

COUNTDOWN TO THE REFERENDUM:

A series of articles by Matrix that will explore a number of legal topics surrounding the UK referendum on 23 June 2016.

2: The new settlement agreement



Claire Darwin is described by the Legal 500 as “a very bright and hardworking junior” barrister. She is an experienced appellate advocate, and has appeared in many leading cases. Claire is described in the latest editions of the leading directories as “well known for the strength of her advocacy” and as “not afraid to push boundaries”. She is a member of the Attorney General’s Panel of Junior Counsel to the Crown (B Panel), and was previously a member of the C Panel.

Many of Claire’s cases involve EU law. She acted for the Appellant in *Daler-Rowney Ltd v Revenue and Customs Commissioners* [2015] ICR 63, on the compatibility of the National Minimum Wage Regulations 1999 with Article 45 of the Treaty on the Functioning of the European Union. She is instructed as junior counsel in *Walker v Innospec Ltd & Ors* [2016] ICR 182, on the “future effects principle” and whether EU law prohibiting discrimination on grounds of sexual orientation has retrospective effect. Recent significant instructions include acting for the Secretary of State in *White v Ministry of Justice* and *John v Ministry of Justice* (and related cases), challenges based on EU law to the compulsory retirement age of 70 for judges and Employment Tribunal lay members. She is currently acting for HRMC as junior counsel in a group of related appeals, in which a reference to the CJEU is sought.

Synopsis

- *Analyses the Decision on the “new settlement” agreed on 19 February 2016 at a meeting of the European Council.*
- *Discusses the status of the Decision, and how it has binding effect.*
- *Considers the argument that the Decision on the new settlement is not legally binding, because it does not amend the EU Treaties, and could be overturned by the CJEU.*
- *Looks at possible judicial interpretation, referencing the Vienna Convention on the Law of Treaties, art 31, which provides that a court must take into account any subsequent agreement between the parties regarding the interpretation of the treaties or application of its provisions.*

1. The EU referendum will offer the UK electorate a choice between remaining within the EU on the basis of the "new settlement" that has recently been negotiated between the UK and the 27 other EU Member States, and leaving the EU forever.
2. On 19 February 2016, at a meeting of the European Council, it was agreed that two arrangements will come into effect if the UK votes to stay in the EU:
 - A decision on the new settlement for the UK remaining a member of the EU (the Decision). The Decision will take effect if the UK Government informs the European Council that the UK has decided to stay in the UK.
 - Various undertakings from Member States and the European Commission, including undertakings relating to the effective management of the banking union and the consequences of further integration of the Euro area.
3. The new settlement is, [according to the FT](#), modelled on an agreement reached at a European Council meeting in Edinburgh in December 1992, whereby it was agreed that Denmark would be granted four significant exceptions from the Maastricht Treaty. The Edinburgh decision was achieved by way of a binding accord signed by all Member States which the FT describes as having “acted like a promissory note from EU leaders” or “a form of post-dated treaty change.”
4. The ink had no sooner dried on the new settlement before critics – [including our very own Justice Secretary](#) – claimed that the Decision was not legally binding. Michael Gove and other Brexiters alighted on the fact that the Decision does not amend the EU Treaties, but merely promises 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.

Status of the Decision

5. Article 15 of the Treaty on European Union (TEU) provides that the European Council consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The European

Council, as an EU institution, is able to make decisions, and such decisions are legally binding under Article 288 of the Treaty on the Functioning of the European Union (TFEU).

6. However, [according to the European Council's own Legal Counsel](#), the aptly named Mr Legal, the Decision was not in fact a decision of the European Council as an institution – but was an intergovernmental agreement of the 28 Member States adopted at the time at which they were participating in a meeting of the European Council, of which they are all members. Accordingly, the Decision does not have binding effect under Article 288 TFEU. However, it is legally binding as an instrument of international law in which the 28 Member States have agreed on a joint interpretation of certain provisions of the EU Treaties, and on principles and arrangements for action in certain circumstances.

Judicial interpretation

7. The fact that the new settlement does not include an agreement that the Treaties are amended between 19 February and 23 June 2016 is unsurprising. Any actual amendment to the European Treaties would have to be ratified by national Parliaments and, in some cases, by referendums and could take several years to finalise.
8. Instead, and presumably as a temporary measure pending actual amendments to the Treaties, the 28 Member States have explicitly agreed that they intend the new settlement to be binding, and that it must be taken into account when interpreting the Treaties of the European Union. In particular, on 19 February 2016 they jointly declared 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”](#). Additionally, the recital to the Decision states that the clarifications in the Decision will have to be taken into consideration as being an instrument for the interpretation of the Treaties.

9. The European Treaties are governed by the 1969 Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention provides that when interpreting a treaty a court must take into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. Further, the Court is required by Article 19 TEU to ensure that in the interpretation and application of the Treaties the law is observed.

10. The Court has previously taken similar agreements into account, although it did not expressly refer to Article 19 TEU or Article 31 of the Vienna Convention when doing so. Thus in [Case C-135/08 Rottmann v Bayern](#) (Grand Chamber, 2 March 2010), the Court held that when interpreting the Treaty on European Union, it must take into account the Edinburgh Decision as an instrument for the interpretation of the Treaty, “especially for the purpose of determining the ambit *ratione personae* of that Treaty”.

11. It is very likely that the Court would similarly take into account the Decision if asked to interpret the Treaties between now and any actual Treaty change. Given the clear language agreed by all of the Member States in the Decision it is difficult to see how the Court could interpret the Treaties in a manner that did not conform with the express wording of the Decision.

Judicial interference

12. Michael Gove has also claimed that in the absence of Treaty change, the deal could be “overturned” by the Court of Justice of the European Union. However, such concerns ignore the fact that the Court does not have any general jurisdiction to review the acts of sovereign governments. Rather, the Court is restricted to ruling on the narrow class of cases provided for in the European Treaties. The Court does not have a role, and will not have any future role, in the enforceability or implementation of the new settlement, except in so far as it may affect the validity or interpretation of the Treaties.

Additional safeguards

13. As an additional safeguard mechanism the Decision includes what Professor Dashwood refers to in his [article](#) as ‘Council conduct agreements’, namely agreements which bind the Member States as to how they will behave in certain circumstances when acting in their capacity as members of the European Council. Further examples of such agreements can be found in Article 7 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the Fiscal Stability Treaty).

Legal effect is conditional on a vote to remain

14. Finally, as is noted above, the new settlement will be of no legal effect if the UK votes to leave the EU. If that happens, then the new settlement will cease to exist and any renegotiation of the UK’s future relationship with the EU will be on the basis of the existing Treaties alone absent any concessions made during the course of negotiating the new settlement. A key question for the UK electorate ahead of 23 June 2016 is whether the UK could achieve a better outcome in any post-referendum negotiations than it has already achieved in the new settlement.

15. If the UK votes to remain in the EU, then notwithstanding the attempts that have been made to ensure that the promises made by the other 27 Member States ahead of the UK’s referendum are legally binding as a matter of international law; it seems very likely that UK officials will want to press for the Treaties to be amended as soon after 23 June 2016 as possible.

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Further information

Find out more about our EU law team at Matrix at matrixlaw.co.uk/practice-areas/eu-law/.