requirement for social housing, so that EU migrants cannot even be considered for a council house unless they have been living in an area for at least four years"
- "If an EU migrant's child is living abroad, then they should receive no child benefit or child tax credit, no matter how long they have worked in the UK and no matter how much tax they have paid"
- "we will end the ability of EU jobseekers to claim any job-seeking benefits at all"

Summary of Settlement provisions

Section D of the Decision is supplemented by a European Commission Declaration on the indexation of child benefits and the Commission's assessment of whether the UK meets the criteria for the 'emergency brake' on in-work benefits. A third Declaration concerns abuse of free movement rights

Free movement: changes affecting non-EU family members and criminal cases

Section D of the Decision of Heads of State of Government concerns social benefits and free movement. It refers to some clarifications of the interpretation of current EU rules, including that:

- Member States may take action to prevent abuse of rights or fraud, such as the use of forged documents and cases of marriages of convenience.
- In assessing whether an individual's personal conduct is likely to represent a genuine and serious threat to public policy or security, Member States may take into account the individual's past conduct, and the threat may not always need to be imminent. Member States may act on preventative grounds as long as they are specific to the individual concerned, including in cases where there is no previous criminal conviction.

It goes on to state that "further exchange of information and administrative cooperation between Member States will be developed together with the Commission", in order to improve efforts to prevent abuse and fraud.

It also acknowledges the UK's position on the use of transitional measures to restrict free movement rights in the event of future EU enlargements, and observes that any such measures would be specified in future Acts of Accession which must be agreed by all Member States.

The Declaration of the European Commission on issues related to the abuse of the right of free movement of persons gives further detail on some of the measures referred to above.

The free movement rights of non-EU family members of EU citizens will be restricted:

- Firstly, the Commission will propose amending the 'free movement' Directive (Directive 2004/38/EC) so that non-EU nationals who had no prior lawful residence in a Member State before marrying an EU citizen, or who married the EU citizen after the EU citizen had established residence in a host Member State, are not covered by EU free movement rights. Instead, the non-EU family members would be subject to the host Member State's national immigration laws.
- Secondly, a Commission Communication will provide guidelines on applying EU free movement of persons law, which will clarify that:
  - Member States can take action in specific cases of abuse, where an EU citizen has been living in another Member State with a non-EU family member with the purpose of evading national immigration rules and without establishing a "sufficiently genuine" residence there, and the EU citizen then seeks to return to their country of nationality with their family member under the cover of EU free movement law.
  - Marriages which subsist in order that a non-EU national family member can have a right of residence under EU law fall under the concept of "marriages of convenience", which is not covered by EU free movement laws.

The scope for expelling EU citizens on public policy or public security grounds, as set out in Directive 2004/38/EC, will be clarified:

- A Commission Communication will clarify that an individual's past conduct may be taken into account when assessing whether they pose a present threat to public policy or security, and that action may be taken on preventative grounds specific to the individual, even if the absence of a previous criminal conviction. The meanings of "serious" and "imperative" grounds of "public policy or public security" will also be clarified.
- The five and ten year residence thresholds for considering whether expulsion is justified on public policy or public security grounds will be examined in the event of a future revision of Directive 2004/38/EC.

Social benefits

On social benefits, the Decision includes a section on interpretation of current EU rules, and proposals for changes to EU secondary legislation in two areas.

The section on **interpretation of existing rules** states that Member States may refuse social benefits to persons exercising their free movement rights solely in order to obtain social assistance. Member States may also reject claims for social assistance from EU migrants "who do not enjoy a right of residence or are entitled to reside on their territory solely because of their job-search."[99] The Government states that this confirms that the UK "will not have to pay means-tested unemployment benefits to EU nationals who come here as jobseekers."[100]

EU secondary legislation will, subject to agreement, provide for an "alert and safeguard mechanism" (the "**emergency brake**") to limit full access to in-work benefits by newly arrived EU workers exercising free movement rights for up to four years when they enter the UK labour market. This will be in force for seven years and is intended to take account of a "pull factor arising from a Member State's in-work benefits regime". This facility will be available to all Member States experiencing an "exceptional situation" as a result of an inflow of workers affecting its social security system, creating problems in its labour marker, or putting pressure on its public services. The Commission's declaration states that the UK already meets these criteria.

On **child benefits**, Regulation 883/2004 on the coordination of social security systems would be amended to give all Member States "an option to index [exported child] benefits to the conditions of the Member State where the child resides. This should apply only to new claims made by EU workers in the host Member State. However, as from 1 January 2020, all Member States may extend indexation to existing claims to child benefits already exported by EU workers".

Comment

Free movement

The Best of Both Worlds White Paper, published by the Government in February 2016, declares that the UK's new settlement "represents the strongest package we have ever had to tackle the abuse of free movement and close down the back-door routes to the UK", and "will allow us to refuse entry to the UK and deport individuals more easily where we believe they pose a threat to the UK's safety and security".[101]

The proposal to amend Directive 2004/38/EC in order to exclude non-EU family members from the free movement provisions if they did not have a prior lawful residence in a Member State before marrying an EU

David Cameron:

"We have secured new powers to tackle the abuse of free movement and reduce the unnatural draw of our benefits system, to meet our aim of reducing immigration, by creating fairer rules, while protecting our open economy".

Best of Both Worlds …

99 Section D.1(b)
100 HM Government, The best of both worlds: the United Kingdom's special status in a reformed European Union, February 2016, para 2.108
101 HM Government, *The best of both worlds: the United Kingdom's special status in a reformed European Union*, February 2016, Para 2.117; 2.126

citizen, or married an EU citizen after they had moved to another Member State, appear designed to reverse previous EU Court of Justice case law. In particular, in the 2008 case of Metock, the Court found that Directive 2004/38/EC did not require that a non-EU family member had previously lawfully resided in a Member State. It also found that non-EU family members could accompany an EU citizen spouse to another Member State regardless of when and where the marriage took place and how the non-EU national had entered the host Member State.

The changes to free movement rights for non-EU family members of EU citizens have the potential to impact on British citizens who temporarily move to another Member State with their partner, so that they may then return to live in the UK under EU law rather than having to satisfy the UK's more restrictive visa requirements for partner visas (the 'Surinder Singh' route).

However, the wording leaves unanswered many questions about how the new provisions will work in practice, and what impact they may have on EU citizens and their family members.

For example, what, if any, practical effect will these legislative changes have on couples whose relationship started before moving to a Member State? Will there be transitional arrangements to cover families who are already exercising their free movement rights before the new legislation comes into force? To what extent will the clarifications in the guidance produced by the Commission go beyond existing case law, and if so, what effect could they have? For example, there is already case law setting out the requirements for establishing a genuine residence in another Member State.

The Government's Best of Both Worlds paper comments on the changes affecting non-EU family members:

> 2.119 The agreement we have secured contains a commitment to new legislation, making important changes, which will help ensure that non-EU nationals will no longer be able to take advantage of EU law to get around our immigration controls. The European Commission Declaration makes clear that it will propose new secondary legislation "in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who marry a Union citizen only after the Union citizen has established residence in the host Member State". This means that non-EU nationals who have been living in the UK illegally will no longer be able to evade our immigration controls by marrying an EU national. In addition, non-EU nationals who are married to or who marry EU nationals already living in a host Member State will need to meet the domestic immigration rules of the first EU country they reside in. In the UK that includes an income test and English language requirement.
>
> 2.120 These changes will remove the incentive for sham marriage and mean that all non-EU nationals will have to meet the immigration controls of the first Member State that they enter, addressing the unfairness of the current situation, in which it is

> easier for an EU national to bring a non-EU spouse to the UK than it is for a UK national.[102]

The White Paper also signals future changes to domestic legislation, in order "to create stronger and longer re-entry bans for those who abuse free movement rights, increasing them from 12 months to three years."[103]

On criminality, there is a commitment in the UK's renegotiation deal to review the thresholds for expulsion on public policy or public security grounds in the event of a future revision of Directive 2004/38/EC, but no indication of if/when such a review is likely to take place.

There is also the issue of how binding some of the measures will be, particularly those which are to be based on guidelines from the Commission.

Similarly, will the European Parliament be supportive of the proposed legislative changes, and what will be the approach of the EU Court of Justice, in the event of legal challenges?

In the view of the European Scrutiny Committee, there is a legitimate question as to whether the proposed secondary legislation to reverse the Surinder Singh case would be compatible with the Treaties, since "the case was based on an interpretation of the Treaties as well as EU secondary legislation".[104]

A lot of the external commentary on the immigration and benefits aspects of the deal has focused on the welfare benefits proposals. In terms of the free movement measures, the deal has been seen to be significant because, for the first time, the scope of free movement rights has been limited rather than extended. However, the general consensus amongst commentators appears to be that the reforms to free movement rights will have a limited effect on overall levels of EU immigration.

New Europeans, a civil society organisation which advocates the rights of EU citizens, interpreted the deal as a victory for the principle of free movement, notwithstanding concerns about the impact on non-EU family members:

> Finally, there are the measures designed to limit the rights of third country nationals married to mobile EU citizens to come to the UK. Again this is unpleasant and painful for those families whose lives will be disrupted as a result and it is an issue we will want to take up as New Europeans. However the measure does not amount to a fundamental compromise of the principle of free movement.

Professor Steve Peers comments on the immigration aspects of the deal on his EU Law Analysis blog:

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[102] HM Government, *The best of both worlds: the United Kingdom's special status in a reformed European Union*, February 2016, Para 2.119-2.220

[103] HM Government, *The best of both worlds: the United Kingdom's special status in a reformed European Union*, February 2016, Para 2.122

[104] European Scrutiny Committee, *The UK renegotiation package*, 3 May 2016, HC 342-xxx 2015-16, para 1.89

> Overall, as I concluded in the earlier post on the draft agreement, these changes, if they are all implemented as planned, will fall short of a fundamental change in the UK's relationship with the EU. But equally it is clearly wrong to say that they mean nothing – if in fact they are implemented. The changes would be modest but significant: amendments to three key pieces of EU legislation that would for the first time roll back EU free movement law, not extend it.[105]

Open Europe, which regards the overall reform package as "a step in the right direction", concluded that the provisions related to abuse of free movement "address long-standing UK concerns about EU rules undermining its national rules on non-EU migration". It concluded:

> Ultimately, this deal will not satisfy those who want 'complete control' over immigration – but it's not clear whether that is something the Leave side can offer either. There is currently no template for a relationship with the EU outside that offers the current levels of access to the single market without accepting the free movement of people.[106]

The initial reaction to the deal from the Chair of Migration Watch, Lord Green of Deddington, reflected this view:

> This deal will do virtually nothing to reduce mass immigration which is the public's greatest concern.

Social benefits

Even before the EU renegotiations began, the Government considered that in light of developing EU case law it had already achieved one of its key aims – **ending benefits for EU jobseekers**. The Best of both worlds document published by the Government following the European Council's Decision in February states that the agreement "confirms that the UK will not have to pay Universal Credit to EU nationals who are in the UK looking for work."[107]

Attention has therefore focused on entitlement to in-work benefits, and child benefits for children in other EU countries.

With regard to the "**emergency brake**", there is no elaboration of the criteria for an "exceptional situation" but the Commission considers it exists in the UK now (see Annex VI of Settlement).

The UK wanted the limits to be applied for up to 13 years, but the Settlement stipulates that they could be applied for up to seven years. There is no outright ban on benefits, but access to them is to be graduated "from an initial complete exclusion … gradually increasing access to such benefits to take account of the growing connection of the worker with the labour market of the host Member State".

The Settlement in this area raises a number of issues and questions:

- practical issues such as how to determine when exactly someone arrived in the UK;

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105 EU Law Analysis Blog, 'The final UK renegotiation deal: immigration issues', 20 February 2016

106 Stephen Booth, Open Europe Blog, 'What did the UK achieve in its renegotiation?', 21 February 2016

107 para 2.111

- how to deal with people who have been in the UK for some time before staring work, people who have moved to and from the UK several times, or who have stopped and started work;
- how "graduated" access to benefits will work, in particular when means-tested benefits and tax credits have been replaced by the single, integrated benefit Universal Credit;
- Member States can only limit access to non-contributory in-work benefits;
- what would happen at the end of the seven year period: and
- whether there might be a surge in new arrivals to beat the emergency brake.[108]

The Decision refers to "non-contributory in-work benefits" but does not define further what this encompasses. It seems likely this would include tax credits, Housing Benefit, and Universal Credit. It is not clear whether it would also cover other benefits including Child Benefit. The Government states that exactly which benefits are understood to be in-work benefits and as a result covered by the emergency brake would be a matter for the implementation process.[109]

In its report on The UK renegotiation package, the House of Commons European Scrutiny Committee noted uncertainty about whether the Court of Justice would accept that the secondary legislation providing for the emergency brake did not violate the Treaties, adding that there would "clearly be opportunity for a challenge" in the domestic courts for refusal to pay in-work benefits that could lead to a reference to the CJEU.[110]

Regarding the export of **child benefits**, Member States are to have the *option* of indexing payments to the conditions in the child's state of residence. The Commission considers that "conditions" include "the standard of living and the level of child benefits", but there is no further detail about how indexing would work.

In future, Child Benefit[111] will be the only exportable UK family benefit, since Child Tax Credit will disappear when Universal Credit is fully introduced.

The indexing option raises the question of how HM Revenue and Customs (HMRC) would pay Child Benefit at 28 different rates, taking into account the existing overlapping benefits rules; and the additional administrative costs this would entail in relation to the savings it would realise. At May 2015, only 19,579 families elsewhere in the EEA were receiving UK Child Benefit, for 32,408 children.[112] HMRC does not know how much it is paying out for children in other EEA states (because in some cases it is only topping up benefits paid by the other

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108 See Guardian interview with Iain Duncan Smith, 24 February 2016.
109 DWP response to the House of Commons Library, 13 May 2016
110 HC 342-xxx 2015-16, paras 1.85-1.88
111 Along with Guardian's Allowance, a minor benefit payable for children who are orphans, or effectively orphaned.
112 See Commons Library briefing CBP-07445, Statistics on migrants and benefits.

state), but this would imply a total **maximum** spend of only around £30 million a year (or 0.25% of total spending on Child Benefit).

Reacting to the benefits measures in the renegotiation package, Jonathan Portes of the National Institute for Social and Economic Research said that all those involved in the negotiations, including the Prime Minister, knew that the proposals would have no significant impact in immigration or on benefit spending, but were instead about "sending a signal." The irony was, he said, that the whole episode had only acted as a "massive advertising campaign for the UK benefit system", meaning that new arrivals were likely to be better informed about their entitlements. He went on:

> "So, even by the standards of the European Union, this has been an Alice-in Wonderland episode. The government has negotiated a watered-down version of something that it knew did not matter very much, and in the process has if anything made a largely non-existent problem slightly worse. Does it matter? Perhaps the real significance of the negotiation is that it has clarified just how fundamental free movement and non-discrimination are to the European Union. And on this, the UK has clearly had to accept the status quo. There is no Treaty change, now or promised, and the main measures the UK is entitled to impose are temporary and/or time-limited."[113]

According to a Migration Watch press release, 24 February 2016, the "emergency brake" would have "little or no effect" on EU migration:

> Migration Watch UK research has found that 50 per cent of those who have arrived in the past four years were single. Another 25 per cent were couples without children. Their entitlement to in-work benefits is marginal, so the 'brake' would be very unlikely to act as a deterrent – especially as these groups are likely to benefit the most from the move to the National Living Wage.
>
> The introduction of a National Living Wage, reaching £9 per hour in 2020, will outweigh any impact the 'brake' may have in deterring migrants from key demographic groups from moving to the UK as income levels rise by more than benefits are reduced, and might indeed increase the attractiveness of the UK as a destination.

A report published by the University of Oxford Migration Observatory on 4 May found that most EU tax credit recipients in the UK did not arrive in the past four years and as such would not have been affected by restrictions on access to in-work benefits had they been in place in recent years.[114] The Observatory's analysis suggests that roughly 10-20% of recently arrived EU adults were receiving tax credits in early 2014 – substantially lower than the Government's estimate of "around 40%" of recently arrived EEA migrants supported by benefits. The report states that this is partly explained by the different data sources used and time periods covered; and the Government's methodology, which involves counting children as benefit recipients, and combining data from different sources.

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[113] Jonathan Portes, Analysing the UK's deal: immigration, free movement, and benefits, NIESR blog, 22 February 2016.

[114] Sumption, M. and S. Altorjai, EU migration, welfare benefits and EU membership, Migration Observatory report, COMPAS, University of Oxford, UK, May 2016

The Oxford study found that more than half of EEA born adults who reported receiving tax credits in 2015 were working full time, and around 90% had dependent children (despite less than half of EEA born adults overall having children). It finds that the impact of proposed benefits restrictions are likely to vary widely and be concentrated on a small share of families with children - particularly Minimum Wage workers and those without two-full time earners. Because the impacts of in-work benefits restrictions are concentrated on a small share of newly arriving families, the authors conclude that it is unlikely that they would lead to a large reduction in EU migration to the UK.

4. How will the Settlement be implemented?

4.1 Treaty change

Two parts of the Settlement state that they will be incorporated into the EU Treaties at the next opportunity for Treaty revision. Section A of the Decision, on economic governance, ends with:

> The substance of this Section 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.

And Section C on sovereignty begins:

> 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 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.

The Decision itself cannot explicitly amend the EU Treaties, nor can it pre-empt the requirements of Article 48 TEU by setting out the exact terms of a proposed amendment, which is why it refers to incorporating the 'substance' of these provisions.

The reason for incorporating these provisions into the EU Treaties is that, while they might be legally binding in one sense under the Decision, making them part of the EU Treaties would give them a significantly enhanced legal status. As part 2 of this briefing paper (above) explains, the Decision (probably) binds the governments of the Member States under international law, but does not bind the EU institutions, cannot be enforced by the Court of Justice of the EU (although it must take the Decision into consideration when interpreting the Treaties), and does not necessarily have direct effect in the Member States. If parts of the Decision were incorporated into the EU Treaties, they would bind the EU institutions, be enforceable by the Court of Justice of the EU, and have direct effect in the Member States.

The Irish concessions of 2009, on which a second referendum on the Lisbon Treaty was predicated, were implemented via a European Council Decision on 11 May 2012 and ratified along with the Croation accession Treaty. But there is no imminent EU accession: Turkey, Macedonia, Albania and Serbia are some way off EU membership. So the Treaties might have to be re-opened just to accommodate the UK deal, which is likely to be resisted by some Member States.

Steven Blockmans[115] speculated on the timing and nature of such a revision: it might have to wait until after French and German elections in

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2017 and it would be weighty enough for amendment by the Ordinary Revision Procedure:

> It may be presumed that the extent of the changes to the economic governance and overall direction of integration of the Union envisaged by the New Settlement, as indeed additional amendments that other member states,[116] the Commission and the European Central Bank may wish to introduce, will trigger the 'ordinary revision procedure' of the Treaties laid down in Article 48(2-5) TEU.[117]

With Treaty change under the Ordinary Revision Procedure (Article 48(2)-(5) TEU), the EP is likely to want a full-blown Convention, with EP delegates, national governments and parliaments contributing to the discussion. This would be followed by an Inter-governmental Conference (IGC) of Member State governments to negotiate the Treaty amendments and adopt them by unanimity. A Treaty amendment under Article 48(4) TEU (an IGC without a Convention) does not require EP approval, but an accession treaty does (Article 49 TEU).

The Simplified Revision Procedure under Article 48(6) TEU can be used to amend provisions of Part Three TFEU relating to the EU's internal policies and action. If this Procedure is used, the European Council consults the EP, Commission and ECB on the amendment. The "ever closer union" change could not be adopted by the simplified procedure but Economic and Monetary Union is in Part Three TFEU, so it is possible that elements of Section A could be amended by the simplified method. In the UK this would trigger the use of Part 1 section 3 of the European Union Act 2011 and would require an Act of Parliament.

As Treaty change is subject to ratification in all EU Member States, there is a possibility that an adverse referendum in a Member State could stall the process or prevent ratification, which is what happened with the EU Constitutional Treaty in 2005. To this extent, and to the extent that it may not prove possible to adopt the secondary legislation, the Settlement is not "irreversible". Referendums might be required in Ireland, some Eastern European States and possibly France and Denmark.

4.2 Secondary legislation

Some elements of the Decision (e.g. limiting child benefits, the emergency brake on in-work benefits, stricter rules on marriages of convenience) will have to be passed by separate secondary EU legislation before they can take legal effect. This would be done using the Ordinary Legislative Procedure, involving QMV in the Council and a simple majority of the EP for approval. The Court of Justice could be

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116 See, e.g., the Joint Communiqué – "Charting the way ahead. An EU Founding Members' initiative on strengthening Cohesion in the European Union", adopted by the Ministers of Foreign Affairs of Belgium, Germany, France, Italy, Luxembourg and the Netherlands on 9 February 2016 in Rome. The text is available at www.esteri.it/mae/it/sala_stampa/archivionotizie/comunicati/2016/02/joint-communique-chartingthe-way.html.

117 CEPS, The EU deal to avoid Brexit: Take it or leave, Stefani Weiss and Steven Blockmans, 23 February 2016.

asked to rule on whether the threshold condition for the emergency brake had been met.

The Council will have to improve the management of the banking union by means of a decision.

This legislation will have to comply with the EU Treaties, which is likely but not certain, and will be open to challenge by the EU Court of Justice. As Steve Peers suggests, the process might be problematic: "Can it be guaranteed that the proposals will: (a) be made; (b) be adopted; (c) not be struck down by the EU Court of Justice (CJEU); and (d) not revoked?"[118]

The legislation that will need to be amended is:

- EU Regulation 883/2004: to give Member States the option to index the export of child benefits to a Member State other than that in which the worker resides to the standard of living and level of child benefits applicable in the Member State in which the child resides.
- EU Regulation 492/2011: to take account of a pull factor resulting from a Member State's in-work benefits system, and provide for an alert and safeguard mechanism to respond to situations where the inflow of workers from other Member States is of an "exceptional magnitude" over a long period of time.
- EU Directive 2004/38/EC: to exclude from the scope of free-movement rights third-country nationals who had no prior lawful residence in a Member State before marrying an EU citizen, or who marry an EU citizen after they have established residence in the host Member State.

Steve Peers notes:

> … in the renegotiation deal the Member States commit themselves to supporting two of these three proposals (on child benefit and the emergency brake). It's odd that there's no parallel commitment as regards the third proposal (on EU citizens' non-EU family members). The timing of these measures depends on how soon they would be adopted, although the Commission declares that it will table them after a 'Remain' vote, if there is one.[119]

4.3 Non-legislative action

Non-legislative action will be needed to implement parts of the Settlement concerning restrictions on free movement.

The Commission will clarify in a Communication providing guidelines on the application of EU free movement law:

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[118] EU Law Analysis, 21 February 2016, The final UK/EU renegotiation deal: legal status and legal effect.
[119] Peers, ibid.

- that Member States can address specific cases of EU citizens abusing free movement rights and evading national immigration rules
- the concept of marriage of convenience
- that Member States may take into account past conduct of an individual in determining whether an EU citizen's conduct poses a "present" threat to public policy or security.
- the notions of "serious grounds of public policy or public security" and "imperative grounds of public security".

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