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A Win-Win Situation? What to Make of the EU-UK Deal

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After over three months of intense multilateral negotiations, an agreement on a new settlement for the United Kingdom within the European Union was successfully concluded at last week's European Council. The deal allows the British government to deliver on its plans for a referendum on EU membership to be held in June 2016. While Prime Minister David Cameron will now need to convince British voters that he has negotiated a strong and credible package for the UK, other EU leaders also will seek to explain to their publics that they have secured their national and European interests. The contents of the deal actually allow for both claims.

David Cameron had fair reason to celebrate over the weekend. On 19 February, after many hours of intense multilateral negotiations, the European Council approved, with some corrections, the package of reforms proposed on 2 February by President of the European Council Donald Tusk for a new settlement for the United Kingdom within the European Union.[1] The agreement ends the first phase of the renegotiation process between Brussels, London and the other 27 Member States and passes the burden of the effort entirely to Cameron to sell the deal at home and negotiate a "remain" vote with his own people. The first step has already been taken: securing the deal at the European Council February summit has sent a positive message to the British public that the EU has taken the UK seriously at a time when multiple crises across the Union demand urgent solutions.

Despite the obvious flaws of a "compromise deal," there are several reasons to think about this UK-EU deal as a major political achievement. First, it proves that a complex international governance structure composed of 28 different Member States is capable of critical self-reflection and forging a compromise to accommodate the different visions of how it should function. Second, the deal not only contains a credible declaration of principles by which a differentiated EU should be governed but also a set of concrete legal provisions for how to achieve it. Third, it quite skilfully reconciles some of the most controversial British demands[2] with EU political reality, avoiding opening up the treaties. Finally, it allows all the parties to go back to their capitals and sell the deal nicely to their domestic publics.

The package agreed last Friday is composed of seven legal texts of various forms,[3] but its main part is contained in the "Decision of the Heads of State or Government," which will be deposited with the United Nations as a legally binding act of international law and which will enter into force only if British voters

[1] "Letter by 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," European Council, 2 February 2016.
[2] K. Borońska-Hryniewiecka, "Skating on Thin Ice: The Problematic Renegotiation of the British EU Membership," *PISM Bulletin*, no. 105 (837), 18 November 2015.
[3] Decision of Heads of State and Government; Statement of the Heads of State and Government, Declaration by the European Council, four Declarations by the European Commission.

decide in the referendum whether to remain in the EU. The "Decision" contains reforms in four areas postulated by Cameron in his letter to Donald Tusk of 10 November 2015.[4] In the field of "competitiveness," the proposals to strengthen and deepen the single market and reduce EU red-tape have not caused much controversy and have been generally accepted by all Member States. As such, this paper focuses on the three remaining elements of the deal, which include social benefits for EU immigrants, issues of sovereignty and EU economic governance.

Non-discriminatory Reform of Social Benefits

The question of EU migrants' social welfare benefits has been the most contentious in the EU-UK dispute over the last few months. Similarly, asked what item on the British renegotiation agenda they perceive as decisive, 52% of Britons pointed to increased control of EU immigration, whereas 46% cited withholding migrants' benefits.[5] Even if these ideas stem from false social perceptions that EU immigrants abuse the British social welfare system,[6] it has to be remembered that putting a cap on the number of people entering the UK was Cameron's original idea back in 2014. Ruled out by the rest of the EU as an unacceptable blow to the principle of the free movement of people and, in fact, a breach of EU law, the idea was replaced by the British Prime Minister with a demand for a ban on in-work benefits for EU immigrants living in the UK for the first four years. He also demanded an end to the practice of paying child benefits to children living outside of the UK. While these proposals also faced opposition from many EU Member States on the grounds that they discriminated against EU citizens, the negotiators started to look at how to tighten access rules to benefits within the limits of the existing EU treaties.

As a result, the approved deal offers a "safeguard mechanism" (informally called an "emergency brake") that allows a Member State to introduce restrictions on in-work benefits for EU immigrants when an exceptional influx of workers over some period of time exerts "excessive pressure" on its public services. Compared to the British point of departure on the issue, this solution seems to be a reasonable compromise. First, immigrants who already live and work in the UK will not be affected by any restrictions since the mechanism will be directed at workers newly entering the labour market. Second, this solution is symmetric and does not privilege only the UK, since, theoretically, it might be applied by any Member State when it experiences excessive systemic pressure. Third, its application will not be permanent but temporary (for a maximum of four years with regard to any new worker) and will be gradually phased out over time. While Tusk's proposal foresaw three empty brackets in sections devoted to the total duration of the brake and the lengths of two additional extension periods, on Friday morning these blanks became last-minute stumbling stones on the way to a deal. The fight over the numbers ended with a compromise of seven years as the total duration of the brake with no possibility of renewal. This change should be seen as a victory for the Visegrad countries, which wanted to limit the time for benefit curbs to the shortest possible period, but it also reduces the risk that the EU Court of Justice might challenge it.

Aware that British Tories would not buy a hypothetical safeguard mechanism that would be hard to use in practice, let alone be left to the mercy of Brussels for verification, in a separate "Declaration" attached to the "Decision," the European Commission confirmed that, based on information provided to it by the British government, the UK currently qualifies to use the emergency brake. In fact, this is the most controversial statement in the whole package because it does not provide any specific information on which grounds and by what measures the Commission assessed the situation to be "excessive pressure" on the UK public services. While it could have been expected that the Member States would have demanded the EU present a transparent and objective verification mechanism, surprisingly, the issue was not raised at the EU level. Yet, to appease the Visegrad countries, which expressed worry that the emergency brake might set a precedent for general use, the "Declaration" underlines that the UK qualifies to use the mechanism especially because it had not made use of transitional periods for letting in EU immigrants after the eastern enlargement in 2004. To what extent such an observation actually decreases the possibility that other EU Member States that used transitional periods (such as Denmark, Austria or Germany) could restrict immigrant benefits remains to be seen.

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[4] D. Cameron, "A New settlement for the United Kingdom in a reformed European Union," Letter to European Council President Donald Tusk, 10 November 2015.

[5] "EU referendum polling. Is the 'leave' number soft?," https://yougov.co.uk/news/2015/12/10/eu-polling-soft-leave.

[6] H. Warren, "EU migrants pay £20bn more in taxes than they receive, *Financial Times*, 5 November 2014, www.ft.com/intl/cms/s/0/c49043a8-6447-11e4-b219-00144feabdc0.html#axzz403wOxllL.

It is important to stress that the brake will not take effect instantly after the British referendum because it requires introducing changes to secondary EU legislation (an amendment to Regulation No 492/2011 on the freedom of movement). Such changes will have to take place through the ordinary legislative procedure, which requires the acceptance of the European Parliament and the Council and might take several months. The biggest British concern at the moment is that the fate of a positive EP vote in this matter is not guaranteed. In this regard, at the latest press conference, EP President Martin Schulz assured interested parties that Parliament will do its utmost to support the compromise solution as achieved and will proceed with the legislative process as fast as possible. Yet, it cannot be ruled out that even approved legislative changes to social benefits could be challenged by the Court of Justice of the EU on the grounds of indirect discrimination.[7]

With regard to Cameron's proposal to end the practice of sending child benefits abroad, the agreement does not go as far as that but instead provides that these benefits be indexed to the conditions of the Member State where the child resides,[8] and that such indexing will be optional for the "benefit-exporting" country. This issue was the subject of a lengthy debate at last week's summit, which resulted in two important changes to Tusk's proposal. First, it was decided that until 1 January 2020, the indexing will apply only to new claimants and after that date Member States that decide to use this option will be able to extend indexation to currently "exported" benefits. This transition period, proposed by Poland and others, is another concession Cameron made with respect to his original demands. More importantly, it was made clear that the indexing system will not be extended to other types of benefits, such as old-age pensions, for example. Since indexing child benefits, as with the emergency brake, requires changes to EU secondary legislation, it will have to have EP acceptance as well.

A "Careful" Answer to the Problematic Question of Sovereignty

In the area labelled by Cameron as "sovereignty"—a concept very dear to British hearts—the UK has made three proposals, namely to end its obligation to work towards an "ever-closer union"—a phrase so often mistakenly reviled by the Brits as "further political integration;"[9] grant national parliaments the possibility to stop unwanted EU legislation; and, fully implement the principle of subsidiarity in EU policymaking.

The first issue is probably where Cameron has won the most ground but also the most symbolism. The "Decision" not only emphasises that the "ever-closer union of peoples" does not entail the further transfer of competences to Brussels and is compatible with different paths of integration for different states but it also grants the UK a promise of an opt-out from the clause.[10] With this, the final deal has managed to accommodate the most ambiguous and problematic British demand, which required a concession from more integrationist states such as France and Belgium. Crucially, for the UK the agreement ensures the incorporation of an appropriate provision to secure the opt-out in the treaty when it is next revised. Yet, in order not to threaten the integrity of the EU by opening a Pandora's box of similar demands by other Member States in the future, this provision will only apply to the UK.

With regard to ensuring that the principle of subsidiarity (decisions should be taken as close to the citizen as possible) is fully implemented, the "Decision" provides that reasoned opinions issued by national parliaments under "Protocol No. 2" of the Lisbon Treaty[11] must be respected by all EU institutions in the decision-making process. The document mentions, "appropriate arrangements" for how to ensure it. It might be expected that such arrangements refer to putting pressure on the Commission to improve its communication with national parliaments under the "early warning system" for subsidiarity control, which

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[7] S. Peers, "The draft renegotiation deal: EU immigration issues," *EU Law Analysis*, 2 February 2016, http://eulawanalysis.blogspot.com/2016/02/the-draft-renegotiation-deal-eu.html.

[8] According to the Commission, these conditions include the standard of living and the level of child benefits applicable in the Member State where the child resides.

[9] K. Borońska-Hryniewiecka, *op. cit.*

[10] Compare with: "European Council conclusions of 27/28 June 2014," www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf.

[11] Article 6 of "Protocol No. 2" on the application of the principles of subsidiarity and proportionality attached to the Treaty of Lisbon provides national parliaments of EU Member States with an "early warning system" tool to control the EU legislative process. Within its framework, national chambers can scrutinise an EU draft legislative act and issue a reasoned opinion stating why they consider that the draft in question does not comply with the principle of subsidiarity.

has not been satisfactory.[12] Additionally, in the separate "Declaration," the Commission commits to establishing a mechanism to review the body of existing EU legislation for compliance with the principles of subsidiarity and proportionality.

Finally, Tusk's proposal offers a concrete way to enhance the role of national parliaments in the EU legislative process. To this end, it provides that if a number of parliaments representing more than 55% of the votes allocated to them under the subsidiarity control mechanism[13] will issue reasoned opinions on a breach of the subsidiarity principle, the Council of the EU will hold a comprehensive discussion on these opinions and either amend the draft in question or discontinue its consideration. While this is a substantial innovation to the previous system of subsidiarity control,[14] it falls short of Cameron's postulate to grant national parliaments the right to "stop unwanted legislation," something many eurosceptics demanded and euro-enthusiasts feared. While the 55% measure *de facto* allows national parliaments to prevent some legislative proceedings at the EU level, it does so on very narrow grounds, namely a breach of subsidiarity. It does not refer to the policy content, merits or even proportionality of the legislative proposal in question. Breaches of subsidiarity by the Commission, as the initiator of EU legislation, are not common because before proposing any policy drafts, the Commission conducts its own "subsidiarity tests," that is, an assessment of whether the proposed policy action could not be sufficiently achieved by the Member States and in what ways EU intervention brings added-value.[15] Although since 2009 parliaments have been able to issue a "yellow card" after a third of them claims a subsidiarity breach, in the last six years yellow cards have been raised only twice. [16] This shows that either national parliaments have difficulty acting together in making a subsidiarity assessment or that the notion that the EU constantly oversteps its competences is quite a stereotype. Finally, if to date a third of parliaments have not been able to act more frequently, the threshold of 55% will be even more difficult to attain.

While the above might serve as arguments to convince supporters of the EU that the deal does not allow parliaments to "block" EU legislation, eurosceptics might view it as offering a potentially more effective tool than the original subsidiarity mechanism because it allows parliaments to influence the Council of Ministers, not the Commission. Taking into account the usually close relationship between parliamentary majorities and their governments, the Council might show more openness towards the "concerns" of their national parliaments and be more willing to re-examine a legislative proposal on broader grounds than just subsidiarity. One example of such behaviour was the "yellow card" issued to the European Public Prosecutor's Office in 2013.[17]

Fairness in Economic Governance

In his letter of 10 November 2015, Cameron's largest number of conditions was put forth with regard to the relationship between the eurozone and non-eurozone members. His proposals, which could be broadly described as "fairness safeguards," included recognition that the EU has more than one currency, no discrimination against any business on the basis of its currency, protection of the integrity of the single market, a provision that non-euro countries will never be liable for operations to support the common currency, that any banking union measure is voluntary for euro-outs, and, last, but most important, a mechanism allowing euro-outs to "co-decide" on issues debated by the eurozone that might affect all EU Member States.[18]

Although the principle of non-discrimination within the single market is enshrined in EU treaties, the British demands stem from long voiced fears that as the eurozone integrates further it might act as a bloc,

[12] K. Borońska-Hryniewiecka, "Democratizing the European multi-level polity? A re-assessment of the Early Warning System," *Yearbook of Polish European Studies*, 2013.
[13] The 55% means at least 31 of the 56 votes allocated to national parliaments under "Protocol 2" on the application of subsidiarity and proportionality attached to the Treaty of Lisbon (two votes for each national parliament; in the case of a bicameral parliament, each of the two chambers has one vote).
[14] K. Borońska-Hryniewiecka, "Democratizing the European multi-level polity? …," *op. cit.*
[15] K. Borońska-Hryniewiecka, "Regional parliaments and subsidiarity after Lisbon: Overcoming the regional blindness?," in: M. Cartabia, N. Lupo, A. Simoncini (eds.), *Democracy and Subsidiarity in the EU: National Parliaments, Regions and Civil Society in the Decision-Making Process*, Il Mulino-Percorsi, a Nova Universitas series, pp. 337–364.
[16] In 2012, in the "Monti II" proposal and again in 2013 in the proposal to establish a European Public Prosecutor's Office.
[17] Although the "yellow card" on EPPO did not stop the Commission from continuing work on the dossier, it generated further debate on the proposal at the level of the Council and effectively extended the legislative procedure.
[18] D. Cameron, *op. cit.*

imposing policy solutions detrimental to UK interests (especially to the financial stability of the City). While these concerns could be backed by a theoretically in-built qualified majority that eurozone states enjoy from 2014 in the Council of Ministers, in reality, euro-ins are internally divided on many policy approaches and do not present a unified position. Yet, either for the sake of a symbolic victory or the actual complacency of the Tory party, Cameron and his finance minister, George Osborne, have asked for clear and legally binding "proof of respect" for its monetary distinctiveness.

In this regard, the deal delivers on all fronts, including the prohibition of discrimination on the basis of currency, respect for the integrity of the single market, and a declaration that taxpayers in non-euro countries will not be liable for any emergency and crisis measures adopted by the eurozone. Most importantly, however, in a separate "Statement," the Heads of State agreed on a safeguard mechanism that provides for a case in which, when a non-euro Member State indicates it has reasonable opposition[19] to the Council's adoption of a legislative act, the latter should discuss the issue. When it does, the Council should, within a reasonable time, find a satisfactory solution to the concerns raised. The aim has been to provide a mechanism that, while giving necessary reassurances on the concerns of non-euro-area Member States, does not constitute a veto right. The possibility for the UK to block policy decisions in this case has been ruled out by France—especially sensitive about the integrity of the eurozone, along with Germany and Belgium—as an asymmetric privilege not enjoyed by any other Member State over any other EU policy sector.

While the original Tusk proposal contained an empty bracket for the number of non-eurozone countries that will be needed to trigger the mechanism, the final deal has placated the British by filling it in with "one." It is understandable from a functional and long-term perspective that the threshold should not be higher than two Member States in any case. Ultimately, only two Member States will remain outside the monetary union (the UK and Denmark),[20] so a higher threshold would be unachievable for them.

One of the last contentious issues that emerged in the negotiations[21] was the possibility of applying two-track banking rules to ensure financial stability in the euro area and among non-euro countries. According to the draft agreement, this differentiation was necessitated by the need for "more uniform" rules for the eurozone. Yet, in the eyes of some French and German politicians, granting the UK more regulatory independence could undermine the idea of fair competition within the European financial sector and the integrity of the common market. In order to appease these critics, the wording of the final agreement was changed to ensure that the rules in both cases (eurozone and non-euro Member States) correspond and that any divergence between them would be minimal in order to preserve the level-playing field within the internal market. In fact, most banking rules originate at the Basel Committee on Banking Supervision and have to be managed in an integrated fashion to avoid regulatory differences from generating barriers and uneven competitive conditions in cross-border trade between the eurozone and euro-outs.[22]

Time to Sell the Deal

Despite the obvious flaws in any compromise solution, the EU-UK deal seems to be less rotten than might have been expected. First and foremost, taking into account the point of departure, when the UK demanded the "impossible" in the face of outright opposition of some of the Member States, it has to be acknowledged that EU lawyers have done a good job. The final agreement cleverly reconciles Cameron's proposals with EU political reality, avoiding major treaty changes. Second, with a bit of political marketing, the deal allows all the parties to go back to their capitals and sell it nicely to their domestic publics.

To eurosceptics, the document clarifies the very privileged relationship the UK enjoys with the EU, releases London from the quest for further political integration and "ever-closer union" while giving national parliaments the possibility to genuinely block EU legislation that breaches the principle of subsidiarity. It also ensures the respected position of the British pound sterling in the EU and grants the City of London,

[19] According to the statement, concerned Member States should justify their opposition by indicating how the draft act does not respect the principles of mutual respect and non-discrimination and the integrity of the single market.
[20] The UK and Denmark enjoy a permanent opt out from the common currency.
[21] E. Maurice, "EU-UK talks stall over banking and benefits," *EUObserver*, 11 February 2016, https://euobserver.com/economic/132225.
[22] B. Jennen, J-A. Verlaine, "Two-track banking rules in EU-Cameron deal meet with scepticism," *Bloomberg Business*, 5 February 2016, www.bloomberg.com/news/articles/2016-02-05/two-track-banking-rules-in-eu-cameron-deal-meet-with-skepticism.

as well as other euro-outs such as Poland, the right to take part in euro-related policy deliberations that affect the interests of euro-outs. In doing this, it confirms eurozone inclusiveness and willingness to maintain non-discriminatory behaviour and builds long-term trust across the single market. Not surprisingly, the City of London is a strong supporter of the UK staying in the EU. Finally, the deal allows Britain not to pay migrants benefits in justified circumstances. Most importantly, however, the proposal has caused Cameron to change his tone, leave ambiguity behind and endorse the deal by stating that the secured reforms, are robust and good for Britain and that he will convince British people to remain in the EU "with all his heart and soul." In fact, it would be naive to expect that the EU would propose much more. No matter how hard the eurosceptics will work to discredit the deal, at the end of the day, any substantial offer to someone whose only bargaining chip is to stay in the negotiating room or to walk away is a generous offer.

To Euro-enthusiasts, the deal offers a "fair" and "non-discriminatory" way of keeping an important member in the club. In many aspects it also improves the functioning of the EU by ensuring the principle of subsidiarity, committing to reducing unnecessary regulatory burdens and strengthening the single market. It also offers convenient restrictions on migrants' benefits, ensuring that domestic systems do not become disadvantaged, without questioning the freedom of movement. In countries such as Poland, with a high record of emigration to the UK, the deal could be "sold" in conjunction with the new child benefits scheme or other government measures to improve the domestic labour market and keep Poles in Poland. Taking into account Poland's deteriorating demographic situation, measures discouraging Poles from emigrating to other EU countries are actually in its interest. From a broader perspective, and leaving the Brexit blackmail rhetoric aside, the agreement achieved at the latest European Council brings a certain comforting experience to the EU. It proves that 28 very different states joined by common interests are capable of conducting a comprehensive, self-critical review of their co-existence and agree on improvements, which—although not very substantial—still constitute a refreshing facelift.

And now that the deal is sealed, all eyes are set on the British voters, who soon will be making an assessment of not only the credibility of the renegotiation package but also the broader pros and cons of EU membership. While Cameron perfectly knows that the cost of a Brexit outweighs by far its benefits, he will have to face another historical challenge in convincing his people to think the same.