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Brexit Broker; UK Leader Strikes a Deal (Maybe)

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This policy insight highlights some of the key political issues relating to the United Kingdom's (UK) imminent referendum to decide whether to withdraw from the European Union (EU). With that vote expected this year, K&L Gates has established a [task force](#) along with a dedicated hotline to assist clients in identifying and responding to the potential legal and business issues that could result from a British exit, or "Brexit," from the 28-member EU. K&L Gates will hold a [panel discussion](#) on "Brexit? Great challenges ahead for both UK and US post-Obama" on 9 March in London.

After weeks of discussions and preparations behind the scenes, the European Council met on February 18–19 to issue a formal response to British Prime Minister David Cameron's November [letter](#) proposing reforms to the EU in light of the UK's concerns about its EU membership.

EU leaders agreed on a [Decision](#) concerning a "New Settlement for the United Kingdom within the EU," annexed to the European Council conclusions, and together with various related Decisions and a Statement (the "agreement"). The agreement attempts to comprehensively address the UK's demands for key changes in four policy areas — economic governance, competitiveness, sovereignty and immigration. Politically, the European Council's positive response was presented as a condition for Prime Minister Cameron to campaign in favour of EU Membership in the Referendum to be held on June 23.

It is important to note that, as noted in section E(2) of the Council Decision, the agreement will only take effect if the pro-EU option wins the referendum and after the UK formally confirms its decision to remain part of the EU. Consequently, the agreement does not currently have legal effect. However, it is a high-level political mandate with great political significance. As it reinforces the exceptionality of the UK's EU membership, it could become a turning point in the history of the construction of the EU.

What does the agreement actually entail?

While recalling the objective set by the EU Treaties for "ever closer Union", the Brexit Agreement recognises different paths of integration. It thus affirms the idea of a "two-speed" EU, where some member states could move faster towards integration while respecting the pace and degree of integration chosen by others. The Brexit Agreement also addresses each British demand:

On economic governance, the agreement recognises that the deepening of the Economic and Monetary Union (EMU) and the eurozone legislation should not create barriers or interfere with the competences, rights and obligations of non-eurozone member states. The contrary is also reaffirmed, as non-Eurozone countries should not create obstacles to the further deepening of the EMU.

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On financial regulation, the agreement outlines that Banking Union law is applicable only in eurozone countries, but that the single rulebook applies to financial institutions in all EU member states, in order to guarantee a level playing field within the EU single market. Here, the agreement states, “specific provisions within the single rulebook and other relevant instruments may be necessary, while preserving the level playing field and contributing to financial stability.”

Importantly and in line with British demands, the agreement states that non-eurozone countries will not see their budget impacted by eurozone crisis management measures such as the resolution of financial institutions.

Moreover, a draft Council Decision on Ecofin Council procedures included in the agreement would allow a member state not participating in the Banking Union to indicate its reasoned opposition to the adoption of an act by qualified majority voting. In such a case, the Council shall discuss the issue. Non-eurozone member states would thus gain the right to delay a relevant decision, not to veto it.

On competitiveness, the agreement reflects a renewed commitment of the European leaders to pursue and strengthen the development of the EU internal market, largely through better regulation and less administrative burdens. The agreement also mentions that the EU “will pursue an active and ambitious trade policy”, but no further elements are included.

On sovereignty, the agreement formally recognises that the UK is not required to progress towards further political integration, namely towards “ever closer Union”. It adds that any further references to “ever closer Union” are not to be applied to the UK, and that Britain “is not committed to further political integration into the European Union”.

While the political importance of such a fundamental concession to a member is considerable and the reason of several pro-European commentators presenting this as some sort of “betrayal” to the EU founding principles, the agreement also notes that EU competencies can only be modified through an EU Treaty change. At the same time, the agreement notes the existing principles of subsidiarity and proportionality to emphasise that the UK already enjoys safeguards to ensure that European legislators do not go beyond the powers they have been granted by the EU Treaties.

On the principle of subsidiarity (which ensures that EU decisions are taken as closely as possible to the EU citizens and that action at the EU level is justified as opposed to other possibilities available at national, regional or local level), the agreement introduces a national parliamentary “brake” that would allow national parliaments representing at least 55 percent of the votes to refer a draft EU legislative act to the Council for discussion. The actual implementation of this mechanism as a real obligation for the Council, and not just as a self-imposed restriction, may face serious legal scrutiny. The agreement also reiterates that national security is not an EU competence and “remains the sole responsibility of each Member State”, while recognising the benefits of acting together on issues that affect the security of member states.

On immigration, one of the most sensitive issues at the negotiation table, the agreement sets the framework for some conditions to be imposed on social benefits of immigrant workers, as far as they are not discriminatory (on nationality for example), and provides elements to avoid or limit the flows of workers that “threaten” the social security system, the

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labour market or public services of a member state. In such emergency situations, member states will be authorized to “limit access of Union workers newly entering its labour market to in-work benefits for a total period of up to four years”. EU leaders also agreed on the indexation of child benefits, if exported, to the standard of living of the country where the child resides.

What is the relevance of the agreement?

The European Council conclusions state in paragraph 3 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” and that “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.”

However, technically speaking, the Decisions of the European Council are not legally binding, and the Treaties expressly forbid any legislative function to that high-level group. The Decision could be more accurately characterized as an intergovernmental agreement “to be taken into consideration as being an instrument for the interpretation of the Treaties.”

In any case, if the UK decides to stay in the EU, the content of the agreement will have to be turned into legally binding provisions, following the applicable procedures. This implies, for example, that any parts of the agreement requiring new EU legislation to be passed will need to be voted by the European Parliament, as co-legislator with the European Council. Moreover, references made to potential EU Treaty changes will need to undergo the process of treaties’ modification (and subsequent ratification by all EU member states).

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