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# The UK's "New Settlement" within the EU – A Reform Package for the Whole Union

## By Professor Sir Alan Dashwood QC

**The Decision of the Heads of State or Government meeting within the European Council, which was annexed to the Conclusions of the European Council of 18 and 19 February 2016, describes the arrangements it contains as "a new settlement for the United Kingdom within the European Union". The Decision does, of course, offer the UK a new settlement, responding systematically, and generously, to the four points raised by Mr Cameron in his letter of 10 November 2015 to Mr Donald Tusk, the European Council President. But it does more than that. The view I want briefly to develop this afternoon is that the Decision represents an important reform package, from which the EU as a whole will benefit immensely, if only it comes into force. And that depends on the vote on 23 June.**

### Legal Character

I should perhaps begin by saying a word about the legal character of the reform package. It has been alleged by some of those on the Leave Side of the Referendum debate that the Decision incorporating the new arrangements is merely an "international declaration" and that, unless and

until the EU Treaties are amended, the Decision will have no relevance to EU law. That is incorrect.

It's worth recalling that Decisions of Representatives of the Governments of the Member States meeting at a less exalted level than the European Council are a familiar feature of the EU system. They provide a way for Member States to exercise national powers collectively, rather than acting through EU institutions, e.g. within the framework of a mixed agreement.

Decisions of this kind are treaties in simplified form, concluded by consensus between, and binding in international law upon, the States parties to them. They have been used at Heads of State or Government level on two previous occasions, to address concerns raised by Denmark regarding the Maastricht Treaty, and concerns raised by Ireland regarding the Treaty of Lisbon. Both of those earlier Decisions were registered with the UN Secretariat as treaties in accordance with Article 102 of the UN Charter; and each of them was followed up by a Protocol, added to the Treaties on the conclusion of, respectively, the Amsterdam Treaty and the Accession Treaty with Croatia.

Though it's somewhat more elaborate, the new Decision conforms to those precedents. Like the Decisions on Denmark and Ireland, it contains only provisions that explain or complement, but are compatible with, the existing Treaties. Its legal nature and effect, like theirs, is that of a binding international agreement. Like them, it will be registered as a treaty with the UN Secretariat. And some parts of it will, in due course, like them, be incorporated into the Treaties.

But the impact of the Decision on EU law isn't dependent on such incorporation. It will be immediate, thanks to Article 31 (3) (a) of the Vienna Convention on the Law of Treaties, which says that there shall be taken into account, as part of the context for the interpretation of a treaty, "any

subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". The Decision on the UK is such an agreement and, by adopting it, the Member States have bound themselves to interpret and apply the EU Treaties in accordance with its terms.

The European Court of Justice has acknowledged that it was bound to take the Decision on Denmark into consideration when interpreting relevant provisions of the Treaties, and it will have to treat the new Decision in the same way. So, from the date of its entry into force, in addition to imposing on the Member States an obligation to take all necessary steps for the delivery of the reform package, the Decision will become a binding instrument for the interpretation of the EU Treaties and acts based on them. The purpose of eventually introducing certain of the principles laid down by the Decision into the Treaties themselves would simply be to enhance their status, from interpretative tools to provisions of primary EU law in their own right.

## Substance

In the light of that analysis of the legal character of the Decision as a whole, I shall look, in turn, at the particular arrangements contained in its four Sections, which correspond to the four headings in Mr Cameron's 10 November letter.

### *Economic Governance*

1. Section A, on Economic Governance, is about the appropriate ordering of the relationship between Economic and Monetary Union (EMU) and the other core EU policies, notably the internal market, and hence between members and non-members of the Eurozone. This is a major constitutional

issue, which has been neglected hitherto, and it's to Mr Cameron's credit that the EU has at last been compelled to take it seriously.

There were, broadly, two problems that needed to be addressed. And these are by no means exclusively of interest to the UK, but to all Member States outside the Eurozone, and indeed to the Union as a whole.

A first problem is that of the undue prioritisation of EMU, graphically illustrated by the ECB's attempt in 2011 to impose a legal requirement that clearing houses handling euro-denominated trades be located within the Eurozone. A more blatant infringement of fundamental internal market principles would be hard to imagine. It's shocking that the move was opposed only by the UK, with the support of Sweden. As I'm sure you know, the story had a happy ending. Following a legal victory for the UK in the General Court, the ECB and the Bank of England reached a sensible arrangement to facilitate the provision of multi-currency liquidity support to clearing houses established, respectively, in the UK and in Eurozone countries. However, the fact that this episode occurred at all, showed the need for more robust legal protection of the internal market acquis. And it's worth making the point that the effects of the ECB's original measure wouldn't only have been felt by clearing houses based in London, or indeed in Sweden. It would also have limited the commercial freedom of traders within the Eurozone that might prefer to place their business in London or Stockhom, rather than in Paris or Frankfurt.

A second problem is that of the potential domination of the ordinary legislative process within the Council by Eurozone members acting as a caucus. This would entail the Member States of the Eurozone, which are now able to muster between them a qualified majority within the Council, voting as a block on proposals for legislation applicable to all of the Member States. If most or all of them were regularly to adopt the same position, whether through prior concertation or from commonality of interests, the normal process of consensus-building within Council bodies would be subverted. I describe this as a potential problem because there's no

convincing evidence to date of systematic caucusing by members of the Eurozone, but it can't be excluded that this may develop over time. The risk, therefore, exists that non-participating Member States may be marginalised in the decision-making process, with no realistic prospect of influencing the content of legislation in core policy areas like the internal market.

The arrangements that have been agreed employ two legal techniques: a set of interpretative principles; and a safeguard mechanism to help ensure that the principles are respected.

The principles are designed, notably, to prevent discrimination between individuals and businesses based on the currency of the Member State to which they belong, to preserve the integrity of the single market and to protect non-members of the Eurozone against the financial costs of ensuring its stability. They are fully compatible with the existing EU Treaties, because they simply spell out what is already implicit in various texts, such as Article 4 (2) TEU on the equality of Member States before the Treaties. The set of principles will become a legally binding instrument of interpretation as soon as the Decision enters into force; and their substance is destined to become primary EU law at the time of the next Treaty revision.

The proposed safeguard mechanism employs the technique of what may be termed a "Council conduct agreement", binding the Member States as to how they will behave in certain circumstances, when acting in their capacity as members of the Council. By making a reasoned case that the legislative proposal under consideration infringes one or more of the Economic Governance principles, a single Member State would be able to interrupt the decision-making process. The Council would then be obliged to do all in its power, within a reasonable time and without infringing obligatory time limits, to accommodate the concerns of that Member State, including the possibility of referring the issue to the European Council.

The clever thing about this arrangement is that it will be added as a new provision to an existing EU measure, Council Decision 2009/857. which established a similar procedure protecting Member States in the minority,

under the rules on qualified majority voting that came into force in November 2014, where the threshold is achieved by a relatively narrow margin. So there can be no doubt as to the validity and the binding legal effect of the mechanism.

I would add that, if the operation of the safeguard mechanism was thought by the UK or any other Member State to have failed, in a particular instance, to protect one or more of the Economic Governance principles, it would still be possible to challenge the validity of the measure in question in annulment proceedings before the Court of Justice, especially once the substance of the principles has become primary EU law.

I've spent rather a long time on the Economic Governance Section of the Decision because of its importance, which I believe has been underestimated. I can be much shorter on the other three Sections.

### *Competitiveness*

2. On the Section relating to "Competitiveness", I need only say that it is concerned essentially with reinvigorating EU policies of particular interest to the UK, and I should imagine to Sweden, namely strengthening the internal market, improving legislation, reducing regulatory burdens on business and promoting an active trade policy. The commitment by the Member States to further those objectives is complemented by Declarations of the European Council, exercising its function of setting policy priorities for the EU, and of the Commission, which will propose a programme of work by the end of 2016.

### *Sovereignty*

3. The Section of the Decision, entitled "Sovereignty", covers a variety of matters. Since time is pressing, I shall limit myself to the two that have attracted most attention, the notion of "ever closer union" and the so-called

"red card" procedure to strengthen the role of national parliaments in the legislative process of the Union.

The Decision provides detailed clarification of the meaning of references to "ever closer union" in various Treaty preambles and in Article 1 of the Treaty on European Union. It states, among other things: that the references "do not offer a basis for extending the scope of any provision of the Treaties or of EU secondary legislation" and "should not be used either to support an extensive interpretation of the competences of the Union or of the powers of its institutions"; and that they are "compatible with different paths of integration being available for different Member States and do not compel all Member States to aim for a common destination". Here, once again, the legal technique employed is that of establishing binding principles of interpretation, the substance of which is to be incorporated into the Treaties at the time of their next revision.

The new "red card" procedure, which would enable a group of national Parliaments to stop draft legislation from going forward, is to be implemented through a Council voting agreement. If the prescribed number of Parliamentary votes were reached (i.e. 55 per cent of the total), the Member States have undertaken to discontinue their consideration of the proposal within the Council, unless it is amended to accommodate the concerns expressed by the national Parliaments.

### *Social Benefits and Free Movement*

4. The final section of the Decision, on "Social Benefits and Free Movement", is of huge political significance in the UK, because of concerns about the volume of net migration from other EU countries. I'm not sure how far those concerns are shared here. At all events, I'm going to be quite brief about this Section, because I want to leave myself time to draw some broad conclusions.

The solution provided by the Decision combines agreed interpretations of existing legislation with the introduction of two significant rule changes. No amendment of the Union's primary law was considered necessary.

The Decision offers robust interpretations of the possibilities that exist under current EU rules for limiting access by migrant workers to social benefits, in the light of recent developments in the case law of the Court of Justice. These are reinforced by a Declaration of the Commission on issues related to the abuse of free movement rights.

The first of the rule changes entails amending the Regulation 883/2004 on the coordination of social security systems (Regulation 883/2004), to give Member States the option, where child benefits are exported to a Member State other than the one in which the worker resides, of indexing the benefits to the standard of living in that Member State. This will initially apply only to new claims, but from 2020 also to existing ones.

The second rule change entails the amendment of the Regulation on freedom of movement for workers within the Union (Regulation 492/2011), to introduce a so-called "emergency brake" limiting access by newly arrived workers to in-work benefits for up to four years. A Declaration by the Commission expresses its understanding that the type of exceptional situation the mechanism is intended to cover already exists in the UK.

Implementation of this aspect of the reform package depends on the actual adoption of the necessary amending legislation. The Commission and the Member States can be relied on to play their respective parts in the legislative process; and so, surely, can the European Parliament, for which there would be nothing to be gained politically from putting the new constitutional settlement in jeopardy.

Nor, I believe, would there be a serious risk of the proposed rule changes being struck down by the Court of Justice. Indexing child benefits is a policy option manifestly open to the EU legislator; while an emergency brake

mechanism of the kind contemplated would lie within the scope of the power of the institutions to regulate the exercise of free movement rights.

### *Conclusion*

To conclude. I hope this summary of the reform package negotiated by Mr Cameron will be enough to give a sense of the ingenuity that has gone into devising the new settlement, and to show that it constitutes a substantial achievement, which is likely to benefit the Union as a whole. For all its annoying features, the European integration project, if you think what Europe was like in the first half of the twentieth century, still surely provides the best available evidence that humankind is capable of collective self-improvement. It has been the vocation of the UK and the Nordic members of the EU to inject a note of realism into the project. The settlement enshrined in the Decision of 19 February 2016 could be a blueprint for an EU that is at ease with its variable geometry – in which non-membership of the Eurozone is consistent with leadership in other fields, such as the internal and external relations. I profoundly believe that, by enabling the new constitutional settlement to come into force, a vote by the UK to remain in the Union will be a corrective to the current EURO-centric orthodoxy. The EU is about so much more than creating a single currency.

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