HENDERSON CHAMBERS

20th February 2016

A "LEGALLY BINDING AND IRREVERSIBLE" AGREEMENT ON THE REFORM OF THE EU

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This Note addresses the question whether the agreement representing the outcome of the negotiations between the United Kingdom and the European Union on the reform of the EU can appropriately be characterised, in the Prime Minister's phrase, as "legally binding and irreversible". The original version of the Note was submitted as written evidence to the House of Commons European Scrutiny Committee ("the Scrutiny Committee"), following on from oral evidence that I gave, together with Sir Francis Jacobs QC and Martin Howe QC, on 18 November 2015.[1] That version was prepared in relation to the draft texts accompanying the letter dated 2 February 2016 from Mr Donald Tusk, the President of the European Council, to the Prime Minister. As presented here, the Note relates to the agreement finally reached on 19 February 2016, which differs in some respects from the texts circulated on 2 February, but not so as to cause me to take a different view of the matters discussed.

I begin by briefly considering the legal character of the Decision of the Heads of State or Government, meeting within the European Council ("the HSG Decision" or "the Decision"), which is the centrepiece of the agreement. Then I go on to consider the specific legal arrangements the Decision contemplates for implementing the four "baskets", as Mr Tusk called them,

[1] The Report of the Scrutiny Committee was published on 15 December 2015. Its Chapter 3 has the heading, "A legally binding and Irreversible agreement?".

of the negotiating agenda set out in the Prime Minister's letter of 10 November 2015 ("the 10 November letter"). The Note ends with a summary of my conclusions.

The HSG Decision

Decisions of Representatives of the Governments of the Member States meeting within the Council are a familiar feature of the EU system. They are used where the Member States exercise their national competences collectively rather than acting through the Council as an institution exercising EU competences. Based on consensus between the Member States, they constitute binding international agreements in simplified form.

There are precedents for the adoption of such Decisions at the level of the Heads of State or Government of the Member States meeting within the European Council, to resolve legal issues that have been raised by a Member State. Such an instrument was used in December 1992 to address Danish concerns regarding aspects of the Maastricht Treaty ("the Decision on Denmark"); and again in June 2009 to address certain concerns of Ireland regarding the Treaty of Lisbon ("the Decision on Ireland"). Both of those Decisions were registered with the UN Secretariat as treaties in accordance with Article 102 of the UN Charter. In each case, moreover, the Decision was followed up by a Protocol, added to the Treaties on the conclusion of, respectively, the Amsterdam Treaty and the Accession Treaty with Croatia.

The Scrutiny Committee's Report of 15 December 2015 referred to the view, which has been expressed by Mr Jean-Claude Piris, formerly Director General of the Legal Service of the Council, that those Decisions do not constitute a precedent for a Decision containing a legally binding commitment to amend the Treaties. He argues that such a commitment, which he describes as an "illegal

trick", would be tantamount to amending the Treaties without recourse to the proper procedure. With all the respect I have for so great a lawyer, I do not entirely share Mr Piris's view. In my opinion, there is a clear distinction between purporting to amend the Treaties by a procedure other than one of those laid down by Article 48 TEU and a binding undertaking, subject to Member States' constitutional requirements, to introduce future changes. Such an undertaking would leave the Treaties intact for the time being. It would simply put the Member States, who are the architects of the Union, under a legal obligation to effect the agreed changes at a convenient moment.

However, there is no need to argue this rather arcane point through to a conclusion because, as the analysis below will show, the HSG Decision does not call for the amendment of the Treaties. In two instances, the UK's wish that certain matters be incorporated eventually into the Treaties has been granted, but these are matters of interpretation compatible with the existing texts. The Decision, accordingly, meets the condition specified by Mr Piris for instruments of the kind in question to "have legal value", namely that "they must be 100% in conformity with the Treaties as drafted at the time of their adoption". In my opinion, though somewhat more elaborate than the Decision on Denmark and the Decision on Ireland, in terms of its legal effects as a binding international agreement, the HSG Decision is on all fours with those instruments.

Since the HSG Decision is a text concerning the interpretation and application of the EU Treaties, any dispute between Member States in relation to it would appear to fall within the exclusive jurisdiction of the Court of Justice of the EU (CJEU) pursuant to Article 344 TFEU. The appropriate procedure for bringing the dispute before the Court would, presumably, be Article 273 TFEU, even though this possibility is not spelled out in the Decision itself.

I note that the HSG Decision is to 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.

Finally, as a binding international agreement based on consensus, the HSG Decision can only be amended or rescinded by consensus, i.e. with the agreement of the UK; so, in that sense, it is irreversible.

Arranging Arrangements for implementing the four "baskets"

I consider these in the order of the HSG Decision, which follows that of the 10 November letter.

A. Economic Governance

On economic governance, the solution being sought was said in the 10 November letter to consist of "legally binding principles that safeguard the operation of the Union for all 28 Member States – and a safeguard mechanism to ensure these principles are respected and enforced". The arrangements provided for by Section A of the HSG Decision, and by the HSG Statement on Section A and the Draft Council Decision attached thereto, constitute such a solution.

The 10 November letter identified seven matters that the envisaged principles needed to address. Those matters are well covered by the principles set out in Section A of the HSG Decision. The principles are fully compatible with the existing EU Treaties: they simply spell out in express language what is already implicit in various texts, such as Article 4 (2) TEU on the equality of Member States before the Treaties. Accordingly, they will become legally binding once the Decision enters into force, as part of a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", within the meaning of Article 31 (3) (a) of the Vienna Convention on the Law of Treaties (VCLT). Consistently with that principle, the Court of Justice of the EU (CJEU) has held in Case C-135/08, *Rottmann*, with regard to the

Decision on Denmark, that it must be taken into consideration as being an instrument for the interpretation of the (then) EC Treaty.[2]

Point 7 of Section A states that "[t]he substance of this Section will be incorporated into the treaties at the time of their next revision...". The effect of eventual incorporation, whether into relevant parts of the Treaties themselves or by way of a separate Protocol, will be to give the principles the status of primary EU law in their own right (as distinct from serving as a tool of interpretation); any infringement of the principles will, therefore, provide grounds for challenging the validity of the offending EU measure in annulment proceedings under Article 267 TFEU.

The proposed safeguard mechanism builds upon the so-called "Ioannina Compromise", initially devised in the context of the 1994 enlargement, which currently applies to qualified majority voting (QMV) by the Council under the rules that came into force in November 2014. It enables Member States in the minority, where the QMV threshold is achieved by a relatively small margin, to insist that the Council do all in its power to reach, within a reasonable time and without prejudicing legally prescribed time limits, a satisfactory solution that addresses their concerns. Legal effect has been given to this procedural device by Council Decision 2009/857/EC.[3]

Pursuant to the HSG Decision, a similar procedure is made available, allowing for the interruption of the decision-making process on legislative acts relating to matters within the scope of the principles laid down by its Section A. The procedure will be triggered by the expression of opposition to the act in question, based on a reasoned case that it failed to respect those principles, by one or more Council member not participating in the banking union. The mechanism will be given binding effect in EU law by adding a further section to Decision 2009/857/EC.

[2] Case C-135/08, *Janko Rottmann* v *Freistaat Bayern*, judgment of 2 March 2010, paragraph 40.
[3] OJ 2009 L 314/73.

The HSG Statement declares that the annexed Council Decision supplementing Decision 2009/857/EC "will be adopted by the Council on the date of the entry into force of the [HSG Decision] and will enter into force on that day." While a "Statement" may not be legally binding in itself, the introduction to Section A of the HSG Decision provides: "Mutual respect and sincere cooperation between Member States participating or not in the operation of the euro area will be ensured by the principles recalled in this Section, which are safeguarded notably through the Council decision referring to it". That passage, central to the ordering of the relationship between members and non-members of the Eurozone, which is the object of Section A, binds the parties to the HSG Decision to ensure the establishment of the safeguard mechanism.

Like Decision 2009/857 itself, the draft Council Decision annexed to the HSG Statement will fall to be adopted under the Council's power of self-organisation pursuant to Article 240 TFEU and, therefore, requires no Commission proposal. Once adoption has taken place, the operation of the safeguard mechanism will be ensured as a matter of binding EU law. While the Council acts for the purposes of Article 240 TFEU by a simple majority, Decision 2009/857, of which the safeguard mechanism would form part, is protected by Protocol (9), which provides that, before examination by the Council of any draft that would aim at amending or abrogating the Decision or any of its provisions, "the European Council shall hold a deliberation on the said draft, *acting by consensus*...".[4] This means that the UK, or any other interested Member State, would be able to block an attempt to abolish or water down the safeguard mechanism.

I note that the Ioannina Compromise is an example of what may be termed a "Council conduct agreement", in other words an agreement binding the Member States as to how they will behave as members of the Council in certain circumstances. The reform package employs agreements of this kind for various purposes, as we shall see. There is no reason of principle why Council conduct agreements should not be regarded as lawful. This is confirmed by the fact that

[4] Emphasis added.

the current version of the Ioannina Compromise has been enshrined in Decision 2009/87, a formal Council act in the sense of Article 288 TFEU, the validity of which has never been questioned.

B. Competitiveness

The Competitiveness basket in the 10 November letter is concerned essentially with reinvigorating EU policies of particular interest to the UK, namely strengthening the internal market, improving legislation, reducing regulatory burdens on business and promoting an active trade policy.

The proposed solution comprises three texts. Section B of the HSG Decision binds the Member States to further the objectives identified in the 10 November letter. This commitment is evidently intended to be read with the Declaration of the European Council on Competitiveness and the Declaration of the Commission on a subsidiarity implementation mechanism and a burden reduction mechanism, to which it refers.

The first of the Declarations involves the exercise by the European Council of its function of setting policy priorities for the EU (Article 15 (1) TEU). It is a little more detailed than Section B of the HSG Decision, especially on the issues of better legislation and the reduction of the burden of EU regulation. The European Council expresses its intention to keep developments under review and asks the General Affairs Council and the Competitiveness Council regularly to evaluate progress on the various elements set out in the Declaration.

By the second Declaration, the Commission expresses its intention to build on existing processes in order to develop mechanisms for the implementation of the principle of subsidiarity and for the reduction of the regulatory burden. There is a specific undertaking to propose a programme of work by the end of 2016.

Given the broad terms in which the UK's objectives under this heading were framed, a negotiated outcome capable of being legally guaranteed in a similar way to the economic governance basket was not to be expected. The combination of a binding legal commitment by the Member States and clear expressions of intention by the European Council and the Commission should be sufficient to

ensure that the momentum sought to be given to developments in the relevant policy areas will be sustained.

C. Sovereignty

Section C of the HSG Decision deals separately with the various matters included in this basket of the 10 November letter.

(1) "Ever closer union"

The text under point 1 of Section C clarifies the meaning of the references to "ever closer union" in various Treaty preambles and in Article 1, second paragraph TEU, more particularly by stating explicitly:

- that the references "are not an equivalent to the objective of political integration, even though such an objective enjoys wide support in the Union";
- that "they do not offer a basis for extending the scope of any provision of the Treaties or of EU secondary legislation" and "should not be used either to support an extensive interpretation of the competences of the Union or of the powers of its institutions as set out in the Treaties";
- that they "do not alter the limits of Union competence governed by the principle of conferral"; nor do they "require that further competences be conferred upon the European Union";
- that "the competences conferred by the Member States on the Union can be modified, whether to increase or reduce them, only through a revision of the Treaties with the agreement of *all* Member States";
- that the fact that the Treaties already contain provisions whereby some Member States are entitled not to take part in or are exempted from the application of certain provisions of Union law shows that the references "are compatible with *different paths of integration being available for different Member States*";
- that "the Treaties allow an evolution towards a deeper degree of integration among the Member States that share such a vision of their common future without this applying to other Member States"; and

- that "it is recognised that the United Kingdom, in the light of the specific situation it has under the Treaties, *is not committed to further integration into the European Union*".[5]

  A more comprehensive response to the reassurance sought on this issue in the 10 November letter could scarcely be imagined.

  Like the principles in Section A of the HSG Decision, this text provides an interpretation perfectly in accord with the Treaties; and it will, therefore, similarly become legally binding, upon the entry into force of the Decision, in the sense of Article 31 (3) (a) VCLT and the CJEU's *Rottmann* judgment (see above). The eventual incorporation of the substance of the text into the Treaties will give it the force of primary EU law.

  (2) Subsidiarity

  To reinforce the principle of subsidiarity, it is provided under point 2 of Section C of the HSG Decision that reasoned opinions issued by national Parliaments in accordance with Article 7 (1) of Protocol (No 2) "are to be duly taken into account by all institutions involved in the decision-making process of the Union" and that "[a]ppropriate arrangements will be made to ensure this". Such a requirement appears to be fully compatible with Protocol (No 2), which it supplements, and thus legally binding on members of the Council as a Council conduct agreement. Demonstrable failure to comply with this obligation would, it is submitted, constitute the infringement of an essential procedural requirement within the meaning of Article 263 TFEU, providing grounds for the annulment of the measure in question. So far as concerns the Council, any "appropriate arrangements" could be adopted on the basis of Article 240 TFEU, without a Commission proposal.

  (3) A "red card procedure"

  The 10 November letter says that groups of national parliaments should be able to "stop unwanted legislative proposals" (a so-called "red card procedure").

[5] Emphasis added.

That demand is acceded to by point 3 of Section C. The period allowed for the transmission of reasoned opinions is increased, in this instance, from the eight weeks provided for by Article 6 of Protocol (No 2) to 12 weeks. Under the procedure, where reasoned opinions on the non-compliance of a draft legislative act with the principle of subsidiarity represent more than 55 per cent of the votes allocated to national Parliaments,[6] the item will be included on the Council agenda for a comprehensive discussion; following which "the representatives of the Member States acting in their capacity as members of the Council will discontinue their consideration of the draft legislative act in question unless the draft is amended to accommodate the concerns expressed in the reasoned opinions". The implementation technique, therefore, entails a Council conduct agreement: the members of the Council would, in the prescribed circumstances, discontinue discussion of the proposal and refrain from voting on it. The envisaged obligation appears to me to be fully compatible with EU law, and hence legally binding, since there is nothing in the Treaties that requires the Council to proceed to the adoption of a given proposal, supposing that the requisite majority is available.

In my opinion, it is arguable that once the HSG Decision is in force, the adoption of a legislative measure in defiance of the red card procedure will constitute an infringement of an essential procedural requirement, and hence grounds for the annulment of the measure under Article 263 TFEU.

(4) The Title V Protocols

Point 4 of Section C recalls that a measure adopted pursuant to Title V of Part Three of the TFEU (on JHA or, in present Treaty parlance, the "Area of Freedom, Security and Justice") does not bind the Member States covered by Protocol (No 21) (i.e. the UK and Ireland) or Protocol (No 22) (i.e. Denmark). The text goes on to state: "The representatives of the Member States acting in their capacity as members of the Council will ensure that, where a Union measure, in the light of its aim and content, falls within the scope of Title V..., Protocols 21 and 22 will apply to it, including where this entails the splitting of the measure into two acts".

[6] 55 per cent of 28 x 2 = 31.

This text is evidently intended to provide the reassurance sought in the 10 November letter that the UK's Title V opt-in right will be fully respected in future. A particular concern has been that the right may be denied, where a measure is adopted on a legal basis outside Title V, because that is where its centre of gravity is judged by the Commission and the Council majority to lie, although the measure may also contain elements appertaining to Title V. The solution here proposed is the acceptance by Member States, when acting in their capacity as members of the Council, of a duty to ensure that Protocols 21 and 22 apply to any proposal that falls within the scope of Title, if necessary splitting off the Title V elements from the remaining content.

As in the case of the red card procedure, the acceptance of this obligation governing behaviour within the Council appears to me to be compatible with the Treaties and, therefore, legally binding as yet another form of Council conduct agreement.

Again, I consider it arguable that, once the HSG Decision is in force, the refusal by the Council majority to split a measure, where the Title V elements are severable, and this would allow the UK and the other Member States concerned to exercise their rights in respect of those elements, will provide grounds for annulment under Article 263 TFEU.

(5) National security

Point 5 of Section C confirms that Member States' sole responsibility for national security does not constitute a derogation from EU law and should therefore not be interpreted restrictively. It further states that the Union institutions will fully respect the national security responsibilities of Member States, while recognising the benefits of collective action on issues that affect the security of all Member States. The reference to "Union institutions" must be understood to include the CJEU.

This represents a binding interpretation of Article 4 (2) TFEU, fully consistent with its letter and spirit.

D. Social benefits and free movement

Section D of the HSG Decision is complemented by two Commission Declarations, one on issues related to the abuse of the right of free movement of persons and one on the safeguard mechanism referred to in paragraph 2 (b) of the Decision.

The issues raised in the "Immigration" basket of the 10 November letter are to be addressed, broadly, in two ways: through the interpretation of, and by complementing, existing EU rules: and through the introduction of two significant rule changes. No amendment of the Union's primary law is considered necessary. There is simply a brief reference to the fact that, with regard to future enlargements of the Union, appropriate transitional measures on the free movement of persons will be provided for in the relevant Act of Accession.

(1) Interpretation of current EU rules

An interpretation is offered of the possibilities that exist under current EU rules for limiting access by migrant workers to social benefits. It is recalled that:

(a) Workers' free movement rights under Article 45 TFEU may be subject to limitations on grounds of public policy, public security and public health; and they may, in addition, be restricted by measures necessitated by overriding reasons of public interest. It may also be possible to justify the imposition of conditions that are non-discriminatory and proportional, "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".

(b) The free movement rights of EU citizens are expressed by Article 21 TFEU to be "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

In particular, EU law makes the right of residence of persons who are not economically active in a host Member State conditional on their having sufficient resources to avoid becoming a burden on its social assistance system. The emphasis on Member States' right to refuse social benefits to persons who do not fulfil that condition, including job-seekers, finds support in recent case law of the

CJEU.[7] An important clarification is that benefits whose predominant function is to cover minimum subsistence costs may be refused to such persons, even where the benefits are intended also to facilitate access to the labour market of the host Member State.

(c) Member States are able to take action to prevent the abuse of EU rights, such as where claims are based on marriages of convenience. They may also adopt the necessary restrictive measures to protect themselves against individuals whose personal conduct is liable to represent a genuine and serious threat to public policy or security. Such a threat need not be imminent and the individual's past conduct may be taken into account.

The interpretations offered by the HSG Decision are reinforced by the Commission's Declaration on issues related to the abuse of free movement rights. The Commission announces its intention to adopt a proposal that would complement Directive 2004/38/EC by excluding, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying an EU citizen or who marry an EU citizen only after the latter has established residence in the host Member State. This would effectively reverse case law based on the present wording of the Directive.[8]

The Commission will also take steps to clarify: that Member States may address abuses of free movement rights by EU citizens returning to their Member State of nationality accompanied by a non-EU family member, "where residence in the host Member State has not been sufficiently genuine to create or strengthen family life and had the purpose of evading the application of national immigration rules"; and that the concept of marriage of convenience covers a marriage which is maintained for the purpose of enabling a non-EU national to enjoy a right of residence.

[7] See Case C-333/13, *Dano* judgment o 11 November 2014; Case C-67/14, *Alimanovic*, judgment of 15 September 2015.
[8] See Case C-127/08, *Metock*, judgment of 25 July 2008.

Moreover, clarification will be provided on the circumstances in which free movement rights may be restricted on grounds of public policy or public security. Those clarifications are to be developed in a future Commission Communication. In my opinion, the interpretations in Section D of the HSG Decision, reinforced by the Commission's intended "complement" to Directive 2004/38/EC and its promised clarifications, provide a sound basis for the robust application by administrative authorities and courts in the UK of the various limitations on rights of free movement that are recognised by EU law. I do not anticipate that decisions taken in the light of those texts would be likely to encounter the disapproval of the CJEU.

(2) Changes to EU secondary legislation

(a) The Commission will propose an amendment to Regulation 883/2004/EC on the coordination of social security systems giving Member States an option, where child benefits are exported to a Member State other than the one in which the worker resides, to index the benefits to the standard of living in that Member State. This will initially apply only to new claims but, from 2020, will be extended to existing ones.

(b) The Commission will propose the amendment of Regulation 492/2011/EC on freedom of movement for workers within the Union, to provide for a new alert and safeguard mechanism to respond to situations of inflow of workers from other Member States of an exceptional magnitude over an extended period. The Member State concerned must provide the Commission with evidence that such an exceptional situation exists. On a proposal from the Commission, the Council could authorise the Member State to limit the access to in-work benefits of EU workers newly entering the labour market for up to four years. The limitation should be graduated, to take account of the worker's increasing connection with the labour market of that Member State. The authorisation would have a duration of 7 years.

The Commission's Declaration on the safeguard mechanism expresses its understanding that the mechanism "can and will be used and therefore will act as a solution to the United Kingdom's concerns...". The Commission considers that

the information the UK has provided to it shows that the type of exceptional situation the proposed safeguard mechanism is intended to cover already exists in the UK. "Accordingly, the United Kingdom would be justified in triggering the mechanism in the full expectation of obtaining approval".

The HSG Decision states that the representatives of the Member States, acting in their capacity as Council members, "will proceed with work on these legislative proposals as a matter of priority and do all within their power to ensure their rapid adoption".

In my opinion, it cannot seriously be doubted that the Commission will fulfil its undertaking to bring forward the two proposals necessary for the amendment of, respectively, Regulation 883/2004/EC and Regulation 492/2011/EC; nor, assuming agreement on the Draft HSG Decision, that the Council will fail to deal with the proposals expeditiously. The European Parliament will, of course, have a part to play, under the ordinary legislative procedure, in the adoption of the proposals. However, I do not consider it plausible, in a situation where the UK has voted to remain within the EU and the HSG Decision has entered into force, that the Parliament would see any political advantage in putting the new settlement with the UK in jeopardy. Nor, finally, do I believe that the amendments would run a serious risk of being struck down by the CJEU.

Summary of conclusions

(i) Once it enters into force, the HSG Decision will have the legal character and effect of a binding international agreement, on all fours with the Decision on Denmark of 1992 and the Decision on Ireland of 2009.

(ii) As to economic governance, from the entry into force of the HSG Decision, there will be a legally binding obligation:

- that the principles laid down in Section A of the Decision be taken into consideration for the interpretation of the EU Treaties (and consequently of any measures based on them); when eventually incorporated into the Treaties or annexed to them as a Protocol, the principles will acquire the status of primary EU law; and

- that the safeguard mechanism referred to in Section A be established in accordance with the HSG Statement annexed to the HSG Decision, through the immediate adoption of the Draft Council Decision annexed to that Statement, which will supplement Decision 2009/857; following the adoption of the Decision, the safeguard mechanism will operate on the basis of EU law and under the protection of Protocol 9.

(iii) As to competitiveness, the combination of a binding legal commitment by the Member States and clear expressions of intention by the European Council and the Commission should be sufficient to ensure that the momentum sought to be given to developments in the relevant policy areas will be sustained.

(iii) As to sovereignty, from the entry into force of the HSG Decision:

- the interpretation of "ever closer union" in Section C (1) of the HSG Decision, will become legally binding; when eventually incorporated into the Treaties, it will acquire the force of primary EU law';
- the requirement that reasoned opinions of national parliaments be duly taken into account will become legally binding as a Council conduct agreement;
- the "red card procedure" will become legally binding as a Council conduct agreement;
- the duty to ensure that Protocols 21 and 22 apply to any proposal that falls within the scope of Title, if necessary splitting off the Title V elements from the remaining content, will become legally binding as a Council conduct agreement.

(iv) As to social benefits and free movement, assuming the entry into force of the HSG Decision:

- the interpretations in Section D of the Draft HSG Decision, reinforced by the Commission's intended "complement" to Directive 2004/38/EC and its promised clarifications, provide a sound basis for the robust application of the various limitations on rights of free movement that are recognised by EU law and are unlikely to encounter the disapproval of the CJEU;
- it cannot seriously be doubted that the Commission will fulfil its undertaking to bring forward the two proposals necessary for the amendment of, respectively,

Regulation 883/2004/EC, as to the indexing of child benefits, and Regulation 492/2011/EC, as to the establishment of a safeguard mechanism applicable to in-work benefits; nor that the Council will fail to deal with the proposals expeditiously; nor is it plausible that the Parliament would see any political advantage in putting the new settlement with the UK in jeopardy; nor, finally, would the amendments run a serious risk of being struck down by the CJEU.

Sir Alan Dashwood QC

20th February 2016