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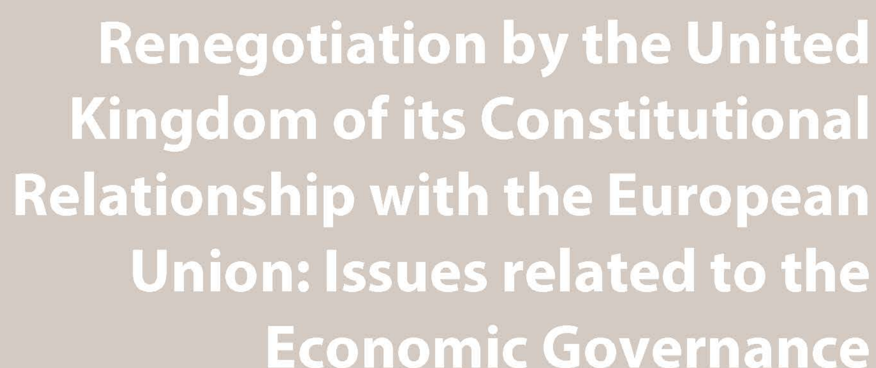

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DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

Renegotiation by the United Kingdom of its Constitutional Relationship with the European Union: Issues related to the Economic Governance

STUDY

Abstract

The 'deal' concerning a new settlement for the United Kingdom within the European Union covers questions relating to the Economic Governance of the EU and of the Euro area. Whilst the 'deal' was negotiated with a view to the United Kingdom, the provision in the respective documents of the 'deal' address 'non euro area Member States'. By that, the 'deal' on the new settlement has consequences that go beyond the membership of the UK in the EU. As an international agreement, the core document of the 'deal', a decision of the Heads of State or Government, exclusively binds Member States but no Union institutions. It, furthermore, must be in compliance with existing EU Primary and secondary law. Otherwise the decision is within the scope of application of EU law inapplicable. This sets the playing field, within which the 'new settlement' affects the existing Economic Governance of the EU and the Euro area.

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LIST OF ABBREVIATIONS

EBA	European Banking Authority
ECB	European Central Bank
ECJ	European Court of Justice
EMU	Economic and Monetary Union
ESM	European Stability Mechanism
GC	General Court
SGP	Stability and Growth Pact
SRF	Single Resolution Fund
TEU	Treaty on European Union
TFEU	Treaty on the Funtioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
VCLT	Vienna Convention on the Law of the Treaties

EXECUTIVE SUMMARY

On Friday, 19 February, the Heads of State or Government of the EU Member States have decided on a new settlement for the United Kingdom within the European Union. The 'deal' consists of several documents that were annexed to the conclusions of the European Council of 18 and 19 February (EUCO 1/16). The core document is the decision of the Heads of State or Government, meeting within the European Council (Annex I).

The legal meaning of this decision is linked to its legal status. The decision is an agreement of the EU Member States under International public law. It is not a Union legal act. Such an international agreement may modify Primary law. Yet, the EU Treaties provide for a special procedure in order to modify the Treaties under Article 48 TEU. Therefore, all international agreements that have not been concluded in compliance with Article 48 TEU cannot modify Primary law. If a conflict between the legal consequences attached to an international agreement and those attached Primary and secondary Union law occurs, this conflict is solved by the principle of supremacy: Union law takes precedence over the international agreement. The latter is then inapplicable within the scope of application of Union. Against this background, the international agreement may include matters, which are not covered by Union law (yet), which relate to the content of future legislation and matters, which specify how the Contracting Parties of the EU Treaties wish to understand certain Treaty provisions. The latter refers to a special type of international agreement under the Vienna Convention of the Law of Treaties (VCLT), namely the interpretive agreement pursuant to Article 31(3)(a) VCLT. Such interpretive agreements may have an impact on how the Court of Justice of the European Union (ECJ) interprets EU law. The ECJ is, however, still free in its legal interpretation of the Treaties in accordance with Article 19(1) TEU. When doing so the ECJ can, in any event, not overcome the boundaries of legal interpretation. This means that any interpretation suggested by an interpretive agreement that is beyond the purpose of an EU legal provision, as it is reflected by its wording, is illicit as this would otherwise amount to a modification of the EU provision, which cannot be done by means of legal interpretation.

Furthermore, as regards future legislation, the decision only binds Member States and thus not the Union institutions themselves. This means that the European Parliament cannot be bound to vote in favour of a certain legislative proposal and the European Commission is not obliged to propose a certain legislation. Only the Member States may declare that their representative will vote in the Council in a certain manner. This declaration is, however, not legally binding under International law. A Member State may not renounce its capacity to vote. By that, if a Member State votes differently than promised under the decision, such vote would not be void. At the same time, if a Member State votes in line with the decision, it would not infringe Primary Union law, since they neither provide for any legal obligation for a Member State to vote in the Council in a certain manner, nor prohibit prior accord on voting behaviour.

The second document that is of relevance in the context of the subject of this study, i.e. economic governance, is the Statement of the Heads of State or Government containing a draft Council Decision on specific provisions relating to the effective management of the banking union and of the consequences of further integration. This statement contains a draft Council decision supplementing Council Decision 2009/857/EC, which has established a safeguard mechanism comparable to the one proposed by this draft decision. The legal base for this Council decision can be found in the powers of the Council to govern its own activities, wherefore no other Union institution is involved in its adoption. Only Protocol (No 9) of the Lisbon Treaty requires a prior deliberation in the European Council.

The introduction of Section A. refers to the voluntary nature for non euro area Member States of 'measures, the purpose of which is to further deepen the [...] monetary union'. In the original proposals made by the President of the European Council on 2 February 2016, this reference was particularly problematic, since it could be understood as providing Member States with a derogation (non euro area Member States in terms of Article 139 TFEU) with the freedom to unilaterally decide to join the euro area after having fulfilled the convergence criteria. Such an understanding would conflict with the obligation of Member States with a derogation, under Article 3(4) TEU and Article 140 TFEU, to take all necessary steps to fulfil the legal and economic criteria for joining the single currency. The final version, as adopted by the Heads of State or Government, now reiterates the obligations of Member States with a derogation with regard to the accession to the euro area.

The potential implications of the reference in the Introduction to the 'voluntary' nature of '[m]easures, the purpose of which is to further deepen the economic [...] union' for non euro area Member States has to be carefully weighed up against the existing legal framework on economic policy coordination that is applicable to all Member States, including namely the United Kingdom. To the extent that measures, which refer to those parts of the multilateral surveillance procedure that apply to all Member States, are taken in accordance with the ordinary legislative procedure by a qualified majority vote in the Council with the participation of all 28 Member States (Article 121(6) TFEU), such measures also bind all Member States. As such, these measures cannot be considered of a 'voluntary nature' for specific Member States that have either opposed such measures or, for that matter, qualify as non euro area Member States. The same can be observed for measures based solely on Article 126(14) TFEU that cover those parts of the excessive deficit procedure for which there exist no derogations.

In paragraph 1 of Section A. a prohibition of discrimination between natural and legal persons based on the official currency is introduced. Since the decision of the Heads of State or Government may not modify Primary Union law but is 'fully compatible with the Treaties' (paragraph I.3.ii of the conclusions of the European Council EUCO 1/16), it must be assumed that this 'new' prohibition of discrimination is already covered by the Treaties as an 'indirect discrimination' based on grounds of nationality or origin, as enshrined in Article 18(1) TFEU and the fundamental freedoms. By that, such discrimination may be justified on the basis of objective reasons, which are pursued by the discriminating measure in a proportionate manner.

The question whether paragraph 1.2 of Section A. has to result in a modification of the current legal situation arises with regard to the reference to the obligation to 'respect the internal market or [in the final version: 'as well as'] economic, social and territorial cohesion' in the context of '[l]egal acts, including intergovernmental agreements between Member States, directly linked to the functioning of the euro area'. If and to the extent that the word 'respect' can be interpreted to mean in legal terms 'observe' or 'conform to', it has to be observed that as a matter of principle any (newly adopted) Union legal acts must comply with existing primary Union law. With regard to acts adopted under enhanced cooperation, this can also be deduced from Article 326 TFEU. As far as intergovernmental agreements are concerned, the Union does not only have the exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, but also insofar as the conclusion of such an agreement may affect common rules or alter their scope. If (a subset of) Member States conclude international agreements by exercising their remaining national competences, the ECJ has already stated that Member States are not allowed to conclude agreements between themselves which might affect common rules or alter their scope.

To the extent that paragraph 1.3 of Section A. introduces an obligation not to 'impede the implementation of legal acts directly linked to the functioning of the euro area', and not to take measurers that 'could jeopardise the attainment of the objectives of the economic and monetary union', it must be noted that in the Union law context voting against or abstaining from a vote on a particular measure by non euro area Member States can hardly be considered as an 'obstruction' on parts of the Member state concerned that amounts to a lack of sincere cooperation. Consequently, the construction of a legally enforceable obligation on parts of these Member States to vote in favour of any measures that by means of the stated objectives or of an objective evaluation are geared towards the attainment of the objectives of the economic and monetary union would arguably run counter to existing Union law. Finally, the reference to 'measures which could jeopardise the attainment of the objectives of the economic and monetary union' is of such a broad and unspecified nature that the question arises exactly what measures would from the outset be excluded from the scope of application of this provisions. Furthermore, it only repeats the wording of Article 4(3)(3) TEU and can, by that, arguably not include further legal obligations than the ones deriving from this Article.

Put together, paragraphs 2 and 4 of Section A. aim to distinguish between the position of euro area Member States and that of non euro area Member States in the context of financial supervision and regulation. Two main points can be observed for the draft decision of the Heads of State or Government and for the final decision, as annexed to conclusions of the European Council. Firstly, the initial wording of paragraph 2 presented problems with respect to cross-border supervision and resolution. In particular, the draft seemed to suggest that the supervision of credit institutions that are located in non SSM-participating countries should fall completely outside the authority of the SSM, the SRB, and EBA, even though all three bodies currently play a role to the supervision and regulation of non euro area-located branches or subsidiaries of credit institutions when these credit institutions are located in euro area Member States. Even though the reference to the 'EU acquis' went some way in addressing this inconsistency, the addition in the final version of the decision, as annexed to the conclusions of the European Council, of an explicit reference to consolidated and group supervision is certainly a welcomed clarification.

Secondly and most notably, paragraphs 2 and 4 raise the issue of uniformity in the way the single rulebook is applied. The draft decision suggested that the national authorities of the non SSM-participating Member States should not be bound by the same need for uniformity that should characterize the application of the rulebook in the euro area Member States. From the perspective of the internal market, this proposition is problematic. Specifically, it goes against the objective of the single rulebook, which is to establish a higher degree of regulatory harmonisation as a response to the inadequacies of the supervisory framework that was in place prior to the crisis and as a way to ensure financial stability. In fact, with regard to financial stability, paragraph 4 seems to discern the financial stability of non euro Member States as a matter to be addressed by their own authorities separately from the developments at EU level. On this point, the additions made by the final version of the decision, as annexed to the conclusions of the European Council, specify that any differentiated implementation of measures in the context of supervision or regulation should respect the development of the single rulebook, as well as existing EU mechanisms. Nonetheless, the lack of any further details as to how this will be done or what will happen in a future conflict of actions taken for these two diametrically opposite objectives could lead to a number of potential tensions.

Budgetary questions are addressed by paragraph 3 of Section A., which states, in essence, that financial means originating from non euro area Member States should not be used in order to finance 'emergency and crisis measures to safeguarding the financial stability of the

euro area'. Paragraph 3.1 refers, in this respect, to the budgetary responsibility of national budgets and Paragraph 3.2 refers to financial contributions paid by Member States into the general budget of the Union. The latter is inspired by the European Financial Stability Mechanism (EFSM), which is financed by the general Union budget and which was used in order to grant bridge loans to Greece in July 2015. The first refers to 'mechanisms', which are backed by national budgets, such as e.g. the ESM. Whilst Union law engaging national budgetary responsibility of non euro area Member States for measures that are only applicable to the euro area is difficult to imagine, the use of the general Union budget for measures that only affect a subset of the Union territory concerns a situation that can occur also in cases other than only the EFSM. By that, the rationale that underlies Paragraph 3.2 goes beyond the question whether non euro area Member States may finance euro area anti-crisis measures. It suggests that Member States may decide on how their financial contribution to general Union budget is used even after it was transferred to the Union budget and granting them, by that, a right to earmark their financial contribution. This rationale runs counter to the delicately balanced budget rules in primary Union law.

Paragraph 5 of Section A. relates to the increasing prominence of the Eurogroup in decisions concerning the euro area governance and to the resulting implications for the non euro area Member States, which are excluded from the Eurogroup meetings. The purpose of paragraph 5 is to ensure that decisions in the area of economic and monetary governance are taken in the Council, which is the forum bestowed with this capacity by the Treaties.

In order to safeguard the 'principles' laid down in the introduction and in paragraphs 1 to 5, paragraph 6 of Section A. in conjunction with paragraph 1 of Section E. establish a mechanism in order to address issues relating to the application of Section A. in the European Council. The mechanism requires a discussion of that matter in the European Council, whilst taking due account of the possible urgency of the matter. In case the matter relates to legislative procedures, a safeguard mechanism in the European Council is not sufficient, since the European Council has no influence on the legislative procedures (Article 15(1) TEU). Therefore the Statement of the Heads of State or Government containing a draft Council decision would like to establish a second mechanism applicable to the Council. This mechanisms is built on the existing mechanism under Council Decision 2009/857/EC, according to which a certain number of Member States may indicate its opposition to a legal act, which is to be adopted by a qualified majority, and request, by that, a discussion of the opposition and an effort from the President of the Council to facilitate a wider basis of agreement in the Council. In case of a failure, the Council may nevertheless proceed with voting by qualified majority. The draft Council decision annexed to the conclusions of the European Council reduces, in essence, the number required for the initiation of this mechanism to one in matters relating to the application of Section A. This reduction is compensated by the necessity to give reasons for the opposition. It remains open how both procedure are linked to each other. From a legal perspective, the mechanism under Section E is independent from the mechanism under the draft Council decision. Deliberations in the European Council may only stall legislative procedures in the Council when the Treaties explicitly state it.

Finally, following the model of Article 16 TSCG, paragraph 7 of Section A. requires that the 'substance' of Section A. will be incorporated into the Treaties at the time of their next revision. Whilst this paragraph can be understood as a proposal for an amendment of the Treaties, the decision of the Heads of State or Government may neither bind the Convention or the subsequent conference of representatives of the governments of the Member States to propose these amendments nor the national Parliaments or the national peoples, where a referendum is required, to ratify these amendments.

1. INTRODUCTION

The following in-depth analysis on the issues relating to 'Economic Governance' within the renegotiation by the United Kingdom of its Constitutional Relationship with the European Union is built on a two-step approach. As a first step, the original proposals made by the President of the European Council, Donald Tusk, on 2 February 2016 will be analysed in detail. As a second step, the final version of the 'deal' concerning a new settlement for the United Kingdom within the European Union, as decided at the meeting of the European Council on 18 and 19 February 2016, will be assessed with regard to the changes of the final version compared to the initial proposals. This approach will highlight the extent to which issues that were identified with respect to the original proposals have been dealt with or new issues arise as a result of the negotiations by the Heads of State of Government, meeting within the European Council.

2. PRELIMINARY REMARKS: THE LEGAL MEANING OF THE DRAFT DEAL

Proposals by the President of the European Council as of 2 February 2016	Conclusions of the European Council of 18 and 19 February 2016
Paragraph I.3	Paragraph I.3
3. Regarding the Decision in Annex 1, the Heads of State or Government have declared that: (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; (ii) the content of the Decision is fully compatible with the Treaties; (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; (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.	3. Regarding the Decision in Annex 1, the Heads of State or Government have declared that: (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; (ii) the content of the Decision is fully compatible with the Treaties; (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; (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.

As a preliminary remark, this study examines the legal meaning of the draft deal on the renegotiation of the UK's membership in the European Union. The draft deal consists of six draft legal texts:

- Draft 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;
- Draft statement on section A of the 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;
- Draft European Council declaration on competitiveness;
- Draft declaration of the European Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism;
- Draft declaration of the European Commission on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the decision;
- Draft declaration of the European Commission on issues related to the abuse of the right of free movement of persons.

The present study will focus on those elements of the draft deal that relate to Economic Governance. These elements are the draft 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 (EUCO 4/16) (2.1.), and the draft statement on section A of the 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 containing a draft Decision of the Council on specific provisions relating to the effective management of

the banking union and of the consequences of further integration of the euro area (EUCO 5/16) (0.).

2.1. The legal meaning of the draft Decision of the Heads of State or Government concerning a New Settlement for the United Kingdom within the European Union (EUCO 4/16)

The core document of the draft deal is a draft decision of the Heads of State or Government, meeting within the European Council. A decision of the Heads of State or Government, meeting within the European Council, is neither a Union act as defined by Article 288 TFEU, nor it an act adopted by the European Council itself. The European Council only forms ('within the European Council') the forum, in which the Heads of State or Governments deliberate and take decisions on behalf of the State that they are representing. By that, the draft decision of the Heads of State or Government will be, if adopted, an act under International law. Comparable kinds of acts were adopted in the past in order to make an offer to the Danish people in 1992 ([1992] OJ C 348, p. 1) and to the Irish people in 2009 (Annex 1 of the Presidency Conclusion of the European in Brussels on 18/19 June 2009) to vote in favour of the respective Treaty change.

As an act under International law, the draft decision of the Heads of State or Government can, once adopted, legally bind the participating States. If concluded exclusively by EU Member States such an international legal act must however still be in compliance with existing Primary and secondary EU law. If this is not the case the principle of supremacy of EU law leads to an inapplicability of this international legal act within the scope of application of Primary and secondary EU law. This conclusion can be drawn from the ECJ's judgment in the 'Defrenne II' case (ECJ 1976), in which the Court stated that 'apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236 [today's Article 48 TEU]' (para. 58). If an International legal act conflicts with Primary, it may, if it was concluded in accordance with Article 48 TEU, modify Primary law or, if it was not concluded in accordance with Article 48 TEU, it is not applicable within the scope of application of Primary Union law because of the principle of supremacy of EU law (Repasi 2013: 56). If an act under International law exclusively adopted by States, which are members of the European Union, conflicts with secondary Union law, it also has to be disapplied within the scope of application of the respective secondary law. This follows from the distribution of competences between the Union and the Member States. Member States (autonomously or collectively) are pre-empted from adopting rules within the scope of exclusive Union competences and of shared competences to the extent that they were exercised by the Union. This follows, in case of an exclusive competence, from Article 2(1) TFEU, according to which Member States are only able to set legally binding rules 'if so empowered by the Union or for the implementation of Union law', or, in case of a shared competence, from Article 2(2) TFEU, according to which 'Member States shall exercise their competence to the extent that the Union has not exercised its competence'. Member States are, hence, not allowed to adopt law (either autonomously or collectively) that conflicts with secondary Union law. In case of a conflict, secondary law takes precedence over that law.

In sum, this draft decision of the Heads of State or Government creates, if adopted, legally binding obligations under International public law for the signatory parties, but only to the extent that these obligations do not violate existing Primary and secondary Union law. Since the signatory parties of this decision are the States represented by the Heads of State of Government and not the EU, it also binds only the States and not the Union or any of its institutions. In the following, this study will therefore examine whether the proposals made

by the draft decision of the Heads of State or Government with respect to economic governance conflict with existing Primary and secondary EU law. To be sure, while the statement in paragraph 1.3 (ii) states that 'the content of the Decision is fully compatible with the Treaties' thus correctly reiterates what the legal situation should be, this reference by itself is is no guarantee that this is actually the case in reality.

Having said this, one may raise the questions of the 'added value' of this draft decision, if it may not modify existing EU law. The potential added value is twofold: First, the decision may include declarations of intent on future amendments of existing Primary and secondary law. This raises the question as to whether future voting of Member States can be bound by such a decision. Second, with regard to subject matters that are not meant to be implemented through amendments, the decision can be considered a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' in terms of Article 31(3)(a) of the Vienna Convention on the Law of the Treaties (VCLT), which is a treaty codifying the general rules under International public law regarding the conclusion, interpretation and termination of international agreements. In such an 'agreement regarding the interpretation of the treaty or the application of its provisions' the Parties of an international Treaty may agree on how they understand the content of certain Treaty provisions. This raises the question as to whether such an agreement binds the Court of Justice of the European Union (ECJ), whose task in accordance with Article 19(1) TEU is to 'ensure that in the interpretation and application of the Treaties the law is observed'.

2.1.1. Binding commitment of the Member States concerning future legislation and Treaty amendments

As a preliminary remark, it should be recalled that the draft decision may not bind any Union institution. In other words, the European Commission cannot be obliged by a decision of the Heads of State or Government to present a certain proposal for secondary law and the European Parliament cannot be obliged to vote in favour of proposals that require the ordinary legislative procedure. It is, furthermore, worth mentioning at this point that the European Commission may, in any event, not propose any legislation which would violate EU Primary law.

Moreover, such a decision may also not bind the Council of the European Union as an institution. Only the representatives of each Member State at ministerial level that constitute the Council (Article 16(2) TEU) are bound by the decision. This leads to an examination of the quality of the binding commitment of the governments of the Member States to vote in favour of certain legislative proposals whose content is outlined in the draft decision. The commitment may, similar to the 'Luxemburg compromise' of 1966 (Bulletin EEC 3/1966, p. 9) and the 'Ioannina compromise' of 1994 ([1994] OJ C 105, p. 1), be considered a merely politically binding declaration of intent on how to use the Member States' voting powers in the Council. Yet, according to paragraph I.3.iii of the draft European Council conclusions (5078/16), the Heads of State or Government declare that 'this Decision is legally binding'. This is certainly true as a matter of principle. As an act under International law, this act produces legal effects under International law.

With regard to the use of their voting rights, however, the decision may, not be understood as legally binding. This follows from the principle enshrined in Article 6 VCLT, according to which 'every State possesses the capacity to conclude Treaties'. This principle refers to a State's capacity to declare acts of will in international relations. Inherent to this capacity guaranteed by the VCLT is the incapacity of State to renounce its capacity to declare an act of will (Geiger 1979: 154). If in an act of international law, such as a decision of the Heads of State or Government, a State declares in a legally binding way to use its capacity to adopt

international legal acts (such as Treaty amendments or secondary legal acts) in only one way, it renounces its capacity to declare a different will at the time of voting in an irreversible manner. This would amount to a renouncement of the capacity to conclude Treaties prohibited by Article 6 VCLT and would be void under International law because of a violation of 'consensual ius cogens' under Article 53 VCLT (Geiger 1979: 167). By that, under International law, a State is legally always free to decide how to vote. Given that after a possible entry into force of the draft decision of the Heads of State or Government a representative of a Member State in the Council would vote differently than promised in the decision, the State would still breach its commitment under this decision. Such breach would give rise to consequences under the principles of the responsibility of states for internationally wrongful acts (Repasi 2013: 47), but would not render the vote void. At the same time, if a representative of a Member State would vote in the Council in accordance with the commitment under the decision, this would not infringe the EU Treaties since they neither provide for any legal obligation for a Member State to vote in the Council in a certain manner, nor prohibit prior accord on voting behaviour. The Treaties only define the majorities required in the Council in order to adopt an act (Article 16(3) and (4) TEU).

2.1.2. Meaning and limits of an 'interpretive agreement' under Article 31(3)(a) VCLT

The meaning and the limits of an 'interpretive agreement' under International law are set by Article 31 VCLT which deals with the interpretation of International Treaties such as the EU Treaties. In principle, according to Article 31(1) VCLT, a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 31(3) VCLT specifies that interpretive agreements concluded after the entry into force of the Treaty which is to be interpreted, 'shall be taken into account, together with the context'. By that, the general limits to 'interpretation' also set the limits of an interpretive agreement. No interpretation may run counter to the purpose of an EU legal provision, as it is reflected by the wording of this provision.

Against this background, an 'interpretive agreement' may be an element of interpretation of EU legal provisions. The EU Treaties conferred upon the ECJ the exclusive competence to interpret EU law (Article 19(1) TEU, Article 344 TFEU). In doing so, 'interpretive agreements' may be considered by the Court, but they can never be the sole source of legal interpretation. They may encourage, within the limits of interpretation, the Court to modify its interpretation without, however, creating any kind of legal obligation for the Court to do so. In this context, the CJEU decided in its judgment in the 'Rottmann' case (ECJ 2010) that 'the decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992, concerning certain problems raised by Denmark on the Treaty of European Union, which were intended to clarify a question of particular importance to the Member States, namely, the definition of the ambit ratione personae of the provisions of European Union law referring to the concept of national, have to be taken into consideration as being instruments for the interpretation of the EC Treaty, especially for the purpose of determining the ambit ratione personae of that Treaty. [...] Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter' (paras. 40 and 41).

2.2. The legal meaning of the draft Decision of the Council on specific provisions relating to the effective management of the banking union and of the consequences of further integration of the euro area (EUCO 5/16)

The second element of the draft deal, which is of relevance for economic governance, is the draft Statement on Section A of the 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. The Heads of State and Government declare in this draft statement that the Council will adopt a 'Decision on specific provisions relating to the effective management of the banking union and of the consequences of further integration of the euro area' and included into the statement a draft Council decision. This draft Council decision is understood as 'supplementing' Decision 2009/857/EC of 13 December 2007 relating to the implementation of Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union between 1 November 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other ([2009] OJ L 314, p. 73).

Council Decision 2009/857/EC was annexed as a draft under Declaration No 7 to the Lisbon Treaty. The legal base for its adoption can be found in the powers of the Council to govern its own activities (ECJ 1981: para 17). By that, the Council can amend this decision without prior proposal of the European Commission. In accordance with Protocol (No 9) of the Lisbon Treaty, the European Council has to hold preliminary deliberations on any draft amendments of this decision and act by consensus. After this deliberation, the Council may decide on the amendment of Council Decision 2009/857/EC. Since the draft Council decision relates to 'procedural matters' of the Council, the Council may, according to Article 240(3) TFEU, adopt the draft decision with a simple majority.

Against this background, it becomes clear that the draft Council decision is meant to either amend Council Decision 2009/857/EC or to be adopted, just as Council Decision 2009/857/EC, on the basis of the Council's autonomy to regulate in matters of its own activities.

3. INTRODUCTION OF SECTION A.

Proposals by the President of the European Council as of 2 February 2016	Conclusions of the European Council of 18 and 19 February 2016
Draft Decision of the Heads of State or Government concerning a New Settlement	Decision of the Heads of State or Government concerning a New Settlement
In order to fulfil the Treaties' objective to establish an economic and monetary union whose currency is the euro, further deepening is needed. Measures, the purpose of which is to further deepen ~~the~~ economic and monetary union, will be voluntary for Member States whose currency is not the euro and will be open to their participation wherever feasible.	In order to fulfil the Treaties' objective to establish an economic and monetary union whose currency is the euro, further deepening is needed. Measures, the purpose of which is to further deepen economic and monetary union, will be voluntary for Member States whose currency is not the euro and will be open to their participation wherever feasible. This is without prejudice to the fact that Member States whose currency is not the euro, other than those without an obligation to adopt the euro or exempted from it, are committed under the Treaties to make progress towards fulfilling the conditions necessary for the adoption of the single currency.
It is acknowledged that Member States not participating in the further deepening of the economic and monetary union will not create obstacles to but facilitate such further deepening while this process will, conversely, respect the rights and competences of the non-participating Member States. The Union institutions, together with the Member States, will facilitate the coexistence between different perspectives within the single institutional framework ensuring ~~both~~ the effective operability of Union mechanisms and the equality of Member States before the Treaties.	It is acknowledged that Member States not participating in the further deepening of the economic and monetary union will not create obstacles to but facilitate such further deepening while this process will, conversely, respect the rights and competences of the non-participating Member States. The Union institutions, together with the Member States, will facilitate the coexistence between different perspectives within the single institutional framework ensuring consistency, the effective operability of Union mechanisms and the equality of Member States before the Treaties, as well as the level-playing field and the integrity of the internal market.
Mutual respect between Member States participating or not in the operation of the euro area will be ensured by the principles recalled in this Section, which are safeguarded notably through the Council decision referring to it.	Mutual respect and sincere cooperation between Member States participating or not in the operation of the euro area will be ensured by the principles recalled in this Section, which are safeguarded notably through the Council Decision referring to it.

3.1. Comment on the original proposals made by the President of the European Council

It can be generally observed that the phrasing of the introduction of section A is rather broad and can have consequences for the future working of economic policy coordination in the EU-28, as well as future monetary integration that may or may not have been anticipated at the time of the drafting of these paragraphs. The reason for this lies mainly in the rather ambiguous reference to 'Measures, the purpose of which is to further deepen the economic and

monetary union' that are supposed to be 'voluntary for Member States whose currency is not the euro and will be open to their participation wherever feasible.'

Considering that a substantive amendment of primary Union law referring to Title VIII TFEU on economic and monetary policy cannot be achieved without the consent of all Member States (regardless of whether the simplified revision procedure of Article 48(6) TFEU can be utilized), the phrase 'measure' appears to primarily refer to any secondary Union law measures that may be adopted based on the existing Primary Union law. Moreover, in a more generic application of the term this may also refer to intergovernmental agreements.

In the third paragraph of the Introduction reference is made to 'principles' that are 'recalled'. Yet, as will become clear from the analysis hereafter, considering the contents of these paragraphs the use of the term 'principle' is not entirely unproblematic in that it may imply that the notions stated in the introduction of section A amount to existing or introduces new general principles of EU law of some sort.

3.1.1. Implications for the single monetary policy and single currency in EMU

Concerning monetary policy, Title VIII TFEU on economic and monetary policy includes several legal bases, including Article 127(6) TFEU on the transfer of prudential supervisory tasks to the European Central Bank;[1] Article 129(3) and (4) TFEU introducing simplified amendment procedures for specific provisions of the Statute of the ESCB and the ECB, as well as for the adoption of specific rules as foreseen in the Statute of the ESCB and the ECB; Article 133 TFEU allowing for implementing measures on the use of the Euro; Article 134 (3) TFEU concerning the adoption of detailed rules concerning the composition of the Economic and Financial Committee; as well as Article 138 TFEU on the establishment of common positions and a unified representation in international financial institutions.[2] These legal bases all have in common that they are part of the (institutional) legal arrangements pertaining to the single currency. For Member States that have not (yet) adopted the Euro, Article 139(2) TFEU excludes the application of parts of this legal regime.[3] This concerns inter alia the objectives and tasks of the ESCB (Article 127(1)-(3) and (5) TFEU; Article 42 of the Statute of the ESCB/ECB) and acts of the European Central Bank (Article 132 TFEU); the issue of the euro and measures governing its use (Article 128 TFEU); monetary agreements and other measures relating to exchange-rate policy; as well as measures in the context of Article 138 TFEU relating to the international financial institutions.[4] Moreover, Article 139(3) TFEU explicitly refers to Chapter IX of the Statute of the ESCB and the ECB on transitional and other provisions for the ESCB. Article 42 of said Statute identifies those provisions that do not create rights and obligations for non euro area Member States, and explicitly states that central banks of Member States with a derogation retain their powers in the field of monetary policy according to national law.[5] This is also reflected in Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, which in the

[1] This provision forms the legal basis for Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013] OJ L 287, p. 63.

[2] It should be noted that while Article 136(1) TFEU refers broadly to the adoption of measures 'to ensure the proper functioning of economic and monetary union, it becomes clear from the enumeration under (a) and (b) that this only refers to measures related to economic policy coordination.

[3] For these specific areas Art. 139(4) TFEU states that the voting rights of these so-called Member States with a derogation are suspended.

[4] Art. 219 TFEU.

[5] Member States with a derogation are not shareholders of the ECB, their central banks do not subscribe to capital of the ECB, and they do not participate in the main decision-making bodies of the ECB (Governing Council and Executive Board). Governors of central banks of Member States with a derogation do participate in the General Council of the ECB, see Art. 44 Statute of the ESCB and the ECB.

sphere of monetary policy explicitly excludes the application of a number of provisions of the TFEU, as well as of the Statute of the ESCB and the ECB, thereby mirroring the above-mentioned provisions in the TFEU and the Statute on the position of Member States with a derogation. The Protocol also makes clear that Article 140(3) TFEU concerning the decision on the irrevocable fixing of the exchange rate at which the Euro is substituted for the national currency of the Member State does not apply to the United Kingdom. With regard to Denmark the Protocol (No 16) on certain provisions relating to Denmark states that 'all Articles and provisions of the Treaties and the Statute of the ESCB referring to a derogation shall be applicable' and, moreover, that the procedure provided for in Article 140 TFEU for the adoption of the single currency shall only be initiated 'at the request of Denmark'.

It becomes clear from this brief overview on the legal situation concerning the application of primary and secondary Union law pertaining to monetary policy to Member States with a derogation, as well as the United Kingdom and Denmark, that in principle the (institutional) legal framework on the single currency does not apply to these Member States. Consequently, the governments of Member States with a derogation are in principle also excluded from the decision-making in the Council in this regard, as becomes clear from Article 139(4) TFEU, as well as the Protocols applying to the United Kingdom. Member States are thus not in a position to 'obstruct' any measures to 'further deepening' monetary policy through their voting behaviour in the Council. One notable acceptation here is Article 127(6) TFEU, which requires a unanimity decision in the Council by all EU Member States.[6] In this context the statement in the Introduction that non euro area Member States should not 'create obstacles to but facilitate such further deepening', while at the same time their 'rights and competences' should be 'respected', is of significance. Indeed, it seems to refer to situations similar to that in the context of the establishment of the Single Supervisory Mechanism (SSM), when the British government made clear that it had no intention of joining such a mechanism as part of a broader banking union, as the latter was considered to be geared towards the euro area. At the same time concerns were raised about 'the potential impact of banking union on the UK financial sector' (UK Treasury 2012). In that concrete example the UK did not block the decision under Article 127(6) TFEU in the end, yet it did ensure that non euro area Member States that do not participate in the SSM cannot simply be overruled on major decisions concerning the regulation of the financial market sector. To this end, the preamble of the SSM Regulation states that '[N]o action, proposal or policy of the ECB shall, directly or indirectly, discriminate against any Member State or group of Member States as a venue for the provision of banking or financial services in any currency' (Article 1(3) of Regulation (EU) No 1024/2013). Moreover, a double-majority requirement for decisions on regulatory and implementing technical standards, as well as guidelines and recommendations inter alia for credit institutions and investment firms that are taken by the EBA Board of Supervisor has been introduced in the legal basis of the European Banking Authority (EBA) (Article 44 of Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority)).[7] If anything it may be argued that the reference to 'obstruction' in the introduction of section A makes the potential difference in interests between euro area and non euro area Member States explicit, while at the same time not providing for a useful conflict resolution or mediation mechanism in case these interests threaten to collide.

Whether it can be concluded that the reference in the Introduction to the voluntary nature for non euro area Member States of 'measures, the purpose of which is to further deepen the

[6] Art. 127(6) TFEU is not included in the enumeration in Art. 139(2) TFEU.

[7] According to this a simple majority of the members from the competent authorities of Member States participating in the SSM, as well as a simple majority of the members from competent authorities of Member States outside the SSM is required. The Board of Supervisors consists among others of the heads of national authorities in charge of the supervision of credit institutions of all 28 Member States.

[...] monetary union' only reflects the status quo and is thus of no further consequence depends on the interpretation of the word 'deepening'. If interpreted narrowly, the latter may refer to measures aimed at the development of the (institutional) legal framework applying to the single monetary policy in the euro area. Here the question arises, whether this would also entail measures applicable to Member States with a derogation that are inter alia aimed at achieving a higher degree of (monetary) convergence.

When given a somewhat broader interpretation an additional question arises, whether this may also cover the decision for the accession of new Member States to the euro area. The latter could be interpreted as a measure aimed at deepening the monetary union. While being of no consequence for the United Kingdom and Denmark, such a broad interpretation would provide Member States with a derogation that are currently in the antechamber to the euro area with the freedom to unilaterally decide on the adoption of the single currency once the convergence criteria are fulfilled. Such a reading is not unproblematic, as the argument can be made based on Article 3(4) TEU and Article 140 TFEU that Member States with a derogation are in principle obligated to take the necessary steps to fulfil the legal and economic criteria foreseen in primary Union law to join the single currency and, moreover, that the Union institutions are also committed to this aim (Siekmann 2013: 50 on Article 3(4) TEU; Herrmann and Steven 2012: 605 on Article 140 TFEU). For the Central and Eastern European countries that have acceded to the EU after 1993, support for this argument can also be found in the accession or Copenhagen criteria, which explicitly refer to the 'adherence to the aims of political, economic and monetary union' as a membership requirement (European Council 1993; Amtenbrink 2012: 23). In the case of such a broad interpretation, the reference to the openness to participation 'wherever feasible' may also be questionable in the sense that, as far as membership in the euro area is concerned, Article 140 TFEU foresees a specific decision making procedure that rules out an automatism of any kind or a enforceable right to participate in the euro area.

3.1.2. Implications for economic policy coordination in EMU

With regard to economic policy, Title VIII TFEU provides for legal bases in Article 121(6) TFEU and Article 126(14) TFEU namely to ensure the proper functioning of economic and monetary union through the strengthening of the coordination and surveillance of budgetary discipline. Both provisions may also be utilized in conjunction with Article 136(1) TFEU when adopting euro area specific measures. Since the Treaty of Lisbon, regulations aimed at establishing detailed rules for the multilateral surveillance procedure (Article 121(3) and (4) TFEU) are adopted under the ordinary legislative procedure, thus providing for the participation of all Member States in the voting. With regard to Article 126(14) TFEU a differentiation has to be made between its paragraphs 2 and 3. Paragraph 2 foresees in a unanimous decision by the Council, consisting of all Member States, for the adoption of provisions to replace the Protocol on the excessive deficit procedure[8], whereas paragraph 3 allows for the adoption of detailed rules and definitions for the application of the provisions of this Protocol by decision of the Council consisting of all Member States. As any reference to a majority requirement is missing, it has to be concluded that such decisions are taken by qualified majority (Hattenberg 2012: 1565).[9] In contrast, according to Article 136(2) TFEU, measures specific to the euro area Member States based on Article 136(1) TFEU in conjunction with Article 121(6) TFEU or

[8] This legal basis has been first used to adopt and thereafter amend Council Regulation 1467/97 on the strengthening of the excessive deficit procedure as part of the Stability and Growth Pact.

[9] This legal basis has been used for the adoption of Council Regulation 479/2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, OJ 2009, L 145/1.

Article 126(1) TFEU are adopted by qualified majority in the Council, whereby only the euro area Member states take part in the voting.

The fact that neither Article 121(6) nor Article 126(14) TFEU foresee in an exclusion of non euro area Member States from the voting procedure (when applied on their own) can be explained by the fact that both the multilateral surveillance as well as the excessive deficit procedure are in large parts applicable to all 28 Member States, including Member States with a derogation. Article 139(2) TFEU excludes only specific parts of the multilateral surveillance and excessive deficit procedure from the scope of application to non euro area Member States.[10] This concerns namely the adoption of the parts of the broad economic policy guidelines which concern the euro area generally (Article 121(1) TFEU), and the sanctioning mechanism foreseen as part of the excessive deficit procedure (Article 126(9) and (11) TFEU). This holds also true for the United Kingdom and Denmark. The mere fact that separate Protocols annexed to the Treaty apply to these countries does not change this assessment. With regard to the United Kingdom the Protocol in principle mirrors Article 139(2) TFEU in excluding namely Articles 121(2) and 126(1), (9) and (11) TFEU.[11] Next to the applicability of large parts of the economic policy coordination framework, also Articles 143 and 144 TFEU, which allow for mutual assistance to non euro area Member States in the case of balance of payment difficulties or a sudden crisis, apply to the United Kingdom.[12] This can also be observed for Article 142 TFEU on the exchange rate policies of Member States with a derogation. For Denmark the Protocol simply puts the country on an equal footing with a Member State with a derogation as defined in Article 139(1) TFEU. One notable exception for the UK is the exclusion in the Protocol of Article 126(1) TFEU, according to which Member States shall avoid excessive government deficits. In place thereof, according to the Protocol '[T]he United Kingdom shall endeavour to avoid an excessive government deficit.' Finally, it can be observed that the United Kingdom is not bound by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) and the Treaty establishing the European Stability Mechanism (ESM-Treaty), both of which it has not signed.

The potential implications of the reference in the Introduction to the 'voluntary' nature of '[M]easures, the purpose of which is to further deepen the economic [...] union' for non euro area Member States has to be carefully weighed up against the above-described legal framework on economic policy coordination framework that does apply to all Member States, including namely the United Kingdom. To the extent that measures, which refer to those parts of the multilateral surveillance procedure that apply to all Member States, are taken in accordance with the ordinary legislative procedure by qualified qualified majority vote in the Council of the European Union with the participation of all 28 Member States (Article 121(6) TFEU), such measures bind all Member States. As such, these measures cannot be considered of a voluntary nature for specific Member States that have either opposed such measures or, for that matter, qualify as non euro area Member States.[13] The same can be observed for measures based solely on Article 126(14) TFEU, which refer to those parts of the excessive deficit procedure for which there exist no derogations.

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[10] For these specific areas Art. 139(4) TFEU states that the voting rights of these so-called Member States with a derogation are suspended.

[11] For Art. 121(2) TFEU this concerns the adoption of the parts of the broad economic policy guidelines which concern the euro area generally.

[12] According to the Protocol for the purpose of these provisions the UK is considered as a Member state with a derogation.

[13] Member States not fulfilling an obligation under Union law can become subject to an action for infringement subject to Art. 258 TFEU or Art. 259 TFEU. Member States can challenge legal binding Union acts with an action for annulment subject to Art. 263 TFEU.

With regard to what is stated in the second paragraph of the introduction to section A (no 'obstruction', and 'respect' of rights and competences) it can be observed that, in accordance with primary Union law in force, voting against or abstaining from a vote on a particular measure in the Council of the European Union cannot be considered as an 'obstruction' on parts of the Member state concerned that may be considered as a lack of sincere cooperation. At the same time it is hard to conceive that the 'rights and competences' of a Member State are infringed as a result of being overruled in the Council, if and to the extent that the act in question has to be considered legal both on procedural and substantive grounds (Article 263(2) TFEU, Craig and De Búrca 2015: Chapter 15). The invoking of such a right in the future to effectively op-out of legally binding Union acts on an ad hoc basis, such as Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances and Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States, both of which form part of the Six Pack, would first and foremost run counter to the aims and objectives of economic policy coordination as laid down in Title VIII TFEU and namely the application of large parts of the coordination framework also to non euro area Member States.[14] Moreover, it would arguably also conflict with the broader Union constitutional principles on the autonomy and supremacy of EU law (on these principles: Chalmer, Davies and Monti 2014: 208 et seq.). From this point of view it is rather problematic when it is suggested in the third paragraph of the introduction to section A that what is stated in the Introduction amounts to 'principles recalled'.

In the second paragraph of the Introduction to section A it is stated that '[T]he Union institutions, together with the Member States, will facilitate the coexistence between different perspectives within the single institutional framework ensuring both the effective operability of Union mechanisms and the equality of Member States before the Treaties'. This can be interpreted to once more refer to the decision-making procedure namely in the Council of the European union, the European Parliament, and the European Commission. Yet, this statement also seems to be more broadly pointed at the application of the legal framework. As has been stated in section 3.1.1., Title VIII TFEU basically differentiates between Member States that have adopted the common currency and Member States with a derogation. This differentiation between groups of Member States stands for a partial differentiated integration in the area of economic and monetary policy, whereby the legal provisions described above must in principle ensure that the legal framework applying to euro area Member States does not create obligations for non euro area Member States (on differentiated integration: Craig and De Bùrca 2015: 13). What is admittedly missing in the present TEU and TFEU is a general and explicit statement to this end. To be sure, the 'equality of Member States before the Treaties' can arguably also not be said to be endangered by the fact that non euro area Member States do not take part in deciding on measures that are not applicable to them.

[14] Of the Six Pack measures, Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances (OJ 2011 L 306/25), Council Regulation 1177/2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ 2011 L 306/33) as well as Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States (OJ 2011 L 306/41) apply to all Member States, whereas Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area (OJ 2011 L 306/1), Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ 2011 L 306/8) and Regulation 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ 2011 L 306/12) only apply tot he euro area Member States. As to the Two Pack both Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ 2013, L 140/1) and Regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (OJ 2013, L 140/11) apply to euro area Member States only.

The reference to 'equality of Member States' in the context of the application of Union legal regime could also be given a very broad interpretation that would be rather problematic from the point of view of the coherence and effective application of the existing primary and secondary Union law. This would be the case if what is actually intended is that all Member States should be treated equally in the application and more precisely the actual procedural steps and associated consequences that are foreseen as part of the multilateral surveillance and excessive deficit procedure. Such an interpretation would run counter to the very aim of economic policy coordination, which is geared towards the budgetary situations in Member States on an individual basis, whereby the necessary assessments, be it by the Economic and Financial Committee, the European Commission or the Council of the European Union, in the context of the multilateral surveillance and excessive deficit procedure are based on the individual performance and circumstances of each Member State.

3.2. Comment on the modifications introduced into the conclusions of the European Council of 18 and 19 February 2016

With regard to monetary policy and the single currency, as has been observed in section 3.1.1., in its original version the Introduction to section A could be interpreted to provide Member States with a derogation with the freedom to unilaterally decide on the adoption of the single currency once the convergence criteria are fulfilled and, moreover, relax the conditions under which a membership in the euro area is possible. In this regard the text adopted in the conclusions of the European Council provides a relevant modification, stating that 'This is without prejudice to the fact that Member States whose currency is not the euro, other than those without an obligation to adopt the euro or exempt from it, are committed under the Treaties to progress towards fulfilling the conditions necessary for the adoption of the single currency.' It now becomes clear that the reference to the voluntary nature for non euro area Member States of 'measures, the purpose of which is to further deepen the [...] monetary union', cannot be interpreted to release Member States with a derogation from their commitment to take the necessary steps to fulfil the legal and economic criteria foreseen in primary Union law to join the single currency. Moreover, it becomes clear that such membership is conditional upon fulfilling certain requirements.

However, this modification does not resolve the point raised in section 3.1. that the broad wording of the Introduction to section A may also be interpreted to cover measures applicable to Member States with a derogation that are inter alia aimed at achieving a higher degree of (monetary) convergence.

With regard to economic policy coordination in EMU, in the conclusions of the European Council the second paragraph of the Introduction to section A has been somewhat modified. Next to the effectiveness reference is now also made to the consistency of the operability of Union mechanisms, as well as to the integrity of the internal market. The inclusion of 'consistency' arguably supports the point made in section 3.1.2. that the application of the Union mechanisms must take place in line with the procedures foreseen in primary and secondary Union law and that a differentiated treatment of Member States for reasons other than those explicitly foreseen in Union law must be excluded. The reference to the integrity of the internal market clearly relates to the concerns of the United Kingdom that measures geared towards the further development of economic and monetary union and applicable only to euro area Member States may negatively impact its position in the internal market (decision-making), namely in the area of financial services legislation that already played a major role in the

negotiations on the SSM Regulation.[15] This could inter alia be the case if the euro area Member States act as a bloc in internal market decision making. However, the precise scope and actual legal obligation(s) arising from this reference to the integrity of the internal market is unclear.

In the revised version of the draft decision the phrase 'sincere cooperation' has been added to the third and final paragraph. This can be interpreted as a reference to the Article 4(3) TEU, according to which 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties', but also Article 13(2) TEU, according to which also the Union institutions 'shall practice mutual sincere cooperation.' (On the nature and scope of this see Klamert 2014).

[15] For the position of the UK in this regard see House of Commons Foreign Affairs Committee, The future of the European Union: UK Government policy. First Report of Session 2013-2014, Volume I, May 2013.

4. PARAGRAPH 1 OF SECTION A.

Proposals by the President of the European Council as of 2 February 2016	Conclusions of the European Council of 18 and 19 February 2016
Draft Decision of the Heads of State or Government concerning a New Settlement	Decision of the Heads of State or Government concerning a New Settlement
1. Discrimination between natural or legal persons based on the official currency of the Member State, or, as the case may be, the currency that has legal tender in the Member State, where they are established is prohibited. Any difference of treatment must be based on objective reasons.	1. Discrimination between natural or legal persons based on the official currency of the Member State, or, as the case may be, the currency that has legal tender in the Member State, where they are established is prohibited. Any difference of treatment must be based on objective reasons.
Legal acts, including intergovernmental agreements between Member States, directly linked to the functioning of the euro area shall respect the internal market ~~or~~ economic, social and territorial cohesion, and shall not constitute a barrier to or discrimination in trade between Member States. These acts shall respect the competences, rights and obligations of Member States whose currency is not the euro.	Legal acts, including intergovernmental agreements between Member States, directly linked to the functioning of the euro area shall respect the internal market, as well as economic and social and territorial cohesion, and shall not constitute a barrier to or discrimination in trade between Member States. These acts shall respect the competences, rights and obligations of Member States whose currency is not the euro.
Member States whose currency is not the euro shall not impede the implementation of legal acts directly linked to the functioning of the euro area and shall refrain from measures which could jeopardise the attainment of the objectives of the economic and monetary union.	Member States whose currency is not the euro shall not impede the implementation of legal acts directly linked to the functioning of the euro area and shall refrain from measures which could jeopardise the attainment of the objectives of economic and monetary union.

4.1. Comment on the original proposals made by the President of the European Council

At the outset the general and non-legal observation can be made that Paragraph 1 of section A of the original proposal is remarkable in so far as it stylises or at least implies deep tranches and (potential) conflicts (of interests) between euro area and non euro area Member States and, moreover, between the single currency area and (trade in) the internal market. What is more, by apparently intending to introduce rules for such conflicts of EU objectives and rules the impression is given that Union law in its current state does not provide for adequate safeguards.

4.1.1. Prohibition of discrimination of natural and legal persons based on the official currency or the currency that has legal tender in the Member State

The first paragraph of Paragraph 1 refers to '[D]iscrimination between natural or legal persons based on the official currency of the Member State, or, as the case may be, the currency that has legal tender in the Member State, where they are established' that is supposed to be prohibited. Given the general wording, the potential scope of application of this provision and namely its addressees is broad. Next to natural and legal persons in all Member States, Member States and their entities, but also Union institutions and bodies seem to be covered. The latter would not only include the Union institutions, including the European Parliament,

Council and European Commission, also the European Central Bank in exercising its powers, as well as other Union bodies, such as the European Supervisory Authorities.

In fact, the latter may have been the very intention of the drafters of this provision, considering the recent dispute between the United Kingdom and the European Central Bank before the General Court concerning the ECB's Eurosystem Oversight Policy Framework (General Court 2015). The United Kingdom sought the annulment of that framework to the extent that the latter originally set out a location policy for central counterparties established in Member States that are not party to the euro area.[16] According to this judgment, 'infrastructures that settle euro-denominated payment transactions should settle these transactions in 'central bank money' and be legally incorporated in the euro area with full managerial and operational control and responsibility, over all core functions, exercised from within that area' (General Court 2015: para 12). One of the pleas submitted by the United Kingdom in the action for annulment was that such a location requirement would infringe the principle of non-discrimination laid down in Article 18 TFEU. The General Court did not examine this argument, as it followed the UK's primary plea that the ECB did not have the competence necessary to regulate the activity of securities clearing systems in the first place and thus, could not legally introduce a requirement for central counterparties involved in the clearing of securities to be located within a Member State party to the Eurosystem (General Court 2015: para 110). As has been observed in section 3.1.1., concerns of a potential discrimination against non euro area Member States also arose in the context of the banking union and resulted in the inclusion of a reassurance in the preamble of the SSM-Regulation that '[N]o action, proposal or policy of the ECB shall, directly or indirectly, discriminate against any Member State or group of Member States as a venue for the provision of banking or financial services in any currency' (Article 1(3) of Regulation (EU) No 1024/2013).

The question is, how the introduction of the above-stated prohibition of discrimination relates to the existing Union legal framework pertaining to discrimination, and namely whether it may alter or otherwise affect this framework. Starting point in this regard is the Treaty on European Union, which in Article 2 TEU refers to equality as one of the values on which the EU is founded. Article 3(3) TEU specifies that the Union must inter alia combat social exclusion and discrimination, and Article 10 TFEU introduces a horizontal clause stating that, in defining and implementing its policies and activities, the Union shall combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Treaty on the Functioning of the European Union identifies several types of discrimination. A central provision in this regard can be found in Article 18 TFEU, according to which discrimination based on nationality is prohibited. Article 18 TFEU does not only cover instances of direct or overt discrimination based on nationality where the nationality actually forms the distinguishing feature, but every discrimination, including indirect or covered discrimination based on nationality. In the latter case a criterion other than nationality is applied to differentiate, whereby the result is in fact the same as a direct or overt discrimination based on nationality, as it affects in large numbers of nationals of another Member State (ECJ 1980: para 9, Holoubek 2012: 470). Considering this wide scope, Article 18 TFEU has been described as an expression of a general or structural principle of primary Union law that has to be taken into account when interpreting other Treaty provisions (Holoubek 2012: 469). Next to Article 18 TFEU, several other provisions in primary Union law refer to specific types of discrimination, including Article 19 TFEU with regard to discrimination based on sex, racial or ethnic origin,

[16] The action for annulment was directed against the framework as decided by the ECB on 11 July 2011. The current – amended - framework can be found at <
https://www.ecb.europa.eu/pub/pdf/other/eurosystemoversightpolicyframework201509.en.pdf.

religion or belief, disability, age or sexual orientation, and Article 157 TFEU on the equal pay for men and women.

What becomes clear from this enumeration is that primary Union law does not include an explicit reference to discrimination based on 'the official currency of the Member State' or 'the currency that has legal tender in the Member State'. Yet, that indirect or covered discrimination based on nationality may also involve currency has already been recognised by the ECJ more than three decades ago. In the ECJ's judgment in the 'Boussac' case the Court has observed that a national law that 'subjects access to courts to conditions relating to the currency in which debts are expressed', 'might in fact place creditors established in the other Member State in a less favourable position than creditors established on national territory and thus constitute a barrier to trade in the common market which would principally affect the nationals of the other Member States' (ECJ 1980: para 10).

In the context of the internal market, several provisions aim at excluding discriminatory treatment, including Article 36 TFEU on justifications of restrictions on imports and exports (including the prohibition of arbitrary discrimination or a disguised restriction on trade between Member States); Article 37(1) TFEU on State monopolies of a commercial character (including the prohibition of discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States); Article 40 TFEU on the common organisation of agricultural markets (including the prohibition of any discrimination between producers or consumers within the Union); Article 45 on the free movement of workers (including the prohibition of discrimination based on nationality between workers); Article 65(3) TFEU on rights retained by Member States in the context of the free movement of capital and payments (which may not constitute a means of arbitrary discrimination or a disguised restriction on the free movement free movement of capital); Article 95 TFEU on transport in the Union (prohibiting certain forms of discrimination by carriers of goods); and Article 107 TFEU on state aid that is compatible with the internal market (prohibiting discrimination related to the origin of products).

As the ECJ has made clear, such specific references to a prohibition of discrimination have to be interpreted as a specific enunciation of a general principle of equality 'which is one of the fundamental principles of Community law' (ECJ 1977: para 7; Tridimas 1999: 40 et seq.). It has been rightly observed that 'the principle has been applied by the ECJ where there has been arbitrary or unjustified unequal treatment of two persons within an area of EU competence' (Craig and De Búrca 2015: 565). According to the ECJ's established case law, this principle 'requires that similar situations shall not be treated differently unless differentiation is objectively justified' (ECJ 1977: para 7). In the context of the action of Union institutions it can be noted that the degree to which such a differentiation can be objectively justified (before the Court) is influenced by the margin of discretion allowed to a Union institution in accordance with Union law. In cases involving a large margin of discretion, judicial review may be effectively limited to a quasi proportionality test (Chalmers, Davies and Monti 2014: 440 et seq.). In the context of the internal market, cases involving overt and covered discrimination inter alia based on nationality or the origin of a good or service are dealt with as barriers to the free movement of goods, persons, services and capital, or the freedom of establishment.

Considering legal doctrine and the case law of the ECJ it needs to be discussed what the significance of the express reference to a prohibition of discrimination linked to currency is adding in substantive terms. Namely, does the adding of a new type discrimination increase the scope of measures that may be considered as unlawful differentiated treatment, in particular with regard to what could be considered to constitute indirect or covert discrimination based on the currency of the Member State?

From an internal market perspective, the envisaged prohibition first of all seems to refer to situations in which natural or legal persons are treated differently from other natural or legal persons because of the fact that they utilize a currency other than the one that is the official currency or has legal tender in the Member State in which the eligibly discriminatory act takes place. The question in this context is whether a refusal in the euro area to accept transactions in a non euro currency of a EU Member State, could be interpreted as a a discrimination 'based on the official currency of the Member State, or, as the case may be, the currency that has legal tender in the Member State'. The same can be asked with regard to the refusal in a non euro area Member State to accept a Euro transaction, or maybe even concerning the rise of additional costs or risks in cross-border transactions as a result of the use of a non-Euro currency of a EU Member State.

As to currencies with legal tender in the EU, Article 128(1) TFEU and Article 11 Council Regulation 974/98 on the introduction of the euro make clear that for the euro area Member States the Euro banknotes issued by the ECB and the Euro coins, authorised by the ECB and issued by the euro area Member States, are the only ones that have the status of legal tender.[17] Interestingly, Article 128(1) TFEU in this context refers in general terms to the status of legal tender 'within the Union', rather than within the euro area. Nevertheless, this provision has been rightly interpreted to refer to the latter only (Selmayr 2015: 1464). In practice it has to be assumed that within the euro area this amounts first and foremost to an obligation for creditors of a payment obligation to accept Euro banknotes and coins, 'unless the parties have agreed on other means of payment' (European Commission 2010: point 1). A similar reference in these or other Union legal instruments to the status of national currencies of non euro area Member States as payment instrument within the euro area or in other non euro area Member States is missing.[18] As far as the non euro area Member States are concerned, the regulation of the legal status of currencies clearly falls outside the competence of the EU (Article 3(1)(c) TFEU, Article 5(1) TFEU). At the same time, for Member States not (yet) participating in the single currency, it is hard to conceive on what legal grounds their governments or nationals (natural and legal persons) could enforce legal equivalence with the single European currency based on a general principle of non-discrimination, as any difference is treatment as far as the status of legal tender is concerned is arguably based on objective reasons. This possibility of differentiated treatment is acknowledged in the draft decision, where it is stated that a differentiated treatment of natural or legal persons may actually be sanctioned by 'objective reasons'.

As far as indirect or covered discrimination is concerned, the envisaged prohibition seems to primarily be geared towards dealing with any differential treatment of natural and legal persons based on whether they are situated inside or outside of the euro area, whereas the broad wording in principle also allows this provision to apply to situations of differentiated treatment of natural and legal persons situated in different non euro area Member States. A concrete example of a situation in which discriminating differentiated treatment has been argued is the Eurosystem Oversight Policy Framework. As mentioned above, the contested part concerned the obligation for legal entities to be fully incorporated in the euro area when settling euro-denominated payment transactions. Yet, it is uncertain whether such a measure would actually be caught by the scope of the prohibition envisaged in Paragraph 1 of section A in the first place and, moreover, would be considered as a prohibited discrimination. For this it would first of all have to be established that the incorporation requirement for central

[17] The concept of legal tender itself is not defined. See however the European Commission recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (2010/191/EU), OJ 2010, L83/70.

[18] Article 9 Council Regulation 974/98 in the context of the changeover to the single currency only states that 'Banknotes and coins denominated in a national currency unit shall retain their status as legal tender within their territorial limits as of the day before the entry into force of this Regulation.'

counterparties actually results from the fact that the currency of the country in which a central counterparty is legally incorporated, e.g. the United Kingdom, differs from that of the Member State(s) in which it conducts business. While it may be argued that the incorporation requirement is linked to the types of transactions that the legal person conducts, rather than the currency of the country where that legal person is situated, and thus does not amount to a direct or overt discrimination, it may still be the case that this application of differentiating criteria other than currency has the same effect as a distinction based on currency (indirect or covered discrimination). However, even if the latter could be established, the argument could still be made that this differentiation is based on 'objective reasons' or, put differently, is objectively justified. In this context reference can be made to the rationale of the introduction of an incorporation requirement that is to prevent the situation where any malfunctioning on part of infrastructures located outside the euro area that participate in the settlement or clearing of euro transactions 'may have adverse effects on payment systems located in the euro area, whilst the euro area has no direct influence on such infrastructures' (General Court 2015: para 11). To be sure, in pursuing this aim, the measure in question would still have to be considered proportionate and thus not to exceed what is necessary to achieve the aim (generally on this requirement: Amtenbrink and Vedder 2014: 142 et seq.). Be that as it may, it results from this summary analysis that the inclusion of the envisaged prohibition would not substantially alter the legal situation arising under existing Union law and namely resulting from an application of the internal market provisions, or Article 18 TFEU for that matter.[19]

4.1.2. Internal market integrity and economic, social and territorial cohesion

Paragraph 1.2 of section A to '[L]egal acts, including intergovernmental agreements between Member States, directly linked to the functioning of the euro area' that are supposed to 'respect the internal market or economic, social and territorial cohesion'. The wording seems to be a reminisce of Article 326 TFEU to the extent that the latter provision in the context of enhanced cooperation states that such cooperation 'shall not undermine the internal market or economic, social and territorial cohesion' and, moreover, 'shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.' One notable difference is that the wording and namely the use of the word 'or' seems to suggest that it is the one (internal market) or the other (economic, social and territorial cohesion) that is supposed to be respected. If indeed the aim was to mimic the wording of Article 326 TFEU, the word 'and' rather than 'or' should have been included. As the envisaged wording in Paragraph 1 does not refer to enhanced cooperation, it extents the scope of this Treaty rule beyond cases of enhanced cooperation to cover not only all legally binding Union acts, but even intergovernmental agreements between Member States.

The envisaged provision of Paragraph 1 also includes a qualification of the types of legal acts that are supposed to be covered, as reference is made to those legal acts 'directly linked to the functioning of the euro area'. As any further qualification of the types of acts intended to be included is missing, one can only speculate in this regard. One way to define these acts is to consider only those Union legal acts to be covered that are exclusively geared towards the euro area. In this regard, reference can be made to what has been observed in section 3.1.1. with regard to the legal bases in Title VIII TFEU on economic and monetary policy and the differentiation between euro area and non euro area Member States. Thus, namely legal acts based on Article 136(1) TFEU in conjunction with Article 121(6) TFEU or Article 126(14) TFEU would then be covered. Against such a narrow interpretation it can be argued that 'the functioning of the euro area' may also benefit from measures that are not directly geared towards

[19] In the case in question the UK had argued that the incorporation requirement amounts to an infringement of the freedom of establishment, the freedom to provide services and the free movement of capital.

the economic policy coordination and single monetary policy framework in EMU, but rather more broadly towards ensuring financial stability, such as the initiative for the introduction of common system for a financial transaction tax.

The question is whether the envisaged provision creates new obligations for Member States beyond what is currently provided for in primary Union law. If and to the extent that the word 'respect' in the envisaged provision can be interpreted to mean in legal terms 'observe' or 'conform to', this is questionable. As matter of principle any Union legal acts must comply with existing primary Union law. This does not only include the internal market provisions, but inter alia also any obligations arising under Title XVIII TFEU on economic, social and territorial cohesion. In the latter context, Article 175(1) TFEU, states that 'the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 [the strengthening of its economic, social and territorial cohesion] and shall contribute to their achievement'.[20] As far as intergovernmental agreements are concerned, it becomes clear from Article 3(2) TFEU that the Union does not only have the exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, but also in so far as the conclusion of such an agreement may affect common rules or alter their scope. As the ECJ has has emphasised in its 'Pringle' judgment in the context of the Treaty establishing the European Stability Mechanism, it derives from this provisions that 'Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope' (ECJ 2012: para 101). The latter may inter alia also be the case, if such an agreement jeopardises the objective pursued by primary Union law.[21] Consequently, the conclusion of any international agreement between all or some Member States, which conflicts with the Union legal regime pertaining to the internal market or pertaining to economic, social and territorial cohesion, is prohibited under existing Union law. As has already been stated above, as far as any enhanced cooperation is concerned, this requirement of the compatibility with the existing Union framework is expressly stated in Article 326 TFEU.

One area of application of such enhanced cooperation that has become a bone of contention namely between the United Kingdom and the Council has been the plans by 11 Member States for the adoption of a common system of financial transaction tax by means of enhanced cooperation.[22] While the ECJ has dismissed the action for annulment brought against the Council Decision authorising enhanced cooperation in the area of financial transaction tax (ECJ 2013), no judgment has been passed yet on the compatibility of a subsequent legal act that is adopted for the purposes of the implementation of the authorised enhanced cooperation. Thus, whether and to what extent a future Council Directive implementing enhanced cooperation in the area of financial transaction tax is compatible with existing Union law,namely does not undermine the internal market or economic, social and territorial cohesion, and moreover does not constitute a barrier to or discrimination in trade between Member States, nor distort competition between them, needs to be established in due course. In this regard the envisaged provision in the draft decision does not seem to add anything substantial to the existing legal framework, e.g. by introducing stricter requirements.

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[20] Brackets added.

[21] In 'Pringle' the ECJ refers to the objectives of Article 122(2) TFEU.

[22] Council Decision authorising enhanced cooperation in the area of financial transaction tax (2013/52/EU), OJ 2013, L22/11; Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC (COM(2011) 594 final).

4.1.3. Collaboration of non euro area Member States

Paragraph 1.3 of section A aims at obliging non euro area Member States not to 'impede the implementation of legal acts directly linked to the functioning of the euro area', and not to take measurers that 'could jeopardise the attainment of the objectives of the economic and monetary union.' There is a notable similarity between this statement and the statement in the second paragraph of the Introduction to section A, according to which 'Member States not participating in the further deepening of the economic and monetary union will not create obstacles to but facilitate such further deepening (…)'. As has been stated in section 3.1.2., voting against or abstaining from a vote on a particular measure by non euro area Member States can hardly be considered as an 'obstruction' on parts of the Member state concerned that amounts to a lack of sincere cooperation. Consequently, the construction of a legally enforceable obligation on parts of these Member States to vote in favour of any measures that by means of the stated objectives or of an objective evaluation are geared towards the attainment of the objectives of the economic and monetary union would arguably run counter to existing Union law. As such this statement can only be interpreted as a political rather than legal commitment.[23]

The reference to the impeding of the 'implementation of legal acts directly linked to the functioning of the euro area' is somewhat puzzling. This concerns first of all the use of the phrase 'implementation of legal acts'. In the EU jargon this normally refers to the transferal of Union secondary acts in the shape of Directives into the national legal orders of the Member States, an obligation on parts of the Member States that finds its legal basis in Article 288 TFEU, rather than the application of Union measures by Union institutions themselves. Yet, it has to be assumed that the latter is actually aimed at with this reference. Similarly to what has been observed in the previous section, as far as the acts 'directly linked to the functioning of the euro area' is concerned, it can be assumed that this is also supposed to include those measures outside Title VIII on economic and monetary policy that are more broadly geared towards ensuring financial stability, as this is usually also considered to be directly linked to the functioning of the euro area. The latter is of particular relevance in the context of the voting behaviour of non-Euro Member States in the European Banking Authority, where a double-majority requirement applies for decisions on regulatory and implementing technical standards, as well as guidelines and recommendations inter alia for credit institutions and investment firms that are taken by the EBA Board of Supervisor.[24] Obviously an interpretation of the envisaged provisions to the effect that non euro area Member States would in the future be obliged in all instance to vote in favour of such decisions would run counter to Regulation 1093/2010. This could moreover also not be interpreted as a breach of the principle of sincere cooperation as laid down in Article 4(3) TFEU.

Finally, the reference to 'measures which could jeopardise the attainment of the objectives of the economic and monetary union' is of such a broad and unspecified nature that the question arises exactly what measures would from the outset be excluded from the scope of application of this provisions. Thus, does this provision e.g. include economic policy measures by Member States with a derogation that result in these countries not fulfilling the convergence criteria laid down in Article 140(1) TFEU? After all, the joining of the euro area of Member States with a derogation that have not secured an exemption, and thus the extension of the single currency area, may be viewed as a major objective of economic and monetary

[23] See also section 2.1.1.

[24] Art. 44 of Regulation (EU) No 1093/2010: According to this a simple majority of the members from the competent authorities of Member States participating in the SSM, as well as a simple majority of the members from competent authorities of Member States outside the SSM is required. The Board of Supervisors consists among others of the heads of national authorities in charge of the supervision of credit institutions of all 28 Member States.

union. What is more, the question arises whether the non-observance of sound budgetary policy, i.e. non-compliance with Article 126(1) TFEU, could in the light of a Decision of the Heads of State or Government be in the future interpreted as a breach of this new provision that may even be enforceable before the European Court of Justice. Yet, as has been pointed out in section 2.1. above, the draft decision of the Heads of State or Government create legally binding obligations under International public law, rather than Union law. Thus, any obligation arising from the decision does not amount to an obligation under Union law that can be enforced by means of Union law, such as by means of an infringement procedure. What is more, even if the latter would consider an excessive deficit as a breach of a Union obligation not to jeopardise the attainment of the objectives of the economic and monetary union, Article 126(10) TFEU would still apply, according to which the application of Articles 258 and 259 TFEU (infringement procedure) are excluded in the context of Article (1)-(9) TFEU.

4.2. Comment on the modifications introduced into the conclusions of the European Council of 18 and 19 February 2016

Paragraph 1 of section A has remained unmodified with the exception of one linguistic improvement. This concerns the replacement of the word 'or' with the words 'as well as' in the second paragraph referring to the Union policies that the legal acts concluded by Member States directly linked to the functioning of the euro area should observe. With this modification it now becomes clear that both the internal market and economic, social and territorial cohesion have to be respected.

5. PARAGRAPHS 2 AND 4 OF SECTION A.

Proposals by the President of the European Council as of 2 February 2016	Conclusions of the European Council of 18 and 19 February 2016
Draft Decision of the Heads of State or Government concerning a New Settlement	Decision of the Heads of State or Government concerning a New Settlement
2. Union law on the banking union conferring upon the European Central Bank, the Single Resolution Board or Union bodies exercising similar functions, authority over credit institutions is applicable only to credit institutions located in Member States whose currency is the euro or in Member States that have concluded with the European Central Bank a close cooperation agreement on prudential supervision, in accordance with relevant EU ~~acquis~~.	2. Union law on the banking union conferring upon the European Central Bank, the Single Resolution Board or Union bodies exercising similar functions, authority over credit institutions is applicable only to credit institutions located in Member States whose currency is the euro or in Member States that have concluded with the European Central Bank a close cooperation agreement on prudential supervision, in accordance with relevant EU rules and subject to the requirements of group and consolidated supervision and resolution.
Substantive Union law~~, including the single rulebook concerning prudential requirements for credit institutions or other legislative measures to be adopted for the purpose of safeguarding financial stability, may need to be conceived in a more uniform manner when it is~~ to be applied by the European Central Bank in the exercise of its functions of single supervisor, or by the Single Resolution Board or Union bodies exercising similar functions, than ~~when it is~~ to be applied by national authorities of Member States that do not take part in the banking union. To this end, ~~different sets of Union rules may have to be adopted in secondary law, thus~~ contributing to financial stability.	The single rulebook is to be applied by all credit institutions and other financial institutions in order to ensure the level-playing field within the internal market. Substantive Union law to be applied by the European Central Bank in the exercise of its functions of single supervisor, or by the Single Resolution Board or Union bodies exercising similar functions, including the single rulebook as regards prudential requirements for credit institutions or other legislative measures to be adopted for the purpose of safeguarding financial stability, may need to be conceived in a more uniform manner than corresponding rules to be applied by national authorities of Member States that do not take part in the banking union. To this end, specific provisions within the single rulebook and other relevant instruments may be necessary, while preserving the level-playing field and contributing to financial stability.
4. The implementation of measures, including the supervision or resolution of financial institutions and markets, and macro-prudential responsibilities, to be taken in view of preserving the financial stability of Member States whose currency is not the euro is a matter for their own authorities, unless such Member States wish to join common mechanisms open to their participation.	4. The implementation of measures, including the supervision or resolution of financial institutions and markets, and macro-prudential responsibilities, to be taken in view of preserving the financial stability of Member States whose currency is not the euro is, subject to the requirements of group and consolidated supervision and resolution, a matter for their own authorities and own budgetary responsibility, unless such Member States wish to join common mechanisms open to their participation.

This is without prejudice to Union mechanisms of macro-prudential oversight for the prevention and mitigation of systemic financial risks in the Union and to the existing powers of the Union ~~institutions~~ to take action that is necessary to respond to threats to financial stability.	This is without prejudice to the development of the single rulebook and to Union mechanisms of macro-prudential oversight for the prevention and mitigation of systemic financial risks in the Union and to the existing powers of the Union to take action that is necessary to respond to threats to financial stability.

5.1. Comment on the original proposals made by the President of the European Council

Paragraphs 2 and 4 attempt to draw distinctions between the position of euro area Member States and non euro area Member States in the context of financial supervision, and regulation of financial services, particularly in light of the banking union. This common thread that runs through the two paragraphs, as well as the similarities in their wording, call for a joint consideration and analysis of the above four paragraphs.

As will be subsequently explained, the two main legislative instruments of the banking union, namely the Single Supervisory Mechanism (SSM) Regulation (SSMR) and the Single Resolution Mechanism (SRM), are by default inapplicable to non euro area Member States; according to the SSMR Regulation, acts adopted by the ECB under the Regulation 'should not create any rights or impose any obligations in non-participating Member States, except where such acts are in accordance with relevant EU law' and in accordance with Protocols 4 (on the statute of the ECB and ESCB) and 15 (on certain provisions applying to the UK) attached to the Treaties. At first sight, this status quo seems to be acknowledged and reiterated in paragraph 2.1, which conveys the message that 'Union law on the banking union' applies to Member States whose currency is the euro or in Member States that have concluded a close cooperation agreement with the ECB, yet non-participating Member States remain subject to 'the relevant EU acquis.' In comparison with this seeming reiteration of the status quo, paragraph 2.2 refers to 'substantive Union law (...) or other legislative measures to be adopted', thus stipulating an extension of this part of the Decision to future rules in the area of banking union. Similarly, paragraph 4.2 recognises current EU mechanisms for macro-prudential oversight and only refers to 'the existing powers of the Union institutions and relevant Union bodies' to act for the purposes of financial stability, and only if such action is 'necessary to respond to threats of financial stability'.

In light of the above, a main question arises as to whether paragraphs 2 and 4 constitute an attempt to merely reiterate and clarify the existing status quo with regard to financial supervision and regulation, or whether they go so far as to entrench the current status quo in future rule-making in the area of EMU. The latter interpretation of paragraphs 2 and 4 would not only have implications for the development of the EU economic integration, but would also give rise to constitutional questions regarding the possibility to 'bind the hands' of the EU legislators.[25] It could even be considered to contrast with primary law, since it could potentially curtail the powers of Member States and EU institutions under Article 48 TFEU, which provides that proposals for Treaty amendments based on the ordinary Treaty revision process may 'serve either to increase or to reduce the competences conferred on the Union in the Treaties.'

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[25] See Section 2 of this study, particularly 2.1.1 and 2.2.2

To contextualise the subsequent analysis of paragraphs 2 and 4, this contribution begins with an overview of the existing position of the UK (and, generally, non euro area Member States) in the legislative and institutional framework of the banking union, and provides an explanation of the UK's national competence and institutional structure in the area of financial supervision and regulation.

5.1.1. Banking union and the UK as a non euro area Member State

The starting point here is that banking union can be described as a common system for banking supervision and resolution based on the single rulebook and currently consists of three main building blocks: (1) the single rulebook; (2) the Single Supervisory Mechanism; and (3) the Single Resolution Mechanism.

Whilst all euro area Member States are members of the SSM, non euro area Member States can choose to participate by entering into a close cooperation with the ECB (Article 7 of Regulation (EU) No 1024/2013 and Decision ECB/2014/5). By clarifying that it has no intention to join the SSM, the UK has retained responsibility at the national level for the oversight of its financial system. As previously explained[26], the UK has also managed to secure its interests vis-à-vis euro area Member States through a double-majority requirement for decisions on regulatory and implementing technical standards and EBA guidelines and recommendations.

At the national level, the UK 2012 Financial Services Act introduced the 'twin peaks model' by separating prudential supervision from supervision of financial markets and conduct of business. Responsibility for the former was bestowed to the Prudential Regulation Authority (PRA), which is a subsidiary of the Bank of England, whilst responsibility for the latter was given to an independent regulator, namely the Financial Conduct Authority (FCA). Under the 2009 Banking Act, the Bank of England is explicitly responsible for contributing to the protection and enhancement of UK's financial stability.

Despite its non-participation in the SSM, the UK is bound by the main legal acts constituting the single rulebook: the Capital Requirements Directive (CRD IV, Directive 2013/36/EU), Capital Requirements Regulation (CRR, Regulation (EU) No 575/2013), Deposit Guarantee Schemes Directive (DGS, Directive 2014/49/EU), and the Bank Recovery and Resolution Directive (BRRD, Directive 2014/59/EU). Nonetheless, the UK does not participate in the Single Resolution Mechanism (SRM, Regulation (EU) No 806/2014). As such, the UK is not part of the institutional and funding architecture that is set out in the SRM Regulation for applying the rules of the BRRD in the euro area Member States (and those Member States that choose to opt in the SSM). Instead, responsibility for transposing the BRRD remains in the hands of the UK authorities.[27]

Although the UK would not benefit from the SRM when dealing with the failure of a bank, it is still obliged under the SRM Regulation to cooperate with the resolution authorities of non-participating Member States. According to the SRM Regulation (Article 32(2)), the SRB and the resolution authorities of the non-participating Member States should conclude memoranda of understanding on how they will ensure cooperation in the implementation of the

[26] See section 3.1.1.

[27] The BRRD was transposed to the UK through an update to the UK's special resolution regime: The Bank Recovery and Resolution Order 2014 (SI 2014 No.3329); See 'The Bank Of England's Approach to Resolution' (October 2014), www.bankofengland.co.uk/financialstability/Documents/resolution/apr231014.pdf; A consultation for the clarification and strengthening of the Directive's transposition is currently ongoing, see: www.gov.uk/government/consultations/consultation-on-the-implementation-of-the-bank-recovery-and-resolution-directive-brrd/bank-recovery-and-resolution-directive-brrd-implementation

BRRD. Also, given that the SRB is directly responsible not only for significant credit institutions and bank groups, but also for cross-border groups, arrangements for cooperation with non-participating Member States are all the more significant with regard to situations where banks have subsidiaries and branches that are located in the non SSM-participating Member States. Similarly, branches and subsidiaries of banks subject to the SRM may be located in non SRM-participating Member States (Haentjens and Wessels 2015).

Additional rules applicable to non SSM-participating Member States in the context of EU financial supervision are set out in the SSM Regulation (SSMR) and the SSM Framework Regulation (SSMFR). For instance, the SSMR requires the ECB to enter into a memorandum of understanding both with supervisory authorities of non-participating Member States, and with supervisory authorities of non-participating Member States that are 'home to at least one global systemically important institution' (Article 3(6) of Regulation (EU) No 1024/2013).

Article 156 of the CRD IV is also relevant to the non euro area Member States which, as host Member States, are obliged to cooperate with the competent authorities of the home Member State 'for the supervision of the liquidity of the branches of credit institutions.' Article 157 of the CRD IV further provides that the competent Member State authorities 'shall collaborate closely in order to supervise the activities of institutions operating, in particular through a branch, in one or more Member States other than that in which their head offices are situated'. This includes an obligation to supply each other with information that is likely to facilitate supervision and monitoring of these institutions.

The above examples illustrate some of the ways in which non-participating Member States are subject to the common regulatory framework referred to as the 'single rulebook', and the way in which these Member States fit into the supervisory framework established by the SSMR. Based on the interconnectedness of the EU regulatory framework with the euro area supervisory framework, and the fact that the single rulebook also applies to Member States that are not necessarily part of the SSM or the SRM, the reference in the draft Decision (paragraph 2.2) to 'Member States that do not take part in the banking union' could benefit from further clarification.

Against this background, the subsequent analysis turns to the specifics of paragraphs 2 and 4.

5.1.2. The Scope of paragraphs 2 and 4

To begin with, the wording of paragraph 2.1 and 2.2 leads to uncertainties as to the meaning and scope of 'Union law' to which the two paragraphs refer. The two paragraphs distinguish 'Union law on the banking union conferring (...) authority over credit institutions' from 'Substantive Union law (...).' The meaning of 'law on the banking union' is not defined, although it can be said that legislation on the SSM and the SRM, which are considered the main elements of the banking union, is included in the reference. A broad interpretation of 'Union law' could include primary law (Treaties and relevant Protocols), secondary legislation (legislative acts under Article 288 TFEU and potentially delegated and implementing acts under Article 290 and 291 TFEU), as well as intergovernmental agreements. In this respect, the subsequent reference of paragraph 2.1 to 'conferring (...) authority over credit institutions' delimits the scope of legislation that is covered by 2.1 in the following ways:

- Legislation conferring authority to the European Central Bank

The SSMR can be included with certainty in this reference given that its purpose is to confer specific tasks on the ECB concerning policies on the prudential supervision of credit institutions. Under the SSMR, the ECB directly supervises all institutions classified as significant,

whilst the direct supervision of less significant institutions remains with the National Competent Authorities (NCAs) (Articles 4 to 6 of Regulation (EU) No 1024/2013).

- Legislation conferring authority to the Single Resolution Board (SRB)

This refers clearly to the Regulation on the SRM and the Single Resolution Fund, which gives responsibility to the SRB for the 'effective and consistent functioning of the SRM' (Article 7 of Regulation (EU) No 806/2014) The SRB is responsible for deciding on resolution schemes for failing banks, for the planning and resolution phases of the cross-border and large banks which are supervised directly by the ECB, and for the resolution of banks that, irrespective of their size, require recourse to the SRF.

- Legislation conferring authority to 'Union bodies exercising similar functions'

The European Banking Authority (EBA) can be considered as a 'Union body exercising similar functions' to the ECB and the SRB, given its central role in contributing to supervisory convergence by integrating supervision across jurisdictions. Banking supervisors are subject to the technical rules and guidelines issued by EBA.

It follows from the above that the wording of paragraph 2.1 can be seen as referring to the supervisory aspect of the banking union, particularly the SSM and the SRM. Two factors further point out to this conclusion. First, the said paragraph mentions the application of the law to credit institutions located in Member States that have entered into 'a close cooperation agreement on prudential supervision' with the ECB, something that is envisaged as a possibility in Article 7 SSMR, and which is a prerequisite for a non euro area Member State to join the SRM (Recital 15 of Regulation (EU) No 806/2014). Second, the scope of paragraph 2.1 contrasts with that of paragraph 2.2, which refers to the single rulebook as 'substantive Union law'. In other words, why would the single rulebook be discussed in a separate paragraph if not because paragraph 2.1 is limited to banking union supervision?

Leaving aside paragraph 2.2 for the moment, we should consider the statement paragraph 2.1, that the abovementioned legislation should apply only to credit institutions located in Member States whose currency is the euro or in Member States that have concluded with the ECB a close cooperation agreement on prudential supervision. This makes a distinction between, on the one hand, the responsibility for financial supervision of credit institutions that are located in the euro area/SSM-Member States (or have entered into a close cooperation agreement with the SSM) and, on the other hand, the responsibility for the financial supervision of credit institutions located in Member States that do not participate in the SSM.

Reading this provision without the attached reference to 'in accordance with relevant EU acquis' could lead to problems concerning the supervision of a credit institution that is located in a non-SSM Member State and operates branches or provides services in an SSM-Member State. In this sense, the meaning of the phrase 'a credit institution located in (...)' (in paragraph 2.1) is rather uncertain, as it does not distinguish between parent undertakings and branches or subsidiaries. In this regard, the definition of 'credit institution' found in Article 4(1)(1) CRR does not provide any clarification either. According to the CRR, ''credit institution' means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account'. A literal interpretation of the words 'located in' results to a suggestion that paragraph 2.1 implies that the supervision of credit institutions that are located in non-SSM countries should fall completely outside the authority of the SSM, the SRB, and EBA.

The above interpretation could open the gate to numerous problems with regard to the supervision of parent credit institutions that operate branches or provide services in other Member States than the one in which they are authorised. Currently, the principles for conducting supervision on a consolidated basis are set out in Section V, Chapter 3 of the CRD IV. According to Article 155 of the CRD IV, 'prudential supervision of an institution shall be the responsibility of the competent authorities of the home Member State.' When it comes to less significant banks in the EU, the original principles of home-state control and host-state control remain intact.[28] Nevertheless, what is important in the context of the current discussion is that, under the SSM, in instances where systemically important banks (supervised by the ECB under the SSM) establish branches in non-participating Member States, the ECB and the NCA of the participating Member States take the role of the home-state supervisor. For banks that are established in non-participating Member States and have branches or provide services in participating Member States, the ECB and the NCAs of the participating Member States act as a host-state supervisor.[29] Paragraph 2.1 could be interpreted to suggest that the ECB should have no such authority for credit institutions that are established in non SSM-participating Member States.

Such an interpretation is, however, rather restricted by the last part of this paragraph, which stipulates that the distinction between the application of the law in question to SSM participating Member States and non-participating Member States should take place 'in accordance with relevant EU acquis'. Generally speaking, the 'acquis' is perceived as 'the accumulated body of European Union law and obligations' (Miller 2011), comprising 'all the EU's treaties and laws (directives, regulations, decisions) declarations and resolutions, international agreements and the judgments of the CJEU' from 1958 to the present day (Miller 2011). Strictly translated from French, the expression 'acquis' means 'that which has been acquired or achieved.' Based on this interpretation, paragraph 2.1 could be seen to recognise the existing status quo regarding financial supervision in the banking Union, which includes the current form of the SSM and SRM Regulations. It could also be seen as an attempt to pre-empt future expansion of the authority bestowed to the ECB, the ERM and the Union bodies to any aspect of financial services in non euro area Member States that do not wish to participate through close cooperation.

Nonetheless, given its vague meaning, the expression 'acquis' here could also be interpreted more broadly as being a concept that is constantly evolving. In the context of paragraph 2, 'acquis' could include both the current form of the SSM and SRM, as well as relevant legislation that would be adopted in the future. Further clarity is certainly desirable with regard to the interpretation of this expression. In addition, it should be noted that 'acquis' is a term generally used in the context of EU enlargement, specifically concerning the acceptance of the body of EU law by candidate countries, that constitutes the basis for the accession negotiations.[30] It can thus be observed, as a final note on paragraph 2.1, that the use of this expression seems rather ill-suited for the draft Decision concerning issues of economic and monetary governance.

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[28] Home-state is defined by Article 4(43) of the CRR as 'the Member State in which an institution has been granted authorisation'; Host-state is defined by Article 4(44) of the CRR as 'the Member State in which an institution has a branch or in which it provides services.'

[29] Article 6 SSMRF (Cooperation within the SSM); ECB Guide to Banking Supervision pages 11 and 12, available at: <www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf>

[30] Article 49 TEU; The expression is also used to describe laws adopted under the Schengen Agreement prior to the Treaty of Amsterdam, and Article 87 TFEU refers to 'the Schengen acquis'.

5.1.3. Single rulebook at the EU and national level

Paragraphs 2.2 and 4 are concerned with 'substantive Union law' that includes, but is not limited to, current legislation and measures comprising the single rulebook. It can be said that the CRD IV, CRR and BRRD are included in this reference. At the same time, the broad reference in paragraph 2 to 'legislative measures to be adopted for the purpose of safeguarding financial stability' could include future legislation.

Whilst paragraph 2.1 refers to substantive Union law that may need to be conceived (...)', para 4.1 concerns the implementation of measures (...)'. The link between the two can be explained in the following way:

Paragraph 2.2 talks about the adoption of law (including legislative measures taken and those that are to be adopted) at the EU level. It states that different considerations should be taken into account during the EU law-making process[31], depending on whether the laws and measures in question would be applied by the ECB, SRB, Union bodies, or Member State authorities.[32] The wording could also refer to the application of such law ('conceived when it is to be applied') in light of these differences.

By way of comparison, paragraph 4.1 concerns the subsequent implementation of these measures at the national level.[33] The word 'implementation' can be said to include both the transposition (where the relevant EU legislation consists of Directives) and application of measures relating, but not limited, to the supervision or resolution of financial institutions and markets, and macro-prudential responsibilities. It could, therefore, be argued that there is an overlap between the two paragraphs insofar as they both concern the application of the single rulebook.[34] Put together, they attempt to differentiate the position of non euro area Member States from that of the euro area-Member States with regard to the single rulebook: from its adoption to its transposition to national law and its application. As a consequence, they generate the following potentially problematic issues:

5.1.3.1. The issue of uniformity

The issue of uniformity goes to the heart of the single rulebook since the purpose behind the creation of the rulebook was to establish a fully harmonized set of EU rules which would be applied consistently across the Member States. In particular, the single rulebook was a response to the need for further harmonisation in financial regulation first identified in the Lamfalussy Report and later stressed in the de Larosière report (De Larosière 2009). The latter called for the creation of a consistent set of rules to ensure the proper functioning of the single financial market; to address competitive distortions among financial institutions; to reduce regulatory arbitrage; to reduce regulatory diversity for cross-border groups; and, to facilitate the management of crises involving cross-border institutions (De Larosière 2009 : 27). It concluded that these objectives could not have been reached on the basis of the arrangements of the pre-banking union regime which largely relied on minimum harmonisation (De Larosière 2009: 28).

The emphasis on uniformity is highlighted by the fact that EU-wide prudential requirements were adopted in the form of a regulation (CRR) to ensure their direct application at national level. The CRR refers explicitly to the aim of achieving uniformity through the establishment of a single rulebook:

[31] 'Substantive Union law (...) may need to be conceived (...)'
[32] See discussion above on the authority of the ECB, SRB and the definition of 'Union bodies'
[33] Para 4.1: 'The implementation of measures (...)'
[34] In this respect, point 4 could have been placed after point 2 in the draft Decision.

> 'In order to remove obstacles to trade and distortions of competition resulting from divergences between national laws and to prevent further likely obstacles to trade and significant distortions of competition from arising, it is therefore necessary to adopt a regulation establishing uniform rules applicable in all Member States.' (Recital 11 of Regulation (EU) No 575/2013)

Yet, even under the present regime comprised of the CRR, CRD IV and the BRRD, complete uniformity has not been achieved. This is partly because, recognising the need for discretion on behalf of national competent supervisors in applying the prudential requirements set out in the CRR, the CRD IV allows for a certain amount of discretion on behalf of the supervisors.

Accordingly, the CRR – CRD IV allows for 80 options and national discretions for the Member States and national competent authorities (Enria 2015: 4). Considering that competent authorities also apply domestic options and discretions on a case-by-case basis, the number increases to 155 (Enria 2015: 4). Some examples include the discretion left to the national authorities to exempt some exposures from the large exposures limit (Article 400(2) of Regulation (EU) No 575/2013), and the flexibility to impose additional prudential requirements for addressing macro-prudential or systemic risks identified in a member State (Article 458 of Regulation (EU) No 575/2013). Moreover, the BRRD is a minimum harmonization measure and thus allows Member States to 'gold plate' some of its requirements, within the limits set out in the Directive. As a result of the existence of national options and discretions, the flexibility in the transposition of EU law, as well as the differences in national supervisory practices constitute obstacles to maximum harmonisation as envisaged by the single rulebook (Enria 2015: 6).

Against this background, paragraph 2.2 envisages that national authorities of the Member States that 'do not take part in the banking union' should not be bound by the same need for uniformity that should characterise the application of the rulebook with regard to the SSM-participating member States. This could thus be read as asking for more leeway for national supervisory authorities in applying the single rulebook. It could also be read as leaving the door open for future secondary legislation to complement this increase in the discretion of the supervisory authorities (as it refers to 'measures to be adopted').

Paragraph 2.2 thus envisages a different standard of regulation for the 'ins' than for the 'outs'. Such an approach presents two problems. Firstly, it could potentially signal a turn back to the fragmented financial services legislative framework, thus having negative implications for EU economic integration. In this sense, it contrasts with the aim of progressing in financial integration through harmonisation of the respective rules. In light of the background to the introduction of the single rulebook, and the identified need for a higher degree of regulatory harmonisation, the assertion that 'different sets of Union rules' would 'contribute to financial stability' is questionable, to say the least.[35]

Secondly, it is doubtful whether such a differentiated standard of regulation is possible. Unlike the SSM, the single rulebook does not offer 'opt-outs'. The CRD IV, CRR and BRRD are applicable to all 28 EU Member States, not just the euro area or the Member States that participate to the SSM. Financial services regulations do not provide mechanisms to pick and choose the provisions that would apply in the practices of each supervisory authority (Simonova 2015: 60). In the same vein, it is questionable whether non euro area Member States are able to choose the intensity with which to apply the relevant regulations.

[35] Schoenmaker talks about the financial trilemma, whereby 'financial stability, financial integration, and national financial policies are incompatible', and not all three can be combined (Schoenmaker 2009).

5.1.3.2. Measures to preserve the financial stability of the non euro area Member States

Whilst paragraph 2 can be read as referring to the financial stability of the EU as a whole (given that it mentions Union law and Union rules), paragraph 4.1 refers to 'preserving the financial stability of Member States whose currency is not the euro'. It concerns in particular the national competent authorities of the non euro area Member States that do not participate in 'common mechanisms' (such as the SSM and the SRM). These competent authorities should be solely responsible for the transposition and application of measures concerning (i) the supervision of financial institutions[36] and markets, (ii) the resolution of financial institutions and markets, and (iii) macro-prudential responsibilities, in case these measures are to be taken in order to preserve the financial stability of the non euro area Member State.

It is then mentioned that Member States should have such discretion subject to the 'Union mechanisms of macro-prudential oversight for the prevention and mitigation of systemic financial risks in the Union.' This can be read as a reference to tasks and the (limited) powers of the European Systemic Risk Board. The macro-prudential instruments available to the national authorities and to the ECB (as a banking supervisor for SSM-participating Member States), are set out in the CRR/ CRD IV and include counter-cyclical capital buffers and systemic risk buffers. Article 458 CRR in particular allows Member State authorities to take a variety of macroprudential measures to address systemic risks. According to Article 458 CRR, when the national authority identifies macroprudential or systemic risks that could have serious negative consequences in a specific Member State, it needs to notify the European Parliament, the Council, the Commission, the ESRB, and EBA (Article 458(2) CRR).

What is not acknowledged in paragraph 4 is that the Council, acting by qualified majority voting upon a proposal from the Commission, has the power to adopt an implementing act (Article 291 TFEU) to reject the suggested national measures (Article 458(4) CRR). If the Council considers that the changes in the intensity of the identified macroprudential or systemic risk pose risk to financial stability at national level, it cannot reject the draft national measures. Nonetheless, the measures also need to be assessed in light of the effects they may have on the whole or parts of the financial system in other Member States or the Union as a whole. If they constitute an obstacle to the functioning of the internal market, the measures may be rejected even if their aim is to preserve financial stability of the Member State in question (article 458(4)(a) and (b) of Regulation (EU) No 575/2013). Under the current legislative framework, therefore, safeguarding an individual Member State's financial stability may not be adequate to justify the implementation of measures by Member State authorities (Simonova 2015: 57). Paragraph 4 could be considered to imply this by referring to the 'existing powers of the Union institutions'. This, however, depends on how broad a meaning is given to the phrase 'necessary to respond to threats to financial stability'.

On that note, a final comment is that due to the broad wording of both paragraphs 2 and 4 (especially where they refer to financial stability considerations, for instance the scope and meaning of 'legislative measures to be adopted' that is mentioned in paragraph 2) there is potential for clash between paragraph 4.2 and the overall purpose of paragraphs 2 and 4. Paragraph 4 recognises the powers of the EU institutions to act where such action is necessary 'to respond to threats to financial stability'. Nonetheless, a future situation could arise,

[36] According to Article 4(26) CRR, 'financial institution' means an undertaking other than an institution, the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to Directive 2013/36/EU, including a financial holding company, a mixed financial holding company, a payment institution within the meaning of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (1), and an asset management company, but excluding insurance holding companies and mixed-activity insurance holding companies as defined in point (g) of Article 212(1) of Directive 2009/138/E;

where action on behalf of EU institutions in fact requires more uniformity in the regulatory framework, thus contrasting the objective of paragraph 2. The insertion of the word 'necessary' may have been intended to limiting the instances where EU institutions can take action, although the meaning of 'necessary' in this context remains unspecified. It is also uncertain whether the phrase 'action that is necessary to respond to threats of financial stability' also includes action that has as one of its objectives to respond to threats of financial stability.

5.2. Comment on the modifications introduced into the conclusions of the European Council of 18 and 19 February 2016

It is notable that the word 'acquis' was replaced by more explicit wording. In addition, the insertion of the last sentence in paragraph 2.1 is directly linked to the argument made in the preceding analysis concerning the potential problems that could arise from the omission in the Draft Decision of a reference to the requirements of group and consolidated supervision and resolution. This addition seems to recognise that the separation of supervisory tasks between SSM-participating Member States and non-participating Member States is not as clear-cut as originally presented. The same can be observed for the insertion of the phrase 'subject to requirements of group and consolidated supervision and resolution' in paragraph 2.2. With regard to paragraph 2.2, the insertion of the first sentence comes across as recognition that the single rulebook is to be applied in all EU Member States. Nonetheless, the reference to diverse standards of uniformity has stayed put, thus not addressing the consequent issues on harmonisation that were discussed above. Possibly in an attempt to mitigate these issues, paragraph 4.2 now refers to the development of the single rulebook, and the last sentence of paragraph 2.2 expresses that any tailored regulation must consider the need to maintain a comparable regulatory level between participating and non-participating Member States. It remains an open question how this challenging task will be achieved while at the same time 'contributing to financial stability'.

6. PARAGRAPH 3 OF SECTION A.

Proposals by the President of the European Council as of 2 February 2016	Conclusions of the European Council of 18 and 19 February 2016
Draft Decision of the Heads of State or Government concerning a New Settlement	Decision of the Heads of State or Government concerning a New Settlement
3. Emergency and crisis measures ~~addressed~~ to safeguarding the financial stability of the euro area will not entail budgetary responsibility for Member States whose currency is not the euro, or, as the case may be, for those not participating in the banking union.	3. Emergency and crisis measures designed to safeguard the financial stability of the euro area will not entail budgetary responsibility for Member States whose currency is not the euro, or, as the case may be, for those not participating in the banking union.
Appropriate mechanisms to ensure full reimbursement will be established where the general budget of the Union supports costs, other than administrative costs, that derive from the emergency and crisis measures referred to in the first subparagraph.	Appropriate mechanisms to ensure full reimbursement will be established where the general budget of the Union supports costs, other than administrative costs, that derive from the emergency and crisis measures referred to in the first subparagraph.

6.1. Comment on the original proposals made by the President of the European Council

Paragraph 3 refers to the use of financial means originating from the general EU budget for emergency and crisis measures regarding Member States whose currency is the euro. The background for this paragraph was the use of the European Financial Stability Mechanism (EFSM) in order to provide a short-term financial assistance to Greece in July 2015, when Greece was in an immediate need for financial means in order to avoid defaulting bond payment to the ECB and to pay arrears to the International Monetary Fund. Since Greece only agreed to conclude a new Memorandum of Understanding with ESM, there was not yet financial assistance from the ESM available. It was therefore decided that the EFSM should grant bridge loans to Greece until the ESM would officially take over.

The EFSM is established as a Union instrument by Regulation (EU) No 407/2010 on the basis of Article 122(2) TFEU. As a Union instrument, the EFSM is financed by the general EU budget and, by that, indirectly also by Member States whose currency is not the euro. In principle, the use of the general EU budget in order to finance the EFSM does not cause any problems since the EFSM may support all Member States. Yet, when the EFSM was activated in order to support Greece, the EFSM-Regulation was amended by Regulation (EU) No 1360/2015. It included into Article 3 of the EFSM-Regulation the following paragraphs:

> '2a. Where the beneficiary Member State is a Member State whose currency is the euro, the granting of Union financial assistance shall be conditional upon the enactment of legally binding provisions, with a dedicated arrangement for that purpose having been put in place prior to disbursement, guaranteeing that the Member States whose currency is not the euro are immediately and fully compensated for any liability they may incur as a result of any failure by the beneficiary Member State to repay the financial assistance in accordance with its terms.
>
> Appropriate arrangements shall also be put in place so as to ensure the absence of overcompensation of Member States whose currency is not the euro, when instruments

to protect the general budget of the Union, including the recovery of debt, where necessary by offsetting amounts receivable and payments over time, are activated.'

Whilst the EFSM-Regulation already implemented what Paragraph 3 seeks to achieve, the question arises whether further situations are imaginable, to which this paragraph could apply.

In principle, the situation covered by Paragraph 3 refers to payments from the general Union budget to a Member State whose currency is the euro. The legal base for these payments must be a legal act that was adopted by all EU Member States. With regard to legal acts adopted under enhanced cooperation, Article 332 TFEU already stipulates what Paragraph 3 outlines, namely that 'expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.'

The scope of Paragraph 3 is, however, limited to payments concerning 'emergency and crisis measures' in order to safeguard the financial stability of the euro area. Whilst the wording of this limitation appears at first sight to only cover measures under Article 122(2) TFEU, the reference to 'safeguarding the financial stability of the euro area' has to be understood as not only including payments to Member States but also to credit institutions. Paragraph 3 does not specify the addressee of the payment. If, in future, the banking resolution or a single deposit guarantee scheme would involve payments from or guarantees of the general Union budget, appropriate mechanismsmust be established in accordance with Paragraph 3.

Beyond the limited scope of Paragraph 3, the underlying rationale of this paragraph may be questioned. It suggests that Member States may decide on how their financial contribution to general Union budget is used even after it was transferred to the Union budget. The budgetary rules of the Union are built on a very delicately balanced procedure. First, under Article 312 TFEU, the Council adopts the multiannual financial framework for a period of at least five years unanimously after obtaining the consent of the European Parliament. On the basis of the multiannual financial framework, the European Parliament and the Council establish, under the procedure in Article 314 TFEU, the Union's annual budget. These rules make clear that the use of financial means of the general Union budget is exclusively decided by Union institutions. Granting a single EU Member State after it transferred its contributions to the general Union budget a right to earmark its contributions, throws the delicately balanced budget rules somewhat into disarray. By that, the impact of Paragraph 3 may be little in practice. Nevertheless, in theoretical terms it ruptures the autonomy of the general Union budget and allows for an earmarking of Member States' financial contributions to the general Union budget.

6.2. Comment on the modifications introduced into the conclusions of the European Council of 18 and 19 February 2016

The change made in the final decision of the Heads of State or Government annexed to the conclusions of the European Council of 18 and 19 February 2016 is of rather linguistic than of substantive nature. The final version refers to 'emergency and crisis measures designed to safeguard the financial stability of the euro area' instead of 'emergency and crisis measures addressed to safeguard the financial stability of the euro area'. To replace the 'addressed' by 'designed' does neither broader nor limit the scope of this paragraph.

7. PARAGRAPH 5 OF SECTION A.

Proposals by the President of the European Council as of 2 February 2016	Conclusions of the European Council of 18 and 19 February 2016
Draft Decision of the Heads of State or Government concerning a New Settlement	Decision of the Heads of State or Government concerning a New Settlement
5. The informal meetings of the ministers of the Member States whose currency is the euro, as referred to in Protocol (No 14) on the Eurogroup, shall respect the powers of the Council as ~~the~~ institution upon which the Treaties confer legislative functions~~, as well as the institution~~ within which Member State coordinate their economic policies	5. The informal meetings of the ministers of the Member States whose currency is the euro, as referred to in Protocol (No 14) on the Eurogroup, shall respect the powers of the Council as an institution upon which the Treaties confer legislative functions and within which Member States coordinate their economic policies.
In accordance with the Treaties, all members of the Council participate in its deliberations, even where not all members have the right to vote. Informal discussions by a group of Member States shall respect the powers of the Council, as well as the prerogatives of the other EU institutions.	In accordance with the Treaties, all members of the Council participate in its deliberations, even where not all members have the right to vote. Informal discussions by a group of Member States shall respect the powers of the Council, as well as the prerogatives of the other EU institutions.

7.1. Comment on the original proposals made by the President of the European Council

Paragraph 5 refers to the distinction between the tasks and powers of the Eurogroup and those of the Council with regard to decision-making in the area of economic and monetary governance. As indicated in paragraph one, this paragraph is particularly focused on the coordination of economic policies. As such, it reflects concerns about the increasing prominence of the Eurogroup in decisions concerning the euro area governance and the respective implications for non euro Member States.

Paragraph 5.1 calls for respect on behalf of the Eurogroup to the powers of the Council 'as an institution upon which the Treaties confer legislative functions'. This can be seen as emphasising the lack of legislative powers of the Eurogroup, and drawing a contrast with the Council as the institution that was given authority by the Lisbon Treaty on economic and monetary policies (Articles 120, 121 and 126 TFEU). Indeed, according to Article 137 TFEU and Protocol No 14 of the Lisbon Treaty, the Eurogroup is not an EU institution, but an informal political body where finance ministers of euro area Member States meet to 'discuss questions related to the specific responsibilities they share with regard to the single currency' (Article 1). As a result of the Eurogroup's informal nature, its decisions cannot be seen as acts intended to produce legal effects vis-à-vis third parties. These decisions are therefore shielded from judicial review by the CJEU, as clearly demonstrated by recent cases concerning Cyprus so-called 'haircut' on uninsured bank deposits which took place prior to the agreement on a macroeconomic adjustment programme for the country (General Court 2014, Karatzia 2015: 175).

The de jure position of the Eurogroup described above is often contrasted with its de facto powers and actions, which arguably go beyond simply discussing matters related to the single currency (Chatham House 2014, Craig 2015, Repasi 2015). For instance, the Eurogroup played a central role in the decisions concerning macroeconomic adjustment programmes (Karatzia 2015), and in the negotiations over the reform of the Stability and Growth pact,

and still monitors their implementation in the euro area Member States (Repasi 2015, Hodson 2014, Eurogroup 2015). An increase in the presence of the Eurogroup in economic governance matters is also envisaged by the 2015 Five Presidents' Report, where it is stated that 'the Eurogroup has a central role to play in discussing, promoting and representing the interest of the euro area. It will step up its involvement in the revamped European Semester. In the short run, this may require a reinforcement of its presidency and the means at its disposal' (Five Presidents 2015: 18). Moreover, the Eurogroup's 2016 Work Programme refers to discussions on inflation and exchange rate, and 'thematic discussions on growth and jobs' that will take into account 'the spillovers between countries and economic issues of relevance for the euro area as a whole' (Eurogroup 2015). Within the Eurogroup, such discussions take place between euro area Member States, even though they may concern Member States that are outside the euro area as well (Craig 2015). In effect, non euro area Member States run the risk of becoming marginalised in discussions that concern EU-28 economic policies.

The augmentation of the de facto powers of the Eurogroup is all the more crucial in light of the qualified majority voting thresholds (QMV) that are applicable since 1 November 2014 (Article 16(4), Council Decision 2009/857/EC) giving the euro area Member States a blocking majority in Council. Considering that the Eurogroup meetings often take place before the official Council ECOFIN meetings, the decisions taken during the latter meetings could end up in mere 'rubberstamps' for those decisions taken during the informal former meetings (Repasi 2015). After all, the Finance Ministers that discuss euro-area matters while wearing the Eurogroup 'hat' are the same people that vote on multilateral surveillance and budgetary control procedures as members of the ECOFIN Council meetings together with the Finance Ministers of non euro area Member States.

The Eurogroup also has a great role in preparing the agenda of the Euro Summit, a biannual meeting of the heads of states or governments of the euro area countries which sets out the strategic guidelines on the euro area economic policy (Article 12 TSCG). Even though the President of the Euro Summit is obliged to keep the non euro area Member States 'closely informed of the preparation and outcome of the Summits' (General Secretariat of the Council 2013: 21), paragraph 5 appears to refer to more than just ex-post information requirements. Instead, paragraph 5.2 seeks to ensure that decisions concerning the economic policy coordination framework (e.g. Articles 121(6) and 126(14) TFEU) are taken in the Council, where all 28 Member States have the right to participate in the deliberations and express their positions even if they do not have any voting rights (Article 121(2) TFEU).

Overall, paragraph 5 chimes well with the position of the ECJ that decisions related to economic governance procedures should be taken by the Council in accordance with primary (Article 126 TFEU) and secondary (Regulation No 1467/97) legislation (ECJ 2004: para 81). Based on the Court's decision, the Council cannot sidestep the applicable provisions for reasons of facilitating the adoption of measures that would not otherwise be adopted.

Ensuring that the Eurogroup is not used as an avenue to make decisions by bypassing the legislative and voting procedures of the Council would be positive not only for alleviating the concerns of non euro area Member States, but also for the accountability of the system as a whole. In contrast to the transparency obligations binding the Council[37], Eurogroup meetings are always held behind closed doors and the minutes are not published, thus escaping the accountability requirements that bind EU Institutions, including judicial review of their decisions. Had the Eurogroup been merely an informal group for discussion on the euro, this lack

[37] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145/43; Council Decision adopting the Council's Rules of Procedure (2004) OJ L 106/22

of transparency could, perhaps, be tolerable. However, as shown in the preceding tour d'horizon of the Eurogroup's functioning, it is nowadays more than such a group. Based on the two paragraphs cited above, the de jure and de facto powers and tasks of the Eurogroup shall take place against the fact that the Treaties confer to the 28 Member States the task of controlling euro area activities collectively by bestowing the role of the main decision-making institution regarding economic coordination to the Council (Repasi 2015).

7.2. Comment on the modifications introduced into the conclusions of the European Council of 18 and 19 February 2016

The changes made to paragraph 5 are merely cosmetic, apart perhaps from the change of the phrase 'the Council as an institution upon which the Treaties' that can now be read as recognising the role of the European Parliament as co-legislator.

8. PARAGRAPH 6 OF SECTION A, SECTION E.1 AND COUNCIL DECISION ON THE SAFEGUARD MECHANISM

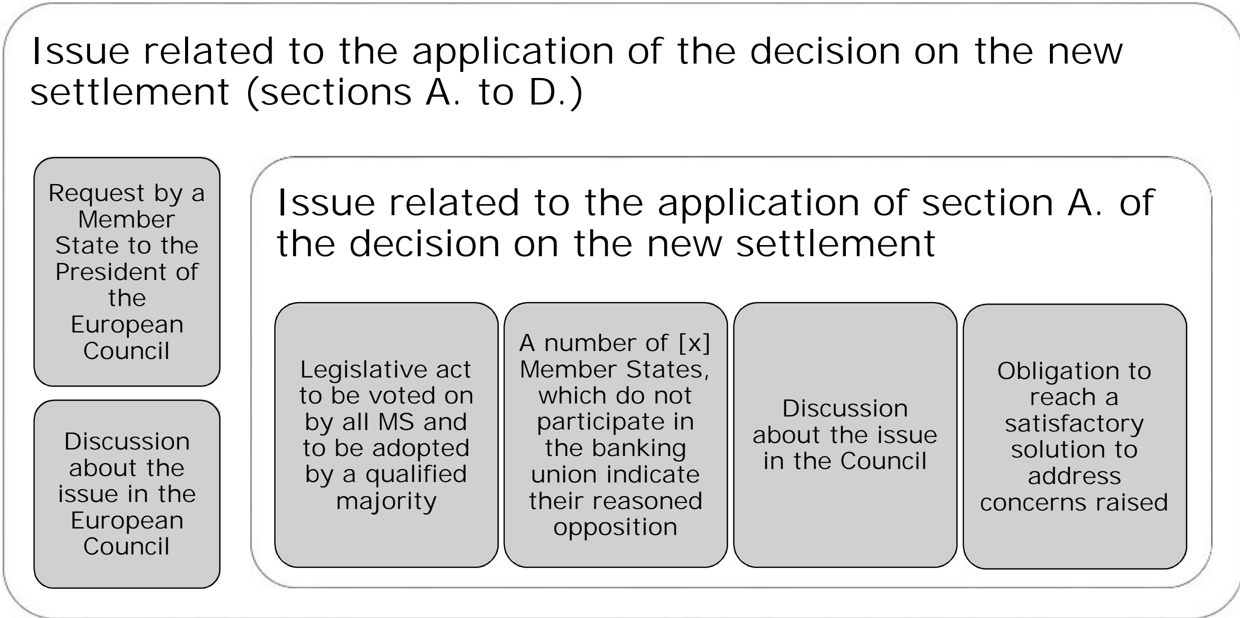
Proposals by the President of the European Council as of 2 February 2016	Conclusions of the European Council of 18 and 19 February 2016
Draft Decision of the Heads of State or Government concerning a New Settlement	Decision of the Heads of State or Government concerning a New Settlement
Section A.	Section A.
6. Where an issue related to the application of this Section is to be discussed in the European Council as provided in paragraph 1 of Section E, due account will be taken of the possible urgency of the matter.	6. Where an issue relating to the application of this Section is to be discussed in the European Council as provided in paragraph 1 of Section E, due account will be taken of the possible urgency of the matter.
Section E.	Section E.
1. Any Member State may ask the President of the European Council that an issue related to the application of this Decision be discussed in the European Council.	1. Any Member State may ask the President of the European Council that an issue relating to the application of this Decision be discussed in the European Council.
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	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
(1) Supplementing Decision 2009/857/EC of 13 December 2007, provisions should be adopted in order to allow for the effective management of the banking union and of the consequences of further integration of the euro area.	(1) Supplementing Decision 2009/857/EC of 13 December 2007, provisions should be adopted in order to allow for the effective management of the banking union and of the consequences of further integration of the euro area.
(2) The mechanism in this Decision contributes to the respect of the principles laid down in Section A of the Decision of the Heads of State or Government as regards legislative acts relating to the effective management of the banking union and of the consequences of further integration of the euro area, the adoption of which is subject to the vote of all members of the Council.	(2) The mechanism in this Decision contributes to the respect of the principles laid down in Section A of the Decision of the Heads of State or Government as regards legislative acts relating to the effective management of the banking union and of the consequences of further integration of the euro area, the adoption of which is subject to the vote of all members of the Council.
(3) ~~It is noted that~~ in accordance with paragraph 1 of Section E of the 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, any Member State may ask the President of the European Council that an issue related to the application of that Decision be discussed in the European Council.	(3) In accordance with paragraph 1 of Section E of the 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, any Member State may ask the President of the European Council that an issue relating to the application of that Decision be discussed in the European Council.
~~(4) This decision cannot result in a situation which would amount to allowing one or more Member States to veto the effective management of the banking union~~	

~~or the future integration of the euro area. In particular, any referral to the European Council is without prejudice to the normal operation of the Union legislative procedure.~~	
~~(5)~~ This Decision ~~should be~~ without prejudice to the specific voting arrangements agreed by the representatives of the 28 Member States meeting within the Council on 18 December 2013, concerning the adoption of Decisions by the Council on the basis of Article 18 of Regulation 806/2014 ~~establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund.~~	(4) This Decision is without prejudice to the specific voting arrangements agreed by the representatives of the 28 Member States meeting within the Council on 18 December 2013, concerning the adoption of Decisions by the Council on the basis of Article 18 of Regulation (EU) No 806/2014 of the European Parliament and of the Council.
~~(6)~~ In the application of this Decision, and ~~more particularly~~ with reference to the reasonable time for the Council to discuss the issue concerned, due account should be taken of ~~possible urgency situations~~.	(5) In the application of this Decision, and in particular with reference to the reasonable time for the Council to discuss the issue concerned, due account should be taken of the possible urgency of the situation.
Article 1	Article 1
1. If, in relation to the legislative acts to which Section A of the Decision of the Heads of State or Government applies, the adoption of which is subject to the vote of all members of the Council, at least ~~[X]~~ member~~[s]~~ of the Council that do~~[~~es~~]~~ not participate in the banking union, indicate their reasoned opposition to the Council adopting such an act by qualified majority, the Council shall discuss the issue. The Member State~~[s]~~ concerned shall justify ~~[~~its~~]/[their]~~ opposition by indicating how the draft act does not respect the principles laid down in the ~~said~~ Section A.	1. If, in relation to the legislative acts to which Section A of the Decision of the Heads of State or Government applies, the adoption of which is subject to the vote of all members of the Council, at least one member of the Council that does not participate in the banking union, indicates its reasoned opposition to the Council adopting such an act by qualified majority, the Council shall discuss the issue. The Member State concerned shall justify its opposition by indicating how the draft act does not respect the principles laid down in Section A of that Decision.
2. The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council referred to in paragraph 1.	2. The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the member or members of the Council referred to in paragraph 1.
3. To this end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her their assistance.	3. To that end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her their assistance.
~~[~~While taking due account of the possible urgency of the matter and based on the reasons	While taking due account of the possible urgency of the matter and based on the reasons

for opposing as indicated under paragraph 1, a request for a discussion in the European Council on the issue, before it returns to the Council for decision, may constitute such an initiative. Any such referral is without prejudice to the normal operation of the ~~Union~~ legislative procedure.~~]~~	for opposing as indicated under paragraph 1, a request for a discussion in the European Council on the issue, before it returns to the Council for decision, may constitute such an initiative. Any such referral is without prejudice to the normal operation of the legislative procedure of the Union and cannot result in a situation which would amount to allowing a Member State a veto.
Article 2	Article 2
This Decision, which supplements Decision 2009/857/EC, shall enter into force on the date of the ~~entry into force~~ of the 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. It shall cease to apply if the latter ceases to apply.	This Decision, which supplements Decision 2009/857/EC, shall enter into force on the date of the taking effect of the 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. It shall cease to apply if the latter ceases to apply.

8.1. Comment on the original proposals made by the President of the European Council

In order to ensure that, in practice, the principles laid down in section A. of the Draft 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 (hereinafter: 'draft decision on the new settlement') are respected, paragraph 6 of Section A, Section E.1 and a draft decision of the Council on specific provisions relating to the effective management of the banking union and of the consequences of further integration of the euro area (hereinafter: 'draft Council decision on the safeguard mechanism') attached to the decision of the Heads of State or Government, meeting within the European Council, seek to establish a mechanism, within which EU Member States may address issues relating to the application of section A. Therefore, present, all three elements (A.6, E.1, draft Council decision on the safeguard mechanism) will be commented together. The relationship of these three elements is shown in the following graph:



8.1.1. The new safeguard mechanism on issues relating to the application of Section A.: Stalling but not vetoing

The necessity for establishing next to the mechanism under Paragraph 1 of Section E of the draft decision on the new settlement another mechanism with regard to issues relating to the application of section A. of this draft decision is linked to the fact the former only takes place in the European Council and that the European Council, under Article 15(1) TEU, may not interfere with the legislative procedure. This means that, from a legal perspective, the mechanism under Section E.1 of the draft decision on the new settlement could not stop a legislative procedure, although the issue raised relates to draft legislative acts of the Union. In order to prevent the Union legislator from deciding on a legislative proposal that, in the eyes of a Member State, gives rise to issues relating to the application of section A. of the draft decision on the new settlement, an additional mechanism has to be installed that halts the legislative procedure within the Council.

This mechanism can be established by the Council on the basis of its autonomy to regulate matters of its own activities (ECJ 1981: para 17). Since the mechanism addresses 'procedural matters', the Council may adopt it by a simple majority (Article 240(3) TFEU). As a Council act to regulate own activities, in principle, no other Union institution is involved in the decision-making procedure. The Heads of State or Government consider the decision establishing the safeguard mechanism as 'supplementing' Council Decision 2009/857/EC on the implementation of Article 16(4) TEU and Article 238(2) TFEU concerning the calculation of the qualified majority between 1 November 2014 and 1 April 2017.

Council Decision 2009/857/EC, whose draft was annexed as Declaration No 7 to the Lisbon Treaty, establishes a mechanism, according to which a certain amount of member of the Council may 'indicate their opposition to the Council adopting an act by a qualified majority' (Article 1). As a consequence of this indication, the Council 'shall discuss the issue'. Article 2 requires from the Council 'in the course of these discussions, [to] do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council'. Article 3 complements that '[t]o this end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members

of the Council shall lend him or her their assistance'. Comparing the wording of Council Decision 2009/857/EC with the wording the draft Council decision on the safeguard mechanisms shows that the latter is only a copy of the former.

Therefore, Council Decision 2009/857/EC is certainly the right legal act for the establishment of the new proposed safeguard mechanism. Only the Statement of the Heads of State or Government contains a draft Council decision, which is not drafted as an amendment but as a decision on its own. Whilst an amendment of Council Decision 2009/857/EC would have been the better way to technically establish the safeguard mechanism, there is no legal reason not to adopt a separate legal act. Nevertheless, Protocol (No 9) of the Lisbon Treaty has to be respected when adopting this Council decision. Protocol (No 9) requires that, by derogation from the above mentioned principle that the Council may decide on regulating its own activities without intereference of any other Union institution, in case of an amendment of Council Decision 2009/857/EC, the European Council has to hold a preliminary deliberation, acting by consensus.

In the following, it will be examined to which extent the safeguard mechanism in the draft Council decision differs from the one already established by Council Decision 2009/857/EC.

As regards the acts covered by it, the new mechanism proposed by the draft Council decision on the safeguard mechanism is applicable to 'legislative acts to which Section A of the Decision of the Heads of State or Government applies'. These are 'legal acts directly linked to the functioning of the euro area', 'Union law on the banking union conferring upon the European Central Bank, the Single Resolution Board or Union bodies exercising similar functions, authority over credit institutions' and 'legislative measures to be adopted for the purpose of safeguarding financial stability'. Furthermore, the legal acts covered by this mechanism must be subject to a vote of all Member States and must be adopted by a qualified majority in the Council. This definition of the covered legal acts excludes those adopted under Enhanced Cooperation and under Article 136 TFEU, since under these procedures not all the EU Member States take part in the vote (Article 330 TFEU, Article 136(2) TFEU). It further excludes legal acts based on Article 126(14)(2) TFEU, Article 127(6) TFEU and Article 352(1) TFEU, since those require a unanimity in the Council. It therefore covers legal acts that are to be adopted on the basis of Article 114(1) TFEU (to the extent that the draft legislative act does not only serve the functioning of the internal market but also to safeguard financial stability), Article 121(6) TFEU and Article 126(14)(3) TFEU.

In order to initiate the procedure foreseen by the proposed mechanism, a number of '[x] member[s] of the Council',[38] whose currency is not the euro and which have not entered into a close cooperation with the ECB on prudential supervision, has to indicate a reasoned opposition stating 'how the draft act does not respect the principles laid down in the said Section A.'. This point is of importance, since the initiation of the mechanism established by Council Decision 2009/857/EC requires, according to its Article 1, in the period from 1 November 2014 to 31 March 2017 '(a) at least three quarters of the population or (b) at least three quarters of the number of Member States necessary to constitute a blocking minority' in order to activate the mechnism under this Decision. This equals, under alternative (a), a share of 26.25 % of the Union population. In the period from 1 November 2017 on, Article 4 of Council Decision 2009/857/EC requires that the mechanism may be initiated by members of the Council 'representing (a) at least 55 % of the population or (b) at least 55 % of the number of Member States necessary to constitute a blocking minority'. This equals, under alternative (a), a share of 29.25 % of the Union population. In both situations, the United Kingdom would be in a position to initate the mechanism on its own. By that, a reduction of

[38] The actual number was not yet defined by the proposal.

the numbers of members of the Council that may initiate the mechanism would amount to a significant strengthening of this mechanism. This easing of the initiation of the mechanism is, however, compensated by the introduction of an obligation for the member[s] to justify their opposition at the time of indicating it ('their reasoned opposition' under the draft Council decision im comparison to 'their opposition' under Council Decision 2009/857/EC).

The consequences attached to the initiation are the same as under the mechanim established by Council Decision 2009/857/EC. The Council has to 'do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address [raised] concerns'. The President of the Council is under the obligation to 'undertake any initiative necessary to facilitate a wider basis of agreement in the Council'. If such agreement cannot be found, the Council may still vote on the draft proposal and may still overrule the Member States that raised the concerns under the mechanism if a qualified majority is reached.

Against this background, it becomes clear that the new safeguard mechanisms may only lead to a delay in the final vote about legal acts, which are to adopted with qualified majority. But the new safeguard mechanism does not provide for a veto for Member States that raise concerns relating to the application of Section A. This new safeguard mechanism does not violate Primary law, since it only specifies the procedure within the Council without modifying the legislative procedure, as defined by Primary law. There are, according to Article 294(4)-(6) TFEU, no time limits for a vote of the Council at the first reading. Therefore a delaying of the voting does not infringe the decision-making procedure, as foreseen by the Treaties. Only the second reading (Article 294(8) TFEU with regard to the Council), the conciliation (Article 294(10) TFEU), or the third reading (Article 294(13) TFEU) provide for time limits so that a delay of the vote in the Council, which goes beyond these deadline would infringe the Treaties. This issue is addressed by Article 1(2) of the draft Council decision on the safeguard mechanism, according to which the discussions should take place 'without prejudicing obligatory time limits laid down by Union law'. Primary law therefore sets at least time limits to this new safeguard mechanism with regard to the second and the third reading.

Comparing the new safeguard mechanism under the draft Council decision to the one that is already established by Council Decision 2009/857/EC reveals that its sole purpose is to reduce the amount of members of the Council that is necessary in order to initiate the mechanisms. Besides, all other elements of the new safeguard mechanism are already covered by the one under Council Decision 2009/857/EC since Article 1 of this Decision refers only to an 'issue' that founds the opposition without specifying what kind of issue it has to be. By that, issues relating to the application of Section A. of the draft decision on the new settlement would have been admissible 'issues' under the existing mechanism.

8.1.2. The new mechanism on issues relating to the application of Sections A. to D. (Section E.1 of the draft decision on the settlement)

Under Section E.1 of the draft decision on the new settlement, any Member State may ask the President of the European Council that an issue relating to application of the draft decision on the new settlement should be discussed in the European Council. This covers all sections of the draft decision on the new settlement, including section A. By that, the request to discuss a matter concerning the application of Section A. in the European Council overlaps with the reasoned request to discuss the same matter in the Council under the above mentioned draft Council decision on the safeguard mechanism. The necessity to establish two mechanisms is due to the fact that legally a discussion of the issue in the European Council under Section E.1 has no impact on the legislative procedure, since the European Council does not exercise any legislative functions (Article 15(1) TEU).

The relationship between both mechanisms is on the basis of the draft decision on the new settlement and of the draft decision on the safeguard mechanism, however, unclear. As already mentioned, the legislative procedure is, if not explicitly stated elsewhere in the Treaties, independent of the procedures in the European Council. Explicit exceptions can be found in Article 48(2) TFEU, Article 82(3) TFEU, Article 83(3) TFEU, Article 86(1)(2) TFEU, Article 87(3)(2) TFEU and in Article 5(4) of Protocol (No 19) on the Schengen Acquis integrated in to the Framework of the European Union. Except for the latter, which refers to the opt-out of Ireland or the UK from proposals or initiatives building upon the Schengen acquis in situations where the Council has not adopted a decision within four months, the Europan Council may discuss matters if requested by a Member State. The legislative procedure is, in these situations, suspended by the respective Treaty provisions. After discussion in the European Council, the draft proposal is sent back to the Council for finishing the legislative procedure.

Neither the draft decision on the new settlement nor the draft Council decision on the safeguard mechanism include a suspension of the legislative procedure once the mechanism under Section E.1 is initiated. Such a suspension would also violate the Treaties. It was shown above that the Treaties explicitly state when a discussion in the European Council leads to a suspension of the legislative procedure.

Therefore, the reference in square brackets in the draft Council decision on the safeguard mechanism below Article 1(3) to 'a request for a discussion in the European Council on the issue, before it returns to the Council for decision' appears misplaced. A request under Section E.1 may not lead to a suspension of the legislative procedure. There is therefore 'nothing' that may return to the Council for decision. Furthermore, it is completely unclear what the text seeks to address when speaking of a 'referral', which is 'without prejudice to the normal operation of the Union legislative procedure'. It may, against the background of existing Primary law, only be understood in a way that the discussion of the issue in the European Council under Section E.1 has no impact on the legislative procedure, which gave rise to the issue. If understood in that way, the only open question is whether a request to discuss an issue in the European Council under Section E.1 can also be considered an opposition in terms of Article 1(1) of the draft Council decision on the safeguard mechanism. In order to be considered as such an opposition, the request to discuss an issue in the European Council under Section E.1 must meet the formal criterion set by Article 1(1), which is that, in contrast to the request under Section E.1, the opposition must be reasoned.

In sum, the mechanism to discuss an issue in the European Council under Section E.1 may not influence the legislative procedure. A request for such a discussion may be considered as an opposition in terms of the draft Council decision on the safeguard mechanism if this request is raised by [X] Member State[s] and states the reasons for the opposition.

8.1.3. The matter of urgency

Under both new mechanisms, urgency is a problematic matter. Even though Member States won't be put into a position to veto the adoption of a legal act, which requires a qualified majority in the Council, delaying the decision-making procedure can, in some situations, already damage the efficiency of the legal act before its adoption. This matter is addressed by Paragraph 6 of the draft decision on the new settlement. According to the draft decision, when there is a request to discuss an issue under E.1, 'due account will be taken of the possible urgency of the matter'. The legally non-binding recital 6 of the draft Council decision on the safeguard mechanism states that 'in the application of this Decision, and more particularly with reference to the reasonable time for the Council to discuss the issue concerned, due account should be taken of possible urgency situations'.

The concept of 'urgency' is known in the decision-making procedure of the Union. Under Article 4 of the Protocol (No 1) on the Role of National Parliaments in the European Union, there has to be an eight-week period starting from the date, on which a draft legislative act is made available to the national Parliaments, has to elapse before the Council may vote on its adoption. There may be exceptions 'in cases of urgency'. The General Secretariat's comments on the Council's Rules of Procedure refer to cases 'where there is the risk of a legal vacuum' in order to define grounds of urgency (p. 61). Yet, neither the draft decision for a new settlement nor the draft Council decision on the safeguard mechanism define cases of urgency. Both don't specify, which consequences are attached to a situation of urgency. It may only be presumed that, as under Article 4 of Protocol (No 1), an urgency situation leads to a shortening of the deliberation time in the Council before a draft legislative act is put to a vote and, by that, reduces the burden on the Council to reach a satisfactory solution since the 'reasonable time' period will shorter than in normal cases.

8.2. Comment on the modifications introduced into the conclusions of the European Council of 18 and 19 February 2016

In legal terms, the final version of the draft Council decision on the safeguard mechanism specifies that it is sufficient for the initiation of the mechanism that one member of the Council indicates its reasoned opinion. By that, the mechanism that is already established by Council Decision 2009/857/EC may now be activated with regard to issues relating to the application of Section A. of the decision of the Heads of State or Government on a new settlement by only one Member State. The initation, however, requires, in contrast to the existing mechanism, that the opposition is reasoned. The added formulation in Article 1(3) of the draft Council decision, according to which a request for a discussion on the issue in the European Council under paragraph 1 of Section E. 'cannot result in a situation which would amount to allowing a Member State a veto' is a mere clarification of the legal status. Since there is no Primary law provision that orders to halt the legislative procedure when there is a matter relating to the application of Section A. in discussed in the European Counil, such a discussion may also not amount to allowing a Member State a veto, via the European Council, which is not foreseen by the required majorities under the applicable legislative procedure.

9. PARAGRAPH 7 OF SECTION A.

Proposals by the President of the European Council as of 2 February 2016	Conclusions of the European Council of 18 and 19 February 2016
Draft Decision of the Heads of State or Government concerning a New Settlement	Decision of the Heads of State or Government concerning a New Settlement
⌈7. The substance of this Section will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States.⌉	7. The substance of this Section will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States.

Paragraph 7 of Section A. is rather a programmatic statement than a legal obligation. It is modelled after Article 16 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), according to which 'necessary steps shall be taken [...] with the aim of incorporating the substance of this Treaty into the legal framework of the European Union'. Both refer to a future Treaty revision.

According to Article 48(3) TEU, a future Treaty revision has to be prepared by a Convention, which adopts a recommendation to a conference of representatives of the governments of the Member States. This conference determines the final amendments, which have to be ratified by all Member States in accordance with their respective constitutional requirements. Article 48 TEU does not restrict the freedom of the Convention of the Conference of representatives of the governments of the Member States as how to vote on certain amendments. Formally, 'the substance' of Section A. has to be introduced into the Convention as a proposal for amendment. Afterwards the Convention and the Conference are free in approving these proposals. Finally, even if 'the substance' of Section A. is a formal amendment of the Treaties, Member States' Parliaments or, where the ratification requries a referendum, Member States' citizens are free in their decision whether they ratify the amendments or not. By that Paragraph 7 of Section A. may only be understood as introducing 'the substance' of Section A. into a Treaty amendment procedure, but not as an 'obligation de résultat' in a way that 'the substance' will be ratified in the end.

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