

LEGAL NOTES ON THE TUSK PACKAGE FOR THE UK

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1. The package proposed by the President of the European Council (“the Tusk Package” or “the Package”) consists of (i) a Draft Decision of the Heads of State or Government meeting within the European Council (“the MS Decision”), (ii) a Draft Decision of the Council (“the Council Decision”) and (iii) four Declarations (“the Declarations”), one from the European Council (“the EC Declarations”) and three from the Commission (“the Commission Declarations”). The objectives and contents of the package are clarified in Tusk’s accompanying letter.

2. The MS Decision is not an act of the European Council (EC). It is an act the Member States (MS) adopted within the EC but outside the EU legal framework. Additionally, it is not a decision; it is, in substance, an international agreement between MS, which is formally termed a decision.

3. Under Section E, the MS Decision would take effect on the same day that the UK informs the Council of its decision to remain a member of the EU. Thus, the Decision is meant to be binding and subject only to the outcome of the UK referendum.

4. Since the Decision is not subject to ratification by Member States, it is to be construed as an international agreement concluded in a simplified form, i.e., entering directly into force upon signing by the Heads of State or Government of the MS.

5. Agreements of this type are deemed valid under international law, provided the intention of the signatories to conclude a binding act is clearly spelled out. This appears to be the case for the MS Decision.

6. The validity of an agreement concluded in simplified form under the constitutional rules of each MS is a different question. In Italy, the question is debated by scholars and in the case law.

7. The MS Decision does not entail a revision of the Treaties, which would require compliance with the procedure of art. 48 TEU. In Sections A and C, however, it is stated (albeit in brackets) that the substance of these sections will be incorporated into the Treaties at the time of their next revision. A general statement to the same effect is contained in Tusk’s accompanying letter.

8. It is questionable, however, whether some of the reforms envisaged by the MS Decision may be legally introduced without a proper revision of the Treaties (Protocols included). The transformation of the so-called “yellow card” of the National Parliaments into a “red card” provides a notable example.

9. The Council Decision is for the moment a Draft Statement of the Heads of State or Government, which states that the Council will adopt a decision on economic governance issues. This decision (namely, the Council Decision) should enter into effect in parallel with the MS Decision.

10. The Council Decision should supplement Council Decision 2009/857/EC of 13 December 2007. It would establish a procedural mechanism (still subject to discussion) with similarities to both the “break clauses” of the Treaties and the “Luxembourg Compromise” of 1966. In the first case, it would allow MS opposing a decision to delay its adoption; in the second, it would amount to granting them a veto.

11. Turning to the declarations, the EC Declaration on competitiveness presents the same legal nature of all declarations issued by the EC. It has a strong political effect, but it is not legally binding.

12. The three Commission Declarations are somewhat similar to the communications (notices) of the Commission. They clarify how the Commission intends to interpret certain rules of EU law or initiate draft legislative acts in the field of competitiveness, social benefits, and free movement. As is the case with communications, these Declarations are not formally binding. Nonetheless, the Commission has a bona fide commitment to implement what it had previously announced.

13. One of the Commission Declarations authorizes the UK to immediately trigger a safeguard mechanism against an exceptional inflow of EU workers. Thus, in derogation of the general rule (supra, point 3), the effects of Section D, paragraph 2.b of the MS Decision would not be suspended without the UK referendum’s positive outcome. The safeguard mechanism contemplated therein would be immediately applicable and, presumably, remain effective within the EU even if the UK referendum has a negative result.

14. The Tusk package is characterized by the absence of any parliamentary involvement at both the national and the European level.

15. National Parliaments (“NPs”) would not intervene because of the simplified form of the international agreement concluded by the MS (supra, point 4). As to the other elements of the Package, they would be adopted by the EU institutions (EC, Council, Commission) within the EU legal framework and, thus, out of the direct reach of NPs.

16. The European Parliament (“EP”) would be excluded as well; actually, the acts of the EC, the Council, and the Commission comprised in the Package do not formally require the participation of the EP.

17. It is manifest, however, that the Package needs the support of the NPs and the EP for political, democratic, legal, and effectiveness reasons. This point does not require any special elaboration here. The problem is how to secure an appropriate parliamentary involvement in view of the envisaged time frame for the approval of the Package (next EC meeting of February 18-19).

18. A special inter-parliamentary session between members of the NPs and the EP could be organised to discuss the Package. One could also consider incorporating some points of the Package into an inter-institutional agreement between the EP, the Council, and the Commission. But, again, it is difficult to see how all this can be arranged within the time limit referred to above.