

# Towards a Solution for the Ratification Conundrum of the EU-Ukraine Association Agreement?

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A Decision of the EU Heads of State or Government, adopted as an [annex](#) to the 15 December 2016 European Council conclusions, should allow to proceed with the ratification process of the EU-Ukraine Association Agreement. This process had been stalled following the Dutch referendum of 6 April 2016 when over 61 % of the voters rejected the approval of the agreement in the Netherlands. Immediately after the referendum, Dutch Prime Minister Rutte announced a reflection period to study the different options to address the main concerns of the Dutch electorate while still enabling the Netherlands to ratify the agreement. The Brexit referendum delayed this exercise, and a first attempt to adopt a 'legally binding declaration' by 1 November 2016 failed. In the following weeks, Prime Minister Rutte threatened to terminate the ratification procedure if no acceptable solution would be found at the 15 December 2016 meeting of the European Council. After long and difficult discussions, the 28 Heads of State or Government adopted a decision addressing the Dutch concerns.

## Legal Nature of the Decision

The formula of a 'Decision of the EU Heads of State or Government, meeting within the European Council' is not new in the EU's legal practice. It has been used in the past in order to agree on certain guarantees for Denmark and Ireland in the wake of the negative referenda on the Treaty of Maastricht (December 1992) and the Treaty of Nice (June 2009) respectively and to decide on the location of the seats of a number of EU institutions and bodies. More recently, the "new settlement for the United Kingdom within the European Union", adopted before the Brexit referendum in response to David Cameron's request for a binding and irreversible new deal, also followed the same logic. In that context, an [opinion](#) of the Council's legal service already observed that this is "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".

In other words, the Decision is an instrument of international law by which the Member States agree on how they understand the EU-Ukraine Association Agreement. The European Council conclusions and an [opinion](#) of the European Council's legal counsel explicitly note that the Decision is legally binding on the 28 Member States and can only be amended or repealed by common accord of their Heads of State or Government. Both the title and the content of the instrument point in that direction. Yet, the legal implications are limited to the EU Member States alone: its provisions cannot create any legal obligations for Ukraine (unless Ukraine would formally declare its acceptance of the Decision). In that sense, it differs from the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States. The latter is a binding source of interpretation in the sense of Article 31 of the Vienna Convention on the Law of Treaties. The Decision on the EU-Ukraine Association Agreement, on the other hand, is a unilateral interpretation which can only be used to assess the intentions of the EU Member States when becoming parties to the agreement. It does not prejudice the interpretative position of Ukraine and cannot affect the content of the rights and obligations contained in the agreement itself. The Decision also does not entail a formal reservation or opt-out from specific provisions of the agreement. Hence, upon finalisation of the final ratification requirements, the EU-Ukraine Association Agreement will fully enter into force as a mixed agreement binding upon the EU and all its Member States. As such, its legal status will not be different from that of the largely comparable Association Agreements with Moldova and Georgia, which were not subject to a popular referendum and already entered into force without major discussions.

## Substance of the Decision

The Decision identifies six issues representing the main concerns that were raised during the referendum, i.e.

the link between the agreement and Ukraine's membership perspectives, the consequences of cooperation in the field of security, access to the national labour market, the financial implications of the agreement and, finally, problems of corruption and the state of the rule of law and democracy in Ukraine. Hence, the Decision must be regarded as an answer to the often false information that was spread during the referendum campaign. For instance, the 'no-camp' proclaimed that the Association Agreement is an entry ticket towards Ukraine's future EU membership, potentially leading to the involvement of Dutch soldiers in the Donbas region and a significant increase of financial support to a largely corrupt political system.

In essence, the Decision only confirms the text of the Association Agreement. This is particularly clear with respect to the importance of the fight against corruption and respect for democratic principles, human rights and fundamental freedoms and the rule of law as 'essential elements' of the association and the possibility to adopt appropriate measures in case of non-fulfilment of obligations. This can with so many words be derived from Articles 2, 3, 14, 22, 459 and 478 of the Association Agreement. Also with respect to the other issues, the Decision merely states the obvious. The Association Agreement does not provide for free movement of persons and only includes a modest section on mobility of workers (Article 18), which is nothing more than a stand-still provision. In the field of security cooperation, Articles 7 and 10 of the Agreement refer to the aim of gradual convergence in the area of foreign and security policy but this clearly falls short of providing for collective security guarantees. Finally, also with respect to the membership issue it is plainly evident that nothing in the Association Agreement leads to the conclusion that Ukraine is granted the status of a candidate country. This being said, the agreement does not exclude Ukraine's right to apply for membership under Article 49 TEU nor does it predetermine the EU's position if such a hypothetical scenario would materialise. The Decision does not and cannot affect this reality; it simply observes that there is no direct or automatic connection between the Association Agreement and Ukraine's membership perspectives.

## Next steps

The Decision will take effect upon the finalisation of all remaining ratification procedures. In practice, this requires the approval of the Dutch parliament (in two chambers) and the adoption of a unanimous Council Decision concluding the agreement. The domestic approval in the Netherlands is not to be taken for granted at this point since the ruling coalition of Prime Minister Rutte has no majority in the Dutch Senate. With upcoming elections in March 2017, the political context is rather difficult. If no parliamentary majority can be found for the continuation of the ratification procedure in the Netherlands, the EU arrives in legally uncharted waters. The option which is currently on the table is by far the easiest to solve the ratification conundrum while responding to the arguments of the 'no-camp' in the referendum campaign. Any alternatives, such as the inclusion of formal reservations or a procedure leading to a Dutch withdrawal from the agreement, entail the risk of long-term legal uncertainty which would only be detrimental for the EU, the Netherlands and Ukraine.

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