Of Decisions, Declarations and Suspensive Conditions: The European Council of 18/19 February 2016

Paper presented by Kenneth Campbell QC at a seminar organised by the Advocates Group on EU Law on 26th May 2016.

A good deal has been spoken and written about a number of possible legal issues which may arise in the event of a 'leave' vote in the forthcoming EU referendum. And the legal consequences in the event of a vote to leave would be almost as profound as the political consequences. However, if the result is a 'remain' vote, that will also have legal consequences, and it seems to me rather less has been said about those - indeed I was chatting recently with one lawyer about giving this talk who said to me that it would be a pretty short event. While I'll certainly try to keep to time, as we'll see there is more to it than complete continuity, and that will be my focus this afternoon.

Today is not about taking one or other side in the argument about staying or leaving. Others are much more vocal about that. Instead this presentation aims to outline some of the legal issues which will arise in the event that the referendum result is for the UK to remain a member of the EU.

What I am going to talk about this afternoon is the legal structures which accompany the political deal which was done at the of European Council of 18/19 February. I will say something about the technical structure of the outcome of the Council meeting, and then the mechanics of implementation, as well as the extent to which the agreement(s) bind in the interim.

Beginning then with the Council meeting in February.

You will recall that the European Council consists of the heads of state or government of the member states, alongside its own President and the Commission President (both of whom are non-voting members), and after years of de facto existence, it finally received institutional status along side the Council of Ministers in the post-Lisbon structure. That is found in Art 15 TEU, which reflects the high level political character of the Council:

> "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political priorities thereof."

Importantly in the present context, the same article also provides that the Council does not have legislative functions. Rather, it is generally the forum for what the press shorthand frequently refers to as 'EU summits' or sometimes 'EU crisis summits'.

After the February meeting, however, the political narrative was that “EU leaders had agreed on a new settlement for the UK within the EU.”

So what did this ‘new settlement’ comprise, and what is the legal - rather than political - interest in it?

Well, to begin with, the political agreement contains a series of interlocking texts, some of which are plainly at least partly legal in character, and I suggest are equally plainly intended to have legal effects. The full set of agreed acts is as follows, and draft texts for a number of Declarations and Decisions have already been agreed and are annexed to the Conclusions adopted by the Council.

> a) a 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 (Annex 1);
> b) a Statement containing 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 which will be adopted on the day the Decision referred to in point (a) takes effect (Annex 2);
> c) a Declaration of the European Council on competitiveness (Annex 3);
> d) a Declaration of the Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism (Annex 4);
> e) a Declaration of the European Commission on the indexation of child benefits exported to a Member State other than that where the worker resides (Annex 5);
> f) a Declaration of the Commission on the safeguard mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government (Annex 6);
> g) a Declaration of the Commission on issues related to the abuse of the right of free movement of persons (Annex 7).
> (Ref: EUCO 1/16 2 **EN**)

You will see that this encompasses instruments on wide range of topics, and as we’ll see, even if the titles are not necessarily attention-grabbing, the content of at least some of these are important. This range of subject-matter becomes more explicable when we recall that the Prime Minister’s letter to Donald Tusk in November 2015 set a 4 point agenda for discussion of the UK’s relationship with the EU. Those 4 points were:

- Economic Governance
- Competitiveness

- Sovereignty
- Immigration

In light of those, the relationship between those headings and the topics to be addressed by prospective legislative acts becomes much clearer.

So what do we find in the Annexes?

Annex I contains the main Council Decision 'concerning a new settlement for the United Kingdom within the European Union' and I will have more to say about that shortly.

As you have seen from the list, the remaining Annexes contain a series of Statements and Declarations, and embedded within some of these are the text of draft Council Decisions. Let me highlight 3 of these: Monetary & economic governance; the end of ever closer union; and free movement.

First, the topic of monetary and economic governance has been at the top of the EU agenda in the years since the financial crash of 2007-8, and the topic of the pre-eminence of the City of London in banking and finance is never far from the minds of the UK Government. And then there is the Euro.

Of course the UK already has a permanent opt-out from the Euro - that is found in Protocol 15 to the Treaty, and is different in character from the position of those Member States which do not yet meet the qualification criteria for membership. The UK is not obliged or committed to adopt the Euro without a separate decision to that effect by the UK Parliament.

So there is no need for additional provision there.

Section A of the main Decision and Annex II of the Decision are about something different, namely balancing the interests of the Euro and non-Euro Members when it comes to decision making, particularly in relation to banking and finance matters. Here the concern is that on the one hand minimising the effects of future financial turbulence in the Euro-zone is likely to entail closer economic cooperation at the EU level, and on the other, there should be no discrimination and no disadvantage for any business on the basis of the currency of their country.

The UK position at the outset of the process was that any changes the Eurozone decides to make, such as the creation of a banking union, must be voluntary for non-Euro countries,

and not compulsory; and further that taxpayers in non-Euro countries should never be financially liable for operations to support the Eurozone as a currency.

What has been agreed? In the main Decision, there is express prohibition on discrimination on the basis of official currency of the member state. Any difference in treatment must be based on objective reasons. (section A, para 1)

Of more interest to the financial sector, the main Decision also makes provision about banking supervision. The supervisory role of the ECB is explicitly said to apply only to institutions located in Euro states "and Member States that have concluded with the ECB a close cooperation agreement on prudential supervision". Which I think is unlikely to include the UK any time soon. That probably makes explicit what was previously implicit. More interesting is the first use of the phrase "level playing-field" which I have come across in a legislative text, and this does matter in the UK. Para 2 of Section A in the main Decision provides that:

> "The single rulebook is to be applied by all [banks and financial institutions] in order to ensure the level playing-field within the internal market."

That is subject to a proviso that in effect the ECB may regulate things more tightly in the Euro zone. It is also subject to agreement within existing powers about macro-prudential banking supervision. On the face of it, that seems to me to address the concerns that non-Euro banks (which for this purpose really means the City of London) might be regulated by the ECB rather than the host member state.

Provision is also made for what the press might call a bale-out and what the Decision calls "emergency and crisis measures designed to safeguard the financial stability of the Euro area". These are expressed not to engage financial responsibility of non-Euro states, and so that is I think a political win for the Prime Minister.

Annex II comprises a draft Decision of the European Council which is stated to come into force on the same day as the main Decision. What we might call the Banking and Finance Decision is essentially an undertaking about decision making and voting process in the European Council in relation to economic and monetary policy.

Where legislation is proposed in this area, a non-Euro state may indicate reasoned opposition to decision making by QMV, and the matter must then be discussed at the European Council, which is required to "do all in its power to reach within a reasonable time

and without prejudice to obligatory time limits [elsewhere in] Union law, a satisfactory solution." This is plainly intended to provide some sort of procedural check on the legislative process, and builds on existing process for decision making in the European Council.

Ever closer union is the second aspect of content I want to mention.

As we know, that has been a phrase resonant in the Treaties since the foundation of what was then the EEC in the Treaty of Rome. Originally in a recital, and latterly in Art 1 TEU the import of the phrase has become politically troublesome. Section C of the main Decision which is headed 'sovereignty' seeks to address that with a recognition that the UK "is not committed to further political integration into the European Union", and that is because of "the specific situation it has under the Treaties" - meaning the existing combination of opt-ins and opt-outs. There is a also an indication this will be incorporated into the Treaties at their next revision, and that is something I'll come on to shortly.

Subsidiarity also gets a mention under this heading, with Annex IV containing an undertaking to review the existing corpus of EU legislation for compliance with the principles of subsidiarity and proportionality. Which in some ways sounds like the hardest task generated by the Decision. Subsidiarity also gets a mention in the so-called red card process whereby national parliaments may issue reasoned opinions under the existing Protocol 2 on subsidiarity, and where 55% of the national parliaments are of that view, the European Council is required to consider those and amendments to the proposed legislation in light of them.

Turning finally on content to free movement.

As we know, free movement of citizens is one of the 4 cornerstones of the Union. That principle is not changed - at least not directly, since that would certainly need a Treaty change. What is addressed in the Decision is the related issue of social security for citizens of one member state living in another member state. The introduction to Section D of the Decision notes that EU law coordinates but does not harmonise social security, and introduces the notion of "measures limiting flows of workers of such a scale that they have negative effects" both for the state origin and of destination. This part of the Decision deals with a number of aspects of child benefits and work-related benefits; however the most eye-catching now as in February is the so-called 'emergency brake'. This requires legislation to amend Reg EU 429/2011 about free movement of workers in order to provide for an process responding to "situations of inflow of workers from other Member States of an exceptional

magnitude over an extended period of time, including as a result of past policies following previous EU enlargements."

A Member State wishing to avail itself of the mechanism would notify the Commission and the Council that such an exceptional situation exists on a scale that affects essential aspects of its social security system, including the primary purpose of its in-work benefits 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 Council will be empowered authorise the Member State concerned to restrict access to non-contributory in-work benefits to newly arriving EU workers for a total period of up to four years from the commencement of employment. The authorisation would have a limited duration and apply to EU workers newly arriving during a period of 7 years.

Annex VI contains in effect a pre-authorisation for the UK to use this procedure, because the Annex comprises Declaration by the Commission that the UK has already provided information which would justify it triggering the mechanism.

So those are some highlights from the contents. More striking from the lawyer's perspective, is the assertion by the Heads of State and Government in the Council Conclusions about main Decision (called Annex 1) of a number of propositions about the status and effect of their agreement:

> "(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;
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> (ii) the content of the Decision is fully compatible with the Treaties;
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> (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;
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> (iv) this Decision will take effect on the date 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."

That is all rather interesting, and in light of point (iii) it is as clear an expression of intention to be bound as one might look for in an agreement of this kind.

The 'Decision of the Heads of State or Government meeting in the European Council' takes the form of an international agreement and not of a European Council decision in the sense of Article 288 TFEU, which envisages a quasi-legislative act addressed to and binding on

specific addressees. Here the point is that a Decision under Article 288 (which may be an act by any of the institutions) is usually an act of EU law for what might be classed as internal purposes. For political and perhaps also for instrumental legal reasons, the Council has gone further and cast this particular act as an instrument independently identifiable in public international law. That course is not without precedent - it was also done in 1992 and in 2008, with the adoption of Council Decisions to address respectively Danish concerns over the Treaty of Maastricht and Irish concerns over the Treaty of Lisbon. Interestingly both of these decisions were subsequently transformed into Protocols to the core Union Treaties. As you may recall, that is a course which has been followed a number of times to provide adjuncts to the Treaties, or to provide for some of the opt-outs and opt-ins which already exist. So for example Protocol No 21 contains the UK opt out and opt in for legislation in the freedom, security and justice area, while Protocol 30 seeks to limit further extension of the operation of the EU Charter of Fundamental Rights in Poland and the UK.

As we have seen, the Decision is expressed to take effect on the same date as the UK Government informs the Secretary General of the Council that the UK has decided to remain a member of the EU (section E, para 2). Thus in the solid world of private law language, what we might call a suspensive condition. And like a suspensive condition in a contract, happening of the event is a prerequisite of obligations coming into effect. However, for the benefit of the wider public and perhaps to avoid any doubt, the Conclusions of the Council meeting - and not the Decision itself - says that should the result of the referendum be for the UK to leave the EU, the whole set of arrangements annexed to the Council Conclusions "will cease to exist". Note the form 'cease to exist' - which you might think is even more final than 'will not have effect.' I suppose that formula also avoids any argument about the need for a further Council dialogue about the fate of the existing text.

So the conclusion at this point is there are no obligations in the meantime.

In the event the condition is purified - that is, by a 'remain' vote - what of the character of the Decision then?

In my view, the Decision itself does not amount to a Treaty change, but it does anticipate Treaty changes in the future. It also seems to me to involve a number of legal obligations in the interim. In the first place, in my view the Decision binds the Member States as an agreement between states in international law. That certainly seems to be the view of the British government, which has deposited the Decision with the UN as an international agreement. That is also the public view of the Commission Legal Service.

Taking that a step further, and allowing that the Decision is not a treaty modifying the Union Treaties, it seems to me that nonetheless it could potentially serve as an instrument for interpretation and clarification of Member States' obligations in connection with the Treaties in those areas which are affected by the subject matter of the Decision. That is on the premise that it reflects the view of Member States who are the ultimate parties to the Union Treaties. And there is precedent for that in the case law of the Court of Justice. So in *Rottmann v Freistaat Bayern* C-135/08 [2010] ECR I-1449, the Court was faced with an intriguing problem about EU citizenship, where the claimant had lost his citizenship of one member state by naturalisation in another, and the later citizenship was thereafter withdrawn because it had been obtained by deception. However for present purposes the important point was that (at para 40) the Court noted that one of the Declarations annexed to the final act of the TEU and a decision of the Heads of State and Government (as the European Council was then officially described) in December 1992 "had to be taken into consideration as being instruments for the interpretation of the EC Treaty".

There is specific instance of that in the section of the Decision about ever closer union not being for Britain, where it is expressly stated that:

> "references in the Treaties and their preambles to the process of creating an ever closer union among the peoples of Europe do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation. They should not be used either to support an extensive interpretation of the competences of the Union or of the powers of its institutions as set out in the Treaties."

So much for the essential nature of the Decision, what of the content of the obligations to legislate? The Decision is not self-executing, and requires further EU legislation - particularly in relation to the free movement aspects. Moreover, when the commitment in the Decision to amend the Treaties is taken forward, the usual Treaty revision procedures would apply (Article 48 TEU). There are two forms of amendment process: what is described as the ordinary revision procedure in terms of Arts 48(1)-(5) TEU, and a simplified revision procedure in terms of Art 48(6)&(7).

If the ordinary revision procedure is used, a convention composed of representatives of national parliaments, the Heads of State and Government, the European Parliament and the Commission is convened to examine the proposed amendment. The convention must achieve consensus, and makes recommendations to a conference of representatives of the governments of Member States.

The simplified revision procedure can only be used to amend provisions of Part Three of the TFEU relating to the internal policies and action of the EU. Here the European Council is firmly in the driving seat, though they must consult the EP, the Commission and the ECB (where change is proposed in the monetary area).

Plainly the ordinary revision procedure makes sense for a major Treaty revision exercise, though it does not obviously lend itself to swift progress. Art 48(3) allows the European Council after consulting the EP to agree by simple majority to dispense with holding a convention "should this not be justified by the extent of the proposed amendments." In that event, the matter proceeds by Inter-Governmental Conference.

Wisely the Decision is silent about which of these courses might serve.

What is the effect of a commitment to make changes to the Treaties? In a domestic context, it seems to me that a commitment to legislate in some circumstances might give rise to a legitimate expectation, certainly if the commitment was recorded in a juridical act. As an international law agreement as well as an EU instrument, my view is that the Decision must be held to be a juridical act.
We have seen that for example in the litigation about the Scottish Government's failure to make regulations bringing into force a right to challenge the security classification of patients in secure hospitals other than the State Hospital. That had been the subject of provision in the Mental Health (Care and Treatment)(Scotland) Act 2003, which was exercisable by Regulation. Scottish Ministers did not lay Regulations before the Scottish Parliament, and a judicial review went all the way to the UKSC, which held that while there was discretion in the manner of making the necessary regulations, there was a duty to exercise the power by the date specified in the commencement provision for the relevant part of the Act.

Obviously that case involved a commitment to legislate at a domestic level. Is that equally apt between states? It is certainly a principle of international law that *pacta sunt servanda*, I wonder whether it might be rather a stretch to say, as it were, that *pacta erunt correxi*. Perhaps 'best endeavours' might be more apt. That is because changes to the existing Union treaties require ratification by all of the Member States, and experience across the last 20 years or so shows that has not been a straightforward or quick process.

For a start, as we know all too well from previous Treaty revision episodes, member states have a variety of processes under their national constitutions for treaty ratification. Some

require only executive acts, others require parliamentary ratification, whilst others again involve the electorate directly via a referendum.

In that connection, there is an interesting question about whether the UK would be one of those Member States requiring a referendum. If it was, that would be as a consequence of the European Union Act 2011. So just to be clear about that, if there is a 'remain' vote, and the 2011 Act remains in force, whenever the EU next gets round to Treaty revision, there is a possibility of another EU-related referendum. However, I think that at least is a fairly remote possibility since the provisions of the 2011 Act which require an EU-related referendum are drafted against the possibility of the extension of EU competence - which plainly is not the situation - and changes in voting rules in certain policy areas - which so far as I can see is not the aim of the plans in the draft acts annexed to the Council Decision. So if there is ever a third EU referendum, it will almost certainly not be due to the legislative follow up to the second.

Moving to a different aspect of legality, I have already mentioned the statement in the Council conclusions to the effect that understanding of the Heads of State or Government is that the content of the Decision is 'fully compatible with the Treaties'.

Under Article 273 TFEU, disputes between Member States that relate to the subject matter of the Treaties may be submitted to the jurisdiction of the Court of Justice of the EU. This Decision does not, however, include a provision to subject disputes resulting from it to the jurisdiction of the Court. That is something which was done in connection with another international agreement related to EU matters, namely the Treaty on the European Stability Mechanism. However, Member States could also agree at a later stage, after a dispute had arisen, to submit it to the Court of Justice. Of course, as we know, *this* Council decision reflects the highest of high politics, and the inclination to have judicial dispute resolution is likely to be limited. Recognising that, paragraph 1 of the final provisions section of the Decision provides a more political forum for resolution of any such questions: Member States may ask the President of the European Council that an issue relating to the application of the Decision be discussed in the European Council.

So far, I have spoken mainly about the Member States and their governments. However, as you will appreciate, the EU legislative process also generally involves the European Parliament. However, the European Parliament does not have a formal role in the procedure for adopting the main Decision by the Council should the suspensive condition be purified.

Nonetheless, as I understand it, the European Parliament has been involved at different stages of the negotiation process, though that has been on political rather than a legal level. The Decision is not self-executing, and will require further legislation or in some circumstances, amendment of existing legislation. This is where the European Parliament will have a more active role - and this is something not squarely addressed in the undertaking in the Council Decision to legislate - it comes at the stage of amending the underlying EU legislation in the areas which are covered by the Decision. It will be engaged in its formal role as a co-legislator when proposals are submitted by the Commission to change secondary EU law.

The Decision expressly recognises this in relation to amendment of a number of specific provisions, namely:

- Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems to change the provisions on the export of child.
- Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union to introduce an 'emergency brake' (ordinary legislative procedure, based on Article 46 TFEU); it should be noted however that the proposed change would enable the Council to authorise the use of the emergency brake by a Member State through an implementing decision (Article 291(2) TFEU), without Parliament's involvement.
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

You will immediately see that all of these provisions relate to areas of core EU policy, and areas moreover which are currently hugely politically contentious, particularly those around free movement. So it is quite conceivable there may be challenges in managing the legislative process, since whatever political compromises were involved in the Council are not, of themselves, binding on the European Parliament.

Perhaps a less predictable but perhaps more likely possibility is judicial challenge. Less predictable in that the infinite variety of circumstances and interests mean that points might be raised in a range of ways. More likely because the direct and personal interests which may be involved. It seems to me that is particularly so in the highly political area of free

movement, and the related area of workers' rights. It seems to me that it is probably unlikely in the form of a direct challenge to the Decision and declarations, but more likely to be in the form of a challenge to amending legislation made in consequence of the agreement reflected in the Decision, if that legislation might constrain the exercise of existing rights. To a large extent, the direction of any challenge depends on the form of the amendment, which we have obviously not seen, and will only see if the suspensive condition is purified.

However, speculating a little, it seems to me that possible areas where this might be anticipated are challenges around the effect of service providers diluting domestic trade union agreements, for example; or, around the operation of the so-called 'Emergency Brake'. There are parallels in litigation which is currently taking place in the Upper Tribunal about social security entitlements of citizens of the most recent Accession States.

So those are the main landmarks on the legal landscape to implement the agreement between the UK and other member states. As we have seen, it is subject to a suspensive condition, but should that be purified, my view is that it certainly creates legal relations. And as we have also seen, there is rather more to it that than the colleague whose conversation I related earlier.