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Secretary of State

9 February 2016

Sir William Cash MP  
House of Commons  
London  
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Dear Bill

I attach a personal copy of the Council Legal Service's opinion on the legal form of President Tusk's proposals for the UK settlement – published today. This is not a public document so while I will draw on it tomorrow we should refrain from referring to it explicitly in the session. (Of course if it has made its way into the public sphere before tomorrow we can review that).

I thought you might want sight before the session.

Yours ever  
Philip

**THE RT HON PHILIP HAMMOND MP**



**European Council**

**Brussels, 8 February 2016  
(OR. en)**

**EUCO 15/16**

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**OPINION OF THE LEGAL COUNSEL**

**Subject:** Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union (doc. EUCO 4/16)  
- Form, legal nature, legal effects and conformity with the EU Treaties

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1. Questions were raised on 5 February 2016, at the meeting which examined the draft package of instruments which was tabled in order to address the concerns of the United Kingdom, regarding the form, the legal nature and the legal effects of the draft Decision of the Heads of State or Government, as well as its conformity with the EU Treaties. This opinion confirms the answers given at that meeting by the Legal Counsel of the European Council.

**Form: a Decision of the Heads of State or Government, meeting within the European Council**

2. The draft Decision, which is intended to be the centre piece of the "new settlement for the United Kingdom within the European Union", takes the form of a draft "*Decision of the Heads of State or Government, meeting within the European Council*". It is therefore a Decision of the Member States of the European Union, of an intergovernmental nature, not a decision of the European Council as an institution of the European Union under Article 15 TEU, within the meaning of the fourth paragraph of Article 288 TFEU, which would require to be based on a specific legal basis in the Treaties.

The addition of the phrase "*meeting within the European Council*" aims only at clarifying that the Heads of State or Government took the opportunity of their participation in a meeting of the European Council, of which they are all members, to adopt their decision.

3. This follows previous practice in comparable situations such as the *Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union*, which was adopted by the Heads of State or Government at Edinburgh, in the context of the European Council of 11 and 12 December 1992<sup>1</sup> ("the Edinburgh Decision") or the *Decision of the Heads of State or Government of the 27 Member States of the EU, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon*, which was adopted in the context of the European Council of 18 and 19 June 2009<sup>2</sup> ("the 2009 Decision").

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<sup>1</sup> Published in the *Official Journal of the European Communities*, OJ C 348, of 31 December 1992, p.2.

<sup>2</sup> See doc. 11225/2/09 REV 2, p. 17-19.

***Legal nature: an instrument of international law, concluded in a simplified form***

4. Like was the case for the two previous examples of 1992 and 2009, the draft Decision of the Heads of State or Government in the present case is an instrument of international law by which the 28 Member States agree on a joint interpretation of certain provisions of the EU Treaties and on principles and arrangements for action in related circumstances.

Adopting such an act, through an agreement concluded in a simplified form, is a prerogative recognised by international law, and notably by Article 31 of the 1969 Vienna Convention on the Law of Treaties, to the signatories of international treaties. This is why the first paragraph of the Preamble of the draft Decision spells out that the Heads of States or Government represent Governments that "*are signatories of the Treaties on which the Union is founded*".

5. Under Article 11 of the Vienna Convention, the consent of a State to be bound by an agreement may be expressed by any means agreed by the parties.<sup>3</sup>

In the present case, the final provision of the draft Decision in paragraph 2 of Section E does not require any formality for the parties to express their consent to be bound. It does not require any formality such as signing or notification of having accomplished a formal ratification or an other procedure in accordance with constitutional requirements.

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<sup>3</sup> Article 11 of the 1969 Vienna Convention on the Law of Treaties, which is entitled "*Means of expressing consent to be bound by a treaty*", reads as follows: "*The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.*" (emphasis added).

The only condition provided for the draft Decision to take effect is that the United Kingdom informs the Secretary-General of the Council that it has decided to remain a member of the European Union.

Therefore, the common accord reached by the Heads of State or Government, on the day they adopt the draft Decision, will be the means by which the parties agree, in the words of Article 11 of the Vienna Convention, to give their consent to be bound by the Decision and the Decision will take effect on the date indicated in Section E, paragraph 2.

6. The legal nature of the present draft Decision will therefore be the same which the two previous examples were recognised to have:
- a) in the case of the Edinburgh Decision, the Legal Counsel of the Council gave a legal opinion<sup>4</sup> concluding that the Decision was an agreement in a simplified form whose final provision did not require any particular ratification procedure and that therefore such a procedure was not necessary under international law for the Decision to become binding. He noted that this issue was however for each Member State to ascertain in the light of its constitutional order;
  - b) in the case of the 2009 Decision, its final provisions did not require either any particular ratification procedure and the Decision did not give rise to formal ratification procedures in the Member States.

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<sup>4</sup> See *Commentaire juridique de l'arrangement pour le Danemark tel que proposé par la Présidence pour le Conseil européen d'Edimbourg* by the *Jurisconsulte du Conseil*, 8 December 1992.

7. To the extent the draft Decision states the intention of the parties to incorporate "*the substance of [certain of its provisions] 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*",<sup>5</sup> it should be noted that such commitments are not of a nature that would require authorisation or ratification by the Parliaments of the Member States as would apply to an obligation undertaken to change the Treaties.

The two provisions in the draft Decision which state this intention refer to "*the substance of*" certain provisions, and not to their exact text, therefore not pre-negotiating their future drafting and not prejudging their precise future content when they will take the form of amendments to the Treaties. In addition, the two provisions in question expressly reserve the future application of the usual provisions for amending the Treaties by referring to "*their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States*" which is, in effect, a reference to Article 48 TEU which sets out the procedures for revising the EU Treaties.

8. Once adopted by common accord of all Heads of State or Government, the Decision can be amended or repealed only by their common accord. Any Member State can therefore oppose its amendment or repeal in the future.

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<sup>5</sup> See, shown in brackets, paragraph 1 of Section A and the last subparagraph of paragraph 1 of Section C.

***Legal effects: a legally binding instrument of international law***

9. Both under international law and EU law, the denomination of a particular instrument, whether it is called "decision", "agreement", "resolution" or else, is not important to ascertain its legal effects, the important elements being the content of the instrument and the will of its authors.

10. In the case of the present draft Decision, its content is drafted in such a way that many of its provisions use legal terminology commonly used in order to provide for legal obligations. The draft Decision contains provisions which are of interpretative character,<sup>6</sup> as well as provisions setting out principles and new arrangements.<sup>7</sup> Where providing for legal obligations was considered not necessary or appropriate, notably in order to respect the institutional autonomy of EU institutions, a few provisions have a descriptive or programmatic character.<sup>8</sup>

On the basis of the analysis of the content of the Edinburgh Decision, the Legal Counsel concluded, in his legal opinion referred to in paragraph 6(a) above that that Decision was legally binding in international law for the Member States.

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<sup>6</sup> See, for example, in Section A, paragraphs 1 and 5, Section C, paragraphs 1, 2, 4 (first and second subparagraphs) and 5 and Section D, paragraph 1.

<sup>7</sup> See, for example, in Section C, paragraphs 3 and 4 (last subparagraph).

<sup>8</sup> See, for example, in Section D, paragraph 2(a) and (b).

11. As to the will of the parties, the declared wish of the United Kingdom, as expressed in Prime Minister Cameron's letter of 10 November 2015, is that some of the concerns listed should be addressed by means of an instrument in a "*formal, legally-binding way*". The other Member States, represented by their Heads of State or Government, did not object to this approach.

In the case of the 2009 Decision, the Heads of State or Government decided to state expressly their will to consider the Decision to be legally binding. They declared, in the Conclusions of the European Council, that the Decision "*gives legal guarantees*" and that "*the Decision is legally binding*".<sup>9</sup>

In the present case, the European Council Conclusions accompanying the draft Decision could refer to a declaration of the Heads of State or Government having the same effect.

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<sup>9</sup> European Council Conclusions of 18 and 19 June 2009, paragraph 5(i) and (iii) (doc. 11225/2/09 REV 2).



12. In addition, with regard to the legal effects of interpretative provisions contained in a draft Decision of the Heads of State or Government similar to the present one, reference can be made to the case law of the Court of Justice of the European Union which, as recently as in 2010, in its judgment in Case *Rottmann*,<sup>10</sup> stated that the Edinburgh Decision of the Heads of State or Government was intended to clarify a specific issue (i.e. the concept of a national of a Member State) and that it "[had] *to be taken into consideration as being [an instrument] for the interpretation of the [Treaties]*".

This draws on Article 31(3)(a) of the Vienna Convention under which a subsequent agreement between the parties on the interpretation of a previous treaty is part of the context to be taken into account for interpreting that treaty.

In the present case, the interpretative authority of the draft Decision is stated expressly in the third paragraph of its Preamble, which uses the same wording as in the *Rottmann* judgment.

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<sup>10</sup> Judgment of the Court of Justice of 2 March 2010, in Case *Rottmann*, C-135/08, point 40.

### **Conformity of the Decision with the EU Treaties**

13. Finally, it should be pointed out that the draft Decision which has been tabled does not amend the EU Treaties, which can be achieved only following the specific procedures provided for this purpose by the Treaties themselves,<sup>11</sup> does not contradict them, and respects the institutional autonomy of the EU institutions which does not allow that their acts be revoked or amended by other entities.<sup>12</sup>

The second paragraph of the Preamble of the draft Decision, where the authors state their intention "to settle, in conformity with the Treaties, certain issues raised by the United Kingdom in its letter of 10 November 2015", clearly confirms this intention.

While fully respecting the Treaties and other components of the law of the Union, the draft decision is an act having legal consequence where it interprets Treaty provisions or foresees action requiring recourse to their procedures (including with regard to the new arrangements referred to above, see paragraph 10) with binding force. Its interpretative provisions draw on the case law of the Court and have the authority that the Court has recognised to such interpretative provisions in the above mentioned *Rottmann* Case (see paragraph 12 above). Where amendments to secondary EU legislation are foreseen, the Decision limits itself to register the declared commitment by the Commission to submit appropriate proposals.

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<sup>11</sup> See Judgment of 8 April 1976, Case 43/75, *Defrenne*, point 58: "(...) apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article [48 TEU]". See also Judgment of 3 February 1976, Case 59/75, *Manghera*, point 21.

<sup>12</sup> See Judgment of the Court of 28 April 2015, Case C-28/12, point 42: "(...) 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"; see also Judgment of 23 February 1988, Case C-68/86, point 38, and Judgment of 6 May 2008, Case C-133/86, point 54.