

Brexit essentials: Renegotiation of the UK's relationship with the EU

Prior to the “in/out” referendum on the UK’s membership of the European Union, Prime Minister David Cameron promised first to attempt to negotiate a “*new settlement*” for the UK within the EU, “*with the single market at its heart*”. The Prime Minister’s proposals for reform were published in a letter to European Council president Donald Tusk on 10 November 2015 (as discussed in the [first edition](#) of this briefing). Those proposals were the starting point for negotiations which were finalised at a European Council summit on 18-19 February 2016.

This is the third in a series of briefings covering the essential aspects of the UK’s referendum on EU membership, which has been called for Thursday 23 June 2016. This edition discusses the reform package agreed upon at the recent European Council summit, the extent of the Prime Minister’s success in achieving his proposals for reform, and how this may affect the outcome of the referendum.

What does the reform deal cover?

The Prime Minister’s proposals of November 2015 covered four key areas:

1. **Economic governance:** ensuring that the interests of non-Eurozone Member States are safeguarded in EU policy.
2. **Competitiveness:** consolidation of the single market, removing remaining barriers to trade and cutting red tape.
3. **Sovereignty:** opting-out of the principle of “*ever closer union*”, enhancing the role of national parliaments, and safeguarding the principle of subsidiarity - that the EU will only intervene if it can act more effectively than Member States at the national level.
4. **Migration:** reducing the benefits available to EU migrants to the UK.

Following the EU summit on 18-19 February 2016, European Council President Donald Tusk published the conclusions adopted by the Council.

The conclusions are comprised of seven legal texts: a Decision of the European Council concerning a new settlement for the UK within the EU, supported by a draft Council Decision on specific provisions relating to economic governance; a Council Declaration on competitiveness; and four European Commission Declarations covering subsidiarity and burden reduction, child benefits, a migration safeguard mechanism, and issues related to the abuse of free movement of persons.

What is the European Council?

Comprises the heads of state or government of each EU Member State, plus the European Commission President and the EU High Representative for Foreign Affairs and Security Policy. It does not pass laws, but decides on the EU's overall direction and political priorities. It also deals with complex or sensitive issues that cannot be resolved at lower levels of intergovernmental cooperation.

Not to be confused with the Council of the European Union, which comprises government ministers from each EU country, depending on the policy area to be discussed. Together with the European Parliament, the Council of the EU is the main decision-making body, as the ministers have the authority to commit their governments to actions agreed on in the meetings.

Is the reform deal legally binding?

The European Council Decision on the new settlement (the “Council Decision”) states that it is a legally binding decision by the leaders of the 28 Member States, which will only become effective if the UK government informs the Council that the UK has voted to remain a member of the EU. It may only be amended or repealed by the agreement of all of the 28 EU leaders.

If the UK's referendum results in a “leave” vote, the proposals will not be put into effect. This is important, as it means that if the UK votes to leave the EU and as an alternative seeks to join the EEA, the proposals will not have been put into effect in areas which affect the EEA States, such as free movement of workers. The different alternatives for exiting the EU were discussed in the [second edition](#) of this briefing.

The Council Decision is technically not an act of the European Council as an institution, but rather of the 28 heads of state or government acting in their own name. This distinction means that the Decision can be registered as an international treaty, which means that it is legally binding on the signatories under international law (as opposed to EU law). The UK (and the other 27 Member States) would therefore need to agree for it to be amended or rescinded.

While the Council Decision itself would not therefore change current EU law, certain elements of the deal - described further in this briefing - do envisage either a future change to the Treaties or new EU legislation if the UK votes to remain in the EU. Some of the measures may also - if implemented - be open to challenge before the EU courts.

“I deeply believe that the UK needs Europe, and Europe needs the UK. To break the link now would be totally against our mutual interests. We have done all we could not to let that happen.”
European Council President Donald Tusk, 19 February 2016

The impact of renegotiation on undecided voters

In a poll conducted on 20 February 2016,¹ immediately following the EU summit, 62% of respondents stated that the renegotiation had made no difference to their voting intentions.

| | Made no difference | More likely to vote leave | More likely to vote remain | Don't know |
|---|--------------------|---------------------------|----------------------------|------------|
| From what you have seen or heard, has the renegotiation made you more likely to vote to leave the EU or more likely to vote to remain a member of the EU? | 62% | 18% | 15% | 6% |

The large proportion of respondents whose views are unchanged by the reform package is indicative of the extent to which voters see (or do not see) the reform package as relevant to the issues that they care about. In the same poll, 59-60% of voters thought that the measures that have been agreed in respect of migration, described further in this briefing would either not halt the rates of migration to the UK or would make no difference to reducing migration to the UK.

What has been agreed?

1. Economic governance

In his letter of 10 November 2015 the Prime Minister requested legally binding principles to safeguard the functioning of the EU as distinct from the Eurozone. The fear was that the qualified majority of 19 Eurozone states could pass legislation which would put the interests of the Eurozone above those of the single market more generally. The UK already has a permanent opt-out from membership of the Eurozone, but the Prime Minister requested specific recognition that:

- i. the EU has more than one currency;
- ii. there should be no discrimination and no disadvantage for any EU-based business on the basis of the currency of their country;
- iii. the integrity of the single market should be protected;
- iv. changes decided by the Eurozone, such as the creation of a banking union, should be voluntary for non-Eurozone countries;
- v. non-Eurozone countries should never be financially liable for operations to support the euro as a currency;

¹ Source: Survation, 20 February 2016, telephone interviews with 1,002 UK voters.

- vi. financial stability and supervision is a key area of competence for national institutions like the Bank of England for non-Eurozone countries, in the same way as the European Central Bank has these competencies for the Eurozone; and
- vii. issues that affect all Member States should be discussed and decided by all Member States.

The Council Decision adopts measures to address each of the Prime Minister's requests. In particular, it recognises that measures to deepen economic and monetary union will be voluntary for Member States whose currency is not the euro, and that such deepening will "*respect the rights and competences of the non-participating Member States*". The Decision also prohibits discrimination between people or companies based on the official currency of their Member State; notes that the European Central Bank has authority only over credit institutions in Eurozone Member States;² and recognises that measures to preserve the financial stability of non-Eurozone Member States are a matter for their own authorities.

The Decision further provides that non-Eurozone Member States will not be responsible for emergency and crisis measures introduced to safeguard the financial stability of the Eurozone, and they will be reimbursed fully if the general EU budget supports such measures.

The Council Decision also addresses the Prime Minister's concerns over the Eurozone Member States caucusing to force through legislation that favours the Eurozone over the single market: it states that "*all members of the Council participate in its deliberations, even where not all members have the right to vote*". Most concretely, the Decision provides that a Member State which does not participate in the banking union can indicate that it is opposed to the Council adopting a legislative act relating to economic governance by qualified majority, in which case the Council will discuss the issue. This mechanism is designed to ensure that non-Eurozone countries can stop the Eurozone majority pushing through economic legislation favouring the euro without taking the interests of the non-Eurozone into account. However, the draft Decision states that this "*cannot result in a situation which would amount to allowing a Member State a veto*".

At face value, the renegotiation can be said to have been a success for the Prime Minister, given that his proposals for reform have all been addressed. However, the extent to which the agreement represents a change to the *status quo* is less obvious. For example, the principle of non-discrimination between EU Member States is already captured in the existing Treaties, so prohibiting discrimination between Eurozone and non-Eurozone States is arguably unnecessary. The mechanism to allow non-Eurozone States to object to being outvoted is designed to encourage the Member States to reach agreement, but does not give the objecting Member State a veto or an opt-out from the laws that are passed despite its objections.

2. Competitiveness

The Prime Minister's proposals on competitiveness focused on cutting back existing regulation, seeking a specific EU target to cut the total regulatory burden on business. He also requested that the EU do more to fulfil its commitment to the free flow of capital, goods and services. This is a desire shared by many Member States and the current President of the European Commission, Jean-Claude Juncker, who had already announced plans to cut unnecessary regulation prior to the Prime Minister's proposals in November 2015.

² Or credit institutions located in Member States that have concluded a close cooperation agreement with the European Central Bank on prudential supervision - this does not include the UK.

The Council Decision confirms that the EU must enhance competitiveness and that the EU institutions and Member States “*will make all efforts to fully implement and strengthen the internal market*” and “*take concrete steps towards better regulation*”. To this end, the accompanying European Commission Declaration sets out a ‘subsidiarity implementation mechanism’ and a ‘burden reduction implementation mechanism’ to review the body of EU law, report annually to the European Parliament and the European Council on compliance with the principles of subsidiarity and proportionality, and establish specific targets to reduce the regulatory burden on businesses and in particular small and medium-size enterprises.

While again his proposals have been wholly accepted, it is not straightforward to position this agreement as a “win” for the Prime Minister. Cutting red tape and reducing EU legislation was already a stated goal of the European Commission, which had withdrawn around 80 draft directives prior to the Prime Minister’s proposals in November 2015.

“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% and it means that the cost of EU red tape will be going down, not up.”
Prime Minister David Cameron, 22 February 2016

3. Sovereignty

There were three limbs to the Prime Minister’s November proposals in respect of sovereignty: (i) opting out of the principle of “*ever closer union*” in a legally-binding and irreversible way;³ (ii) enhancing the role of national parliaments through a mechanism allowing them to act together to block European laws that were not in their national interest; and (iii) safeguarding the principle of subsidiarity.

“Ever closer union”

The Council Decision recognises that the UK is not committed to further political integration into the EU, and commits to make it clear in the Treaties at their next revision that the phrase “*ever closer union*” does not apply to the UK. It also confirms that the phrase should not be used as a legal basis for expanding the scope of EU law or the EU’s powers, and recognises that it is compatible with different paths of integration being available for all Member States. The Prime Minister has therefore achieved the political statement that he was seeking.

“People used to talk about a multi-speed Europe. Now we have a clear agreement that not only are different countries able to travel at different speeds, they are ultimately heading to different destinations too.”
Prime Minister David Cameron, 22 February 2016

³ The UK doctrine of parliamentary sovereignty means that the current UK parliament cannot bind its successors, so the extent to which any measures agreed by the Prime Minister are truly “irreversible” is questionable.

However, given that the phrase itself is purely symbolic, there is no tangible or direct legal impact resulting from the ending of this commitment with respect to the UK. The Prime Minister has argued that the EU Courts have in the past relied on the phrase “*ever closer union*” to support “*centralising judgments*”⁴ - i.e. those that support the expansion of the EU’s competences. However, the EU Courts have in fact rarely cited the phrase, and when they have done so it has mostly been in the context of public access to official documents (the full phrase in the Treaties being “*ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen*”).⁵

Enhancing the role of national parliaments: the “red card” and safeguarding subsidiarity

The Council Decision addresses the Prime Minister’s concerns over the role of national parliaments and safeguarding subsidiarity together, with what has been referred to as the “red card” mechanism. The EU institutions must take into account any reasoned opinions from national parliaments on the application of the principles of subsidiarity and proportionality: simply put, national parliaments can object to EU legislation if they believe that action should more properly be taken at national, rather than EU, level.

If there are subsidiarity objections to draft EU legislation from Member State parliaments representing more than 55% of the votes allocated to national parliaments (equivalent to the parliaments of 16 Member States), this would trigger a discussion of the issue at the Council of Ministers. This “red card” intervention allows national parliaments to intervene directly in the EU decision-making process, where previously only national governments could have a say.

“The purpose of the principle of subsidiarity is to ensure that decisions are taken as closely as possible to the citizen.”

Council Decision on the new settlement for the UK within the EU, 19 February 2016

4. Migration

The Prime Minister’s November proposals on intra-EU migration had two limbs: (i) that EU migrants to the UK must live in the UK and contribute to UK taxes for four years before qualifying for in-work benefits or social housing; and (ii) stopping child benefit payments to migrants’ children who live elsewhere in the EU. Both proposals were designed to limit the “pull factors” perceived as drawing EU migrants to the UK.

⁴ Prime Minister David Cameron, 19 October 2015: “[...] *this concept does have legal force because ever-closer union has been used by the courts to enforce centralising judgments and I want that to change.*”

⁵ The House of Commons Library has found that the Court of Justice of the European Union has referred to “*ever closer union*” in 0.2% of its judgments and opinions: House of Commons Library Briefing Paper 07230, 16 November 2015, “*Ever Closer Union*” in the *EU Treaties and Court of Justice case law*’.

“In the end, this is about migration. Since access to welfare benefits is a means to an end, there are various other mechanisms that we might consider and would test with public opinion.

The Prime Minister has said four years, but there is no magic about four years. It is just a figure that we calculated would provide a sufficient deterrent. We are looking to deter people.”
UK Foreign Secretary Philip Hammond, 18 January 2016

The Prime Minister also stated in November 2015 that the EU needed to ensure that free movement of persons would only apply to newly-admitted Member States once their economies have converged much more closely with existing Member States. This was a reaction to the large number of Eastern European migrants that entered the UK after the 2004 enlargement of the EU to include 10 new countries (the UK being one of only three pre-existing EU countries, along with Ireland and Sweden, which chose not to implement a transition period to restrict the rights of workers from the new Member States).⁶ The Prime Minister also requested that the EU “*crack down on the abuse of free movement*”, such as by imposing longer re-entry bans for those committing fraud and giving Member States stronger powers to deport criminals.

This was seen as the most difficult area of reform, as non-discrimination against Member State nationals is a key principle of the EU. The Council Decision recognises that freedom of movement of workers is “*an integral part of the internal market*” which entails “*the right for workers of the Member States to accept offers of employment anywhere within the Union*”. However, an agreement has been reached on all of the concerns raised by the Prime Minister, in a way that the 28 Member States have agreed is in keeping with EU law.

The Council Decision acknowledges that social security systems are structured differently in different Member States and so, where workers may be disproportionately attracted to certain countries, is it legitimate to limit flows of workers “*of such a scale that they have negative effects*” for both the “push” and “pull” countries. Free movement of workers may therefore be restricted for overriding reasons of public interest - including the need to avoid undermining the sustainability of a State’s social security system.

On that basis, the agreement provides that the European Commission will introduce proposals to change EU law:

- i. To introduce an alert and safeguard mechanism (referred to informally as an “emergency break”), which would allow any Member State to restrict access to in-work benefits (such as the Working Tax Credit) for new EU migrants for four years from the date of the start of their new employment, if it experienced an inflow of workers of “*exceptional magnitude over an extended period of time*”. Such restrictions could apply to any workers arriving within up to seven years of the introduction of the restriction. The Member State would need to show that the inflow of workers affects its social security system, leads to serious difficulties in its labour market, or puts “*excessive pressure*” on its public services. The Commission Declaration notes that the type of exceptional situation that it intends to cover already exists in the UK today.

⁶ The UK did, however, impose the permitted transitional employment restrictions on Bulgarian and Romanian migrants when those two countries joined the EU in 2007.

- ii. To broaden the grounds on which Member States can restrict entry to or deport EU migrants: for the first time, they will be able to do so on preventative (as opposed to reactive) grounds if there is a likely threat to public policy or security and take into account past criminal convictions.
- iii. To allow for child benefit payments to be linked to the cost of living and level of child benefit in the country where the child resides. Initially this will apply only to new claims, but from 2020 it will apply to all existing claims. The Council Decision expressly notes that there are no proposals to extend this system of indexation to other types of benefits, such as old-age pensions.
- iv. To restrict the right of free movement for non-EU nationals who marry an EU citizen of a different Member State. This means that non-EU spouses would not be granted a right of residence in the UK by marrying an EU national from outside the UK; they would instead be subject to UK immigration rules. Member States are already empowered to address abuses of free movement rights through sham marriages, but the Commission has also pledged to provide additional guidance in this area.

The only area where the Prime Minister's proposals have not been fully accepted in the form that he proposed is in respect of child benefit. The agreement does not allow Member States to refuse child benefit payments to EU workers whose children live in another EU Member State (which would be directly contrary to the principles of free movement of workers and non-discrimination), but only to adjust the value of the payment based on indexation to the cost of living in the child's home country.

To read all the briefings in this series, please see:

1. [Brexit essentials: UK proposals for EU reform](#)
2. [Brexit essentials: Alternatives to EU membership](#)