
The UK's 'new settlement' in the European Union

Renegotiation and referendum



IN-DEPTH ANALYSIS

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This analysis takes stock of the renegotiation of the United Kingdom's membership of the European Union ahead of the UK's referendum on 23 June 2016 on whether it should remain a member of the EU. It covers the background leading up to the UK's decision to renegotiate its relationship with the EU and presents the concerns raised by the UK Prime Minister as well as the agreement reached at the European Council on 18-19 February 2016. It looks ahead to the forthcoming referendum campaign and the possible next steps in the event of a vote by the UK either to stay or to leave the EU.

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EXECUTIVE SUMMARY

Having committed to hold a referendum on the United Kingdom's membership in a 'reformed EU' by the end of 2017, David Cameron, the UK Prime Minister, wrote to the President of the European Council, Donald Tusk, on 10 November 2015 outlining his demands in four specific areas – economic governance, competitiveness, sovereignty and immigration – which if met would enable him to campaign for the UK's continued membership of the EU in a referendum on the subject.

On 2 February 2016, Mr Tusk presented proposals for a 'New settlement for the UK in the EU' that formed the basis for negotiations in the run-up to the European Council meeting of 18-19 February, at which Member States' leaders reached agreement on the issue. The agreement comprises a decision of the Heads of State or Government – constituting an agreement between EU Member States under international law, rather than a European Council decision – as well as a draft Council decision on the banking union and several declarations by the European Commission committing to submit legislative proposals. The agreement will enter into force only if and when the UK has notified to the Council its decision to stay in the EU.

The 'new settlement' provides, on economic governance, that any non-euro-area Member State can request a legislative proposal be discussed in the Council and/or the European Council before a decision is adopted under qualified majority. It makes clear that the EU's Single Rulebook for the financial sector is applicable to banks and financial institutions in all Member States, but recognises that special provisions might be needed to take account of the particular circumstances of non-euro-area Member States. The competitiveness chapter confirms existing EU initiatives in the field of the Digital Single Market, Capital Markets Union and trade; it provides notably that the Commission will review the entire body of EU law for its compliance with the principles of subsidiarity and proportionality. On 'sovereignty' the decision establishes that the UK is not bound by the wording 'ever closer union' in the Treaties, and introduces an obligation for the representatives of the Member States in the Council to suspend the consideration of a legislative proposal if 55% (16) of national parliaments oppose it due to non-compliance with the principle of subsidiarity. And on social benefits and free movement, the Commission is to present three proposals to amend existing EU legislation in the fields of social security coordination and free movement. These would, inter alia, include the possibility to adapt child benefit paid for a child resident in a Member State other than that in which the EU worker works to the living standards and level of child benefits there, and an 'emergency brake' on access to non-contributory, in-work benefits for four years from the EU worker's arrival in the host Member State, with the 'emergency brake' applying for a maximum of seven years.

Following the 19 February agreement, Mr Cameron announced that 'the government's position will be to recommend that Britain remains in a reformed European Union', but individual Cabinet ministers would be allowed to campaign differently in a personal capacity. The referendum will ask 'Should the United Kingdom remain a member of the European Union or leave the European Union?', with the vote due on 23 June 2016.

Although the outcome of the referendum is only advisory in legal terms, Mr Cameron has promised to respect the outcome. He has also dismissed the possibility of a second referendum, while the European Council agreement will cease to exist if the UK votes to leave. The agreement will take effect if the vote is to remain. In the event of a vote to leave, the expectation is that negotiations would start under the terms of Article 50 TEU, initiated by the UK notifying the European Council of its wish to withdraw.

Timeline towards the UK's in-out referendum on EU membership

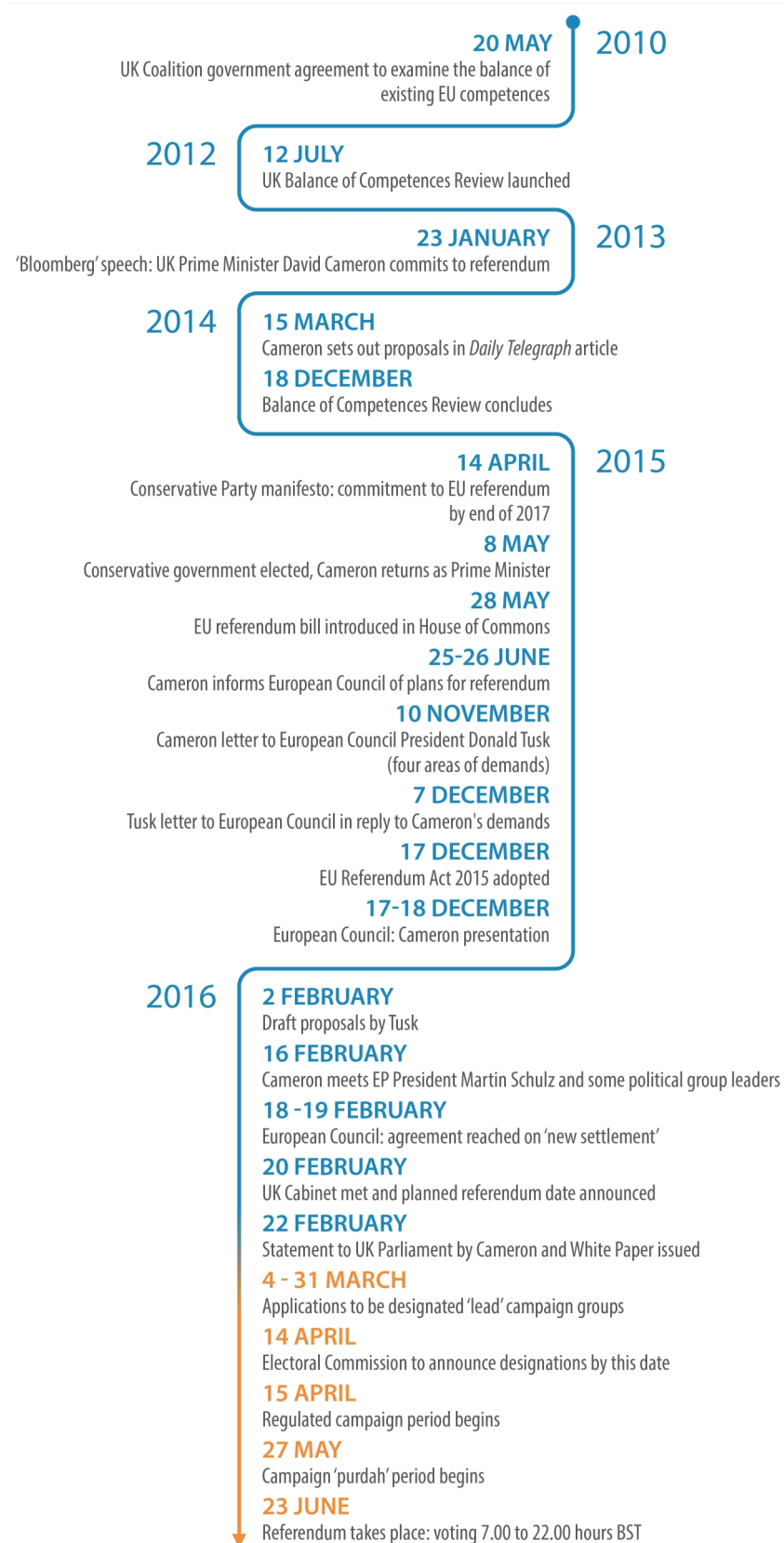


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1 Introduction

Following the election of a majority Conservative government in the United Kingdom general election of May 2015, the British Prime Minister, David Cameron, opened negotiations with the other Member States and the EU institutions to alter the terms of the UK's existing membership of the Union.

On 10 November 2015, the Prime Minister set out his demands in a letter to the President of the European Council, Donald Tusk, for a 'new settlement' for the United Kingdom in a 'reformed' European Union. It involved changes in four broad areas: economic governance, competitiveness, sovereignty and free movement.

After intensive negotiations, a new settlement was agreed and unanimously endorsed by the Heads of State or Government at the European Council meeting of 18 and 19 February 2016. The question of whether the UK should remain in the EU on these new terms, or whether it should leave, will now be put to a referendum in the UK, to be held on 23 June 2016.

2 UK membership of the EU to date

2.1 Question of the terms of UK membership of the EU

The process of questioning terms of UK membership of the EU (and its predecessor, the European Communities) is not new, but rather one that started more or less immediately after UK accession. After two unsuccessful bids to join the European Communities in 1963 and 1967 – due to vetos by France's then-President, Charles de Gaulle – the UK finally entered the EC in 1973. The aspiration of UK governments to secure special arrangements for their country within the Communities dates back to shortly after that accession.¹

2.1.1 *The first renegotiation and referendum of 1975*

The UK did not hold a referendum prior to its accession to the EC in January 1973 under Conservative Prime Minister Edward Heath. It was not until April 1974, after the UK had entered the EU, that the newly elected minority Labour government led by Harold Wilson announced to the Council of Ministers that it wanted to seek a 'fundamental renegotiation of the Accession Treaty'. The subjects of this renegotiation included the extension of preferential terms with regard to the import of Caribbean sugar and New Zealand butter into the UK, a reduction in the UK's contribution to the Community budget, and the renewal of direct subsidies to small farmers in the poorest regions.²

The call for renegotiation received a mixed reception from other Member States. Eventually, they agreed to negotiate with the UK government to avoid the UK blocking every future initiative for deeper EU integration, at a time when nearly all decisions were still taken by unanimity in the Council, giving a veto to individual Member States.

A final deal was struck at the European Council in Dublin on 10-11 March 1975. After the House of Commons first voted to accept the newly renegotiated terms of UK membership of the EC, a referendum was held on 5 June 1975, on the question 'Do you think the UK should stay in the European Community (Common Market)?'. The Wilson

¹ David Gowland, Arthur Turner, Alex Wright, *Britain and European Integration since 1945 – On the sidelines*, Routledge, 2010, pp. 77 et seq.

² Centre Virtuel de la Connaissance sur l'Europe (CVCE), ['The British call for renegotiation'](#), 2011.

government (though not all its ministers) campaigned for the public to accept the results of the renegotiation, and in the end, 67.2% of those voting supported staying in the European Communities under the new terms.³

2.1.2 *The budget 'rebate'*

Under Prime Minister Margaret Thatcher, who came into office in 1979, a solution was agreed to long-standing British demands for a reduction of the UK's net contribution to the EC budget. At that time, the UK had the third-lowest gross domestic product (GDP) per capita of the nine Member States but was the second-biggest net contributor to the Communities' budget. This was largely due to the fact that the UK had relatively few farms, so it got a relatively small share of agricultural subsidies, which at the time made up 70% of Community expenditure. Moreover, its value added tax (VAT) base represented a higher share of gross national product (GNP) than that of other Member States, while the VAT-based resource was then the largest of the Communities' own resources. The issue was finally settled at the Fontainebleau European Council of June 1984, when a rebate⁴ was agreed amounting to 66% of the difference between the UK's VAT-based contributions to the budget and the expenditure allocated to it.⁵

2.1.3 *The 'opt-outs'*

The 1992 Maastricht Treaty set out the conditions for moving towards Economic and Monetary Union (EMU). Rather than prevent the 11 other Member States from moving ahead in this area, the UK secured a protocol ensuring it had no obligation to join stage three of EMU (with its single currency and monetary policy), a step subsequently taken in 1999. At Maastricht, the UK government under Prime Minister John Major (in office from 1990 to 1997) also declined to participate in the Social Protocol, but his successor, Tony Blair, ended that opt-out, and the content of the protocol was written into the 1997 Amsterdam Treaty.

At the same time, when the intergovernmental Schengen agreement was incorporated into EU law by the Amsterdam Treaty, Ireland and the UK obtained an opt-out, due to the UK's desire not to give up border controls. The UK (and Ireland) may, however, request to participate in some or all aspects of the Schengen *acquis*, provided they gain the approval of the other Schengen states. The UK and Ireland also gained an opt-in facility in respect of other proposals in the field of justice and home affairs.

The Lisbon Treaty created an Area of Freedom, Security and Justice (AFSJ), extending the 'Community method' to justice and police cooperation in criminal matters, previously areas of intergovernmental cooperation. At that time, the UK obtained the right to opt out *en bloc* from around 130 pre-Lisbon instruments in this field, a right which it exercised before the 2014 deadline for doing so. Nonetheless it opted back into some 36 measures immediately thereafter, including the acts on Europol and the European Arrest Warrant.⁶

³ *Ibidem*.

⁴ Referred to as a 'correction' in the Fontainebleau conclusions, and in successive EC and then EU Own Resources Decisions, the mechanism is widely known as the 'UK rebate' although the bulk of the money concerned is not paid over to the Commission and thus cannot be *paid back*. In view of this, in UK administrative documents, the mechanism is often also referred to as the 'abatement'. For more details, see Alessandro D'Alfonso, ['The UK 'rebate' on the EU budget'](#), EPRS, February 2016.

⁵ Andrew Geddes, *Britain and the European Union*, Palgrave Macmillan, 2013, p. 68.

⁶ Vaughne Miller, ['The 2014 bloc opt-out and selective opt-back-ins'](#), House of Commons Library, SN/IA/6684, 2013.

2.1.4 'Referendum lock' in the European Union Act 2011

The possibility of the UK putting in place a 'referendum lock', namely an obligatory referendum in case of proposals to extend EU powers, was included in the 2010 Coalition agreement between the Conservatives and Liberal Democrats. As a result, the European Union Act 2011 was adopted by the UK Parliament. Besides requiring a referendum for any future transfer of powers to the EU, it also states that EU law has effect in the UK only through an act of the UK Parliament.

2.1.5 December 2011 European Council and the 'Fiscal Compact'

In 2011, EU Member States sought to move towards further fiscal and economic policy integration to minimise the risk of future financial and economic crises. At the December 2011 European Council meeting, Herman Van Rompuy, President of the European Council, put forward proposals for changes to the EU Treaties. The British Prime Minister, David Cameron, however, reportedly made the UK's agreement to Treaty change conditional on certain 'safeguards', including inter alia unanimity in the Council on measures related to financial services, and an exemption from EU rules for non-EU financial institutions operating in only one Member State. Other Member States declined to agree to his requests. Hence, as EU Treaty change was not possible, an intergovernmental treaty was signed outside the EU framework by 25 of the then 27 Member States (the Treaty on Stability, Coordination and Governance in the EMU, also known as the 'Fiscal Compact'). The UK and the Czech Republic declined to sign that treaty. The fact that the UK was able to prevent a Treaty change through its veto, but not to stop stronger integration by the other Member States in fiscal and economic matters, led some commentators to conclude that the December 2011 European Council represented a watershed in the UK's relations with the rest of the Union.⁷

2.2 Current state of special arrangements for the UK in the EU

Differentiated (flexible) integration

In the course of the development of the EU, not all Member States have been willing or ready to achieve the same degree of supranational integration. Varying political and economic interests and traditions on the part of the Member States have been accommodated, notably since the 1992 Maastricht Treaty, by allowing 'differentiated' (also called 'flexible') integration. The result has also been described as a 'two-speed' or 'multi-speed Europe', 'core Europe' or a Europe of 'concentric circles'.⁸

Differentiated integration occurs through complete sector-specific opt-outs (Schengen area, euro area), opt-out or opt-in provisions on secondary legislation (particularly regarding the AFSJ), enhanced cooperation within the EU framework, or intergovernmental agreements outside the Treaty structures (for example, the Fiscal Compact). In some cases, Member States have no opt-out from a specific policy area but do not yet participate since they need to comply with certain conditions first in order to join (Schengen area, euro area).⁹

The United Kingdom is one of the Member States with the most far-reaching special arrangements regarding participation in EU policy areas.

⁷ Evidence provided to the Foreign Affairs Committee of the UK House of Commons, Foreign Affairs Committee, First Report, ['The future of the European Union: UK Government policy'](#), 2013.

⁸ Nicole Koenig, ['A differentiated view of Differentiated Integration'](#), Jacques Delors Institut Berlin, 2015.

⁹ For a comprehensive overview, see Stijn Verhelst, Marc Lepoivre (eds.), ['Variable geometry union: how differentiated integration is shaping the EU'](#), *Studia Diplomatica* Vol. LXVI, Issue 3, 2013. See also the EPRS infographic, ['Differentiated integration in the European Union'](#), February 2016.

The United Kingdom has secured the following special arrangements over the years:

- In the area of **Economic and Monetary Union**
 - The UK has a permanent opt-out from the euro area (Protocol No 15 to the Treaties);
 - The UK is not a signatory of the intergovernmental Treaty on Stability, Coordination and Governance ('Fiscal Compact').
- **Schengen area**
 - The UK is not bound by the Schengen *acquis*, but can request to take part in some or all provisions of that *acquis* (Protocol No 19);
 - The UK participates in some of Schengen's police and judicial cooperation elements (e.g. Schengen Information System II), but does not participate in the Schengen area as regards internal and external border controls (Protocol No 20).
- **Area of Freedom, Security and Justice**¹⁰
 - The UK can choose whether or not to participate in measures in the Area of Freedom, Security and Justice within three months of a proposal being presented to the Council. If it notifies it is opting in, there is no possibility of opting out later. If the UK does not opt in by the three-month point, it can still decide to opt in after a measure has been adopted, with the Commission's approval (Protocol No 21).
 - The UK had the right (by December 2014) to opt out *en bloc* from all Union acts in the field of police cooperation and judicial cooperation in criminal matters which had been adopted before the entry into force of the Treaty of Lisbon and to opt back into some acts on an individual basis (Article 10(4) and (5) of Protocol No 36), and used this right in 2013 (as described above).
- **Charter of Fundamental Rights of the European Union**
 - Protocol No 30 clarifies that the Charter has not extended the ability of the Court of Justice of the EU or any court or tribunal in the UK to rule on the consistency of the law and practice of the UK with the fundamental rights that it reaffirms.

Table 1: UK participation in certain instruments in the field of EMU, Schengen and the Area of Freedom, Security and Justice

Legal instruments	UK participation
Euro area / Euro Plus Pact / Fiscal Compact / Bank resolution	X
Schengen area	✓
Schengen Information System II	✓
Dublin III Regulation	✓
Asylum Procedures Directive 2013 (recast)	X
European Investigation Order	✓
Framework Decision on combatting terrorism	X
Europol (2009)	✓
Eurojust	✓
European Arrest Warrant	✓

¹⁰ See also Vaughne Miller, '[UK Government opt-in decisions in the Area of Freedom, Security and Justice](#)', House of Commons Library, SN/IA/6087 2011.

3 The road to a 'new settlement for the UK within the EU'

3.1 The UK's EU Balance of Competences Review

3.1.1 2010 general election manifestos

The Conservative Party manifesto¹¹ for the 2010 UK general election had declared:

We will be positive members of the European Union but we are clear that there should be no further extension of the EU's power over the UK without the British people's consent. We will ensure that by law no future government can hand over areas of power to the EU or join the euro without a referendum of the British people. We will work to bring back key powers over legal rights, criminal justice and social and employment legislation to the UK.

The Liberal Democrats' manifesto¹² for the same election said:

The European Union has evolved significantly since the last public vote on membership over thirty years ago. Liberal Democrats therefore remain committed to an in/out referendum the next time a British government signs up for fundamental change in the relationship between the UK and the EU.

3.1.2 The 2010-2015 Coalition agreement

Following the 2010 general election, a Conservative-Liberal Democrat Coalition government was formed and set out its agreed programme and policies¹³ for its five-year mandate. On Europe, this included the statement that:

The Government believes that Britain should play a leading role in an enlarged European Union, but that no further powers should be transferred to Brussels without a referendum. This approach strikes the right balance between constructive engagement with the EU to deal with the issues that affect us all, and protecting our national sovereignty.

and a commitment that:

We will ensure that there is no further transfer of sovereignty or powers over the course of the next Parliament. We will examine the balance of the EU's existing competences and will, in particular, work to limit the application of the Working Time Directive in the United Kingdom.

3.1.3 Balance of Competences Review

Stemming from this latter commitment, in July 2012, the Coalition government launched a 'Balance of Competences Review'¹⁴ to analyse and examine the UK's overall relationship with the Union. It used a broad definition of EU competence as its starting point, covering 'everything deriving from EU law that affects what happens in the UK'. The review sought to examine all the areas where the Treaties gave the EU competence to act, and to audit what the EU did and how this affected the UK. The whole process would be 'comprehensive, well informed and analytical', gathering evidence to help inform public debate. It was made clear from the outset that the review would not look to produce specific recommendations, prejudge future policy, or consider alternative models for the UK's overall relationship with the EU. Rather, the purpose would be to

¹¹ [Invitation to join the Government of Britain](#), p. 113, Conservative Party, April 2010.

¹² [Liberal Democrat Manifesto 2010](#), pp. 66-67, Liberal Democrats, April 2010.

¹³ [The Coalition: our programme for government](#), 20 May 2010.

¹⁴ [Review of the Balance of Competences between the United Kingdom and the European Union](#), UK Government, Cm8415, July 2012.

enhance understanding of the current relationship and hence to provide a basis on which to develop future UK policy towards the EU.

The review was divided into a number of individual reports covering specific areas of policy. These were conducted and published in tranches over four semesters. Inputs to the reports came from a range of interested parties within and outside the UK, including both chambers of the UK Parliament and its committees, the devolved administrations in Scotland, Wales and Northern Ireland, and the EU institutions, as well as representative organisations, businesses, professional bodies, civil-society organisations, think-tanks, academia and members of the general public. Evidence was received from representatives of the European Commission and individually from 43 Members of the European Parliament (MEPs). In total, some 2 300 pieces of written evidence were received.

Thirty-two separate reports¹⁵ covering the various policy areas were published in four tranches over the course of the review. No formal overarching summary of the review was produced at its conclusion in December 2014. This was criticised by some stakeholders including those who felt the reports had been deliberately 'buried'. However, broad themes the (then) government noted at the review's conclusion included: the need for better implementation of the principles of subsidiarity and proportionality; the need for greater democratic accountability of EU actions; recognition that the UK had often been successful in shaping the EU agenda; that less and better EU regulation with more effective enforcement was necessary; protecting the rights of all EU Member States as the euro area integrates further; and the importance of the EU focusing on areas where it adds genuine value with appropriate flexibility for Member States. The benefits brought by the single market and the potential for building on this (notably in digital, energy and services) were also flagged.

In other reactions, the UK House of Lords considered the reports to be fair and neutral for the most part. The Scottish Government felt the review showed that '...the EU Treaties strike the right balance on the competences which have been conferred on the EU...' There were similar views from the Centre of European Policy Studies (CEPS) and the Senior European Experts group who noted the UK's existing opt-outs in various fields and the way competences could evolve over time. However, Open Europe felt that the review had been hindered by a flawed mandate which prevented it reaching conclusions, 'even in areas where the evidence overwhelmingly identified problems with the status quo'. And Business for Britain said, 'The reports claim to reflect different views, but in fact have very little to say, and while they do not come to explicit conclusions, it's clear that the intentions of the authors are to present a view which is broadly reflective of the current consensus...'

3.2 David Cameron's demands in 2015

The Conservative Party's manifesto¹⁶ for the May 2015 general election stated that:

We will negotiate a new settlement for Britain in Europe, and then ask the British people whether they want to stay in the EU on this reformed basis or leave. ... We will hold that in-out referendum before the end of 2017 and respect the outcome.

¹⁵ All 32 reports are available on the gov.uk site, while EPRS has produced a [briefing](#) summarising the whole review process, the findings of some of the reports and some reactions to them.

¹⁶ [The Conservative Party Manifesto 2015](#).

This commitment came after a process, starting two years earlier, during which the UK Prime Minister, David Cameron, had made clear that if his party was elected to office in 2015, it would seek a significant renegotiation of the terms of UK membership of the Union.

Mr Cameron first set out a renegotiation agenda in his 'Bloomberg' speech in January 2013, where he identified three main challenges before the EU: safeguards to ensure that British access to the single market is not compromised by further integration of euro area Member States; competitiveness and cutting red tape for business; and democratic accountability.¹⁷

Mr Cameron further elaborated on his EU reform plans in a 2014 article in the *Daily Telegraph*.¹⁸ This envisaged 'powers flowing away from the EU and not always to it; national parliaments able to work together to block unwanted European legislation; businesses liberated from red tape and benefiting from the strength of the EU's own market to open up greater free trade with North America and Asia; British police forces and justice systems to be able to protect British citizens, unencumbered by unnecessary interference from the European institutions, including the European Court of Human Rights; free movement to take up work, not free benefits; support for the continued enlargement of the EU to new members but with new mechanisms in place to prevent vast migrations across the Continent; and dealing properly with the concept of "ever closer union"'.

3.2.1 *David Cameron's letter of 10 November 2015*

After a round of mostly bilateral conversations with EU leaders in the early autumn of 2015, on 10 November, Mr Cameron sent a letter¹⁹ to the President of the European Council, Donald Tusk, entitled 'A new settlement for the United Kingdom in a reformed European Union'. This set out reform proposals, divided into four sections: economic governance, competitiveness, sovereignty and immigration. If an agreement could be reached on this basis, the Prime Minister undertook to campaign, in an in-out referendum, for the UK to stay in the Union.

Economic governance

Mr Cameron referred in his letter to his concern that any structural changes in euro-area governance should respect the integrity of the single market. He made clear that the UK did not seek a veto over euro-area decision-making, but legally binding principles ensuring inter alia that:

- there is no discrimination and no disadvantage for any business on the basis of the currency of their country;
- the integrity of the single market is protected;
- any changes in the euro area, such as in the banking union, will be voluntary and never compulsory for non-euro-area Member States;
- non-euro-area Member States would not face financial liabilities for support to the euro area;
- financial stability and supervision remains a competence of national institutions, such as the Bank of England, for non-euro-area countries; and

¹⁷ David Cameron, [EU speech at Bloomberg](#), 23 January 2013.

¹⁸ David Cameron, ['The EU is not working and we will change it'](#), *The Telegraph*, 15 March 2014.

¹⁹ [Letter](#) from David Cameron to Donald Tusk, 10 November 2015.

- any issues that affect all Member States must be discussed and decided by all Member States.

What is at stake?

1) The first bloc of UK demands addressed concerns over possible **spill-over effects of deeper euro area integration into the functioning of the Single Market**. As euro-area Member States together constitute a qualified majority in the Council of Ministers that co-legislates (together with the European Parliament) in single-market matters, they could, in principle, take decisions towards greater harmonisation of economic and social policies, deemed necessary for further euro area integration, that spill over to non-euro-area Member States adversely or that lead to fragmentation of the single market to the disadvantage of the latter. In this context, some commentators have criticised the blurred lines between pure euro-area decisions prepared in the Eurogroup, and other decisions concerning the single market in general, bemoaning the fact that non-euro-area Member States are often excluded from such informal discussions that concern both euro area and non-euro-area Member States alike.

Experts' proposals to address these issues included a change in the Council's Rules of Procedure to allow non-euro-area Member States to be able to delay a decision on a proposal in the Council until a dispute is settled²⁰ and to ensure full participation, including within Eurogroup discussions, of all Member States if the whole EU could be affected.²¹

The difficulty here is to strike a fair balance between the legitimate interests of Member States wishing to push ahead with further economic integration and those of the non-euro-area Member States, whereby veto power of the latter seems unacceptable to euro-area countries. Furthermore, any changes to current arrangements would need to address the demands for legally binding rules against the stated unwillingness to undertake procedurally cumbersome Treaty changes.

2) The issue of guaranteeing that **non-euro-area Member States are not liable for bail-outs of euro-area Member States** goes back to the use of the European Financial Stabilisation Mechanism (EFSM) for Greece in 2015. The EFSM entails liability of the EU budget,²² unlike the European Stability Mechanism (ESM), an intergovernmental mechanism financed only by euro-area Member States. In order to exclude the liability of non-euro-area Member States from the bail-out of euro-area Member States through their contributions to the EU budget, the EFSM Regulation was amended in August 2015²³ to ensure that non-euro-area Member States are compensated by the euro-area Member States for any contributions to the EU budget that were required as a consequence of the failure of a Member State to repay the financial assistance received.

Competitiveness

David Cameron welcomed EU initiatives supporting economic growth such as a Single Digital Market (DSM) and a Capital Markets Union (CMU), as well as a new trade strategy with third countries. He called for further reductions in the burden on business from existing regulation.

²⁰ This provision would be similar to that contained in the Declaration on Articles 16(4) TEU and 238(2) TFEU enabling a blocking minority in the Council to ask for a discussion and dispute settlement before a formal voting takes place (inspired by the former 'Ioannina compromise').

²¹ Steve Peers, '[Is it possible to reform the EU without amending the Treaties?](#)', EU Law Analysis blog, May 2015.

²² Under the EFSM, the Commission is allowed to borrow up to a total of €60 billion in financial markets on behalf of the Union under an implicit EU budget guarantee.

²³ [Council Regulation \(EU\) 2015/1360](#) of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism.

What is at stake?

1) Mr Cameron's demands under this heading seem to converge with the European Commission's initiative on the '**Digital Single Market**', which was one of the ten priorities of President Jean-Claude Juncker²⁴ and forms part of the annual work programme of the Commission for 2016. The Commission estimates the DSM could contribute €415 billion per year to the European economy through expanded markets and improved services at better prices, and create new sources of employment. In September 2015, the Commission launched the Capital Markets Union Action Plan to unlock investment in the EU and to create a more fluid single market for capital.

2) A new **trade strategy** was adopted by the Commission in October 2015.²⁵ Trade agreements are currently being pursued with the USA and with Japan, Australia and New Zealand, as well as an investment agreement with China.

3) **Better regulation and cutting red tape** for business and other stakeholders has been at the centre of the Commission's recent priorities. The number of legislative proposals has been significantly reduced, when one compares previous Commission work programmes with those of the Juncker Commission, and initiatives launched to identify possible areas for regulatory burden reduction. The Interinstitutional Agreement on Better Law-Making²⁶ also addresses the need to cut red tape, with the Parliament, Council and Commission agreeing to cooperate in order to update and simplify legislation and seeking to avoid over-regulation and administrative burdens for citizens, administrations and businesses, while ensuring that the political objectives of the legislation are met.

Commentators note that, however legitimate Mr Cameron's demands for Commission action may be, with many in fact already being met or under way, any agreement in principle among leaders in these fields cannot pre-empt specific political decisions during, and at the end of, a democratic decision-making process in each case, which inevitably involves compromises between different (national or ideological) positions of the different actors, who might not always share the same perception of what is a good outcome of such negotiations.²⁷

Sovereignty

In this field, Mr Cameron demanded:

- an end to the UK's obligation to work towards an 'ever closer union' as set out in the EU Treaty, in a formal, legally binding and irreversible way. There was however no explicit demand for clarification of the possibility of repatriating EU competences to the Member States, as foreshadowed in previous documents;
- an enhanced role for national parliaments at EU level by enabling a group of them acting together to stop legislative proposals (the so-called 'red card' proposal);
- full implementation of the EU commitments on subsidiarity;
- a confirmation that the EU institutions will respect the purpose behind the Justice and Home Affairs opt-out protocols in any future proposals so as to preserve the UK's ability to choose to opt in into such instruments; and

²⁴ See Ariane Debyser et al., '[The ten priorities of the Juncker Commission: State of play a year on](#)', EPRS, September 2015.

²⁵ European Commission, '[Trade for all towards a more responsible trade and transparent investment policy](#)', October 2015.

²⁶ [Provisional text](#) of the Interinstitutional Agreement on Better Law-Making, 15 December 2015, due to be [voted](#) in the European Parliament's March 2016 plenary, following its approval by the Constitutional Affairs Committee on 23 February.

²⁷ Floris de Witte, '[Cameron's EU reforms: political feasibility and legal implications](#)', London School of Economics, Policy Briefing 11, 2015.

- recognition that national security should remain the sole responsibility of Member States.

What is at stake?

1) The principle of **subsidiarity** is established in Article 5(1) and (3) TEU. It should be noted, however, that it only applies to legislative acts where the Union does not possess exclusive competence.²⁸ The Treaty of Lisbon introduced the possibility for national parliaments and the Committee of the Regions to contest a legislative act before the CJEU if they consider that the principle of subsidiarity has not been observed. Furthermore, better compliance with subsidiarity forms part of the Commission's current agenda,²⁹ with it committed to explaining more clearly how each initiative that it tables meets the test.

2) According to Protocols 1 and 2 to the Treaties, the Commission already has to reconsider proposals where a group of parliaments (one third, or one quarter in the Area of Freedom, Security and Justice) has issued reasoned opinions over the proposal's non-compliance with the principle of subsidiarity, under the existing 'yellow' and 'orange' card mechanisms. The mechanism sought in Mr Cameron's November letter would strengthen the power of national parliaments in this regard, enabling them to block proposals entirely with a '**red card**'. Since 'the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves',³⁰ a formal role for national parliaments as 'veto player' within the legislative procedure would need to be enshrined in the Treaties. In contrast, a (political) commitment on the part of the Member States' representatives in the Council could be made without Treaty change. In practice, a negative position by a large group of national parliaments regarding a Commission proposal, even if not strictly related to subsidiarity, is already likely to have an informal veto effect as it would be difficult for the proposal to get through the Council anyway.

3) The demands regarding the '**ever closer union**' clause refer to the understanding that it means increasing political integration between Member States. The clause is contained in the preambles to the Treaties and to the EU Charter of Fundamental Rights, as well as in Article 1(2) TEU: 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.' Some experts point to the purely symbolic character of the clause, involving no legal obligation, and recall that it does not simply proclaim an ever closer union but one between the 'peoples of Europe', and not therefore not between states – a unity that has been seen as a goal from the very start of the construction of the Communities after the Second World War as a guarantor of peace.³¹ Others, however, point to case law of the Court of Justice in which it has used the clause as an aid to interpretation to identify the purpose and spirit of other Treaty provisions and secondary EU law. Some argue that the notion of 'ever closer union' has (sometimes implicitly) underpinned the Court's alleged judicial activism towards further integration as a kind of 'master EU value'.³² It should be noted, however, that the recourse to the 'ever closer union' clause has been primarily used by the Court with regard

²⁸ Article 5(3) TEU: 'Under the principle of subsidiarity, **in areas which do not fall within its exclusive competence**, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.' [emphasis added].

²⁹ European Commission, [Communication – The EU's agenda for better regulation](#), COM(2015) 215 final 19 May 2015.

³⁰ Judgment of the Court of Justice of 28 April 2015, [C-28/12](#), *European Commission v Council*, para. 42.

³¹ See summary of oral evidence to the House of Commons European Scrutiny Committee, UK Government's renegotiation of EU membership: parliamentary sovereignty and scrutiny, 14th report of session 2015-16, pp. 27, 28.

³² Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart, Oxford, 2012.

to the principle of transparency, rather than to close legal gaps to facilitate further integration.³³ Many recall in this context that the clause has in any case not prevented differentiated integration of EU Member States, including the UK's many opt-outs.

4) That **national security** is the sole responsibility of Member States is already enshrined in Article 4(2) TEU. The demands here seem to address possible spill-over effects from other EU legislation.

5) **Justice and home affairs opt-outs**: The practical effectiveness of the opt-outs, and particularly of the possibility to opt into certain legal instruments, might be hampered by the combination of several measures with different legal bases into a single legal act.

Immigration

David Cameron stated that immigration from other EU Member States has put an unsustainable pressure on the UK's public services. He asked for:

- EU citizens from other EU Member States to have to live and contribute in the UK for four years before they qualify for in-work benefits or social housing;
- an end to the practice of sending child benefits abroad, to where children live;
- an end to abuses of free movement, through longer re-entry bans for fraudsters and people who collude in sham marriages and through addressing the fact that it is easier for EU citizens to bring a non-EU spouse to the UK than for a British citizen. He calls for stronger powers to deport criminals and preventing entry in the first place as well as addressing Court of Justice judgments widening the scope of free movement making it more difficult to tackle abuse; and
- ensuring that, in the future, free movement will not apply to new countries that join the EU until their economies have converged closely with existing Member States.

What is at stake?

This fourth 'basket' of demands presented the biggest challenge in both political and legal terms. It concerns the free movement of workers, which, together with the other fundamental freedoms – free movement of goods, services, capital, and of establishment – are the very foundations of the single market. Workers from another EU Member State may not be discriminated against, including indirectly, on the grounds of their nationality. The introduction of Union citizenship saw free movement extended also to economically inactive citizens (such as students and pensioners), as long as they have sufficient resources to support themselves.

1) The controversially labelled 'welfare tourism' has traditionally referred to job-seekers who will potentially become workers and are therefore granted some social benefits in their host Member State. However, the Court of Justice recently delivered two rulings (*Dano*³⁴ and *Alimanovic*³⁵), making clear that Member States may refuse to grant social benefits to EU citizens who have no intention to work in the host Member State and cannot support themselves, as well as when EU citizens have lost their status as workers six months after becoming unemployed. Notably, the Court seems to depart from its earlier case law and to recognise that while the single claim for social benefits would not be an unreasonable burden on a Member State's social system, the **accumulation of all the individual claims** would be bound to be so. It seems that this may be why Mr Cameron abandoned his previous demands

³³ See examples quoted in the House of Commons Library briefing paper, '[Ever Closer Union' in the EU Treaties and Court of Justice case law](#)', CBP-7230, November 2015, pp. 9 *et seq.*

³⁴ Judgment of the CJEU of 11 November 2014, [C-333/13](#), *Dano v Jobcenter Leipzig*.

³⁵ Judgment of the CJEU of 15 September 2015, [C-67/14](#), *Jobcenter Berlin Neukölln v Alimanovic*.

to allow social benefits to be limited to job-seekers,³⁶ and has focused instead on so called in-work benefits.

In-work benefits are granted to workers whose salary is below a certain threshold (which is why they are non-contributory in nature), and include universal credit (working tax credit and housing benefit), as well as child tax credits. Mr Cameron's proposal was to start granting these benefits to workers from other EU Member States only after four years of work in the UK. It should be noted, however, that such a waiting period may not be required in order to prove a sufficient link with the host society (such periods are commonly required for job-seekers' benefits), since the work is already the necessary link to the 'solidarity community' of the host society.³⁷ Mr Cameron may therefore have framed the four-year transitional period as necessary in order to alleviate the pressure on the UK's social security system, rather than as proof of a durable relationship between the worker and British society, as the latter could be at odds with the Free Movement Directive 2004/38/EC.

Free movement of workers and other EU citizens, as well as the principle of non-discrimination, are established directly in the Treaties, but they are not absolute rights and are subject to limits set in secondary EU legislation. The right to free movement and residence are further shaped through the Free Movement Directive.³⁸ Any changes to the secondary EU instruments however would need to be in accordance with the Treaties. For this, any exception, even temporary, from the principle of equal treatment between nationals and other EU citizens needs to be justified by a legitimate objective that cannot be achieved in a different way (principle of proportionality).

2) **Exportable child benefits:** The EU regulations on the coordination of social security were adopted to ensure that citizens do not suffer disadvantages in their social security protection when exercising their right to free movement across the EU, but also so that social benefits are not paid twice, in the home and host Member States. Regulation 883/2004³⁹ establishes that family benefits (including child benefits) are paid by the Member State where EU citizens work, even if their family members reside in another Member State (Article 67).

3) The right of EU citizens to re-unite with their **family members who are non-EU nationals** was developed by the Court of Justice and later included in the Free Movement Directive, in order to allow EU citizens to effectively enjoy their free movement rights. Purely national situations, for instance a British citizen wishing to reunite with non-EU family members, are in contrast not covered by EU law and are subject to national migration law. EU citizens can, however, make use of their free movement in order to avail themselves of the more advantageous EU rules than those of their home Member State and then return there with their non-EU family members. This has been endorsed by the Court of Justice⁴⁰ so that a restriction of these rights would require a change in the Free Movement Directive 2004/38/EC, taking into account the Treaty provisions on free movement of Union citizens.

4) **Abuse and fraud:** Pursuant to Article 35 of Directive 2004/38/EC, Member States may adopt

³⁶ In fact, the UK [tightened](#) the conditions for granting welfare benefits to workers and job-seekers in 2014, including a minimum threshold for earning by an EU citizen in order to qualify as a worker, as well as a three-month waiting period for job-seekers in order to be granted job-seekers allowance. Some of these measures are being examined by the Commission as for their compatibility with EU law.

³⁷ See Eva-Maria Poptcheva, '[Free movement and residence of EU citizens. Access to social benefits](#)', EPRS, July 2014.

³⁸ [Directive 2004/38/EC](#) of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

³⁹ [Regulation \(EC\) No 883/2004](#) of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

⁴⁰ CJEU, [C-127/08](#), *Metock and others v Minister for Justice, Equality and Law Reform*, 25 July 2008.

the 'necessary measures' to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud. Up until now however, the threshold has been set fairly high, thus requiring a serious offence (such as forgery of a document or a marriage of convenience with involvement of organised crime) to expel an EU citizen and impose a re-entry ban.

5) The Member States that joined the EU from 2004 onwards were subjected to transitional provisions including regarding free movement so as to prevent citizens from these countries migrating *en masse* to Member States with higher social standards. Some Member States however did not make use of these transitional periods and allowed immediate access to their labour markets. The UK did not apply the transitional period for the 10 Member States that joined the EU in 2004 but only for those that joined later (Romania, Bulgaria and Croatia).

3.3 The response of Donald Tusk and the draft 'new settlement'

The President of the European Council, Donald Tusk, replied to the British Prime Minister's letter⁴¹ on 7 December 2015, setting out his first assessment of the proposals made. He addressed all four baskets of proposals contained in the November letter – relations between the euro 'ins' and 'outs', competitiveness, sovereignty and social benefits for EU citizens living in another Member State – stating that the latter was the most delicate and would require a substantive political debate at the European Council's December 2015 meeting.

On 2 February 2016, Mr Tusk sent a letter⁴² to the Heads of State or Government of the Member States, presenting a draft 'New settlement for the United Kingdom in the European Union'. It addressed all four areas in David Cameron's letter of November 2015 and was to be the basis for negotiations among Member States in the run-up to the European Council meeting of 18-19 February 2016.

The most controversial points were those on the application of the 'single rule book' in the field of financial services regulation to non-euro-area Member States, the indexation of exported child benefits, and the duration of the safeguard mechanism to prevent the 'pull' effect of in-work benefits.

4 The new settlement for the UK in the EU

The Heads of State or Government of the EU Member States reached an agreement on a 'new settlement for the UK in the EU' at the European Council on 18-19 February 2016.⁴³ The agreement largely endorsed the initial draft proposed by President Tusk, with some changes in the three most controversial areas identified above.

⁴¹ [Letter](#) from the President of the European Council, Donald Tusk, to the members of the European Council on the issue of a UK in-out referendum, 7 December 2015.

⁴² [Letter](#) from President Donald Tusk to the Members of the European Council on his proposal for a new settlement for the United Kingdom within the European Union, 2 February 2016.

⁴³ See also ['Outcome of the European Council of 18-19 February 2016'](#), by the EPRS European Council Oversight Unit, February 2016.

4.1 Structure

The 'new settlement' comprises an 'umbrella Decision' of the Heads of State or Government, and six other documents, as follows:⁴⁴

- a Decision by the Heads of State or Government laying down the arrangements of the 'new settlement' ('umbrella Decision');
- a Statement on Section A of the Decision, containing a draft Council decision on effective management of the banking union and of the consequences of further integration of the euro area;
- a European Council declaration on competitiveness;
- a Declaration of the European Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism;
- a Declaration of the Commission on the indexation of child benefits exported to a Member State other than where the worker resides;
- a Declaration of the Commission committing itself to table a proposal to amend Regulation (EU) No 492/2011 on freedom of movement of workers within the Union introducing an 'emergency break'; and
- a Declaration by the Commission on issues related to the abuse of the right of free movement, including a commitment to adopt a proposal to complement the Free Movement Directive (2004/38/EC).

The Decision will take effect on the same date as the Government of the UK informs the Secretary-General of the Council that the UK has decided to remain a member of the EU. Furthermore, a novelty was introduced in comparison with President Tusk's draft: the seven instruments will cease to exist should the result of the referendum in the United Kingdom be for the country to leave the European Union. The agreement thus refers directly to the result of the referendum, even if it is only consultative, legally speaking, and not to the ensuing decision (or not) of the British government to notify to the European Council its intention to withdraw from the EU.⁴⁵

Furthermore, the Decision establishes that any Member State may ask the President of the European Council that an issue relating to the application of the Decision is discussed in the European Council, taking into account, however, the possible urgency of the matter, in particular with regard to the provisions relating to economic governance.

4.2 Content

4.2.1 Section A: Economic governance

Member States not participating in further deepening of the EMU will not create obstacles to that process; conversely, respect for rights and competences of non-participating Member States will be guaranteed through the following:

- there will be no discrimination based on the official currency of the Member State: difference in treatment will be based on objective reasons;

⁴⁴ '[A new settlement for the United Kingdom within the European Union](#)', Official Journal of the European Union – OJ C 69 I of 23.2.2016; also published with the [Conclusions](#) of the 18-19 February European Council.

⁴⁵ See next section, on the withdrawal procedure.

- the European Central Bank, the Single Resolution Board or similar EU bodies will have authority only over credit institutions in euro-area states, or over those Member States that have voluntarily adopted the EU's prudential supervision;
- the Decision makes clear (in contrast to the first draft) that the Single Rulebook for the financial sector⁴⁶ will cover all banks and financial institutions in the EU, 'in order to ensure the level playing field within the internal market'; at the same time, the Decision points out that this 'uniform' conception of the Single Rulebook, in particular as regards the prudential requirements for credit institutions, may need to include in the future 'specific provision' (presumably for non-euro-area Member States), while preserving financial stability and the integrity of the internal market;
- emergency measures to safeguard the financial stability of the euro area will not result in budgetary responsibilities for non-euro-area Member States;
- the Eurogroup will respect the legislative functions of the Council; the Decision recalls that all members of the Council participate in its deliberations, including those without the right to vote;
- as for the 'effective management of the banking union', a draft Council decision would be adopted to supplement the so called 'Ioannina *bis* Decision'⁴⁷ allowing for a number of Member States close to the 'blocking minority' to indicate their opposition to the Council adopting an act by a qualified majority, so that the Council tries further to find an agreement, instead of simply outvoting the minority of Member States. In the case of the banking union, the 'Ioannina compromise' would go further: for legislative measures on economic governance adopted with the participation of all Member States (based on the internal market, Article 114 TFEU), when at least one member of the Council that does not participate in the banking union indicated its reasoned opposition to the Council adopting such an act by qualified majority, the Council shall discuss the issue. Furthermore, any Member State can also request a discussion in the European Council, before the Council decides on the issue in question. The Council decision states that any such referral to the European Council is without prejudice to the normal operation of the Union legislative procedures and cannot amount to allowing a Member State a veto.

It should be noted in this context that the European Parliament is co-legislator for many of the acts adopted in this field, which has led many to criticise the fact that deliberations on a legislative file might be taken to the European Council, thus eluding parliamentary oversight. Furthermore, by delaying the adoption of the decision in the Council and referring the matter to the European Council, which decides by consensus (Article 15(4) TEU), many fear that the qualified majority voting foreseen by the Treaties might in practice be replaced by a unanimity requirement. It should be noted however that the Rules of Procedure of the Council continue to apply even within an 'Ioannina' procedure, so that a simple majority of Member States can at any time request to proceed to a vote (and in this way enforce qualified majority voting).⁴⁸

⁴⁶ The [Single Rulebook](#) is the backbone of financial sector regulation in the EU and in particular of the Banking Union. It includes legal instruments on capital requirements for banks, protection for depositors and the prevention and management of bank failures.

⁴⁷ Jean-Claude Piris, *The Lisbon Treaty – A legal and political analysis*, Cambridge, 2010, pp. 223-225.

⁴⁸ Jean-Claude Piris, 'Constitutional pathways: which institutional and constitutional adjustments for the United Kingdom?', [United Kingdom's renegotiation of its constitutional relationship with the EU: agenda, priorities and risks](#), EP DG for Internal Policies, Policy Department C, Study commissioned at

- the substance of this section will be incorporated into the Treaties with the next Treaty revision.

4.2.2 *Section B: Competitiveness*

The Decision underlines the need for the EU to increase efforts to enhance its competitiveness to generate more growth and jobs, in particular stating that:

- the EU institutions and Member States will take steps towards better regulation, reducing administrative burdens and compliance costs on economic operators, especially SMEs, and repealing unnecessary legislation, building on the Regulatory Fitness Programme (REFIT);
- the European Commission will carry out an annual review of the EU's efforts to simplify legislation, avoid over-regulation and reduce burdens for business, including an Annual Burden Survey. The Commission is invited to propose to repeal measures that are inconsistent with the principle of subsidiarity, or that involve a disproportionate regulatory burden. Furthermore, in a declaration to the umbrella Decision (Annex IV), the Commission undertakes the commitment to review the body of existing EU legislation for its compliance with the principle of subsidiarity and proportionality.

4.2.3 *Section C: Sovereignty*

In the area of sovereignty, the Decision sets out clarifications of the UK's position in the EU, as well as developing the subsidiarity-control mechanism:

- it is recognised that the UK, in the light of its specific situation under the Treaties, is not committed to further integration into the EU. The substance of this will be incorporated into the Treaties at their next revision;
- the notion of 'ever closer union among the peoples of Europe' does not offer a legal basis for extending the scope of any treaty provision of secondary legislation. It does not mean that competences conferred on the EU could not be reduced and returned to the Member States. It is compatible with different paths of integration;
- where reasoned opinions on the non-compliance of a draft EU legislative act with the principle of subsidiarity have been issued by national parliaments representing more than 55% of the votes allocated to the national parliaments (currently 16 parliaments) and sent within 12 weeks of the transmission of the draft, the representatives of the Member States in the Council will discontinue the consideration of the draft legislative act unless it is amended to accommodate the concerns expressed;

Whilst the existing 'yellow' and 'orange' card procedures under the Protocols on subsidiarity entail a review of the legislative act's compliance with the principle of subsidiarity by the European Commission (or by the initiator of the legislation if this is not the Commission), the 'red card' mechanism takes place within the Council. It should be noted however that it does not bind the Council as such, but refers rather to actions of the Member States' representatives in the Council.

- the Council will ensure that where an EU measure falls within the Area of Freedom, Security and Justice, opt-out and opt-in rights will apply to it including when this entails the splitting of the measure into two acts;

- national security is confirmed as the sole responsibility of each Member State (Article 4(2) TEU), but the benefits of collective action on issues affecting all Member States is also recognised.

4.2.4 *Section D: Social benefits and free movement*

Here, the Decision clarifies the interpretation of some current EU free movement rules, inter alia:

- free movement of workers may be subject to limitations if over-riding reasons of public interest, such as encouraging recruitment, reducing unemployment, protecting vulnerable workers, averting the risk of seriously undermining the sustainability of social security systems, as recognised in the jurisprudence of the Court of Justice;
- therefore, conditions may be imposed in relation to certain welfare benefits, to ensure that there is a real and effective degree of connection between the person concerned and the labour market of the host Member State;
- Member States may take restrictive measures against individual EU citizens whose personal conduct is likely to represent a serious threat to public policy or security; the threat need not be imminent, and a Member State may act preventively based on the individual's past conduct, even if there is no previous criminal conviction.

In parallel, the European Commission commits to presenting proposals to amend the following instruments of secondary EU legislation:

- **Regulation 883/2004**, to give Member States the option to index the export of child benefits to a Member State other than that in which the worker resides to the conditions (standard of living and level of child benefits applicable in that State, European Commission declaration, Annex V) of the Member State in which the child resides. In contrast to the initial draft presented by President Tusk, it was agreed that this indexation option would be available only for new claims made by EU workers and may be extended to already existing claims to exportable child benefits only from 2020 onwards. All Member States will be able to use the indexation option, and not only the UK, as proposed by some Member States during the negotiations.

Furthermore, the European Commission states that it does not intend to propose that the optional indexation extended to other types of exportable benefits, such as old-age pensions;

- **Regulation 492/2011**, to take account of a pull factor as a result of a Member State's in-work benefits system and to provide for an alert and safeguard mechanism to respond to situations where the inflow of workers from other Member States is of an 'exceptional magnitude' over a long period of time. The umbrella Decision makes a reference in this context, and in contrast to the initial draft, to past policies following previous EU enlargement, i.e. not invoking the transitional periods provided for in the Accession Acts from 2004 onwards.

On a proposal from the Commission, the Council could authorise a Member State to restrict access to non-contributory in-work benefits to Union workers newly entering its labour market for a total period of up to four years from the commencement of employment. The exclusion could be complete at the beginning of employment but the access to such benefits would increase gradually as the worker's connection with the labour market concerned grows.

This 'emergency brake' would have a limited duration of seven years. The Commission has recognised that the UK meets the requirement to trigger the 'emergency brake'.

The Decision now also states that these measures should not result in EU workers enjoying less favourable treatment than third-country nationals in a comparable situation;

- **Directive 2004/38/EC**, to exclude from the scope of free-movement rights third-country nationals who had no prior lawful residence in a Member State before marrying a Union citizen, or who marry a Union citizen only after they have established residence in the host Member State. In such cases, the host Member State's immigration law will apply to the third-country national.

4.3 Legal nature of the 'new settlement'

The 'Decision of the Heads of State or Government meeting in the European Council' takes the form of an international agreement and not of a European Council decision in the sense of Article 288(4) TFEU. Previous similar decisions also took the form of international agreements. This was the case in 1992 and in 2008, to address respectively Danish concerns over the Treaty of Maastricht and Irish concerns over the Treaty of Lisbon. Both decisions were later transformed into Protocols to the Treaties.

The Decision itself does not amount to a Treaty change, which can be undertaken only following the procedures established in Article 48 TEU.⁴⁹ It does, however, provide for some Treaty changes in the future. Section A of the draft Decision, regarding the co-existence of the euro area and non-euro-area Member States, in its point 7, states that '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.' Section C provides for the recognition that the UK is not committed to further political integration into the European Union to be incorporated into the Treaties at the time of their next revision. It should be noted, however, that neither aspect requires Treaty change to become effective; rather, their future status as primary EU law appears to have a symbolic character.

The legal force of such a 'promise' to change the Treaties is controversial. Some experts point to the impossibility of a legally binding 'promise' for future Treaty change, since this would circumvent the decision by the national parliaments and/or electorates that would have to ratify any Treaty change.⁵⁰ According to the Council Legal Service, however, these commitments to modify the Treaties accordingly do not pre-empt the decision of the actors responsible for Treaty revisions according to the Treaty, since they refer only to the 'substance' and not to the exact wording of the provisions in question.⁵¹

As mentioned above, the Decision is not itself EU law, but it binds the Member States under international law.⁵² It cannot as such entail a modification of the Treaties, but it can serve as an instrument for interpretation and clarification of the meaning of the

⁴⁹ CJEU, [C-43/75, Defrenne II](#), 8 April 1976, paras. 57-58.

⁵⁰ Jean-Claude Piris, 'Constitutional pathways: which institutional and constitutional adjustments for the United Kingdom?', op. cit., p. 22.

⁵¹ [Council Legal Service opinion](#) of 8 February 2016, EUCO 15/16, p. 5, as released by the UK House of Commons European Scrutiny Committee.

⁵² The UK Ambassador to the UN [deposited the agreement](#) with the UN Secretariat on 24 February 2016.

Treaties, as intended by the Member States as 'masters' of the latter.⁵³ The limits of this interpretation are set where the interpretation would amount to a Treaty change, such that it would contradict current Treaty provisions. The European Council conclusions therefore state the understanding of the Heads of State or Government that the content of the Decision is 'fully compatible with the Treaties'.

Under Article 273 TFEU, disputes between Member States that relate to the subject matter of the Treaties may be submitted to the jurisdiction of the Court of Justice of the EU. This Decision of the Heads of State or Government does not, however, include a provision to subject disputes resulting from it to the jurisdiction of the Court, as was the case with another international agreement related to EU matters, the Treaty on the European Stability Mechanism. However, Member States could also agree at a later stage, after a dispute had arisen, to submit it to the Court of Justice.⁵⁴

4.4 Role of the European Parliament

The European Parliament does not have a formal role in the procedure for adopting the Decision by the Heads of State or Government on a New Settlement for the United Kingdom in the EU under international law. However, the Parliament has been involved at different stages of the negotiation process, taking due account of its nature as a political institution in which many different political views are represented.

A delegation from the European Parliament's Committee on Constitutional Affairs (AFCO) visited London on 16-17 November 2015. The visit included meetings with ministers, committees of the House of Commons and the House of Lords, and representatives of political parties, civil-society organisations and think-tanks, to discuss the forthcoming referendum on UK membership of the European Union and the institutional future of the EU.

Two meetings were held in February 2016 between President Tusk's negotiating team and the three Sherpas designated by the parliament: Elmar Brok, Roberto Gualtieri and Guy Verhofstadt. Donald Tusk also met with EP President Martin Schulz on 10 February.

Furthermore, the UK Prime Minister met with leaders of Parliament's major political groups on 16 February, ahead of the European Council meeting, to discuss the draft agreement. President Schulz then addressed the European Council on 18 February.⁵⁵ He noted that 'The overwhelming majority in the European Parliament wants to see the UK remain in the European Union' and that, within the framework and spirit of the Treaties, the Parliament wished to be a constructive partner in discussions. Whilst agreeing with aims to make the EU more democratic, more transparent, more competitive and less bureaucratic, the President highlighted some areas of concern, in which the details would be crucial. These included noting that many wish to continue to pursue 'ever closer union' for the future; ensuring a strong, stable and more integrated euro-area, avoiding any veto and ensuring consistent rules for the single market, avoiding discrimination; ensuring equal treatment and non-discrimination in free movement and benefit rules; and maintaining the smooth running of the legislative processes, whilst supporting national parliaments' role in EU legislation.

⁵³ CJEU, [C-135/08](#), *Janko Rottman v Freistaat Bayern*, 2 March 2010, para. 40.

⁵⁴ See on this question Sir Alan Dashwood QC, '[A "legally binding and irreversible" agreement on the reform of the EU](#)', Henderson Chambers, February 2016, p. 4.

⁵⁵ [Speech](#) by President Martin Schulz at the European Council meeting of 18-19 February 2016.

President Schulz also took part in the Friday session at which the agreement was finalised.

The Parliament will have a formal role as a co-legislator when proposals are submitted by the Commission to change secondary EU law. This is provided for in the Decision in respect of the amendment of:

- Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems to change the provisions on the export of child benefits (ordinary legislative procedure, Article 48 TFEU);
- Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union to introduce an 'emergency brake' (ordinary legislative procedure, based on Article 46 TFEU); it should be noted however that the proposed change would enable the Council to authorise the use of the emergency brake by a Member State through an implementing decision (Article 291(2) TFEU), without Parliament's involvement.
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (ordinary legislative procedure, Article 21(2) TFEU).

Moreover, when the Treaties are amended in the future, to incorporate some of the provisions established in the Decision (see above), the usual Treaty revision procedures would apply (Article 48 TEU). If the ordinary revision procedure is used (Article 48(1)-(5) TEU), the Parliament would be represented in the Convention, unless it agrees, upon a proposal by the European Council, not to convene a Convention. Conversely, in the case of the simplified revision procedure, the Parliament is only consulted by the European Council on the amendment of the Treaties. The simplified revision procedure (Article 48(6) TEU) can only be used to amend provisions of Part Three of the TFEU relating to the internal policies and action of the EU, and thus not the provisions on 'ever closer union'. Conversely, the provisions on Economic and Monetary Union are within Part Three of the TFEU, so that some aspects addressed in Section A of the Decision on economic governance could possibly be amended using the simplified Treaty revision procedure.

5 The withdrawal path

The renegotiation of the UK's membership in the EU has been, from the start, linked with the in-out referendum that David Cameron promised to hold by the end of 2017 at the latest. In fact, he had said that he would only campaign for the UK to stay in the EU if his reform demands were met. Those in favour of the UK leaving the EU nonetheless believe that in practice the UK would be able to maintain certain of the beneficial aspects of membership. It is therefore necessary to look into the right to withdraw from the EU and its consequences.

5.1 Procedure

The right of a Member State to withdraw from the European Union was explicitly introduced for the first time with the Lisbon Treaty. Before that, this question was highly controversial. Article 50 TEU, which incorporates that right, does not, however,

establish any substantive conditions for a Member State to be able to exercise its right to withdrawal, but rather only procedural requirements.⁵⁶

The formal withdrawal process is initiated by a notification from the Member State wishing to withdraw to the European Council declaring its intention. The European Council would then provide guidelines for negotiations between the EU and the Member State concerned, in order to conclude an agreement setting out the specific withdrawal arrangements. These arrangements should also take account of the Member State's future relationship with the Union. The Union and the Member State wishing to withdraw have a time-frame of two years to agree on these arrangements. After that, membership ends automatically, unless the European Council and the Member State concerned decide jointly to extend this period (Article 50(3) TEU).

Before concluding the agreement, the Council would need first to obtain Parliament's consent (Article 50(2) TEU). The Council would then decide to conclude the agreement with a 'super qualified majority', without the participation of the Member State concerned. The qualified majority is defined in this case as at least 72% of the members of the Council, comprising at least 65% of the population of the Member States (without the withdrawing state) (Article 238(3)b) TFEU).

Whilst the representatives of the withdrawing state are excluded from discussions and decisions of the Council and European Council relating to the withdrawal (Article 50(4) TEU), there are no provisions in the Treaties prohibiting the withdrawing Member State from taking part in the adoption of any other EU acts between the time it gives formal notice and its actual withdrawal from the EU.

Article 50 TEU has no provisions on the participation of Members of the European Parliament (MEPs) elected in the withdrawing Member State. Therefore, it can be assumed that, given the role of MEPs as representing the Union's citizens as a whole and not only those of the Member State in which they were elected, MEPs elected in the Member State in question would be able to participate in debates in Parliament and in its committees, and in voting on the Parliament's motion to consent to the withdrawal agreement.

Unlike the accession of new Member States to the EU, the withdrawal by a Member State does not require ratification of that withdrawal as such by the remaining Member States – Article 50(1) TEU mentions (by way of declaration) only the decision of the withdrawing state in accordance with its constitutional requirements. However, any Treaty changes or international agreements (such as a free trade agreement) that might be necessary as a consequence of the withdrawal agreement would need to be ratified by the remaining Member States according to Article 48 TEU. At the very least, Article 52 TEU on the territorial scope of the Treaties, which lists all Member States, would need to be changed, and Protocols concerning the withdrawing Member State would need to be revised or repealed.

5.2 Revoking a withdrawal notification?

Some have proposed the use of the Article 50 procedure to force the renegotiation of a Member State's terms of membership in the EU. In this context, the question might be posed as to whether, once a Member State has notified the European Council of its intention to withdraw from the EU and a withdrawal agreement has been negotiated, it

⁵⁶ For more detailed information, see Eva-Maria Poptcheva, ['Article 50 TEU: Withdrawal of a Member State from the EU'](#), EPRS, February 2016.

could, depending on the results of the negotiations, unilaterally revoke the notification and suspend the withdrawal procedure. Most commentators argue that this is not possible, or at least doubtful from a legal point of view.⁵⁷ Indeed, Article 50 TEU does not expressly provide for the revocation of a notice of withdrawal, and establishes that, once opened, the withdrawal process ends either within two years or later, if this deadline is extended by agreement. Furthermore, it should be noted that the event triggering the withdrawal is the unilateral notification as such and not the agreement between the withdrawing state and the EU. The merely declaratory character of the withdrawal agreement for the cancellation of membership derives from the fact that the withdrawal takes place even when the conclusion of an agreement has failed (Article 50(3) TEU). This argument is also supported by the fact that the agreement is to be concluded between the EU and the Member State in question on the 'arrangements for its withdrawal', establishing in particular the framework for its future relationship with the Union (Article 50(2) TEU), but not on the withdrawal itself.⁵⁸ This does not mean, however, that the withdrawal process could not be suspended, if there was mutual agreement between the withdrawing state, the remaining Member States and the EU institutions, rather than a unilateral revocation.⁵⁹

5.3 Consequences of withdrawal and possible content of agreement

Under Article 50(3) TEU, the legal consequence of a withdrawal from the EU is the end of the application of the Treaties and the Protocols thereto in the Member State concerned from that point on. EU law would cease to apply in the state concerned, although any national acts adopted in implementation or transposition of EU law would remain valid until the national authorities decide to amend or repeal them. A withdrawal agreement would need to address the phasing-out of EU spending programmes and other EU norms. Most experts agree that in order to replace EU law, specifically in the field of exclusive EU competence, the withdrawing state would need to enact substantial new legislation, and that, in any case, complete isolation of the withdrawing state from the effects of the EU *acquis* would be impossible if there were to be a future relationship between the former Member State and the EU.⁶⁰ The rights and obligations deriving from the Treaties would extinguish, at least to the extent agreed between the EU and the withdrawing state. Moreover, agreements between the EU and third countries or international organisations, for instance trade agreements, would cease to apply to the withdrawing state too.

5.3.1 Partial withdrawal?

Some commentators have proposed exploring the possibility of an extensive withdrawal agreement creating an '*à la carte*' membership for the state concerned. Limits to such an arrangement would, according to them, need to be drawn to avoid this amounting to an abuse of Article 50 TEU. This could be the case if the state's

⁵⁷ Steve Peers, '[Article 50 TEU: The uses and abuses of the process of withdrawing from the EU](#)', EU Law Analysis blog, December 2014; Alan Renwick, '[What happens if we vote for Brexit?](#)', Constitution Unit, University College London, January 2016.

⁵⁸ See in this sense Allan F Tatham, 'Don't mention divorce at the wedding, Darling!: EU accession and withdrawal after Lisbon', A Biondi, P Eeckhout, S Ripley (eds.), *EU law after Lisbon*, Oxford 2012, pp. 128. 152.

⁵⁹ Adam Łazowski, '[Withdrawal from the European Union and alternatives to membership](#)', *European Law Review* 2012, p. 530.

⁶⁰ Phedon Nicolaidis, '[Withdrawal from the European Union: a typology of effects](#)', *Maastricht Journal*, Vol. 20, 2013, pp. 209, 218.

reduced obligations under EU law were not mirrored in limits on its participation in EU decision-making.⁶¹ However, Article 50 TEU would not seem to be the correct legal instrument to achieve such a 'partial withdrawal' if the state concerned remained a Member State of the EU. Rather, Treaty-change procedures are seen in the academic literature as more appropriate if the UK wished to further deepen its opt-outs from different policy areas.⁶²

5.3.2 Transitional provisions on 'acquired rights'

The arrangements made for the withdrawal of a Member State could aim at attenuating its consequences, including through transitional application of some EU legislation in the withdrawing state so as to protect any individual subjective rights based on them.

As regards the rights deriving from EU citizenship, some scholars have argued that EU citizenship can stand alone, detached from the nationality of a Member State, so that the nationals of the state in question would keep their Union citizenship even after that state's withdrawal from the EU.⁶³ This reasoning is based on the assumption that some of the nationals of a withdrawing state would involuntarily lose their Union citizenship in the case of withdrawal. However, this is highly controversial and the vast majority of experts agree that the nature of EU citizenship, as 'additional' to a Member State's nationality (Article 20(1) TFEU), cannot be interpreted as giving Union citizenship a self-standing character. It should also be noted that the decision to withdraw from the EU would have been taken according to the constitutional requirements of the state concerned and thus taking into account all possible consequences, including for the individual citizens of the withdrawing state. Furthermore, some commentators believe that any (private or public) contract-based rights would persist as long as the contracts would remain valid,⁶⁴ although it can be expected that a withdrawal agreement would address such issues, in order to guarantee legal certainty.⁶⁵

5.4 After a withdrawal: a new relationship with the EU?

Most supporters of the UK leaving the EU argue for a new relationship with the EU and with the other Member States. Proposals range from the UK becoming a member of the European Economic Area (EEA) and the European Free Trade Area (EFTA), adopting the Swiss model, concluding a free trade agreement with the EU or entering into a customs union with the EU (like Turkey).⁶⁶

⁶¹ Oliver Dörr, 'Commentary to Article 50 TEU', para. 30, E Grabitz, M Hilf, M Nettesheim (eds.), *Das Recht der Europäischen Union: EUV/AEUV*, 57th ed., C.H. Beck, 2015.

⁶² Bruno de Witte, 'Partial EU membership – which legal options and scenarios?', [United Kingdom's renegotiation of its constitutional relationship with the EU: agenda, politics and risks](#), op. cit., pp. 30 et seq.

⁶³ Clemens M Rieder, '[The withdrawal clause of the Lisbon Treaty in the light of EU citizenship: between disintegration and integration](#)', *Fordham International Law Journal*, Vol. 147, 2013, pp. 147, 168-172.

⁶⁴ Phedon Nicolaides, 'Withdrawal from the European Union: a typology of effects', op. cit., p. 214.

⁶⁵ See further to the consequences of a withdrawal by the UK from the EU, Vaughne Miller, '[EU referendum: impact of an EU exit in key UK policy areas](#)', House of Commons Library, CBP-7213, February 2016.

⁶⁶ See the comprehensive overview provided by Jean-Claude Piris, '[Should the UK withdraw from the EU: legal aspects and effects of possible options](#)', Fondation Robert Schuman, European issues No 355, May 2015; see also by the same author, '[Brexit or Britin: is it really colder outside?](#)', Fondation Robert Schuman, European issues No 369, October 2015.

If the UK were to become a member of the EEA and EFTA, it would participate in the internal market but not in other policy areas. However, it would need to apply EU legislation related to the internal market, as interpreted by the Court of Justice, without being involved in the decision-making process, and with no vote in Council or Parliament. It would also need to pay a financial contribution to the EU budget and be subject to decisions of the EFTA Surveillance Authority and the EFTA Court.

The Swiss model is, by contrast, more tailored and would mean the conclusion of many bilateral 'sectoral' agreements (Switzerland currently has some 120 agreements with the EU). Internal market rules as interpreted by the Court of Justice, would also need to be followed by the UK in this case, with no say in the decision-making process.

The customs union model, as the EU has with Turkey, does not provide access to the internal market.

6 Next steps

6.1 UK campaign and referendum

6.1.1 *David Cameron's statement of 20 February 2016*

Following the European Council of 18-19 February, David Cameron held a special meeting of the Cabinet to update his Ministers on the outcome of the renegotiation, and he gave a statement⁶⁷ afterwards, saying 'the Cabinet agreed that the Government's position will be to recommend that Britain remains in a reformed European Union.' He also noted that 'individual Cabinet ministers will have the freedom to campaign in a personal capacity as they wish.' In addition, he confirmed that he would propose to hold the referendum on 23 June 2016. This date had been widely anticipated, notwithstanding controversy⁶⁸ due to its proximity to elections to the devolved assemblies and certain local governments, all taking place on 5 May 2016.

On 22 February 2016, Mr Cameron made a statement to the House of Commons,⁶⁹ setting out the agreement reached in the European Council and the case for the UK to remain in a reformed EU.

6.1.2 *EU Referendum Act*

As the proposed new settlement for the United Kingdom within the European Union has been agreed, the UK will now make arrangements to hold its referendum on whether to remain in the EU on these terms or whether to leave.

The arrangements for the referendum are set out in the European Union Referendum Act 2015.⁷⁰ Some key provisions of the Act are that:

⁶⁷ [Prime Minister's statement following Cabinet meeting on EU settlement](#), 20 February 2016.

⁶⁸ There had been long-standing pressure to avoid any overlap between the minimum 10-week referendum campaign and the election campaigns for the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly and for the London Mayor and Assembly, as well as local government elections in some parts of England, culminating on 5 May. See for instance House of Commons Opposition Day Debate on 'EU Referendum: Timing' [column 944 Official Report](#) (Hansard), 9 February 2016. Nonetheless, with the referendum set for 23 June 2016, there will now be a three-week overlap.

⁶⁹ House of Commons [Official Report](#) (Hansard) Volume 606, No 117, 22 February 2016.

⁷⁰ [The European Union Referendum Act 2015](#) which gained [Royal Assent](#) on 17 December 2015. The provisions of the Act not already in force as of Royal Assent were brought into force on 1 February 2016 by the [European Union Referendum Act 2015 \(Commencement\) Regulations 2016](#).

- a referendum must be held by the end of 2017 at the latest, with the exact date set by secondary legislation;
- the question to be put will be 'Should the United Kingdom remain a member of the European Union or leave the European Union?';⁷¹
- for the franchise, please see box 'Who can vote?' below;
- at least 10 weeks before the referendum, the Government must publish:
 - Information on the outcome of the negotiations on the UK's membership of the European Union and the UK government's opinion on this;⁷²
 - Information on important rights and obligations resulting from the UK's EU membership and examples of non-EU member countries having other arrangements with the EU, describing those arrangements;
- certain restrictions are placed on individuals, such as civil servants, and bodies who are wholly or mainly publicly funded. They may not publish material relating to the referendum question or encourage voting during the final 28 days of the campaign, ending with the poll (namely during the pre-election period often referred to as 'purdah');⁷³
- secondary legislation, setting out detailed regulations in a number of areas, is required before the referendum can take place. These areas include:
 - Setting the date of the referendum;
 - Setting a 'referendum period' (of at least 10 weeks' duration) during which the campaign is regulated;
 - Setting the timing for the period when lead campaign groups are to be designated;⁷⁴
 - Regulations to govern the conduct of the referendum (which must be made only after first consulting the UK Electoral Commission);
- the Government could also choose to make regulations to amend the rules for 'purdah' (see above), but this has to be done at least four months before the referendum is held and after consulting the Electoral Commission;⁷⁵
- the Act provides for the designation process for the lead campaigns, time periods for pre-poll reporting of loans and donations, and detailed rules about the administration of the referendum;
- the Act includes three schedules setting out amongst other things, various rules on campaigning, financial controls and the running of the referendum.

⁷¹ This wording followed [consideration](#) from the [Electoral Commission](#) (an independent body, set up by the UK Parliament, which regulates party and election finance and sets standards for well-run elections) as required by the [Political Parties Elections and Referendums Act 2000](#).

⁷² This requirement was met with publication of the UK Government's White Paper on 22 February, '[The best of both worlds: The United Kingdom's special status in a reformed European Union](#)'.

⁷³ Section 125 of the [Political Parties Elections and Referendums Act 2000](#) governs the so-called 'purdah' or 'pre-election period' for referenda. See '["Purdah" before elections and referendums](#)', House of Commons Library, SN-5262, 15 July 2015, p. 4.

⁷⁴ A maximum of one [designated lead campaign group](#) for each side of the debate may be chosen by the Electoral Commission. They get a number of benefits, including higher spending limits, access to public funding and the right to make broadcasts and have one free distribution of information to voters.

NB If such a group is not designated for *both* sides, the one that is designated would not receive the public funding or the right to broadcasts.

⁷⁵ The exact application or otherwise of 'purdah' had been controversial during the passage of the 2015 Bill. The final legislation in the Act represented a compromise, see '[European Union Referendum Bill 2015-16: Progress of the Bill](#)', House of Commons Library, CBP-7249, 11 December 2015, p. 17.

Who can vote?

The franchise for the UK referendum is based on that applicable to general elections and includes British citizens resident in the UK; qualifying Commonwealth citizens resident in the UK; Irish citizens resident in the UK; British citizens living abroad, who can be registered to vote for up to 15 years⁷⁶ after leaving the UK in the constituency they were registered, or resided, in prior to leaving; and certain others (such as Members of the House of Lords who are able to vote at local or European Parliamentary elections, but not general elections, in the UK, and Commonwealth and Irish citizens able to vote at European Parliamentary elections in Gibraltar).

The minimum voting age is 18 years.⁷⁷ Attempts to amend the referendum legislation to lower the voting age to allow 16 and 17-year olds to vote were defeated during the passage of the Bill through Parliament.

6.1.3 Secondary legislation and other requirements

As noted above, the UK government must put in place a number of pieces of secondary legislation before the referendum can be held. There was also the option to legislate to adjust the rules on 'purdah', but given the planned timing of the referendum vote and the requirement for any such regulations to be made four months beforehand, this option will not be taken up.

Regulations governing the conduct of the referendum were laid before Parliament on 25 January 2016.⁷⁸ These had previously been published in draft form on 21 July 2015⁷⁹ and the Electoral Commission had been consulted as required, together with some further informal consultations.⁸⁰ These regulations ('Statutory Instruments') have to be scrutinised in both the House of Commons and the House of Lords, which each need to approve them before they can take effect. The conduct regulations were approved by the House of Commons on 22 February, and in the House of Lords on 24 February.

Draft regulations to set the date of the referendum as 23 June 2016 were laid on 22 February 2016.⁸¹ These set the start of the referendum period as 15 April, giving a ten-week period (the minimum permitted) for the regulated campaign. This will mean an overlap with the election campaigns for the devolved assemblies and certain local governments in the final three weeks leading up to those elections on 5 May. The regulations also set out that organisations can apply to be designated lead campaign bodies in the 28 days starting from 4 March. After this period, the Electoral Commission will then have up to 14 days to decide which (if any) organisations to designate for each side (they can designate up to one per side). This means the designation process will be completed, at the latest, by the time the regulated referendum period starts on 15 April 2016.

⁷⁶ Although there was a commitment in the [Conservative Party Manifesto 2015](#) to 'introduce votes for life, scrapping the rule that bars British citizens who have lived abroad for more than 15 years from voting' the 15-year limit remains.

⁷⁷ As with [UK Parliamentary general elections](#) (but in contrast to the 2014 [Scottish independence referendum](#) where most people aged over 16 living in Scotland could vote).

⁷⁸ [Draft European Union Referendum \(Conduct\) Regulations 2016](#)

⁷⁹ See [written Ministerial statement](#) of 21 July 2015.

⁸⁰ As set out in the [explanatory notes](#) to the draft regulations, page 4.

⁸¹ [Draft European Union Referendum \(Date of Referendum etc.\) Regulations 2016](#). The Government aims to have these regulations approved in both Houses during the week beginning 29 February.

As noted above, the European Union Referendum Act 2015 also sets out requirements for the government to publish certain information at least 10 weeks before the referendum. On 22 February 2016, the government published a White Paper⁸² detailing the outcome of its negotiations on UK membership of the EU and its opinion on this. This satisfies the obligations set out in section 6 of the Act. Information covering the requirements under section 7 of the Act is to be published separately. This information must cover rights and obligations resulting from the UK's EU membership and examples of non-EU member countries having other arrangements with the EU.

6.2 What happens after the referendum?

6.2.1 *Not legally binding – but politically so?*

Whilst the outcome of the referendum is technically only advisory – as with the 2014 Scottish referendum on independence, and the 1975 referendum on EC membership – the expectation is that political realities would mean the result would have to be respected.⁸³ Moreover, the Conservative Party's 2015 Manifesto explicitly committed the Party to 'respect the outcome' of the promised referendum, and David Cameron has reiterated that view publicly on several occasions. Some⁸⁴ have speculated about the possibility of a second referendum being held after a vote to leave, either about the terms negotiated for the UK's exit or, alternatively, following further negotiations resulting in a revised deal for the UK to stay after all. However, the Prime Minister and Chancellor of the Exchequer have both dismissed this possibility.⁸⁵ The February European Council conclusions state that the arrangements to offer the UK a new settlement in the EU will cease to exist if the UK should vote to leave.⁸⁶ As noted above, it is also unclear legally whether a request from a Member State to withdraw from the EU made under Article 50 TEU can be revoked unilaterally after renegotiation.

6.2.2 *Some possible complications*

One potential complication already highlighted by the Scottish First Minister, Nicola Sturgeon,⁸⁷ as well as various commentators,⁸⁸ is the prospect of significantly different voting patterns in different parts of the UK.⁸⁹ According to polling,⁹⁰ Northern Ireland

⁸² [‘The best of both worlds: the United Kingdom’s special status in a reformed European Union’](#), 22 February 2016.

⁸³ According to a [post](#) by Alan Renwick, Deputy Director of [the Constitution Unit](#).

⁸⁴ These have included a [Director of the Vote Leave](#) campaign, [Conservative Home](#) and [Open Europe](#).

⁸⁵ According to a [Reuters](#) article, and in a [BBC interview](#), respectively. Furthermore, David Cameron again repeatedly ruled out this possibility in the House of Commons on 22 February.

⁸⁶ The [European Council Conclusions](#) (18-19 February 2016) state ‘It is understood that, should the result of the referendum in the United Kingdom be for it to leave the European Union, the set of arrangements referred to in paragraph 2 above [i.e. the various arrangements agreed by the Heads of State or Government as a response to the UK’s concerns] will cease to exist.’

⁸⁷ First Minister Nicola Sturgeon (Scottish National Party) noted, for example in a [speech](#) in June 2015, the Scottish Government’s call for a ‘double majority’ being required in the referendum vote (i.e. that any vote to leave would require not just a majority in the UK as a whole, but majorities in England, Scotland, Wales and Northern Ireland individually).

⁸⁸ For instance this [Daily Telegraph article](#) highlights the former UK Prime Minister Tony Blair’s view that the UK leaving the EU could precipitate Scotland leaving the UK.

⁸⁹ Individual results will be declared for a total of 382 counting areas – 326 in England, 32 in Scotland, 22 in Wales, plus Northern Ireland and Gibraltar – but only the overall result counts.

⁹⁰ According to an article of 15 January 2016 by [the UK in a changing Europe initiative](#) ‘[Divided by Europe: the UK nations and the EU referendum](#)’ an average of May to December 2015 polling by respected organisations shows that England is 51% to 49% in favour of remaining and Wales is 52% to 48%, whilst Scotland (at 66% to 34%) and Northern Ireland (at 75% to 25%) are both significantly more in favour of remaining.

(which polls suggest is currently three to one in favour of staying)⁹¹ and Scotland (two to one) are much more likely to vote 'remain' than England or Wales (both marginally for remain, but close to evens). Whilst the vote is decided at UK level, different outcomes in different parts of the UK could be problematic politically. Most notably, an overall UK vote to leave, combined with a clear Scottish vote to stay, could fuel renewed calls for Scottish independence. There are other potentially tricky scenarios too. One such would be a narrow vote in England to leave being out-weighted by votes in the other three parts of the UK⁹² to stay. Leaving aside these issues, other complications could include a particularly close overall result tempting some to feel the matter has not been definitively settled, or the prospect that the outcome results in a significant change of personnel within government, which could cause delay or add uncertainty to subsequent steps, even though David Cameron has said he would stay on as Prime Minister, regardless of any referendum decision to leave.

6.2.3 *The UK votes to stay in the EU*

According to the Decision of the Heads of State or Government concerning a new settlement for the United Kingdom within the EU, 'This Decision shall take effect on the same date as 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.'⁹³ There are no other conditions required for the Decision to take effect.⁹⁴ As noted above, some follow-up procedures, in particular legislative proposals from the Commission, and involving the European Parliament as co-legislator, would need to be put in train – as well as in the longer term Treaty changes when the opportunity arises.

6.2.4 *The UK votes to leave the EU*

The exact process is clearly more uncertain. But the assumption is that negotiations would begin under the terms of Article 50 TEU, initiated by the UK notifying the European Council of its wish to withdraw. David Cameron indicated in the House of Commons on 22 February that, in the event of a 'leave' vote, the Article 50 process would be initiated 'straight away'. A number of possibilities have been floated for the UK's relations with the EU after exit and how these could be formalised,⁹⁵ and these are covered above.

⁹¹ The [Northern Ireland parties](#) are not all in favour of remaining in the EU, however.

⁹² This and some other scenarios are discussed, for instance, in an [article](#) published by [Open Democracy](#).

⁹³ See [European Council Conclusions](#) (18-19 February 2016), Annex 1 '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', page 24, section E, paragraph 2.

⁹⁴ According to p. 4 of the [opinion](#) of the Legal Counsel of the European Council.

⁹⁵ For an overview of some options see, for instance, '[United Kingdom's renegotiation of its constitutional relationship with the EU: agenda, priorities and risks](#)' Directorate-General for internal policies, Policy Department C, European Parliament, 2015, p. 25.

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Following the election of a majority Conservative government in the UK general election of May 2015, the British Prime Minister, David Cameron, opened negotiations with the other EU Member States and the EU institutions to establish a 'new settlement' between the UK and the Union. This renegotiation, conducted in recent months, has now concluded.

On the basis of proposals made by the President of the European Council, Donald Tusk, Member States reached an agreement at the European Council meeting of 18-19 February. The agreement comprises a decision by the Heads of State or Government – constituting an agreement between Member States under international law rather than a European Council decision – as well as a draft Council decision on the banking union and several declarations by the European Commission committing it to submit proposals to amend existing EU legislation in the fields of free movement and access to social benefits for EU workers. The agreement would enter into force once the UK has notified the Council of its decision to stay in the EU, following the in-out referendum, now set for 23 June 2016.

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