

PLUS ÇA CHANGE: THE LEGAL IMPLICATIONS OF REMAINING WITHIN THE EU

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Much legal ink has been spilt considering the legal implications of the UK leaving the EU, but there will be legal implications for staying in too. This article considers the key proposals in the European Council's draft Decision for a new settlement for the UK within the EU.

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Whilst much legal ink has been spilt on the legal implications of the UK leaving the EU (aka Brexit), remaining a member of the EU will have legal implications too. The EU referendum, currently expected to be held on 23 June 2016, will offer the UK electorate a choice between remaining within the EU on the basis of a "new settlement" hurriedly being negotiated between the UK and the 27 other EU member states, and leaving the EU forever.

Greater clarity on the settlement proposals was finally achieved on 2 February 2016, with the publication of the draft Decision of the Heads of State or Government, meeting within the *European Council* (www.practicallaw.com/9-107-6551), concerning a new settlement for the UK within the EU (the draft Decision). Section E specifically states that the draft Decision will only take effect if the UK decides to remain a member of the EU.

THE KEY PROPOSALS

The draft Decision will not amend the EU Treaties and there are no details of any specific draft amendments to them. However, it does promise that certain matters, such as the agreement on a "multi-speed" EU, will be incorporated into the Treaties at the time of their next revision. The recital also states that the clarifications in the draft Decision will have to be taken into consideration as being an instrument for the interpretation of the Treaties. These promises and clarifications, which will be contained within a European Council decision signed by all 28 member states, will then be binding on those member states.

Treaty change is, of course, now impossible before 23 June 2016 (the likely referendum date), since any such change would have to be ratified by national Parliaments and, in some cases, by referendums. It is unclear when the anticipated revision of the EU Treaties will happen in practice, and it may well not happen for some years.

Sovereignty and the new "multi-speed" EU

The phrase "an ever closer union among the peoples of Europe", which first appeared in the 1957 Treaty of Rome, has been restrictively interpreted in the draft Decision. The draft Decision clarifies that references in the Treaties and their preambles to ever closer union should not be interpreted as an equivalent to the objective of political integration, and that they do not offer a basis for extending the scope of any provision of the Treaties or of EU secondary legislation. Further, the phrase "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".

The recital recognises the existence of a "multi-speed" EU, whereby different member states will have different paths of integration and those that want to deepen integration will move ahead whilst respecting the rights of other member states, such as the UK, who do not. This is further recognised in Section C, which records that the

RESOURCE INFORMATION

RESOURCE ID

3-622-8180

RESOURCE TYPE

Article

PUBLISHED DATE

5 February 2016

JURISDICTION

European Union, United Kingdom



references to ever closer union in the Treaties are consistent with different member states adopting different paths of integration.

The draft Decision acknowledges that the UK does not agree that further integration is inevitable or desirable.

Competence and subsidiarity

The EU legal system is based on the principle of conferral of powers, whereby the EU is only permitted to act within the limits of the competences (or powers) that have been conferred on it by the member states (*Article 5, Treaty on European Union (TEU)*). The principle of subsidiarity (*Article 5(3), TEU*) was introduced by the Maastricht Treaty in order to prevent the EU from unduly encroaching on the role of national governments in areas of shared competence. The EU is only permitted to act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by member states, but can be better achieved at EU level.

The draft Decision reiterates the importance of the principle of subsidiarity, and explains that its purpose is to ensure that decisions are taken as closely as possible to the citizen.

In line with its emphasis on the accountability of EU institutions and the repatriation of competences, the draft Decision includes a mechanism which gives a national Parliament 12 weeks to object to draft EU legislation on the basis that it does not comply with the principle of subsidiarity; however, a significant percentage of national Parliaments will have to object for this “red card” to come into play.

Eurozone and non-euro discrimination

The UK and other EU member states outside of the Eurozone have apparently become increasingly concerned about fair treatment by the bloc of countries that have adopted the euro. The draft Decision requires countries within the Eurozone to respect the rights and competences of those member states that are outside it. It also introduces a new form of unlawful discrimination: anti-sterling discrimination! Member states will be prohibited from discriminating based on the official currency of the member state, and any discrimination will have to be justified.

Freedom of movement

The draft Decision will not impede the ability of EU citizens to move freely between member states; however, it does contain a number of measures which are intended to discourage freedom of movement within the EU by certain groups. Such measures are intended to address concerns about so-called “benefit tourism” and marriages of convenience between EU citizens and non-EU citizens. The draft Decision recognises that it is legitimate for member states to adopt measures avoiding or limiting flows of workers, provided that the flow is of such a scale that it has negative effects for both the member states of origin and the host member states.

Interestingly, the draft Decision does not contain any proposal to limit the definition of a worker (for the purposes of Article 45 of the Treaty on the Functioning of the EU and secondary legislation) to workers earning more than about £13,000 a year, nor does it make any mention of the proposal by the UK government that new EU migrants should be banned from qualifying for in-work benefits and social housing for four years after their arrival in the UK.

Employment law

It was anticipated that the new settlement would contain details of an emergency brake on EU employment law, in particular the Working Time Directive (2003/88/EC) and the Temporary Agency Work Directive (2008/104/EC). However, there are no proposals for amending EU employment laws.

Human rights

Careful readers of the draft Decision will note the section dealing with the legal effect of the *Charter of Fundamental Rights of the European Union* (www.practicallaw.com/6-503-0145) (the Charter). This section is no

doubt intended to assist the government with its next challenge: abolishing the Human Rights Act 1998 (HRA 1998) and replacing it with a Bill of Rights in a manner that is consistent with its legal obligations under TEU.

The recital recalls in particular that the “Charter of Fundamental Rights has not extended the ability of the Court of Justice (CJEU) or any court or tribunal in the United Kingdom to rule on the consistency of the law and practice of the United Kingdom with the fundamental rights that it affirms”.

This text presumably aims to prevent any human rights challenges made after the abolition of the HRA 1998 being brought as EU challenges instead, and is presumably intended to address the interpretation of Protocol No 30 to the Lisbon Treaty by the CJEU. However, the wording is woolly and ultimately the scope of the application of the Charter is a matter for the CJEU.

UK legal changes

In the meantime, the government has announced that it intends to amend section 2 of the European Communities Act 1972 to assert that UK law has primacy over EU law. Quite how the government intends to do this remains unclear. As Sir Francis Jacobs, a former Advocate General at the CJEU explained on BBC Radio 4 on 5 February 2016, if the EU is to work at all then EU law has to prevail over the law of the member states.

A waiting game

Whether the draft Decision is accepted by the rest of the EU or not will be decided over the next two weeks. Even if it is agreed in full, given that it anticipates the introduction of secondary legislation, there is every possibility that the European Parliament could derail the agreement at a later stage.

If the UK chooses to remain within the EU then the Decision, by then presumably a binding decision of the European Council, will take immediate effect with fairly limited legal implications for the UK.

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