

Assessing the first draft of David Cameron's European Union deal

After months of negotiation, on 2 February 2016 at 11am, the President of the European Council, Donald Tusk, published draft documents setting out details of Prime Minister David Cameron's "new settlement" for the UK within the European Union. Shortly afterwards, the Prime Minister declared it a good start, pointing towards his hope that final agreement would come in February or March. This could see a referendum in June – possibly on the 23rd – or later in September.

This briefing examines those draft documents, and sets out the likely next steps.

What did David Cameron set out to achieve?

David Cameron set out the UK's objectives in his letter to Donald Tusk, the President of the European Council, on 10 November 2015.

In summary, those objectives were:

- Economic Governance. Recognise that the EU has more than one currency.
- Competitiveness. A target to cut regulatory burden on business. A consolidation of the EU's competitiveness initiatives.
- Sovereignty. Disapply "ever closer union" to the UK in a "formal, legally-binding and irreversible way." A red card procedure for EU national parliaments.
- Immigration. A four year waiting period for EU Member State citizens to claim in-work benefits. An end to the practice of sending child benefit overseas.

Did he succeed?

Largely, yes. To varying degrees, the Prime Minister has succeeded in delivering on most of his objectives.

What are the main elements of the draft deal?

The draft Decision is structured as follows:

- Section A on economic governance
- Section B on competitiveness
- Section C on sovereignty
- Section D on social benefits and free movement

These sections are examined in detail below.

Section A on economic governance

The draft Decision starts by stating that it is intended to be used as an "instrument for the interpretation of the Treaties." Given that there are many in the UK who believe, rightly or wrongly, that the Court of Justice of the European Union has acted



against the interests of the UK in the past, this will be taken as evidence that this concern is being addressed.

Section A includes a statement that "not all Member States have the euro as their currency." Whilst this is a statement of fact, it is intended to meet the Prime Minister's objective that the EU is recognised as a multi-

currency union. Perhaps more significantly, it goes on to state that the EU institutions will "facilitate the coexistence of different perspectives."

The European Central Bank's role is emphasised as focusing on "Member States whose currency is the euro or in Member States that have concluded ... a close cooperation agreement" and that it "or Union bodies exercising a similar function" - presumably a reference to the European Supervisory Authorities - "may" need to conceive the single rule book and other relevant legislative measures in a "more uniform manner" than when it is applied by national authorities of Member States that do not take part in the banking union. The section adds, "to this end, different sets of Union rules may have to be adopted in secondary law, thus contributing to financial stability." This would appear to provide non-euro financial supervisors a margin of appreciation that was not previously present. It does not clarify to what extent the margin of appreciation would be set by the relevant supervisors or would have to be provided for in the drafting of the legislative measures themselves. It is possible that this would effectively cut across the European Banking Authority's role in setting Level 3 guidance and that function would be claimed more by the ECB (for banking union entities) and the other regulators for those outside.

The draft Statement on Section A on economic governance sets out a mechanism which seeks to give non-banking union Member States the power to require the Council to "discuss" any contentious issues whilst not allowing "one or more Member States to veto the effective

management of the banking union or the future integration of the euro area." The Council shall then "do all in its power" to reach a "satisfactory solution" to address those states' concerns. This would appear to apply the so-called "Ioannina compromise", to allow non-banking union members to challenge actions taken by banking union members. While the original compromise no longer exists, it can be said that the same principle applies, although changed somewhat from the original, as part of the transitional measures to the new voting rules under the Lisbon Treaty (see Declaration 7 on Article 16(4) of the Treaty on European Union and Article 238(2) on the Treaty on the Functioning of the European Union).

Section B on competitiveness

The section on competitiveness does not include any substantive measures beyond the EU's existing policies. It does however underline the importance of pursuing an "active and ambitious policy of trade," the need to "strengthen the internal market" and "lowering administrative burdens."

The accompanying draft declaration of competitiveness is of inferior legal effect to a decision, which underlines the fact that the Council alone cannot propose substantive measures in this area. However, this reform should be considered in the wider context of the existing "Better Regulation" plan published by the Juncker Commission and the draft inter-institutional agreement on better regulation.

The accompanying declaration of the European Commission states that the Commission would "establish a mechanism to review the body of existing EU legislation for its compliance with the principle of

subsidiarity and proportionality..."

This would complement the existing Regulatory Fitness and Performance Programme ("REFIT") and would see the Commission report to the European Council annually. This underlines the UK's focus on better regulation.

Section C on sovereignty

The draft Decision states that "references to ever closer union among the people of Europe do not offer a basis for extending the scope of any provision of the Treaties or of EU secondary legislation." This reflects one of the Prime Minister's key objectives which is to ensure that the UK is not bound into any sort of integrationist project. The draft Decision goes on to explicitly state 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" adding, in square brackets, that "the substance of this will be incorporated into the Treaties at the time of the next revisions..."

The draft Decision includes a substantive strengthening of the current yellow and orange card "Subsidiarity Control Mechanism" which allows EU Member State national parliaments to issue reasoned opinions that require the Commission to consider whether to maintain, amend or withdraw the proposal. The draft Decision includes a red card procedure whereby a draft legislative act would have to be discontinued if the concerns of national Parliaments could not be accommodated. The threshold for the use of this mechanism would be more than 55% of the votes allocated to national Parliaments.

The draft Decision underlines that "the rights and obligations of Member

States provided for under the protocols annexed to the Treaties must be fully recognised and given no lesser status than the other provisions of the Treaties of which such protocols form an integral part."

Section D on social benefits and free movement

This is one of the Prime Minister's key negotiating areas and one where he has encountered the greatest resistance.

The draft Decision states that it is legitimate to avoid or limit "flows of workers of such a scale that they have negative effects both for the Member States of origin and for Member States of destination." It goes on to re-state what is an existing qualification of the right of free movement of workers under Article 45 of the Treaty on the Functioning of the EU, that "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."

In light of this, the draft Decision goes on to propose amendments to Regulation 883/2004 on the coordination of social security systems to index exported child benefits "to the standard of living in the Member State where the child resides." This is less than what David Cameron originally asked for but goes some way to meeting his objective.

A further amendment is proposed to provide an "emergency brake" in relation to in-work benefits. The amendment would be to Regulation (EC) No 492/2011 on freedom of movement for workers within the Union. A Member State would notify

the Commission and Council that, in terms of "inflow of workers from other Member States" an "exceptional situation exists on a scale that affects essential aspects of its social security system, or which leads to difficulties which are serious and liable to persist in its employment market or are putting an excessive pressure on the proper functioning of its public services." The Commission would appear to act as an initial gatekeeper, having to examine the notification before making a proposal to the Council. The Council would then by means of an Implementing Act, authorise the Member State to "restrict access to in-work benefits to the extent necessary" for "up to four years from the commencement of employment." It notes that "the limitation should be graduated, from an initial complete exclusion but 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." It imposes a further limitation in principle - with the dates to be agreed in square brackets - that the measure would have "a limited duration" extendible "for two successive periods."

The emergency brake mechanism is an alternative to David Cameron's original objective of requiring EU workers to wait for a period of four years before being entitled to claim in-work benefits. This is less than what David Cameron originally asked for but goes some way to meeting his objective.

The fact that the UK would not, under this proposal, be able to unilaterally engage this mechanism is sought to be mitigated by the draft Declaration stating that "The European Commission considers that the kind of information provided to it by the

United Kingdom shows the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today. Accordingly, the United Kingdom would be justified in triggering the mechanism in the full expectation of obtaining approval."

Will it be legally binding?

It is interesting to note that in Section E on application and final provisions, the draft Decision states that it "shall take effect on the same date as the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain a member of the European Union." This underlines the fact that these measures would not be adopted but for the "renegotiation" demanded by David Cameron.

The deal takes the form of a European Council "decision." The statement by President of the Council Donald Tusk noted that "Most of the substance of this proposal takes the form of a legally binding Decision of the Heads of State or Governments. We should also be prepared to discuss the possible incorporation of the substance of a few elements covered by the Decision into the Treaties at the time of their next revision."

The UK government has stated that: "This text, if agreed by all Member States, is in itself an international law decision that is legally binding and irreversible." This is arguable, as the agreement would have the status of an international agreement similar to previous similar agreements by Ireland and Denmark.

While the agreement between the Member States themselves would be legally binding, the proposed changes to secondary EU legislation would still

be subject to the ordinary legislative procedure and therefore would have to be based on a proposal from the Commission and decided by co-decision of the European Parliament and Council.

What happens next?

The UK will now seek to negotiate the details of this deal with other EU Member States before the European Council meeting scheduled for 18-19 February. If agreement is reached at that meeting, it is likely that David Cameron would announce the date of the referendum shortly after that, triggering the start of the official "Referendum Period" under the Political Parties, Elections and Referendums Act 2000 as amended by the EU Referendum Act 2015. The referendum would likely take place in June in those circumstances.

In the event that agreement could not be reached in February, David Cameron would likely seek agreement at the next European Council meeting on 17-18 March. This would likely push a referendum back to September.

Conclusion

To varying degrees David Cameron has been able to address the issues in all four of the negotiating areas he set out in 2015. If adopted, some, such as the red card for national parliaments and the reforms in the area of economic governance, would be substantive changes.

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