The Inquiry into the UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny: preliminary note on the outcome of negotiations.

1. This note provides an outline of, and a preliminary legal analysis on, the outcome of the UK renegotiations. It also makes a suggestion for further handling by the Committee in the light of the formal history as outlined in the Annex (with links to the relevant documents, hard copies available on request).

2. The Committee will be briefed orally at the meeting on any new and significant matters emerging from the ongoing scrutiny of the renegotiation outcomes arising since the circulation of this note.

Summary of the legal analysis:

- The renegotiation package is based on an international agreement which is binding in international law (which means it lacks the enforcement mechanisms of EU or domestic law). Any such agreement must conform to EU law. To the extent it does not EU law prevails.
- The international agreement is "irreversible" in the sense that it can only be repealed or amended by common accord of the parties, but that does not have the effect of removing the legal uncertainties highlighted by this note i.e. there is no legal guarantee that the Decision will produce all the results envisaged.
- This international law agreement does not purport to change the Treaties, only clarify or supplement them. Any such clarifications of the Treaties, and the consistency with the Treaties of supplemental agreements, are subject to the view of the Court of Justice of the European Union (CJEU) because it is the ultimate interpreter of the Treaties.
- There are two areas where Treaty change is envisaged, in each case to "upgrade" clarifications to Treaty level. Any such upgrade limits the scope for the Court of Justice to give an adverse judgment.
- Both areas of future Treaty change lack detail and urgency; and are in any event conditional, as they must be, on the approval/ratification of the Member States. This makes any future Treaty change vulnerable to a change in government or an adverse referendum result in another Member State.
- Critical EU secondary legislation envisaged by the package is subject to agreement by the European Parliament which is not bound by the international law agreement and has made no declaration of its intentions (although it has been involved in the negotiations and European Parliament Groups have made positive statements[1]).
- It is questionable how much effect the red card will make in practice.

[1] S&D, ALDE, and the EPP have indicated that they want a positive result.

- The emergency brake in respect of the Eurozone is not a veto.
- The emergency brake in respect of free movement applies only to in work benefits and relies on agreement by the Commission (effectively given for this first time by a Declaration) and the Council (which is also likely on this first occasion).

The renegotiation package

3. The package comprises:

a) *Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union* ("the Decision"). This is the overarching key document and is an international agreement.
b) *Draft Statement on Section A of the Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union.* This sets out a draft Decision to be taken by the Council which will constitute the "emergency brake" for non-Eurozone Member States.
c) *Draft European Council Declaration on Competitiveness.* This supplements Section B of the Decision.
d) *Draft Declaration of the European Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism.* The Commission promises (a) to establish and implement a programme to review the existing body of EU law for compliance with subsidiarity, and (b) to work with Member States and stakeholders to establish and implement specific targets for reducing the burden on business.
e) *Draft Declaration of the European Commission on child benefit exported to a Member State other than that where the worker resides.* This supplements Section D of the Decision by providing a promise by the Commission to bring forward a proposal on the rate of exported child benefit and provides greater detail as to the possible rates that can be chosen.
f) *Draft Declaration of the European Commission on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union.* This expresses the view of the Commission that the conditions for triggering the social benefits emergency brake is fulfilled in respect of the United Kingdom.
g) *Draft declaration of the European Commission on issues related to the abuse of the right of free movement of persons.* This contains (a) a promise to adopt a proposal to complement the existing Free Movement Directive in order to address existing abuse of free movement rights by third country nationals and (b) a promise to clarify the scope for Member States to deport undesirable EU citizens in guidelines and to

examine future related amendment to the Free Movement Directive.

4. The Council Conclusions emphasise that "It is understood that, should the result of the referendum in the United Kingdom be for it to leave the European Union, the set of arrangements …will cease to exist."

The nature and effects of the Decision

5. As an international agreement the Decision is binding as a matter of international law. However, international law lacks the more stringent interpretation and enforcement mechanisms of EU law and domestic law. Its interpretation is, as a general rule, left to the parties[2] and its enforcement is a matter of diplomacy.

6. As an international agreement the Decision cannot amend the EU Treaties. It does not purport to do so.[3] In fact it does four things:

- It provides interpretations and clarifications of the Treaties.[4]

  In his evidence to the Committee on 10 February the Foreign Secretary emphasised the fact that the *Rottmann* case required the CJEU to "take into consideration" clarificatory decisions such as this Decision.[5] However "taking into consideration" is not the same as being bound; and in the *Rottmann* case the CJEU arguably did not consider itself bound because it imposed an EU test of proportionality on a decision of a Member State whether or not to confer nationality, which, according to the Edinburgh Decision and a Declaration to the Treaties, was to be settled solely by reference to the national law of the Member State concerned.

- It supplements the Treaties by governing how Member States will conduct themselves as Members of the Council. In doing so they must nevertheless continue to conform to the existing Treaties. This route is used to create the red card for national parliaments.

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[2] Professor Dashwood claims that the agreement would "appear to fall within the exclusive jurisdiction of the Court of Justice of the EU (CJEU) pursuant to Article 344 TFEU…" and that "The appropriate procedure for bringing a dispute before the Court would, presumably, be Article 273 TFEU, even though this possibility is not spelled out in the Decision itself." The language he uses reveals the uncertainty of these propositions. Article 344 confers exclusive jurisdiction "concerning the interpretation or application of the Treaties" to the CJEU. The Decision would not be one of the Treaties (as defined in Article 1 TEU). Article 273 allows a dispute "between Member States which relates to the subject matter of the Treaties" ¬– which the Decision would be – to be dealt with by the CJEU, but only if the parties agree. Whilst such an agreement would address the question of interpretation it would not make the Decision enforceable as if it were an EU Treaty.

[3] The third recital makes it clear that the Decision is intended to clarify certain questions.

[4] As permitted by Article 31 of the Vienna Convention on the Law of Treaties.

[5] C-135/08. It concerned a Decision of the Heads of State or Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992, concerning certain problems raised by Denmark on the Treaty of European Union.

- It envisages Treaty change – but only subject to the proper Treaty revision process prescribed by Article 48 TEU, i.e. any Treaty change must be ratified or approved in accordance with the constitutional requirements of each Member State. This is vulnerable to a change in government or an adverse referendum in any other Member State. In this context, the Times of 18 February reported that in Belgium, each of 6 regional assemblies must agree to ratification by Belgium of EU Treaty change. It is also important in this context that the Decision does not envisage a special exercise to make the envisaged Treaty changes, but only at the time of the next revision. In other words the envisaged Treaty change would only be attempted when there are other Treaty changes on the table. This introduces an additional element of uncertainty in that any wider Treaty revision may be more controversial and more likely to trigger referenda in other Member States.[6]

  Furthermore, the two elements of Treaty change envisaged would effectively upgrade interpretations provided by the Decision to Treaty level. If the interpretations were made explicit in the Treaties the Court of Justice would not be able to question them.

- It envisages secondary EU legislation. The emergency brake for non-Eurozone Member States (document b)) will be achieved by EU secondary legislation adopted by the Council alone. In respect of social benefits and free movement the EU secondary legislation envisaged must be proposed by the Commission and agreed to by the European Parliament. The Commission has made declarations as to its intentions (documents d) to g)), including to examine amendment of the Directive on the free movement of EU citizens in relation to the thresholds set for the deportation of undesirables.

7. It should be noted that the Statement and Declarations are not legally binding[7] although the institutions making commitments through declarations are unlikely, politically, to renege on them.

8. The Conclusions of the Council state that "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". This statement must be seen in the light of the status of the Decision as an international agreement as outlined above and the content of the Decision.

9. The Conclusions also state that "this Decision is legally binding, and may be repealed by common accord of the Heads of State or Government of the Member States of the European Union." This statement is, strictly, correct, but does not take into account the uncertainties inherent in the Decision. It does not, and cannot, provide legal guarantees (a) that the CJEU will accept the interpretations provided by the Decision or accept that EU secondary legislation envisaged is compatible with the Treaties (b) that he Treaty change

[6] Or even the UK under the European Union Act 2011.

[7] Declarations may however have legal effect in influencing the interpretation of the Treaties by the CJEU.

envisaged will come about and (c) that the European Parliament will approve the EU secondary legislation envisaged. These matters are therefore matters of politics rather than legal obligation. It is therefore understandable that the Conclusions do not claim the Decision or the package to be "irreversible".

Economic Governance

10. Section A provides that Union institutions together with the Member States "will facilitate coexistence between different perspectives within the single institutional framework ensuring consistency, the effective operability of Union mechanisms and the equality of Member States before the Treaties, as well as a level-playing field and the integrity of the internal market."

11. It then sets out a series of principles which can be broadly summarised as follows:

1) No discrimination between natural or legal persons based on the currency of the Member State of their establishment which is reinforced by statements that legal acts shall respect the internal market and not constitute a barrier to or discrimination in trade; whilst also not jeopardising the attainment of the objectives of monetary and economic union.
2) Union law on banking union[8] only applies to banks etc. located in Euro-in Member States, whilst recognising that the single rulebook[9] must to be applied by all banks etc. to ensure a level playing field within the internal market (subject to exceptions where the Eurozone requires more uniform rules "whilst preserving the level playing-field and contributing to financial stability").
3) Non-Eurozone Member States should not contribute to Eurozone bailouts, or if they do should be recompensed.[10]
4) In non-Euro Member States "supervision or resolution of financial institutions and markets and macro-financial responsibilities" are a matter for the Member State concerned, without prejudice to the single rulebook, Union mechanisms for macro-prudential oversight and the existing powers of the Union to take action to protect financial stability.
5) Informal meetings of Eurozone Member States shall respect the powers of the Council and in the Council all Member States can participate in discussions even if they do not have a right to vote.

12. The wording of this section is dense and complex, reflecting carefully nuanced and balanced political compromise between the Euro-ins and the Euro-outs.[11] It remains to be

[8] Comprising notable a Single Supervisory mechanism and a Single Resolution Mechanism.
[9] The single rulebook essentially implements the Basel III rules for a regulatory framework on bank capital adequacy, stress testing, and market liquidity risk. It applies to all Member States.
[10] As happened when the European Financial Stability Mechanism was used to bail out Greece.

seen how effective it will be for either "perspective". From the legal perspective it can be noted that the Decision does not bind all the European Institutions (relevant to this matter, the European Parliament and the CJEU).[12]

13. These principles appear to substantially reflect existing practice and do not appear to contradict the existing case law of the CJEU.

14. The necessary "Mutual respect and sincere co-operation" between Euro-ins and Euro-outs will be ensured by a Council Decision (set out in document b))[13] enabling a (single) Member State which does not participate in the banking union to object to the Council acting by qualified majority in a way which it considers contrary to the principles of economic governance set out in the Decision. In such case the European Council is obliged to "do all in its power to reach…a satisfactory solution".

15. This does not amount to a veto for one or more non-Euro Member State(s); all the more, in practice, since the principles which will be under dispute are nuanced and balanced.

16. Finally, it is envisaged that "The substance of this Section will be incorporated into the Treaties at their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States" (as to which see comment in paragraph 6).

Competitiveness

17. Section B of the Decision acknowledges that the EU must enhance competition in line with the Council Declaration (document c)). This document confirms the commitment to competitiveness and refers to existing initiatives such as REFIT and an Interinstitutional Agreement of Better Law-making, for which a "provisional final text" is awaiting agreement by the European Parliament.

18. Going further than existing initiatives, the Council Declaration envisages an exercise in repealing unnecessary legislation, the use of burden reduction targets (where feasible) and monitoring. This is also picked up in the in the Commission Declaration on a subsidiarity implementation mechanism and a burden reduction mechanism…" (document d)); in which the Commission undertakes to "work with Member States and stakeholders towards establishing specific targets at EU and national levels for reducing burden on business."

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[11] Described in the Financial Times of 20 February as "the most consequential part of the agreement, but also the hardest to interpret."

[12] The use of the word "will" tends to be non-binding compared with the word "shall".

[13] This additional Council Decision would be adopted by qualified majority. Professor Dashwood, in his additional evidence to the Committee considers that it could only be amended or repealed by consensus because Protocol 9 applies. It is not evident on the face of that Protocol that it would – although this is unlikely to become a critical issue.

19. As indicted above the Decision does not bind all the EU institutions, notably in this case the European Parliament, which will have a say in EU secondary legislation to which this section applies.

Sovereignty: ever closer union

20. The Committee's Report examined the significance of the concept of ever closer union and in particular the implications of a UK carve out.

21. Section C of the Decision, on sovereignty, is introduced by the words "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." This wording denotes the current position. Nevertheless in the very next sentence it is stated, "The substance of this will be incorporated into the Treaties at the time of their next revision …so as to make it clear that the references to ever closer union do not apply to the United Kingdom."

22. The existing wording of the Treaties, and the Council Conclusions of June 2014 which are elaborated in the Decision, do not contain an express carve out for the UK from ever closer union. The Decision unhelpfully uses two separate notions, the absence of a commitment to further political integration on the part of the UK (the present position) which then flows into a concept of a UK carve out from ever closer union (as envisaged by future Treaty change). Given the nature of the concept of ever closer union, this distinction is unlikely to cause practical difficulties, but the change in wording gives rise to the suspicion that the envisaged Treaty amendment might be going further than merely encapsulating an interpretation of the Treaty. But, in any event future Treaty revision is conditional on all Member States either approving or ratifying it.

23. There is further, legally unexceptional, clarification that references to ever closer union in the Treaties do not alter the limits of competence or use of the competence; or imply that competence must be exercised or that competence cannot be reduced.

Sovereignty: subsidiarity and the "red card"

24. Section C provides some guidance on subsidiarity, redolent of a Protocol to the Amsterdam Treaty which was dropped at the Lisbon revision.

25. It also enjoins all institutions to duly take account of subsidiarity concerns raised by national parliaments. Again it is worth recalling that the Decision does not bind the European Parliament.

26. More substantively it introduces a red card, whereby subsidiarity reasoned opinions by 55% of national parliaments/chambers would trigger the Council to discontinue discussion of a proposal until it was amended to accommodate the concerns. Despite the longer deadline of 12 weeks for national parliaments to produce reasoned opinions,[14] the red card is unlikely to be of significance in practice:

- National parliaments have only reached the existing yellow card on two occasions, and never the existing orange card which has a threshold lower that this proposed red card;
- It is limited to subsidiarity objections.
- The threshold is so high that there is almost certain to be a blocking minority in the Council in any event.

Sovereignty: the UK opt in

27. The Decision addresses the difficulty the Government faces because it considers that the opt-in under existing Protocol 21 (concerning legislation relating to Title V of Part Three of the TFEU concerning the area of freedom, security and justice[15]) is engaged if a proposal has content falling within the subject matter of Title V whereas all the EU institutions and the Committee consider (with the support of existing CJEU case law) that the measure must have a Title V legal basis. As the clarificatory language used is very similar to that in the existing Protocol it remains uncertain that the CJEU will be influenced to change its approach. There may, however, be some benefit to the Government's position from the encouragement of the Council to split measures into separate ones dealing with Title V issues and non-Title V issues, despite the fact that choice of legal base is meant to be objective.

[14] The existing reasoned opinion Protocol sets a deadline of 8 weeks for national parliaments to issue reasoned opinions.

[15] This covers immigration of third country nationals, judicial co-operation in civil and criminal matters and police co-operation.

Social Benefits and Free Movement

28. Section D of the Decision starts with a declaration that "the social security systems of the Member States, which Union law coordinates but does not harmonise, are diversely structured and this may in itself attract workers to certain Member states. It is legitimate to take this situation into account and to provide, both at Union and national level, and without creating unjustified direct or indirect discrimination, for measures limiting flows of workers of such a scale that they have negative effects both for the Member States of origin and for the Member States of destination".

29. It then sets out various interpretations:

a) Under Article 45 TFEU on the free movement of workers, "conditions may be imposed in relation to certain benefits to ensure that there is a real and effective degree of connection between the person concerned and the labour market of the host Member State".
b) Under Article 21 TFEU on citizenship, Member States can refuse to grant social benefits to persons "who exercise their right to freedom of movement solely in order to obtain Member States' social assistance…" or "are entitled to reside on their territory solely because of their job-search."
c) Member States can take action against abuse of free movement involving the use of forged documents and marriages of convenience, and also to deport undesirables. This is given more flesh by the Commission Declaration on issues related to the abuse of the right of free movement of persons (document g)) which promises guidelines on abuse by non-EU nationals marrying EU citizens exercising free movement rights, the concept of marriages of convenience and the thresholds for deporting undesirables. It promises to examine these thresholds on the occasion of a future revision of the Directive on free movement of EU citizens.[16]

30. These interpretations appear to be in line with current case law of the CJEU, or consonant with a trend in its case law[17] – except in respect of the deportation of undesirables where there appears to be an attempt to guide the CJEU away from its current case law. The Court can and does deviate from its own case law but the existence of an existing divergent interpretation from the CJEU increases the level of uncertainty.[18]

31. The Decision then envisages two specific changes to EU secondary legislation.

32. First, to amend the Regulation on the co-ordination of social security systems[19] to allow Member States to index exported child benefit to the conditions of the Member State

[16] 2004/38.
[17] See particularly the Dano and Alimanovic cases.
[18] See note 15 of 8 February from the Assistant Legal Adviser on the Advocate General's Opinion of 4 February in Case C-304/14.
[19] 883/2004.

where the child resides". This would be limited to new claims until 1 January 2020. A Commission declaration on the indexation of child benefit (document e)) clarifies that the indexation can include "the standard of living and the level of child benefits applicable" in the Member State where the child resides.

33. Such secondary legislation is unlikely to be annulled by the CJEU as incompatible with the Treaty.

34. Second, to amend the Directive on freedom of movement of workers[20] to introduce an emergency brake to respond to "situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time." This would authorise a Member State to restrict, for a maximum period of 7 years, access (on a graduated basis) to non-contributory in-work benefits for a total of four years after the commencement of employment. The authorisation would have to be proposed by the Commission and agreed by the Council, by qualified majority. The Commission will declare that the UK qualifies (document f)).

35. This emergency brake is limited to restricting in-work benefits for a limited period. It is subject to agreement by the Commission and the Council (which can be assumed for immediate first application by the UK). It is also subject to the jurisdiction of the CJEU if there is a challenge that the emergency brake is contrary to the Treaties[21] or, more, likely that the conditions for invoking it have not been met. The Decision leaves EU secondary legislation to determine the rate of gradual conferral of in-work benefit; and also considerable detail to cover the many and various circumstances that can arise in individual cases.

36. The wording of the Decision and the Commission Declaration imply that the UK meets the condition of the emergency brake because it did not restrict free movement from new Member States during previous accessions. This circumstance is unlikely to be repeated.

Next steps

37. It is proposed that formal scrutiny of the package be continued. The Government has already deposited earlier draft texts (with an Explanatory Memorandum) and has undertaken to deposit the texts of the actual agreement. It is suggested that an enhanced draft chapter, based on this note be produced for consideration by the Committee. The aim would be for the meeting of 10 March.

[20] 492/2011.

[21] In a blog of 20 February Professor Steve Peers of Essex University described the changes to in work benefits as "highly vulnerable."

38. From the legal perspective the only area I suggest where the Committee may wish to take further evidence is on the precise effects of the economic governance provisions found in Section A of the Decision, although taking such evidence is likely to delay any final report.

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22 February 2016

Annex

The Committee published its Report *UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny* on 15 December 2015.

The Government responded to this Report on 28 January 2016.

Additional legal evidence was received from Professor Sir Francis Jacobs, Professor Sir Alan Dashwood and Professor Damian Chalmers. This has been ben previously circulated to the committee, but not yet been published. The Committee considered a (confidential) commentary on the evidence of Professor Sir Alan Dashwood at its meeting of 10 February.

The Council Legal Service Opinion on the first Tusk package of draft legal texts for negotiation was published on 10 February 2016.

The Foreign Secretary gave further evidence to the Committee on 10 February 2016.

The Tusk package of draft legal texts for negotiation were deposited for scrutiny on 2 February 2016.