



House of Commons  
Foreign Affairs Committee

---

# Article 50 negotiations: Implications of 'no deal'

---

**Ninth Report of Session 2016–17**

*Report, together with formal minutes and  
appendices relating to the report*

*Ordered by the House of Commons to be printed 7 March 2017*

## The Foreign Affairs Committee

The Foreign Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Foreign and Commonwealth Office and its associated public bodies.

### Current membership

[Crispin Blunt MP](#) (*Conservative, Reigate*) (Chair)

[Mr John Baron MP](#) (*Conservative, Basildon and Billericay*)

[Ann Clwyd MP](#) (*Labour, Cynon Valley*)

[Mike Gapes MP](#) (*Labour (Co-op), Ilford South*)

[Stephen Gethins MP](#) (*Scottish National Party, North East Fife*)

[Mr Mark Hendrick MP](#) (*Labour (Co-op), Preston*)

[Adam Holloway MP](#) (*Conservative, Gravesham*)

[Daniel Kawczynski MP](#) (*Conservative, Shrewsbury and Atcham*)

[Ian Murray MP](#) (*Labour, Edinburgh South*)

[Andrew Rosindell MP](#) (*Conservative, Romford*)

[Nadhim Zahawi MP](#) (*Conservative, Stratford-on-Avon*)

### Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via [www.parliament.uk](http://www.parliament.uk).

### Publication

Committee reports are published on the Committee's website at [www.parliament.uk/facom](http://www.parliament.uk/facom) and in print by Order of the House.

Evidence relating to this report is published on the [inquiry page](#) of the Committee's website.

### Committee staff

The current staff of the Committee are Chris Stanton (Clerk), Nick Beech (Second Clerk), Dr Ariella Huff and Zoe Oliver-Watts (Senior Committee Specialists), Ashlee Godwin and Nicholas Wade (Committee Specialists), Clare Genis (Senior Committee Assistant), James Hockaday and Su Panchanathan (Committee Assistants), and Estelle Currie (Media Officer).

### Contacts

All correspondence should be addressed to the Clerk of the Foreign Affairs Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 6105; the Committee's email address is [fac@parliament.uk](mailto:fac@parliament.uk).

# Contents

---

<b>Introduction</b>	<b>3</b>
Background to the inquiry	3
Government refusal to submit evidence	3
Commissioned research	4
Work of other Committees	5
<b>1 The Article 50 process</b>	<b>6</b>
The divorce settlement and the future relationship	6
<b>2 Why 'no deal' is a real possibility</b>	<b>10</b>
The UK Government's position	10
The 27	10
Domestic politics	10
Negotiations inside the EU	11
The exit bill	11
Error or miscalculation	12
The parliamentary dimension	13
The European Parliament	13
The UK Parliament	13
The short timetable	14
<b>3 Key implications of 'no deal'</b>	<b>15</b>
An "exercise in guesswork"?	15
Some headline findings	15
Disputes over the exit bill	16
Uncertainty for EU citizens in the UK and UK citizens in the EU	17
Trading on World Trade Organisation terms	19
The 'regulatory gap' and the limitations of the Great Repeal Bill	20
Uncertainty for UK participation in the EU's common foreign and security policy	23
The sudden return of a 'hard' customs border between Northern Ireland and the Republic of Ireland	24
<b>4 Conclusions and recommendations</b>	<b>26</b>

<b>Appendix 1: Submission on behalf of the Bar Council by Professor Derrick Wyatt QC and Hugo Leith</b>	<b>27</b>
<b>Appendix 2: Submission by Professor Kenneth Armstrong, University of Cambridge</b>	<b>61</b>
<b>Formal Minutes</b>	<b>77</b>
<b>Witnesses</b>	<b>78</b>
<b>Published written evidence</b>	<b>79</b>
<b>List of Reports from the Committee during the current Parliament</b>	<b>80</b>

# Introduction

---

## Background to the inquiry

1. Assuming successful passage of the European Union (Notification of Withdrawal) Bill 2016–17, the Government has stated its intention to trigger Article 50 of the Treaty on European Union (TEU) before the end of March 2017, launching the legal process that enables a state to withdraw from the European Union (see Box 1 below). The UK's official notification to the EU of its intent to leave sets the clock ticking on a two-year negotiating period, at the end of which the UK automatically leaves the EU unless the UK and all 27 remaining EU states agree unanimously to extend the negotiations.

2. The UK's withdrawal from the EU is without precedent. Until now, only Algeria (upon independence from France) and Greenland (which remained part of Denmark) have left the bloc. Both events took place long before the establishment of the Article 50 process, which was incorporated into the Treaties as part of the Treaty of Lisbon in 2008, nor were they of the same order as the departure of a large state such as the UK. It is therefore difficult to predict how the Article 50 process will progress. However, two years is a short period of time in which to complete such a challenging and complex task. As this Report outlines, there are many ways in which the talks could be stalled or derailed. It is therefore quite possible that the UK could reach the end of the negotiating period with no withdrawal agreement in place.

3. In November 2016, therefore, the Foreign Affairs Committee launched an inquiry on the implications for the UK if the two-year negotiating period mandated by Article 50 ends with no withdrawal agreement in place. We asked for evidence which addressed, in particular:–

- The implications for European foreign and security policy
- The implications for UK participation in organisations and bodies to which it is currently a party in its capacity as an EU Member State
- The legal status of the UK-EU relationship if the UK leaves the EU with no withdrawal agreement in place, including police, justice and counter-terrorism co-operation
- The outstanding issues that would have to be resolved in that eventuality, and the process by which any arbitration or litigation might take place, including its potential duration and cost
- The terms of trade that would exist between the UK and remaining EU.

## Government refusal to submit evidence

4. We would normally expect the Government to submit evidence to all our inquiries. On 5 December 2016, the Rt Hon Sir Alan Duncan MP, Minister of State at the Foreign and Commonwealth Office with responsibility for Europe, wrote to the Committee to explain that the Government would not make a submission in this case. He said:

I can assure the Committee that the topic of this inquiry is of high importance to the Foreign and Commonwealth Office and colleagues across Government. HMG's efforts will be focused on getting the best deal possible for the UK in the Article 50 negotiations with the EU. Since those negotiations are not yet underway, the Government is not currently in a position to provide written evidence to the Committee. I hope you appreciate our position and that this is not in any way meant to show any lack of respect for the Committee.<sup>1</sup>

5. The Committee responded to Sir Alan on 14 December, asking him to reconsider his stance in the light of the strong public interest in reducing uncertainty around the potential outcomes of the Article 50 negotiations.<sup>2</sup> The same month, Sir Alan replied to the Committee with a short submission of evidence. He said:

I regret that my previous letter of 5 December was found unsatisfactory by the Committee. It was meant as an act of courtesy in response to the general invitation for evidence on your Committee's website. I would like to reassure the Committee that, as I'm sure you're aware, the Government takes the negotiations to leave the European Union very seriously and is preparing accordingly.

As you know, the Department for Exiting the European Union is the lead Department coordinating this work. As the Secretary of State for Exiting the EU explained to the Select Committee on Exiting the EU on 14 December, the Government is carrying out detailed analysis and a wide-ranging programme of engagement, allowing us to understand the concerns of organisations, institutions and companies across a variety of sectors, as well as to prepare to seize the opportunities that exiting the European Union might bring. The format and process for the coming negotiations are yet to be determined, but the Government will work to achieve a smooth and orderly withdrawal. The Prime Minister has been clear that we are committed to triggering Article 50 by the end of March next year, and we will set out our position in more detail ahead of negotiations. We are intent on getting the best possible deal for the UK, and our work to do so will involve a full range of scenario planning.<sup>3</sup>

## Commissioned research

6. In January 2017, we invited the Bar Council and Professor Kenneth Armstrong of Cambridge University to provide evidence setting out the main legal and technical issues that would remain unresolved if the UK left the EU at the end of the Article 50 period with no deal in place. Our aim was to be able to explain what the impact of 'no deal' might be on day-to-day life, using hypothetical examples to illustrate the real-world implications of some of the potentially unresolved legal questions, including the possibility of sudden withdrawal from EU regulatory and other bodies.

---

1 [Letter from the Rt Hon Sir Alan Duncan MP to Crispin Blunt MP](#), 5 December 2016

2 [Letter from Crispin Blunt MP to the Rt Hon Sir Alan Duncan MP](#), 14 December 2016

3 Rt Hon Sir Alan Duncan MP, Foreign and Commonwealth Office ([REU0027](#)) paras 2–3

7. Both the Bar Council and Professor Armstrong submitted drafts of their evidence to us in the week commencing 30 January. On that basis, we held an oral evidence session on 7 February in which we questioned Professor Armstrong and the authors of the Bar Council’s submission, Professor Derrick Wyatt QC and Hugo Leith, on their outline findings. Both parties submitted final versions of their evidence in the week following the evidence session.

8. We are very grateful to Professor Armstrong, Professor Wyatt and Mr Leith for the substantial pieces of work that they carried out at our request. Their evidence makes a significant contribution to the overall body of knowledge on the potential consequences of failing to agree a deal under Article 50. The two submissions are published in full as Appendices to this report. They are complementary: Professor Armstrong’s submission focuses in detail on the potential impact of sudden withdrawal from the EU’s regulatory and other bodies, and the Bar Council’s evidence is wide-ranging and extensive across a range of issues.

### Work of other Committees

9. Several Committees in both Houses of Parliament have taken evidence or reported on aspects of the potential implications of failing to reach a deal under Article 50. We have referred to some of this evidence in this report, where possible. The Committee on Exiting the EU, the International Trade Committee, and the Treasury Committee have all taken evidence that is relevant to this question.<sup>4</sup> The House of Lords European Union Committee and its various sub-committees have published a range of reports on issues including UK-Irish relations, trade, acquired rights, security and policing co-operation, and fisheries, many of which also include reference to the potential implications of ‘no deal’ in the relevant policy areas.<sup>5</sup> This report, however, is the first Select Committee publication to focus specifically on the implications for Government and the country as a whole of ‘no deal’, with reference to a range of different sectors, policy areas and circumstances.

---

4 Oral evidence taken before the Exiting the European Union Committee on 21 February 2017, HC (2016–17) [1072](#); Oral evidence taken before the International Trade Committee on 7 February 2017, HC (2016–17) [817-viii](#); Treasury Committee, [UK’s future economic relationship with the EU inquiry](#), accessed 8 March 2017

5 Parliament, [European Union Committee Publications, Session 2016–17](#), accessed 7 March 2017

# 1 The Article 50 process

## Box 1: Article 50 of the Treaty on European Union

- (1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
- (2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
- (3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
- (4) For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
- (5) A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
- (6) If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Source: EUR-LEX

## The divorce settlement and the future relationship

10. Article 50 leaves considerable room for interpretation regarding the extent to which the 'future framework' for relations between a withdrawing state and the remaining EU should be included in the negotiations and the final agreement. Witnesses to this inquiry suggested that the negotiations would be likely to involve three separate but inter-related deals: a "divorce" settlement, a transitional arrangement, and a deal on the long-term relationship.<sup>6</sup>

11. Thus far, the UK and EU have expressed different views about both the content and the timing of the Article 50 process. As the Prime Minister set out in her Lancaster House speech, the UK Government hopes to negotiate the exit deal and the terms of the future relationship in parallel and to agree both at the end of the Article 50 period.<sup>7</sup> Michel

6 Q335 [Professor Derrick Wyatt]

7 Number 10, [Speech: The Government's negotiating objectives for exiting the EU](#), 17 January 2017

Barnier, however, has said the European Commission will only commence talks on the future relationship between the EU and UK after the 'divorce' settlement has been reached. On 19 February, for example, the Financial Times reported:

In recent weeks Mr Barnier has outlined to the EU's remaining 27 members his views on the timing and order of talks, which moves from basic terms for the disentanglement, to scoping future trade relations and finally to preparations for a transition. "He thinks we will be discussing money and acquired rights [of expatriate citizens] until December," said one senior eurozone official in contact with Mr Barnier. "No trade, nothing about the future, just the past."<sup>8</sup>

12. The question of what specific policy issues will be covered by the Article 50 withdrawal deal also has yet to be settled, and is likely to be among the first items to be negotiated by the UK and EU.<sup>9</sup> The House of Commons Committee on Exiting the EU concluded in January 2017 that, at a "bare minimum", by the time the UK leaves the EU, some clarity should have been provided around:

- The institutional and financial consequences of leaving the EU including resolving all budget, pension and other liabilities and the status of EU agencies currently based in the UK;
- Border arrangements between Northern Ireland and the Republic of Ireland and a recognition of Northern Ireland's unique status with regard to the EU and confirmation of the institutional arrangements for north-south co-operation and east-west co-operation underpinning the Good Friday Agreement;
- the status of UK citizens living in the EU;
- the status of EU citizens living in the UK;
- the UK's ongoing relationship with EU regulatory bodies and agencies;
- the status of ongoing police and judicial co-operation; and
- the status of UK participation in ongoing Common Foreign and Security Policy missions;
- a clear framework for UK-EU trade; and
- clarity on location of former EU powers between UK and devolved governments.<sup>10</sup>

13. The Government has indicated that it intends to pursue the possibility of transitional arrangements, or what it calls "a phased process of implementation." Calls for implementing

---

8 Alex Barker, "[Brussels focuses on UK's €60bn exit bill before trade talks](#)", Financial Times, 19 February 2017

9 Exiting the European Union Committee, First Report of Session 2016–17, [The process for exiting the European Union and the Government's negotiating objectives](#), HC 815, para 56

10 Exiting the European Union Committee, First Report of Session 2016–17, [The process for exiting the European Union and the Government's negotiating objectives](#), HC 815, para 103

transitional arrangements have come from several quarters, including the Committee on Exiting the EU and the Institute of Directors.<sup>11</sup> The Government's White Paper on its objectives for exiting the EU says:

It is [ ... ] in no one's interests for there to be a cliff-edge for business or a threat to stability, as we change from our existing relationship to a new partnership with the EU. Instead, we want to have reached an agreement about our future partnership by the time the two year Article 50 process has concluded. From that point onwards, we believe a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new arrangements that will exist between us, will be in our mutual interest. This will give businesses enough time to plan and prepare for those new arrangements. This might be about our immigration controls, customs systems or the way in which we cooperate on criminal and civil justice matters. Or it might be about the future legal and regulatory framework for business. For each issue, the time we need to phase in the new arrangements may differ; some might be introduced very quickly, some might take longer. And the interim arrangements we rely upon are likely to be a matter of negotiation. The UK will not, however, seek some form of unlimited transitional status. That would not be good for the UK and nor would it be good for the EU.<sup>12</sup>

14. If no arrangements for a transitional or implementation phase can be agreed, the UK will leave the EU at the end of the two-year period mandated by Article 50. Even if there is no withdrawal deal agreed by that point, however, the UK and EU might nevertheless wish to continue negotiating over the terms of the UK's exit and, potentially, the future relationship.

15. We heard two different perspectives on whether it would be possible to resurrect the negotiation process under the terms of Article 50, which could theoretically be advantageous because it requires agreement by a qualified majority of Member States. Any agreement reached under the EU's normal processes for trade deals with third states would almost certainly require unanimous agreement, and could also require ratification by national and some sub-state parliaments.<sup>13</sup> Professor Kenneth Armstrong of Cambridge University offered one view, telling us that "Article 50 does run out at the point where the UK leaves without a deal."<sup>14</sup> However, Professor Derrick Wyatt, speaking on behalf of the Bar Council, disagreed. He said he would be "more optimistic" about the possibility of reviving the Article 50 process as the basis for agreement between the UK and EU, stating: "There is nothing in Article 50 that says you cannot conclude an agreement after exit. You can draw that inference, but it is not actually excluded and it might be a convenient political perception of a legal possibility."<sup>15</sup> Professor Wyatt added that it could also, in theory, be used to put into place a transitional arrangement, stating:

11 Exiting the European Union Committee, First Report of Session 2016–17, *The process for exiting the European Union and the Government's negotiating objectives*, HC 815, para 163; Institute of Directors Policy Report, *Navigating Brexit: Priorities for business, options for government*, (February 2017), p 12

12 HM Government, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, February 2017, p 65

13 Q335 [Professor Derrick Wyatt]

14 Q335 [Professor Kenneth Armstrong]

15 Q335 [Professor Derrick Wyatt]

It might become an attractive legal option if both the EU and the UK are over the cliff edge [ ... ] applying tariffs to each other, there is a good deal of inconvenience and public opinion is not difficult to manage. It could be a lot more attractive to use a special super-qualified majority to get a transitional arrangement in place than getting into unanimity and potentially mixity for a transitional arrangement.<sup>16</sup>

## 2 Why 'no deal' is a real possibility

---

### The UK Government's position

16. The Government has asserted repeatedly that it will walk away from the Article 50 negotiations if it does not approve of the terms of the final deal. In her 17 January 2017 speech setting out the Government's objectives for Brexit, the Prime Minister said:

Britain wants to remain a good friend and neighbour to Europe. Yet I know there are some voices calling for a punitive deal that punishes Britain and discourages other countries from taking the same path.

That would be an act of calamitous self-harm for the countries of Europe. And it would not be the act of a friend. Britain would not—indeed we could not—accept such an approach. And while I am confident that this scenario need never arise—while I am sure a positive agreement can be reached—I am equally clear that no deal for Britain is better than a bad deal for Britain.<sup>17</sup>

17. This position was reiterated in the 2 February 2017 Government White Paper on exiting the EU, which stated that

We are confident that the UK and the EU can reach a positive deal on our future partnership, as this would be to the mutual benefit of both the UK and the EU, and we will approach the negotiations in this spirit. However, the Government is clear that no deal for the UK is better than a bad deal for the UK.<sup>18</sup>

### The 27

#### *Domestic politics*

18. The exit negotiations will be immensely complex, not least because of the number of parties involved. In addition to the Brussels institutions, each of the 27 remaining Member States has its own domestic political concerns to consider in formulating its approach to the negotiations. This task will be made additionally complex by changing political dynamics across the 27. As the Secretary of State for Exiting the EU said on 14 December 2016:

from the beginning of this process to the probable conclusion, there are 17 electoral events. We have had the Italian referendum and the Austrian election, so there are 15 to go, by my best estimate, assuming we go the distance.<sup>19</sup>

---

17 Number 10, [Speech: The Government's negotiating objectives for exiting the EU](#), 17 January 2017

18 HM Government, *The United Kingdom's exit from and new partnership with the European Union*, [Cm 9417](#), February 2017, p 9

19 Oral evidence taken before the Exiting the European Union Committee on 14 December 2016, HC (2016–2017) 815, [Q513](#)

In 2017 alone, that includes elections in France, Germany and the Netherlands. It is difficult to predict, at this stage, how the elections or potential changes in the governments of those key countries might delay or otherwise affect the Article 50 process.

### **Negotiations inside the EU**

19. Although the EU-27 and the EU institutions have been relatively united in their approach to the UK's exit negotiations thus far, there is no guarantee that this unity will continue. Jonathan Faull, previously the highest-ranking UK national in the European Commission, told the Committee that

It is a complicated process. Each of those 27 countries has its own politics, interests and concerns, and its own elections, in some cases, this year. The Brussels institutions will no doubt play their role to the full as well, so it is a complicated business.<sup>20</sup>

Similarly, Brussels-based journalists Maïa de la Baume and Ryan Heath recently reported in Politico that

The interplay between the negotiators and national capitals promises to be fraught: once technical agreement has been reached on any point up for negotiation, national leaders may be tempted to re-litigate elements that prove politically contentious, or even to take over the talks directly if their underlings fail to agree.<sup>21</sup>

20. The Member States all have different priorities and interests, both with respect to their relations with the UK and with respect to the future shape of the EU itself. As Dr Tim Oliver wrote in evidence to this Committee, "Whether the EU can reach a compromise on what to offer a departing Britain will be the focus of a great deal of the negotiations and play a significant part in deciding what form of deal Britain can expect."<sup>22</sup> Divisions within the EU, therefore—whether over the substance of the EU's negotiating position, or over tactics and sequencing—could conceivably delay or derail the Article 50 process. Once Article 50 is invoked, furthermore, the EU-27 will need to agree on the guidelines mandating the Commission to negotiate on their behalf. If they do not mandate that the negotiations on the withdrawal and future relationship are carried out in parallel, the prospect of no deal significantly increases.

### **The exit bill**

21. Even if the UK is able to realise its goal of holding talks on the withdrawal settlement and the future UK-EU relationship in parallel, the highly contentious question of the exit 'bill'—the UK's claimed financial liabilities (for example, pensions and existing commitments to future programmes)—is likely to be among the first issues on the table. Sir Ivan Rogers, head of UKRep until his resignation in January 2017, told the Committee on Exiting the EU that the dispute over a potential exit payment could get "pretty bitter

---

20 Q369

21 Maïa de la Baume and Ryan Heath, "[EU expects home-team advantage in Brexit talks](#)", Politico, 23 February 2017

22 Dr Tim Oliver ([REU0003](#)) para 11

and twisted".<sup>23</sup> This could result in negotiations quickly becoming bogged down amid acrimony from which it could be difficult to recover. As the *Economist* has noted, "a row over the exit payment could derail the talks in their earliest stages."<sup>24</sup> A recent report for Politico also called the exit bill "the issue with the greatest risk attached" in the negotiations.<sup>25</sup> The reported figure of liabilities amounting to €60 billion has already begun a countervailing debate about the UK's share of EU assets.

## Error or miscalculation

22. As in any complex international negotiation, the possibility of simple error or miscalculation by one side or another cannot be discounted. Both sides may under- or over-estimate the strength of their respective hands, or may inaccurately judge the point at which the other party (or parties, in the case of the multi-faceted EU) would be willing to walk away. As Charles Grant of the Centre for European Reform has pointed out, the UK Government has suggested that it believes it has a strong negotiating hand relative to that of the EU, particularly with respect to foreign and security policy co-operation and financial services.<sup>26</sup> Meanwhile, the EU appears to take the opposite view, especially regarding the consequences of 'no deal'.<sup>27</sup> Sir Ivan Rogers, for example, told the European Scrutiny Committee:

I think the view from many will be that the implications for the UK of walking away without any deal on the economic side, without any preferential agreement, and walking into a WTOonly world, are, from their perspective, so unpalatable that we will not do it. That may be a misreading of us, but I think that will become a major question during 2017. [ ... ] A unilateral abrogation or desire simply to walk away from the table and say, "If you are sticking liabilities of that sort on the table, we are not playing", is not a route that they think we will take.<sup>28</sup>

23. The re-negotiation of the UK's EU membership, undertaken by the previous UK Government between November 2015 and February 2016, provides a recent example of how time pressure and different negotiating strategies may produce non-optimal results. The package of reforms obtained by the then-Prime Minister, David Cameron, was widely seen by the UK media as insufficiently robust.<sup>29</sup> On 5 January 2017, Mats Persson, adviser to the then-Prime Minister during the re-negotiation process, conceded that "played differently and perhaps over a longer period of time, we could have perhaps achieved some more reforms."<sup>30</sup> Lord Hill of Oareford, who served on the European Commission during the re-negotiation period, also suggested that the then-Prime Minister may have relied too heavily on Germany to secure agreement:

---

23 Henry Mance, "[Former UK top diplomat warns EU will oppose sectoral Brexit deals](#)", *Financial Times*, 22 February 2015

24 "[A row over money could derail Brexit talks before they have begun](#)", *The Economist*, 11 February 2017

25 Maïa de la Baume and Ryan Heath, "[EU expects home-team advantage in Brexit talks](#)", *Politico*, 23 February 2017

26 Charles Grant, "[Mrs May's emerging deal on Brexit](#)", *Centre for European Reform*, February 2017

27 Alex Barker, "[Cards stacked in our favour, say Brexit officials](#)", *Financial Times*, 28 November 2016

28 Oral evidence taken before the European Scrutiny Committee on 1 February 2017, HC (2016–17) 791, [Q10](#)

29 Roy Greenslade, "[David Cameron's EU deal—what the national newspapers said](#)", *The Guardian*, 20 February 2016

30 Laura Hughes, "[David Cameron could have secured a better deal from Europe, his own EU adviser claims](#)", *The Telegraph*, 5 January 2017

Putting all your eggs in one basket is not a very smart strategy. What does not work is what I know is sometimes a sort of shorthand over here, which is, “Well, the Germans are kind of in charge, so all we have to do is square Mrs Merkel and it will be fine.” It does not work like that.<sup>31</sup>

## The parliamentary dimension

### *The European Parliament*

24. Under the terms of Article 50, the European Parliament (EP) must give its consent to the final deal, but no provision is made for its involvement throughout the negotiations. However, it has already made clear that it intends to play a significant role.<sup>32</sup> In September 2016, the EP appointed Guy Verhofstadt of the Alliance of Liberals and Democrats group (ALDE) to act as the EP’s “Brexit co-ordinator”. In December, then-EP President Martin Schultz warned that there would be “grave consequences” if the EP is excluded from the Article 50 negotiation process and reminded the European Council President that the EP has the power to reject the final agreement.<sup>33</sup> This warning was echoed by Manfred Weber, leader of the centre-right European People’s Party group, in a January 2017 interview.<sup>34</sup> The possibility that the European Parliament might reject any agreement—whether on policy grounds, as part of an inter-institutional power play, or due to differences between the political parties represented in the European Parliament and national governments—cannot be excluded.

25. It might be assumed that the political supporters of the national governments in the European Parliament would follow the decisions made by their countries in the Council. However, even this cannot be guaranteed. The political complexion of the European Parliament is based on the results of the elections to it in May 2014. With 15 national elections due to be held before the end of the negotiations, there is the possibility of an increasing disconnect between the party-political makeup of some of the national governments represented in the Council and the Members of the European Parliament from those Member States.

### *The UK Parliament*

26. In the White Paper on exiting the EU, the Government committed to putting the “final deal” that is agreed between the UK and EU “to a vote in both Houses of Parliament”.<sup>35</sup> It is the Government’s view that notification under Article 50 is irrevocable. If Parliament sought to require the Government to withdraw notification of Article 50 or to return to the negotiating table, the practical effect of that instruction is wholly unclear. The Government has stated that Parliament will only be given a choice between the terms agreed by the Government and ‘no deal’.<sup>36</sup> There is the possibility that either House might

31 Oral evidence taken on 10 January 2017, HC (2016–17) 900, [Q30](#)

32 Agata Gostyrńska-Jakubowska, “[Parliamentarians in Brexit talks: bulls in a china shop?](#)” Centre for European Reform, February 2017

33 European Parliament, [Press Release](#), 14 December 2016

34 Daniel Boffey, “[EU parliament will be ‘very difficult’ in Brexit talks, says leading MEP](#)”, The Guardian, 25 January 2017

35 HM Government, *The United Kingdom’s exit from and new partnership with the European Union*, [Cm 9417](#), February 2017, p 11

36 Andrew Sparrow, “[Politics Live blog](#)”, The Guardian, 6 March 2017

choose to reject the terms secured by the Government at a very late stage in the Article 50 process, by which point the Government would have run out of time to secure new terms that would be acceptable to Parliament.

### The short timetable

27. None of the potential issues outlined above are insoluble. However, the tight timetable set out by the Article 50 process leaves almost no room for error, magnifying the potential damage that might be done by any delay or diversion. In December 2016, Michel Barnier said that there would be “less than 18 months” in total to negotiate the deal, because agreement would have to be reached by October 2018 to allow time for ratification by the European Council, European Parliament and UK Parliament.<sup>37</sup> In practice, the period in which substantive discussions can be undertaken may be even shorter owing to the political constraints imposed by Germany’s elections in autumn 2017, among other elections.

28. Article 50 permits the extension of the withdrawal period by unanimous agreement, which could solve any potential problems posed by the short timetable if a deal has not yet been struck but there is general willingness to continue talks. Because of the requirement for unanimity on this decision, however, any single Member State could block the extension of talks. As Peter Kellner of Carnegie Europe has explained:

If negotiations get bogged down but don’t break down, any state could veto a proposal to keep the talks going. Suppose that proposal came before the European Council. To take just one example of what might happen, Spain could threaten to veto further talks unless the UK offered concessions in relation to its overseas territory of Gibraltar. Indeed, any of the other 27 Member States could throw a wrench in the works.<sup>38</sup>

29. The view of the Foreign Affairs Committee in April 2016, before the referendum was held, was that “The Government should recognise the probability of no mutual interest deal being concluded within the two-year notice period [ ... ] It is, however, a reasonable assumption that in the medium term a suitable mutual interest deal would be concluded.”<sup>39</sup> Lord Kerr of Kinlochard, who was involved in the drafting of Article 50, recently corroborated this assessment, saying “I rate the chances of breakdown at well over 30%.”<sup>40</sup>

---

37 Charlie Cooper, Maïa de la Baume and Paul Dallison, “[UK caught out by Michel Barnier’s tighter Brexit timetable](#)”, Politico, 6 December 2017

38 Peter Kellner, “[Brexit, a game of deal or no deal](#)”, Carnegie Europe, 6 February 2017

39 Foreign Affairs Committee, Fifth Report of Session 2015–16, [Implications of the referendum on EU membership for the UK’s role in the world](#), HC 545, para 19

40 HL Deb, 21 February 2017, [col 229](#)

## 3 Key implications of ‘no deal’

---

### An “exercise in guesswork”?

30. Asked on the Floor of the House why the Government refused to give evidence to this inquiry, the Secretary of State for Exiting the EU said:

[ ... ] we will provide as much information as we can. However, this is a question of a negotiation, and we do not know where the end game will be [ ... ] There are so many different things to assess that it would be, frankly, nothing more than an exercise in guesswork at this stage.<sup>41</sup>

31. In reality, however, the key issues that would be left outstanding if the UK and EU fail to agree a deal by the end of the Article 50 period are relatively clear, and have been delineated in the evidence we commissioned (see Appendices). Professor Derrick Wyatt, main author of the Bar Council’s evidence to this inquiry, said:

In our draft evidence on behalf of the Bar Council, we said that there is a speculative element in the exercise, but if there is no speculation, there is no planning. There have got to be some attempts to establish assumptions of possibilities, and that does seem to be ascertainable.<sup>42</sup>

Professor Kenneth Armstrong of Cambridge University, whose evidence focused primarily on regulatory issues, went further. He told the Committee:

I don’t think it needs guesswork at all. I think we’ve very clearly tried to lay out the scenarios of what happens if there is no deal. Particularly in the area I have been looking at—the regulatory side of things and the non-tariff side of things—it becomes incredibly clear what happens. There is enormous uncertainty for economic undertakings in businesses located in this country and across the EU, as to what happens to their ability to do business and trade. A credit rating agency that is currently based in the UK and takes advantage of an EU-wide authorisation won’t have that advantage going forward. Those things are all very clear. They are not speculation in any way, shape or form.<sup>43</sup>

### Some headline findings

32. The full potential implications of ‘no deal’ are explored in detail in the Appendices to this report. These include, but are not limited to:—

- Ongoing disputes over the exit “bill”;
- Uncertainty and confusion for UK citizens in the EU and EU citizens in the UK;
- Trading on World Trade Organisation (WTO) terms;

---

41 HC Deb, 24 January 2017, [col 173](#)

42 Q364

43 Q365 [Professor Kenneth Armstrong]

- A 'regulatory gap' and legal uncertainty in areas not covered by the "Great Repeal Bill";
- Uncertainty over UK participation in the EU's common foreign and security policy; and
- The sudden return of a customs border between Northern Ireland and the Republic of Ireland.

33. Some of these issues, such as a dispute over the exit bill, would flow from the failure to agree a withdrawal agreement and are therefore all but inevitable consequences of a 'no deal' scenario. Other potential consequences explored in the appended evidence, such as a sudden switch to trading on WTO-only terms, could occur even if an Article 50 deal is reached but there is no agreement on a transitional phase or the future relationship. Those matters are included here on the assumption that failure to agree a withdrawal deal would necessarily imply the absence of any deal on transitional arrangements or the future relationship.

### ***Disputes over the exit bill***

34. If the UK and EU fail to agree an exit deal, any liabilities that the EU claims are owed by the UK will be left outstanding. It is probable that there would need to be ongoing debate over the precise formula used to calculate the bill, and over the final number.<sup>44</sup> According to Professor Wyatt:

The European Court can't determine what the UK owes. When the UK leaves the EU, the matter will have to be negotiated. If you ask what legal rules apply, public international law applies and EU law is relevant as a factual context to that. Is there any international court with compulsory jurisdiction? No. Could the UK and the EU set up an international arbitration? Yes, they could. They could set up an arbitration. Would they? Probably not. [ ... ] If I had to formulate the relevant principle of international law, it would be along these lines: there is a duty for the UK and the EU to negotiate about the level of the UK's share of EU liabilities; in the absence of negotiation, it is to be decided on equitable principles. Handing that over to an arbitration smacks a little bit of handing over to a third party what is essentially a negotiating political decision.<sup>45</sup>

35. The House of Lords European Union Committee concluded that "Article 50 allows the UK to leave the EU without being liable for outstanding financial obligations under the EU budget and related financial instruments, unless a withdrawal agreement is concluded which resolves this issue", adding that it was "questionable" whether any international court could have jurisdiction.<sup>46</sup> The Lords Committee also concluded, however, that "the political and economic consequences of the UK leaving the EU without responding to

44 For a detailed description of what the bill is likely to involve, see, for example, Alex Barker, "[The €60 billion Brexit bill: How to disentangle Britain from the EU budget](#)", Centre for European Reform, February 2017

45 Q343 [Professor Derrick Wyatt]

46 European Union Committee, 15th Report of Session 2016–17, [Brexit and the EU budget](#), HL Paper 125, paras 135–136

claims under the EU budget are likely to be profound”.<sup>47</sup> Asked whether the UK could simply refuse to pay any bill under these circumstances, and if this in turn would give the UK a strong hand in the negotiations, Professor Armstrong said:

It is strong in the sense of “We don’t care what the consequence is”. It is only strong in that sense. If we don’t care about having any kind of deal with the EU for the future and we don’t care about having a future relationship with the EU, of course we could do that, but how is that putting the UK in a strong position? I don’t know.<sup>48</sup>

### ***Uncertainty for EU citizens in the UK and UK citizens in the EU***

36. Along with the exit bill, the questions of the acquired rights and status of EU citizens in the UK, and vice versa, are likely to be among the first issues addressed in the Article 50 negotiations.<sup>49</sup> The Bar Council’s report (see Appendix 1) states:

The status of EU migrants in the UK and UK migrants in the EU should be one of the less controversial aspects of a withdrawal agreement, and agreement in principle is likely to have been reached in negotiations even if a withdrawal agreement has not been concluded at the time of Brexit. In the event of unplanned Brexit, the right way forward for the UK and the EU would be to implement any such agreement, or recognise rights of residence on a provisional basis pending conclusion of a withdrawal agreement after Brexit.<sup>50</sup>

37. Unlike some other aspects of the withdrawal agreement, the rights of EU citizens in the UK and UK citizens in the EU are not wholly dependent on a deal being struck under Article 50. In both cases, national governments could decide unilaterally to guarantee the rights of those individuals, and may even choose to do so before the Article 50 period is over. As the House of Lords European Union Committee noted:

In the event that the UK exits the EU without a withdrawal agreement, the most effective safeguard for maintaining the citizenship rights of EU nationals in the UK will be national law [ ... ] The nature of the forthcoming negotiations is such that absolute reciprocity in all matters cannot be guaranteed. Nevertheless, we believe that absolute reciprocity should apply and be guaranteed in respect of citizenship rights.<sup>51</sup>

We also note that the Committee on Exiting the European Union recently recommended that “the UK should now make a unilateral decision to safeguard the rights of EU nationals living in the UK”.<sup>52</sup> At the date of publication, the House of Lords has voted to amend the European Union (Notification of Withdrawal) Bill to secure the residency rights of EU nationals in the UK.

47 European Union Committee, 15th Report of Session 2016–17, [Brexit and the EU budget](#), HL Paper 125, para 137  
48 Q346

49 Maïa de la Baume and Ryan Heath, “[EU expects home-team advantage in Brexit talks](#)”, Politico, 23 February 2017

50 Appendix 1, para 37

51 European Union Committee, Tenth Report of Session 2016–17, [Brexit: acquired rights](#), HL Paper 82, paras 105 and 108

52 Committee on Exiting the European Union, Second Report of Session 2016–17, [The Government’s negotiating objectives: the rights of UK and EU citizens](#), HC 1071, para 45

38. If questions regarding acquired rights for EU citizens in the UK and UK citizens in the EU remained unresolved, however, those individuals would face considerable uncertainty around issues including their residency rights, access to employment, ability to claim pensions and other social security benefits, and access to healthcare. The evidence submitted by the Bar Council uses hypothetical examples to explore in detail the different issues that might affect EU nationals in the UK depending on the duration of their time in this country and their employment status. For UK nationals in the EU who do not yet qualify for permanent residence, meanwhile, the Bar Council concludes that the “worst case scenario” would be that they are treated differently in different countries, subject to different national rules. It concludes (see Appendix 1):

Urgent and informal negotiations between the UK and the EU countries concerned could be expected, to arrange either provisional or longer term arrangements, depending on the state of play of any continuing efforts between the UK and the EU to conclude a belated withdrawal agreement. If this sounds somewhat chaotic, that is how it might turn out to be. The position of EU migrants in the UK and UK migrants in the EU in the event of an unplanned Brexit is something the UK Government (and the Governments of other EU countries) should be planning for in advance.<sup>53</sup>

39. In the event of ‘no deal’, tourists and short-term travellers would also face some confusion and uncertainty. As the commissioned evidence explains, for example, UK nationals visiting the EU would no longer be entitled to European Health Insurance Cards, which permit unplanned access to healthcare on the same basis as local residents. Roaming charges might also be imposed overnight. Professor Wyatt told us that although the default legal position would be that UK citizens travelling to Europe would not require visas, there might in practice be some confusion at borders:

Let us take first the visas and secondly the health card. The default position would be that UK tourists could travel without visas to other EU countries—we are on neither the “must have a visa” list, nor the “must be given a short-term visa” list. The effect of that is that there is no common visa policy rule for UK tourists the day after our hypothetical Brexit over the cliff.

That would mean, first, that there was some confusion. The tourist group going to France or Italy four or five days after Brexit might find puzzled officials looking at their British passports thinking, “We know what’s happened. What’s their position?” The formal legal position would be no visa requirements, unless individual member states impose them. Do I think they would impose them? No, unless the UK started imposing visa requirements on nationals of individual EU countries.

One reason why I think the UK would not want to do that is that it would complicate the border between Ireland and Northern Ireland. Another reason is that it would be interested in retrieving the position and doing as little as possible to take adverse action that would provoke retaliation against individuals who are trying to get on with their lives.

I think the European health card depends on the application in other European countries of European law. Unless immediate action was taken at the European level to extend UK rights outside the framework of the UK being a member of the EU, the cards would become worthless.<sup>54</sup>

### **Trading on World Trade Organisation terms**

40. If the UK leaves the EU with no deal in place—or with a very narrow withdrawal agreement that does not include transitional arrangements or a framework for future relations—it will trade with the EU on World Trade Organisation (WTO) terms. This would almost certainly involve the immediate imposition of tariffs across a range of sectors, which would have differentiated impact as they are low on many products, such as automotive parts (5%), but high in sectors such as agriculture (30–40%).<sup>55</sup> As Sir Ivan Rogers has pointed out in evidence to the Committee on Exiting the EU, most of the other countries that trade with the EU but do not have Free Trade Agreements (FTAs) do have some agreements above the most basic level of WTO rules:

If you are a third country in EU jargon and doctrine, first of all you have to be on the list of countries permitted to export into the EU market. Secondly, individual firms then have to be approved, and thirdly individual consignments have to be cleared before the goods or services are allowed on the EU market. That applies to all nonmember states. That is my point in response to what I perceive to be the argument, “Why is not WTO only fine? We have moved to a world outside, but they all know that we are the same beast the day after as we were the day before”.

They would say, “No, the world does not work like that and our legal order does not work like that. If there is no agreement with us, you move into a legal void. It is not that you are a oncemember state; you have become a third country, and unless and until you have a preferential agreement enabling you to trade on preferential terms, you cannot trade on preferential terms”. This is where I part company with some of what I am reading on WTO-only. No other major player trades with the EU on pure WTO only terms. It is not true that the Americans, Australians, Canadians, Israelis or Swiss do.

They strike preferential trade deals where they can, but they also strike more minor equivalence agreements: financial services equivalence agreements, veterinary equivalence agreements, mutual conformity of assessment agreements. The EU has mutual conformity of assessment agreements with the US, Canada, Israel, Switzerland, Australia and New Zealand, and more.<sup>56</sup>

41. This echoes the view advanced by Professor Wyatt, who told us that

If we look at what the difference is, at the end of the day, between a good trade deal and a bad trade deal, the worst-case scenario trade deal would actually be better than WTO terms, but I don't think we would tolerate WTO terms for long. A worst-case scenario final trade deal would probably

54 Q354

55 Q331 [Professor Derrick Wyatt]

56 Oral evidence taken on 22 February 2017, HC (2016–17) 1072, [Q1076](#)

have tariff-free trade in manufactured goods. There is strong mutual interest in that. Agricultural products we could not guarantee—I could not say that with the same confidence as for manufactured goods. [ ... ] It would be in services that we really see a detrimental impact.<sup>57</sup>

For this reason, Professor Wyatt took the view that the imposition of WTO-only terms of trade between the UK and EU would be likely to push both sides toward the swift conclusion of an agreement, since the costs for both sides would be high.<sup>58</sup>

42. Roderick Abbott, however, Senior Adviser on Trade Policy at the European Centre for International Political Economy, took a more optimistic view in evidence to the Committee on Exiting the EU:

Whether all of this would be destructive to business is an open question, as you said. My belief is that if you are out, under those conditions, and you are trading under WTO, it is perfectly feasible. Trade is not going to stop. There will be areas where you will face barriers that you did not face before. You perhaps will make less profit, but trade will flow.<sup>59</sup>

43. In the event of a sudden or 'no deal' UK withdrawal from the EU, questions would also arise as to the applicability to the UK and legal status of the Free Trade Agreements (FTAs) that the EU currently has with third countries, such as South Korea and Canada. Before the referendum, we heard that the UK would lose access to those agreements upon leaving the EU.<sup>60</sup> The Bar Council's evidence (see Appendix 1) has qualified that view somewhat, arguing that "It might be that even in the case of an unplanned Brexit, the UK could in most cases continue to trade on the same basis with those countries, if it could secure simplified agreements to do so", for example by agreeing an exchange of notes (in the international law sense).

44. In addition to the legal issues and examples set out in the evidence we commissioned (see Appendices), detailed analyses of the implications of trading under WTO terms can be found in evidence taken by several other Committees, including the Committee on Exiting the EU, the International Trade Committee, and the Treasury Committee.<sup>61</sup> The House of Lords European Union Committee also published a report in December 2016 on the options for UK-EU trade after Brexit that included analysis of the implications of WTO-only terms of trade, both financial and procedural.<sup>62</sup>

### ***The 'regulatory gap' and the limitations of the Great Repeal Bill***

45. The Government's White Paper on exiting the EU portrays the proposed "Great Repeal Bill" as a way to create certainty for businesses and individuals, regardless of the outcome of the Article 50 negotiations. The White Paper says:

57 Q341 [Professor Derrick Wyatt]

58 Q347

59 Oral evidence taken before the Exiting the European Union Committee on 21 February 2017, HC (2016–17) 1072, [Q1004](#)

60 Foreign Affairs Committee, Fifth Report of Session 2015–16, [Implications of the referendum on EU membership for the UK's role in the world](#), HC 545, para 20

61 Oral evidence taken before the Exiting the European Union Committee on 21 February 2017, HC (2016–17) [1072](#); Oral evidence taken before the International Trade Committee on 7 February 2017, HC (2016–17) [817-viii](#); Treasury Committee, [UK's future economic relationship with the EU inquiry](#), accessed 8 March 2017

62 European Union Committee, Fifth Report of Session 2016–17, [Brexit: the options for trade](#), HL Paper 72

1.1 To provide legal certainty over our exit from the EU, we will introduce the Great Repeal Bill to remove the European Communities Act 1972 from the statute book and convert the 'acquis'—the body of existing EU law—into domestic law. This means that, wherever practical and appropriate, the same rules and laws will apply on the day after we leave the EU as they did before.

1.2 This approach will preserve the rights and obligations that already exist in the UK under EU law and provide a secure basis for future changes to our domestic law. This allows businesses to continue trading in the knowledge that the rules will not change significantly overnight and provides fairness to individuals whose rights and obligations will not be subject to sudden change. It will also be important for business in both the UK and the EU to have as much certainty as possible as early as possible.

1.3 Once we have left the EU, Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal.

1.4 We will bring forward a White Paper on the Great Repeal Bill that provides more detail about our approach.

1.5 Domestic legislation will also need to reflect the content of the agreement we intend to negotiate with the EU.<sup>63</sup>

46. However, it is clear that the Great Repeal Bill alone cannot compensate for the uncertainty for both the UK and EU that would be caused by failing to agree a withdrawal agreement under Article 50. Professor Kenneth Armstrong told us that

The great repeal Bill is supposed to leave all this EU legislation behind in the UK, but that legislation only works if you have people who can administer it and civil servants who can co-operate with one another. For industry, when things go wrong—when they have an authorisation for a product in the UK which at the moment is authorised in another member state, but that state's authorities suddenly decide that they will no longer recognise that product—what is the mechanism for resolving the dispute outside the structures of co-operation that have grown up over the years? In terms of disruption, there is potentially massive disruption in the ordinary, day-to-day boring business of administering legal frameworks. It is the iceberg below the top level of the legislation that we see in the great repeal Bill. We know that that will be a difficult task, to put in place the legal framework to deal with the legislation, but I think it will look like a sixth-form project compared with the task of putting in place the structures of co-operation between administrators outside the structures of the European Union.<sup>64</sup>

---

63 HM Government, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, February 2017, p 9

64 Q341 [Professor Kenneth Armstrong]

Later, he added:

What we are then going to have to work out, if we do not have any overarching framework or any other agreement, is what happens to all those national authorisations that are currently in place and which benefit automatically as a matter of EU law from mutual recognition, and whether that will be maintained going forward. I do not think that is something the great repeal Bill itself can touch.<sup>65</sup>

47. Similarly, Sir Ivan Rogers told the Committee on Exiting the EU that, on the day after a sudden UK exit from the EU with no withdrawal agreement:

We are saying [ ... ] “Come on guys. You know the day before you used to take our accreditation and inspection regimes. They were perfectly fine the day before; why the hell are they not the day after? Do not be ridiculous”. The EU is perfectly capable of saying, “It is not a matter of being ridiculous; it is a matter of the law. In the absence of any law, given that you have now left the Union and left the single market, there is nothing. You have not signed any other agreement with us, and unless there is a legal agreement between the two of us, we no longer recognise your accreditation, conformity assessment bodies, abattoirs or slaughterhouses. We do not recognise any of it”.

You may think this is ludicrous. Of course, there is an element of me that thinks, “This is a ludicrous state of affairs. What has changed from 31 March to 1 April?” But they will say, “The law has changed. You have left the European Union. You have left the single market. You are now a third country officially, and that is your status. We do not have to give you anything”.<sup>66</sup>

48. As the evidence we received from Professor Kenneth Armstrong demonstrates (see Appendix 2), there are currently some 33 EU regulatory and other bodies covering sectors as varied as aviation, fisheries, food safety, medicines, law enforcement and financial services. Before withdrawing from the EU, the UK will need to be prepared to expand the capacity of UK regulatory bodies in these fields and to establish new UK-only regulatory bodies in some cases. These might then look for equivalence or mutual recognition agreements with EU and other counterparts, or to seek to remain under the EU regulatory umbrella in some way if agreement can be reached. Hugo Leith of the Bar Council told us that

[ ... ] in the field of civil aviation, all air operators based in the UK are granted an air operators certificate by the UK Civil Aviation Authority. That is recognised throughout the European Aviation Safety Agency remit, which is the member states plus three other states. That status will change if the UK leaves in the event of an unplanned Brexit. The UK would effectively become a third state outside that system. Its air operators, such as British Airways and other airlines located in the UK, would have to obtain approval from the European body responsible for granting those authorisations to third states. One way that could be streamlined is if the UK enters into an

65 Q359

66 Oral evidence taken before the Exiting the European Union Committee on 22 February 2017, HC (2016–17) 1072, [Q1081](#)

agreement with the EU itself. There is provision for that to occur, but that would require some ongoing monitoring by the aviation safety authority of the UK’s monitoring systems, so there would still be some interlinks at that level.

To take the medicines example [ ... ] the Europe-wide authorisations that can be given for medicines and which are compulsory for some kinds of medicines—those for the treatment of diabetes, cancer, AIDS, rare conditions and so on—have to be held by an undertaking that is established in the EU. So if UK companies wanted to hold on to their authorisations, they would have to move or establish a place of business in another member state. That would impose some costs and challenges to their business.

Similar considerations would apply with the regulation of chemicals—an undertaking that a chemical registered has to have a representative in the EU. Either whoever is manufacturing the chemical has to be in the EU or they have to appoint another firm to do so and to carry out the responsibilities imposed by chemicals regulation on their behalf. On both levels, there are challenges for businesses at the moment that either have national or centralised authorisation.<sup>67</sup>

These issues can all be resolved—in some cases, relatively easily—but a sudden withdrawal with no exit deal in place would leave the UK playing catch-up in order to close gaps in the legal or regulatory frameworks governing a wide range of sectors.

### ***Uncertainty for UK participation in the EU’s common foreign and security policy***

49. The Government has stated that it wishes to “continue to play a leading role along EU partners in buttressing and promoting European security and influence around the world”.<sup>68</sup> This could be achieved through agreement on close co-operation with the EU on its Common Foreign and Security Policy (CSFP) and Common Security and Defence Policy (CSDP). The Committee has taken evidence on this issue and intends to explore it further in future.<sup>69</sup>

50. In the event of no agreement at the end of the Article 50 period, however, legal and political uncertainty could be cast over the status of UK assets deployed as part of ongoing EU CSDP missions. These include HMS Enterprise, which is currently deployed in the Mediterranean, rescuing migrants as part of the EU’s Operation Sophia. The absence of any withdrawal deal or separate agreement on CSDP would also be likely to make it impossible for the EU to continue basing the Operational Headquarters of its anti-piracy mission off the Horn of Africa, Naval Force ATLANTA, at its current location in Northwood. Non-EU states can and do participate in CSDP missions, but only under appropriate legal framework agreements, and there is no precedent for an Operational Headquarters for a CSDP mission to be outside the EU.<sup>70</sup>

67 Q360 [Hugo Leith]

68 HM Government, *The United Kingdom’s exit from and new partnership with the European Union*, Cm 9417, February 2017, p 63

69 Qq276–330

70 Q281

51. Leaving the EU without any withdrawal deal would also mean immediately leaving the European Defence Agency (EDA), which was established in 1994 to foster co-operation in capabilities-building, procurement and the defence industry across the Member States. The UK would drop out of the many projects in which it is currently participating through the EDA, such as building air-to-air refuelling capabilities and improving the commercial satellite communications market across Europe.<sup>71</sup> The UK could participate in EDA projects after leaving the EU as a third party country, as Norway does.<sup>72</sup> However, this would require a legal agreement to be in place.

### ***The sudden return of a 'hard' customs border between Northern Ireland and the Republic of Ireland***

52. The Government has said that it is committed to the preservation of the UK-Ireland Common Travel Area after the UK's withdrawal from the EU, including the maintenance of "as seamless and frictionless a border as possible between Northern Ireland and Ireland".<sup>73</sup> However, if the UK leaves the EU with no deal in place, it will also exit the EU's customs union. This means that even if the UK and Ireland were to maintain complete free movement of people within the UK/Ireland Common Travel Area, there would have to be some form of customs checking arrangement put into place immediately.

53. The sudden imposition of a customs border would be difficult, if not impossible, to reconcile with the desire to maintain a "seamless and frictionless" border with Ireland. As the House of Lords European Union Committee noted:

Retaining customs-free trade between the UK and Ireland will be essential if the current soft border arrangements are to be maintained. The experience at other EU borders shows that, where a customs border exists, while the burden and visibility of customs checks can be minimised, they cannot be eliminated entirely. Nor, while electronic solutions and cross-border co-operation are helpful as far as they go, is the technology currently available to maintain an accurate record of cross-border movement of goods without physical checks at the border.

The only way to retain the current open border in its entirety would be either for the UK to remain in the customs union, or for EU partners to agree to a bilateral UK-Irish agreement on trade and customs. Yet given the EU's exclusive competence to negotiate trade agreements with third countries, the latter option is not currently available.<sup>74</sup>

54. The Bar Council's evidence concludes that it would be difficult to maintain an open border even in the event of "a planned and orderly Brexit", because of the need to check imports of products in both directions and the need to check people moving in either direction. The evidence notes (see Appendix 1):

---

71 European Defence Agency, *What we do*, accessed 3 March 2017

72 Sophia Besch, "*EU defence, Brexit and Trump: the good, the bad and the ugly*", Centre for European Reform, December 2016, p 9

73 HM Government, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, February 2017, p 21

74 European Union Committee, Sixth Report of Session 2016–17, *Brexit: UK-Irish relations*, HL paper 76, paras 126–127

In the event of a FTA between the UK and the EU of either an EEA type (with harmonised standards for food safety and plant safety, etc.) or a Canada-type (tariff-free trade for originating products but no harmonisation of standards), it is possible that a lighter touch than that applied at the Norway/Sweden border could be applied to the Ireland/UK land border, with reliance on automatic number-plate recognition, designation of most road crossings as “green lanes”, and spot checks in the vicinity of the border but not at the border. Commercial vehicles could be required to make declarations at customs depots but these depots could be located away from the border. Such a system would not be watertight, but no system at the Ireland/UK land border could be.

A system along the above lines would be severely stretched if, in the wake of an unplanned Brexit, trade between Ireland and Northern Ireland were conducted on WTO terms, with tariffs of up to 40% on products regularly traded in both directions. Tariff levels as high as this might in some cases bring lawful cross-border trade to a standstill, and provide huge incentives for smuggling. There is no doubt the UK would make every effort to maintain the status quo and avoid any semblance of a “hard” border, as would Ireland, but Ireland would not be a free agent, having to account to the EU for its collection of tariffs on UK exports to Ireland, 80% of which would amount to “own resources” of the EU.<sup>75</sup>

55. We note that the Northern Ireland Affairs Committee is currently conducting an inquiry into the future of the land border between the UK and the Republic of Ireland.<sup>76</sup> They have taken a great deal of evidence on potential future scenarios for the border and we look forward with interest to their report on this critical issue.

---

75 Appendix 1, paras 124–125

76 Northern Ireland Affairs Committee, [Future of the land border with the Republic of Ireland inquiry](#), accessed 8 March 2017

## 4 Conclusions and recommendations

---

56. The process of UK withdrawal from the EU will be complex and challenging, and the exit agreement will have to be concluded under significant time pressure. Even if all sides enter into the process with goodwill and the desire to ensure a successful outcome, there are many reasons why the negotiations might fail.

57. The consequences of such a failure are far from “an exercise in guesswork”. They are, in scope if not in detail, largely predictable—and, in the evidence we commissioned, have been predicted.

58. It is possible to envisage scenarios in which ‘no deal’ might be better than a bad deal, as the Government has suggested; such as, for example, if the eventual proposed agreement only involves payment of a large sum to the EU in settlement of UK liabilities, with no provisions for any preferential trade arrangements or transitional arrangements towards a mutually beneficial future relationship. It is clear from our evidence, however, that a complete breakdown in negotiations represents a very destructive outcome leading to mutually assured damage for the EU and the UK. Both sides would suffer economic losses and harm to their international reputations. Individuals and businesses in both the UK and EU could be subject to considerable personal uncertainty and legal confusion. It is a key national and European Union interest that such a situation is avoided.

59. The immediate consequences of failing to secure an agreement might focus minds in both the UK and EU on resurrecting a deal of some kind, however basic, as quickly as possible, albeit in difficult circumstances. As the Bar Council writes in its evidence, ending the Article 50 period without a deal “could lead to a short, sharp shock, rather than a lengthy period of economic dislocation and political acrimony. But a favourable outcome would be far from certain.”

60. The possibility of ‘no deal’ is real enough to justify planning for it. The Government has produced no evidence, either to this inquiry or in its White Paper, to indicate that it is giving the possibility of ‘no deal’ the level of consideration that it deserves, or is contemplating any serious contingency planning. This is all the more urgent if the Government is serious in its assertion that it will walk away from a “bad” deal. Last year, we concluded that the previous Government’s decision not to instruct key Departments to plan for a ‘leave’ vote in the EU referendum amounted to gross negligence. Making an equivalent mistake would constitute a serious dereliction of duty by the present Administration.

61. *The Government should require each Department to produce a ‘no deal’ plan, outlining the likely consequences in their areas of remit and setting out proposals to mitigate potential risks. Such preparation would strengthen the Government’s negotiating hand by providing credibility to its position that it would be prepared to walk away from a bad deal.*

# Appendix 1: Submission on behalf of the Bar Council by<sup>1</sup> Professor Derrick Wyatt QC<sup>2</sup> and Hugo Leith<sup>3</sup>

---

## *A “no-deal” would bring loss of rights, serious economic damage, and confusion and uncertainty*

1. If no withdrawal agreement has been put in place by the end of the two year period under Article 50, the EU Treaties will cease to apply to the UK. EU legal rights will disappear overnight. The effects will be loss of rights, serious economic damage, and confusion and uncertainty. For good reason, this has been described as “falling over the cliff-edge”.

2. Effects of a no-deal include:

- Trading on WTO terms with resulting disruption of UK free trade in goods and services with the EU, and with dozens of countries the UK trades with via EU free trade agreements.
- Uncertainty for millions of UK and EU migrants about their residence rights, along with their rights to work, to health care, and to state pension rights.
- UK migrants at risk of different treatment in different EU countries with their rights depending on the state of national law in the EU country in question at the time of Brexit.
- A seriously increased risk of a “hard” border between Ireland and Northern Ireland, to enforce collection of tariffs of 30–40% on agricultural products currently traded without tariffs and without customs checks across the open border.
- Loss of the rights of UK tourists and business travellers to use their European Health Insurance Card in EU countries, reduced access to EU air passenger rights, loss of protection from excessive roaming charges, loss of rights of NHS patients to cross border health care, and uncertainty over visa-free access to EU countries.

## *Disruption of trade in goods and financial services*

3. While tariffs on UK exports to the EU would on *average* be low, in some sectors they would be high enough to inflict serious damage on UK trade. Imports and exports of cars would face 10% tariffs. The confidence of inwardly investing manufacturers, such as Nissan, would be shaken, and their future commitment to the UK would be called in question.

---

1 The Bar Council Working Group on Brexit provided advice and feedback which has been incorporated into this evidence. We are indebted to David Anderson QC for reviewing the draft in its final stages.

2 Brick Court Chambers, Emeritus Professor of Law, University of Oxford.

3 Brick Court Chambers.

4. Trade on WTO terms would mean the transfer of the EU-facing business of numerous UK banks and other financial businesses from London to subsidiaries in the EU, involving the transfer of highly paid jobs whose holders would in future pay their tax in EU countries rather than in the UK.

#### *Could the UK walk away from its exit liabilities? Could the EU sue the UK?*

5. One cause of a no-deal could be deadlock over the UK's exit liabilities, with reports that the EU might claim €60 billion from the UK.

6. There is no international court with compulsory jurisdiction over such a claim. EU law does not bind the UK after it has left the EU, and does not determine the UK's exit liabilities. Public international law would in principle apply. UK liabilities should be settled by agreement, and failing agreement, should be determined on an equitable basis. It would be open to the UK and the EU to submit the issue of exit liabilities to arbitrators of their choosing, and to specify the principles and criteria to be applied, but this would be policy choice and not an obligation.

#### *Regulatory Gaps as EU agencies terminate services to UK businesses*

7. Unplanned Brexit would separate EU regulatory agencies (such as the European Chemicals Agency, the European Medicines Agency, and the European Aviation Safety Agency), from the commercial activities in the UK which they currently service and regulate. The UK would either have to ensure that new or existing home-grown agencies could fulfil these responsibilities, or seek to maintain links with the relevant EU bodies after Brexit.

#### *Falling over the cliff-edge need not mean the end of negotiations, and a belated withdrawal agreement might be put in place*

8. If the UK and the EU fall over the cliff-edge, that need not be end of negotiations. The economic and political shock for the UK and the EU could lead to renewed attempts to deal with outstanding issues. The position might be recovered, and a belated withdrawal agreement which included transitional arrangements might be put in place.

#### *The failure of negotiations would be a worst case scenario, and every effort should be made to avoid it*

9. It is always possible that negotiations might fail. Trade on WTO terms could continue for a prolonged period. Public opinion on both sides might harden. Relations between the UK and the EU might deteriorate so badly over trade as to damage highly important non-trade issues such as co-operation over internal and external security. This is a worst case scenario, but it is one which cannot be ruled out. It is surely an outcome to avoid, and every effort should be made to avoid it.

### *The possibility of a no-deal is sufficiently real to make contingency planning essential*

10. While most of the Government's efforts should go into securing the best possible agreement with the EU, so as to avoid the cliff-edge, and a hard Brexit, the possibility of a "no-deal" is sufficiently real to justify planning how to manage it, including continued negotiations to recover the position.

### *The Committee's request for evidence*

11. The Committee invited the Bar Council to provide evidence which would set out, for an ordinary or lay audience, what the impact would be on day-to-day life if the UK leaves the EU with no withdrawal agreement in place ("unplanned Brexit"). We were asked to address the questions with reference to a few illustrative examples that can be clearly explained. This evidence aims to provide a general assessment of how disruptive a 'no deal' scenario would or would not be, and of the outstanding issues that would have to be resolved (including a sense of the processes by which such resolution might happen).

12. The potentially damaging consequences for individuals and businesses of (for example) uncertainty over rights to residence, health care and state pension entitlements, 30–40% tariffs on agricultural imports and exports, and the abrupt withdrawal of the rights of UK banks and insurance companies to carry on direct business in the EU, or are too obvious to be stated. They explain why the scenario we are asked to examine is often referred to as the "cliff-edge".

13. We seek to indicate, where possible, how an unplanned Brexit might be managed, by the UK Government, and by businesses. But that does not mean that we think that *all* the consequences of an unplanned Brexit necessarily could be managed, and we indicate possible "worst case scenarios" of, e.g., a prolonged period of trading under WTO rules in which inwardly investing manufacturers in the UK downsize their investment plans, and the EU-facing business of UK financial services providers is transferred *en masse* to subsidiaries in the EU.

14. We note that in its recent White Paper on Brexit, the Government has said that it intends to reach an agreement on the UK's future relationship with the EU by the time the two year Article 50 process has been concluded. But it adds that no deal is better than a bad deal, and "In any eventuality we will ensure that our economic and other functions can continue, including by passing legislation as necessary to mitigate the effects of failing to reach a deal."<sup>4</sup> There will, it seems, be some contingency planning for an unplanned Brexit. While most of the Government's efforts and resources should certainly go into securing a satisfactory agreement with the EU, in order to avoid the damage and uncertainty of a "no-deal", the possibility of a "no-deal" is sufficiently real to make contingency planning essential.

15. We have sought to reduce to a minimum technical legal analysis in the text, while providing references in footnotes to the legal basis for conclusions in the text. We refer on the whole to "EU countries" rather than to "EU Member States", and to "EU nationals"

---

4 Cm 9417 The United Kingdom's exit from and new partnership with the European Union, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589191/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf) paragraphs 12.2 and 12.3. Henceforth referred to simply as the "White Paper".

rather than to “Citizens of the Union.” When we refer to “EU countries” and “EU nationals” we generally include the EFTA countries who are members of the European Economic Area (EEA), namely, Norway, Iceland and Liechtenstein, and their nationals, since EU single market rules, and certain other EU rules and policies, apply to those countries as well as to EU countries.

### *The structure of our evidence and its aims and limitations*

16. We include in our evidence a section entitled “identifying the consequences of a *planned* Brexit” which describes the counter-factual to an *unplanned* Brexit, and explains why we consider that that latter scenario might produce the consequences which we identify.

17. In Part A of our evidence we examine some of the consequences of an unplanned Brexit for individuals (migrants, tourists and consumers), and businesses (UK exporters of both manufactured and agricultural products and, in a general way, UK financial services providers). We consider the particular problem of the impact of unplanned Brexit on the role of those EU agencies which currently figure directly in the UK regulatory framework (regulating medicines, aircraft safety, chemicals, food safety and some financial services), and whose separation from the UK market could lead to regulatory gaps. Throughout we offer illustrative examples, and explain them. We have had to be selective, and have chosen situations readily recognisable to the non-specialist, and (we hope) likely to be of interest to a general audience.

18. In Part B of our evidence we examine the consequences of an unplanned Brexit for the UK Government. We consider the steps that the UK Government might take to retrieve the situation. We also consider the particular problem of the impact of trade on WTO terms on the open land border between Ireland and Northern Ireland.

### *Forecasting the future involves some speculation, but without at least some speculation, no plans can be made*

19. It is not easy, looking into the future, to distinguish between consequences which might follow from the absence of a withdrawal agreement, and consequences which might follow from Brexit anyway, even if a withdrawal agreement is concluded. We acknowledge that there is an inevitable speculative element in this exercise, but without some degree of speculation, no plans for the future can be made. It is clearly essential that such plans should be made, and that Parliament and public be so far as possible empowered to understand and participate in that process.

### *If the withdrawal agreement has not been concluded, neither will the transitional agreement and the future trade agreement*

20. If the UK leaves the EU without having concluded a withdrawal agreement with the EU, there will be legal and practical consequences. Some of these consequences will follow from lack of agreement on matters which require settlement in the withdrawal agreement, such as the amount of any outstanding financial liabilities of the UK to the EU, and the rights of British citizens working and/or resident in the EU at the time of withdrawal. Other consequences will flow from the lack of transitional arrangements, and

a future trade agreement. Because if there is no withdrawal agreement, there will also be no agreement on transitional arrangements, and no future trade agreement will have been agreed. In those circumstances, the UK and the EU will fall back on trade on WTO terms.

### *Identifying the consequences of a planned Brexit. The counter-factual to an unplanned Brexit—what a planned Brexit would look like*

21. In order to demonstrate how we identify the unfilled gaps left by an unplanned Brexit, we describe in the following paragraphs what a planned Brexit would look like.

#### *Removing uncertainty for migrants and agreement on severance payments by the UK*

22. The withdrawal agreement will provide legal rights for individuals whose status at the time of Brexit has been agreed to merit permanent or transitional protection, for example, British citizens lawfully resident in EU countries, and citizens of EU countries resident in the UK. The Government has said that “[s]ecuring the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU is one of this Government’s early priorities for the forthcoming negotiations.”<sup>5</sup> Such persons are likely to be granted rights of residence after Brexit, accompanied by appropriate rights to work as employed or self-employed persons, and to receive health care and other benefits. We note and agree with the view of the House of Commons ExEU Committee that the withdrawal agreement will also deal with “the institutional and financial consequences of leaving the EU including resolving all budget, pension and other liabilities...”<sup>6</sup>

#### *Ensuring a smooth transition with transitional arrangements provided for in a withdrawal agreement based on Article 50*

23. The Government has said that it wants to avoid a “disruptive cliff-edge,” and indicated that the withdrawal agreement will also provide for a “phased process of implementation” as the UK moves from EU Membership to “a new partnership with the EU.”<sup>7</sup> That new partnership “may take in elements of current Single Market arrangements in certain areas as it makes no sense to start again from scratch when the UK and the remaining Member States have adhered to the same rules for so many years.”<sup>8</sup>

24. We think it likely that the “phased process of implementation” would be more than that, and would include transitional trading arrangements which would to a greater or lesser extent replicate those which currently apply to trade between the UK and the EU. Transitional arrangements might also cover, as the House of Commons ExEU Committee has suggested, “the status of EU agencies currently based in the UK”, and “the UK’s ongoing relationship with EU regulatory bodies and agencies”<sup>9</sup>. The Brexit White Paper refers to a

---

5 White Paper, paragraph 6.3.

6 The Committee’s first report, *The Process for exiting the European Union and the Government’s negotiating objectives*, p. 6, para. 21.

7 White Paper, paragraph 12.2.

8 White Paper, paragraph 8.3.

9 See Note 5.

number of EU agencies<sup>10</sup> and says that “[as] part of exit negotiations the Government will discuss with the EU and Member States our future status and arrangements with regard to these agencies.”<sup>11</sup>

25. The right of the UK to benefit from free trade agreements between the EU and non-EU countries might possibly be preserved under a transitional agreement, but that would entail the UK remaining inside the customs union, unless the UK made immediate legally binding arrangements with the non-EU countries concerned to carry on trading with them so far as possible as if Brexit had not happened. If the UK remained within the customs union during the transitional period, it might be agreed with the EU that the UK would be free to negotiate and conclude free trade agreements with non-EU countries to take effect after the expiry of the transitional period. A withdrawal agreement under Article 50 of the Treaty on European Union would be agreed by a “super” qualified majority in the Council,<sup>12</sup> and require the consent of the European Parliament.

*Extending the two year period under Article 50 remains an option*

26. It is true that a transitional regime might be put in place by extending the two year period referred to in Article 50. This would require the unanimous agreement of the UK and the other EU countries (in contrast to the qualified majority procedure for concluding a withdrawal agreement). There might be little difference in practice, as regards benefits and burdens for those concerned, between a transitional extension of EU membership, on the one hand, and provision in the withdrawal agreement for transitional application to the UK of elements of EU membership. But different decision making procedures would apply, and it might be politically more acceptable in the UK to have a transitional trading arrangement after Brexit than an extension of EU membership.

*Brexit without a withdrawal agreement would not necessarily mean that negotiations on a withdrawal agreement would come to an end*

27. If the UK leaves the EU without having negotiated a withdrawal agreement, and without having put in place a future trade agreement, it should not be assumed that negotiations to conclude a withdrawal agreement will come to an end, nor that negotiations to conclude a future trade agreement will come to an end. While Brexit unaccompanied by the conclusion of a withdrawal agreement, and a future trade agreement, would have a number of adverse consequences (for example, tariffs on trade conducted on WTO terms, and loss of important market access rights for UK financial services providers), the position could be recovered fairly quickly if the political will was there, and particularly if the EU took the view that it retained the power, after Brexit, to carry on seeking to reach an agreement under Article 50. The economic and political shock for the UK and the EU of Brexit without a withdrawal agreement, and without a future trade agreement, could lead to renewed attempts to deal with outstanding issues, including (in principle) international arbitration on outstanding issues of post-Brexit liability, and the putting in place of a transitional trade agreement.

10 The European Medicines Agency (EMA), the European Chemicals Agency (ECHA), the European Aviation Safety Agency (EASA), the European Food Safety Authority (EFSA) and the European (Financial Services) Supervisory Agencies.

11 Paragraph 8.42.

12 Article 50(4) provides that a qualified majority shall be defined in accordance with Article 238(3)(b) TFEU and that provision refers to “72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.” In practice this would mean 20 EU countries amounting to 65% of the population of all EU countries minus the population of the UK.

*Distinguishing the consequences of unplanned Brexit from consequences which will in any event flow from Brexit*

28. Even if the UK negotiates a “comprehensive” future trade agreement with the EU, neither that agreement, nor the withdrawal agreement, will *necessarily* provide rights for British citizens, and “British” companies,<sup>13</sup> which they currently enjoy as a result of EU membership. In some cases, rights might be safeguarded in a transitional agreement, but not figure in the future trade agreement. That would simply be a consequence of Brexit. But the general point, that it is difficult to distinguish, looking into the future, the consequences of an unplanned Brexit from the consequences of what turns out to be a planned Brexit, is worth making.

*The Great Repeal Bill becomes the Great Repeal Act (and the Great Maintaining in Force Act); EU law is absorbed by UK law, with appropriate repeals, amendments and gap filling*

29. Brexit will mean that new EU rules will no longer apply to the UK (leaving aside the terms of any transitional arrangement). It will also mean that some EU rules which apply in the UK at the time of Brexit will be repealed and will no longer apply. These consequences will follow when what has been described as the “Great Repeal Bill” becomes law. Rules which will no longer apply (subject to any transitional arrangements) will include those rules giving EU migrants<sup>14</sup> rights to reside and work in the UK, and rules which authorise the Court of Justice of the European Union, and the European Commission, to exercise powers which are binding on the UK authorities.

30. But the enactment of the Great Repeal Act will also ensure that most EU legislation in force in the UK at the time of Brexit will remain in force, unless and until reviewed, and amended or repealed, in due course. The subject matter of the rules which will remain in force are likely to include product labelling, product specifications, advertising, consumer protection, regulation of cartels and mergers, product liability, public health, environmental protection, equality law, and employment rights. The reason for maintaining most EU legislation in force after Brexit is that it is neither practicable nor necessary to undertake an immediate review, followed by possible reform or repeal, of all elements in the UK legal system comprising or derived from EU law. It is not practicable because the government, civil service and Parliament lack the resources to carry out such an extensive review, followed by possible reform or repeal. It is not necessary because the mere fact that rules in force in the UK are derived from EU law does not mean that they are bad rules or even suspect rules. In most cases such rules were supported by the UK government of the day, and in most cases the application of the rules in the UK is not politically controversial.

31. There is no doubt that maintaining most EU legislation in force in the UK is both convenient, and possible. The Great Repeal Act could cover most EU law by a general provision that EU legislation in force would continue to have effect. But such a general saving provision would not be adequate to deal with all situations. Where, for example, EU agencies exercise regulatory functions which apply to UK economic operators within the UK, Brexit will leave regulatory gaps. This sort of situation requires a tailor-made solution, perhaps involving negotiated continued participation in the activities of the agency in question, and/or amendments to UK legislation, including the terms of EU

13 That is to say, companies incorporated in England and Wales, Scotland, or Northern Ireland.

14 References in this evidence to EU migrants include EEA migrants from Norway, Iceland, and Liechtenstein, and references to the EU are where appropriate references to the EEA.

legislation which is maintained in force. In the event of unplanned Brexit, negotiations would not have produced the possible solution of continued UK participation in certain EU agencies, and there could be significant gaps in the UK's regulatory framework as a result. Gaps such as this are one of the possible consequences of an unplanned Brexit, and are examined in this evidence.

### *A—The consequences of unplanned Brexit for individuals and businesses*

#### *The position of EU migrants in the UK and UK migrants in the EU after an unplanned Brexit*

##### Hypothetical Example No 1

A, B and C are non-UK EU nationals. A has lived and worked in the UK for 6 years, B has done so for 3 years, and C has been in the UK for one month, is seeking work, but has yet to find a job. What is their legal position after an unplanned Brexit?

32. After Brexit, A, B and C have no rights under EU law in the UK.
33. Under EU law, A had acquired a right of permanent residence in the UK after five years lawful residence in the UK, but the question he will wish to have answered is whether UK law will honour that.
34. B was entitled under EU law to continue residing and working in the UK, to claim in-work benefits, and to claim job-seeker's allowance to find another job if she became unemployed. B's rights now depend upon UK law.
35. C was entitled under EU law to look for work in the UK, was entitled to claim job-seeker's allowance for three months, and was entitled to take up a job if she found one. If she had not found a job in six months, she could be required to leave the UK.
36. It is possible that the status of EU migrants in the UK after Brexit will be resolved by the UK before Brexit. Even if this is not the case, the UK is likely to announce at some point that EU migrants arriving in the UK after a certain date cannot expect to be granted permanent residence after Brexit. Those who have arrived prior to that date are likely to be granted a right of permanent residence in the UK, but that right could be restricted to those with a right of permanent residence under EU law, based on five years prior lawful residence in the UK. British citizens who had been resident in an EU country for five years at the time of Brexit would be eligible (although no longer EU nationals) for a grant of permanent residence in that country under EU law.<sup>15</sup>
37. The status of EU migrants in the UK and UK migrants in the EU should be one of the less controversial aspects of a withdrawal agreement, and agreement in principle is likely to have been reached in negotiations even if a withdrawal agreement has not been concluded at the time of Brexit. In the event of unplanned Brexit, the right way forward for the UK and the EU would be to implement any such agreement, or recognise rights

15 Article 4(1) of Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003L0109>

of residence on a provisional basis pending conclusion of a withdrawal agreement after Brexit. This might be easier said than done, since it might, at least initially, depend upon national action, as well as EU level action.

38. High levels of anxiety must be being felt by the millions of EU migrants in the UK, and UK migrants in the EU, about their future rights of residence. The sooner the UK and the EU take steps to give them the benefit of certainty about their future rights to residence, and associated matters such as rights to work, and healthcare, the better.

39. To return to the position of our hypothetical EU migrants in the UK, it must be frankly admitted that their position in the event of an unplanned Brexit cannot be forecast with certainty. We think that A will be granted the right to permanent residence in the UK (having already acquired a right of permanent residence under EU law prior to Brexit), B is likely—in due course—to be granted either permanent residence or some transitional residence rights, and C is unlikely to be granted a right of residence in the UK, unless she qualifies under future rules for EU migrants. The UK counterpart of A resident in an EU country would be eligible for permanent residence in that country under EU law (see above), but it is impossible to forecast the position of the UK counterparts of B and C in the EU if there is no withdrawal agreement covering their position, because UK migrants in different EU countries might be treated differently, at any rate pending the adoption of any common rules by the EU.

40. The worst case scenario for UK migrants in the EU would be that they would be treated differently in different EU countries, at any rate where they had resided in an EU country for fewer than five years. They would be subject to national rules, which might, at the time of Brexit, provide them with no automatic rights of residence, work, or health care and benefits. Attitudes to UK migrants in EU countries might have become unsympathetic in the wake of failed negotiations between the UK and the EU, but the need to reach an accommodation in respect of EU migrants in the UK would be bound to be a moderating influence. Urgent and informal negotiations between the UK and the EU countries concerned could be expected, to arrange either provisional or longer term arrangements, depending on the state of play of any continuing efforts between the UK and the EU to conclude a belated withdrawal agreement. If this sounds somewhat chaotic, that is how it might turn out to be. The position of EU migrants in the UK and UK migrants in the EU in the event of an unplanned Brexit is something the UK Government (and the Governments of other EU countries) should be planning for in advance. Press reports suggest that this is happening.<sup>16</sup>

### *The pensions position of EU migrants in the UK, and UK migrants in the EU, who have made contributions to a state pension scheme in more than one country*

41. Mention should be made of the pensions position of EU migrants in the UK, and UK migrants in EU countries, who have paid contributions under state pension schemes in more than one country. Contributions in one EU country may be taken into account for purposes of eligibility to a pension in another, and a pensioner may be entitled to a pension from more than one EU country, with the amount of the pension, and the

16 <http://www.thelocal.se/20170214/uk-and-sweden-agree-everybody-should-be-able-to-stay-after-brexit-eu-minister> The Swedish EU Affairs Minister is quoted as saying "We have the same vision that it should be possible for everybody to stay, but there are many details. It's not so easy.."

costs of providing it, being calculated on a pro rata basis.<sup>17</sup> Those already in receipt of pensions calculated on this basis prior to Brexit are likely to be treated under a withdrawal agreement as having accrued rights and continue to be paid on the same basis after Brexit.

#### Hypothetical Example No 2

D is a non-UK EU national who has reached pensionable age and has seven qualifying years on her national insurance card in the UK. She worked in T, an EU country other than the UK for 16 years and paid contributions to that country's State pension.

Before Brexit she will meet the minimum qualifying years to get a UK state pension (10 years) because account will be taken of her contributions in the EU country other than the UK. The amount of her pension in the UK will only be based on the 7 years of National Insurance contributions made in the UK and will thus be proportionate to her contributions in the UK, but she will also be entitled to receive a similarly proportionate pension (pro rata to her contributions there) at the expense of the EU country where she had previously worked.

What would D's position be if she reaches retirement age after an unplanned Brexit?

42. In the immediate aftermath of an unplanned Brexit D will face uncertainty and perhaps delay as regards a proportionate UK pension, and perhaps considerable delay as regards any proportionate pension from EU country T.

43. Questions such as this, relating to rights which might be regarded as being accrued rights under the EU social security rules, are likely to be settled in a withdrawal agreement. An agreed solution would probably involve pensions authorities in the UK and EU countries continuing to take into account contributions already made in the UK and EU countries, cooperation between the social security institutions of the UK and of EU countries, and pro rata pension payments continuing to be made by those institutions.

44. In the event of pensioners resident in the UK claiming a pension after an unplanned Brexit, the UK would be likely (but not certain) to maintain those rules which would allow a person claiming a pension in the UK to count contributions in an EU country to establish eligibility, and would continue to base the amount of the UK pension solely on national insurance contributions in the UK. EU countries would be likely (but not certain) to take the same approach. It is unlikely that the UK and EU countries would unilaterally accept liability for paying pensions on a pro rata basis to migrants no longer resident within their territory, in the absence of an agreement to that effect, providing for reciprocity, and ongoing cooperation between the national authorities in the countries concerned. It is likely that some sort of an agreement would be forthcoming in due course, even if there were an initial failure to conclude a withdrawal agreement, leading to an unplanned Brexit. In the meantime there would be uncertainty for those approaching pensionable age.

17 Regulation (EC) no 883/2004 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:166:0001:0123:en:PDF>. See in particular Chapter 5 on old-age pensions.

*The right of UK tourists to visit EU countries and EU tourists to visit the UK—would visa-free holiday travel be affected?*

45. The current position is that British citizens are free to visit all EU countries as tourists without a visa. Would the position change after an unplanned Brexit?

Hypothetical Question No 3

E, F, G and H are a family of British citizens resident in the UK who are planning a holiday in France when Brexit occurs. Will they have to apply for visas?

46. Quite apart from the formal legal position, it is always possible that our hypothetical family would encounter problems entering France simply because of uncertainty on the part of national officials in the immediate aftermath of an unplanned Brexit. The family in the hypothetical example would not have to apply for visas unless France imposed a visa requirement or the EU amended its common visa rules policy to require British citizens to obtain visas for travel into the Schengen area. Neither eventuality seems likely, unless the UK required nationals of one or more EU countries to apply for visas for the UK, and that too seems unlikely, not least because of the problems it would cause for the open land border between Ireland and the UK. All our suggestions of what is likely, however, are based on the calculation that national authorities will act in a rational and reasonable manner, and we appreciate that the possibility of some recriminations and retaliatory behaviour in the aftermath of failed negotiations over Brexit cannot be ruled out.

47. Most EU countries, plus Norway, Iceland, Liechtenstein and Switzerland, (26 countries in all) are in the Schengen area, and these countries apply a common visa policy. That policy is laid down by EU rules.<sup>18</sup> In the event of unplanned Brexit, the default position would be that the countries in Schengen would not be obliged to require British citizens to apply for visas to travel into the Schengen area, since the UK is not listed as one of the countries requiring a visa. It is unlikely that the EU would add the UK to that list unless the UK imposed a visa requirement on nationals of an EU country, but the possibility cannot be ruled out, in the aftermath of failed negotiations.

48. But nor does the UK appear in the list of countries entitled to visa free access for short stays (up to 90 days in any half year period). This means that Schengen countries are not *bound* to grant visa free travel to the UK. In theory, in the event of unplanned Brexit, individual Schengen countries could require British citizens to obtain a visa. Once again, this is not really likely, except as retaliation for the imposition of a visa requirement by the UK, but it cannot be ruled out. In any event, uncertainty could lead to delays for British tourists in the immediate aftermath of an unplanned Brexit.

49. Not all EU countries participate in the common visa policy. Bulgaria, Croatia, Cyprus, Ireland, and Romania do not, though Bulgaria and Romania will soon join Schengen.

50. If the UK did impose visa requirements on the nationals of any EU country, this would lead to tension with the UK Government's aim to maintain free movement without

18 Made under Article 77(2)(a) TFEU, see Council Regulation (EC) No 539/2001, as amended, and consolidated version published in June 2014 see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02001R0539-20140609>

passport checks across the border between Ireland and Northern Ireland. It would lead to tension because nationals of all EU countries are free to travel to and within Ireland, and it would be impossible to fully enforce UK visa requirements (which would make a visa a precondition for entry to the UK) for some such nationals in the absence of passport checks at the border with Northern Ireland. We address this issue in more detail in Part B of our evidence.

51. By the time of a hypothetical unplanned Brexit, the legal position of travellers from non-EU countries in the Schengen area might have changed somewhat. Non-EU citizens entitled to visa-free travel in the Schengen area might nevertheless be required to seek online authorisation to travel, and pay a €5 euro fee.<sup>19</sup> The UK might adopt a similar scheme in respect of EU travellers to the UK. One advantage would be in respect of checking the status of EU nationals who had travelled from Ireland to Northern Ireland.

52. The best case scenario for British tourists travelling to EU countries after an unplanned Brexit would be for the EU to list the UK as a country whose nationals were entitled to short-stay visa-free entry to the Schengen area, along with agreed visa-free access to EU countries not in Schengen. The worst case scenario would be facing sudden and different visa requirements from different EU countries. A general requirement for a visa for British citizens visiting the Schengen area might be preferable to some countries requiring visas for entry to the area and some not, because the position would be more clear. An online authorisation to travel with a €5 euro fee would probably apply in all cases anyway.

### *Would UK tourists in the EU forfeit use of their European Health Insurance Cards, and face high roaming charges for their phone calls and data access?*

#### Hypothetical Example No 4

J and K have booked a holiday in Spain. They both have European Health Insurance Cards. The last time they visited Spain the roaming charges for calls and data downloads had been capped. They had read more recently that all roaming charges had been abolished in the EU.

Brexit occurs while they are on holiday. Will it affect their EU rights to health care in Spain and how much they pay to use their mobile phones while on holiday?

53. A European Health Insurance Card (EHIC) is issued by national authorities acting under EU rules.<sup>20</sup> The card is issued free to nationals of EU countries who are entitled to benefit from the coordination at EU level of social security rules including those providing for health care. A card can be used by a national of one EU country who is temporarily visiting another EU country to secure equal access to health treatment which is either provided by state authorities or funded by a state scheme. The card cannot be used if the holder is travelling to another EU country for the purpose of receiving health care, but

19 [http://europa.eu/rapid/press-release\\_MEMO-16-3706\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-3706_en.htm)

20 2003/751/EC: Decision No 189 of 18 June 2003 aimed at introducing a European health insurance card to replace the forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 as regards access to health care during a temporary stay in a Member State other than the competent State or the State of residence (Text with relevance for the EEA and for the EU/Switzerland Agreement.) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003D0751>

Council Regulation (EC) No 883/2004 repealed and replaced Regulation 1408/71, and Council Regulation (EC) No 987/2009 repealed and replaced Regulation 574/72.

there are other EU rules providing for this possibility, and they are explained below. The card does not guarantee free health treatment, but it guarantees access to health treatment on the same basis as that treatment is provided to local residents. Thus for example, the card holder might have to pay for the treatment s/he receives, but will be entitled to reimbursement by the state authorities of, say, 70% of the cost of the care provided, because that is the way that the health care system in that country works.

54. In the event of unplanned Brexit while J and K, the characters in our hypothetical example are on holiday in Spain, their EU health cover would end. The same would be the case for EU tourists in the UK, who would normally be entitled to free treatment by the NHS, but who would, after Brexit, presumably have to pay the charges normally charged to nationals of those countries outside the EU who cannot claim the benefit of a reciprocal health care agreement with the UK.

55. J and K might also find that the cost of using their mobile phones in Spain will increase sharply if they take their holiday after an unplanned Brexit. In recent years, EU legislation has capped and reduced the charges which telecoms providers in EU countries make to providers in other countries in return for providing connections for the latter's customers when they want to use their mobile phones and devices abroad. The current EU plan is to abolish all discriminatory charges in respect of EU residents using their phones and devices when they travel to another EU country.<sup>21</sup> In the event of an unplanned Brexit, UK residents would no longer be resident in an EU country and telecoms providers in the EU would be at liberty to impose discriminatory charges in respect of their calls at levels which have in the past been described as excessive.

### *Would NHS patients who travel to an EU country to receive medical treatment be denied free or reduced charges or NHS reimbursement?*

#### Hypothetical Example No 5

L wishes to arrange to have a hip replacement as soon as possible because he is suffering considerable pain. The hip replacement is available on the NHS, but L is reluctant to wait for four months, and is considering surgery in France. He has read on the NHS website that patients might receive treatment free or at a reduced rate in other EU countries, and that NHS England reimburses the cost of private treatment in EU countries.

Will it affect his options if he travels to France for surgery after an unplanned Brexit?

56. EU law offers two possible options for patients considering medical treatment in another EU country. Under the first, the patient must seek NHS approval for treatment abroad on the ground that the treatment cannot be provided in the UK without a delay that is medically unjustifiable. This route provides access for NHS patients to state health care schemes in the EU under the same conditions as that of nationals of the country concerned. This may mean free health care, or that the patient bears part of the cost, and the arrangement works in much the same way as does the European Health Insurance Card, referred to above. The NHS reimburses the provider of the treatment the same proportion of the cost of treating the NHS patient which would be borne by the foreign

21 [http://europa.eu/rapid/press-release\\_IP-17-193\\_en.htm](http://europa.eu/rapid/press-release_IP-17-193_en.htm)

health care provider in respect of its own patients.<sup>22</sup> In some cases this results in the NHS reimbursing the full cost of the treatment, in which case there is no charge made to the NHS patient by the foreign provider. But in other cases, where patients of the foreign health care system in question bear some of their own costs, the NHS patient will be responsible for making a similar payment to the foreign health care provider, while the NHS is responsible for the rest. In the event of unplanned Brexit, state health care schemes in EU countries would no longer be obliged to apply the EU rules to patients from the UK, and UK patients would be guaranteed neither free treatment, nor treatment at a reduced rate.

57. There is a second option under EU rules,<sup>23</sup> whereby a UK patient is entitled to claim from the NHS the cost of medical treatment received and paid for by the patient in another EU country (whether from a state or private provider), provided that the treatment is of a type available in the UK, and that the cost does not exceed that of the same care under the NHS. After an unplanned Brexit, the UK would no longer be bound to make this option available, but could if it wished continue to reimburse the cost of treatment, either generally, or where that treatment had been arranged prior to Brexit. If the UK simply maintained in force the UK Regulations which implement the underlying EU rules, under the Great Repeal Act, L would presumably receive reimbursement, despite the fact that the text of the Regulations presupposes that the UK is an EU country.<sup>24</sup> If the UK adopts primary legislation which repeals some EU based UK legislation, and maintains other such legislation in force, the intent must be that the latter be so far as possible be given effect unless and until it is repealed and amended. We do not assume, however, that the UK would necessarily wish to continue to provide this option to NHS patients if the UK left the EU.

### *Air passenger rights under EU law—assistance and compensation for flyers in respect of delayed or cancelled flights to and from the EU and third countries*

#### Hypothetical Example No 6

M has arranged business meetings in Italy and the USA. His flight to Italy is cancelled. After travelling on to the USA, his return flight to the UK is subject to a long delay. He has to spend an extra night in the USA. Is he entitled to assistance and compensation in respect of his delayed and cancelled flights if they occurred after an unplanned Brexit?

58. Under EU rules, passengers whose flights are subject to cancellation or long delays, or are denied boarding, are entitled, according to circumstances, to assistance including food and accommodation, to refunds on tickets, to free return or onward transport, and to compensation. Flights are covered if they depart from an EU airport, or depart from a

22 This route is available under Council Regulation (EC) No 883/2004 (referred to in NHS information and guidance as the "S2" (formerly "E112") route.

23 Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, transposed by The National Health Service (Cross-Border) Regulations 2013 (SI 2013/2269). In the case of specialist treatments, the patient must seek prior authorisation.

24 See e.g., the reference to "Reimbursement of cost of services provided in another EEA state where expenditure incurred on or after 25 October 2013" in regulation 7.

country outside the EU to an EU destination, provided in the latter case that the carrier is an EU airline. Airlines only qualify as EU airlines if they are owned and controlled by EU state authorities, or nationals of EU countries.<sup>25</sup>

59. In the above hypothetical situation, after an unplanned Brexit, M’s flight from the UK to Italy is a flight from a non-EU country to an EU country, and would only be covered by the EU rules if M’s airline is an EU airline. If M’s flight to Italy is operated by an EU airline, M can claim his EU air passenger rights, irrespective of whether the UK Great Repeal Act provides that the EU rules continue in force—the EU airline is still bound by the EU rules. M’s flight from the USA to the UK would not be covered by the EU rules.

60. The Great Repeal Act might, however, not only provide that the EU rules shall continue to apply, but that flights departing from a UK airport shall be deemed to be flights from an EU airport, that flights which depart from a country outside the EU to a UK airport shall be deemed to be flights to an EU destination, and that an airline owned and controlled by British citizens shall be deemed to be an EU airline. This might be the policy choice of the UK, because if the UK appeared to be creating “loopholes” in air passenger rights, this might not be popular with air passengers. In that case, M would have a claim in respect of his cancelled flight to Italy, even if his airline was owned and controlled by British citizens. Equally, M would have a claim in respect of his long delayed flight from the USA to the UK, providing that the airline was an EU airline, or a UK owned and controlled airline.

61. If the UK provided for the continued application, as UK law, of the EU rules on air passenger rights, the question whether UK courts should continue to follow judgments of the CJEU in interpreting UK rules derived from EU rules would arise in stark form. This is because the European Court in several cases “interpreted” the rules in a way which led to criticisms that the Court had in reality amended and extended the rules, rather than explained what they meant. As written, the rules confine compensation to cases of cancellation and denial of boarding, while providing only for assistance (meals, accommodation, etc) in the case of delay. In controversial rulings, the Court of Justice held that passengers subject to delays of more than three hours should nevertheless be entitled to compensation.<sup>26</sup> In this case, it would probably be appropriate to interpret the UK rules in accordance with the controversial judgments of the CJEU, if the policy aim of the UK Government was to ensure that passengers flying to and from UK airports and on UK airlines should not enjoy a lower standard of protection than those flying from EU airports and on EU airlines.

*Falling over the “cliff edge”—unplanned Brexit—would lead to trade between the UK and the EU (and perhaps between the UK and non-EU countries with which the EU has free-trade agreements) on WTO terms, and that would impose costs on businesses and consumers in the UK and the EU*

*(a) Tariffs on trade as a result of unplanned Brexit*

62. An unplanned Brexit would mean a Brexit without a transitional trade arrangement having been put in place, since it would have been the withdrawal agreement that would

25 Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights

26 Joined Cases C-402/07 Sturgeon v Condor and C-432/06 Bock v Air France; Joined Cases C581/10 and C629/10, Nelson and Tui.

have put in place the “safety net” of transitional arrangements in time for Brexit. It would also mean that there would be no future trade agreement in place, because that could only be concluded after Brexit. The only option in the immediate aftermath of an unplanned Brexit would be to trade on WTO terms.

63. The UK is a member of the WTO but for most purposes the EU acts for the UK within the framework of the WTO, as it does for all EU countries. Members of the WTO have tariff schedules listing the tariffs to which they are committed in trade with other countries. WTO members apply their tariffs to all trading partners equally. This is known as “most favoured nation” (MFN) treatment. Free trade agreements and customs union arrangements are exceptions to this principle. Since the EU is a customs union, the UK applies the EU’s common customs tariff (CCT) to all imports from non-EU countries, unless the imports are from a country which has a free trade agreement or customs union arrangement (as does Turkey) with the EU. When the UK leaves the EU, the UK will “stand on its own feet” in the WTO, and apply its own tariff schedules to imports from other countries, unless the imports are from a country with which the UK has entered into a free trade agreement. In order for the UK to apply its own tariff schedules, it will have to acquire its own set of schedules. This means securing the consent of all other members of the WTO to the UK’s list.

64. The UK plans to adopt the same tariff schedules as it currently applies as part of the EU, that is to say, the tariffs contained in the EU CCT. That aim, and the process by which it is hoped that that aim will be achieved, was outlined on the 23 January by the UK’s Ambassador and Permanent Representative to the UN and other international organisations in Geneva, Julian Braithwaite, in the FCO’s blog:

“There is a process in the WTO that allows the UK to submit new schedules. But they can only be adopted—or certified—and thus replace our existing EU schedules if none of the WTO’s other 163 members object to them. So to minimise any grounds for objection, we plan to replicate our existing trade regime as far as possible in our new schedules. Before we take any formal steps in the WTO we will hold extensive informal consultations with the WTO membership. Every member will have an opportunity to raise any issues or concerns with us before we proceed. We intend to work closely with the EU during this process.”

65. It is perhaps appropriate to distinguish between two potential problems. The first is the UK securing certification of its tariff schedules relating to non-agricultural products through agreement with WTO members. It is not certain that the UK will have secured agreement on its schedules by March 2019. But that lack of agreement would not necessarily cause problems for the UK in practice in trading on WTO terms after Brexit.<sup>27</sup> It has been noted that the current tariff schedules of the EU have not been certified.<sup>28</sup>

66. The second potential problem concerns agricultural products, and it involves dividing the EU’s tariff rate quotas on agricultural products between the UK and the

27 The House of Lords EU Committee received conflicting evidence on this, see paragraphs 191 and 192 of its 5th Report of Session 2016–2017 *Brexit: the options for trade* <http://www.publications.parliament.uk/pa/ld201617/ldselect/lddeucom/72/72.pdf>

28 *Ibid.*, paragraph 191

EU, in negotiations which will also involve the countries which benefit from the quotas.<sup>29</sup> Disagreements unresolved in March 2019 would not necessarily impede trade in agricultural products unaffected by such disagreements, but tripartite disagreement over undivided quotas would affect trade in the products concerned, and disputes over such trade could spill over and affect trade in other products with the countries concerned.

67. In the event of an unplanned Brexit, it seems likely that the UK would be in a position to trade with the EU on WTO terms, with the EU applying the CCT, and the UK applying its own tariff schedules, based on the CCT. Leaving aside for a moment countries with which the UK currently has the benefit of free trade under agreements negotiated by the EU, the UK would also trade on WTO terms with the rest of the world. Although we have not been asked to quantify the effects of unplanned Brexit, we have sought in the following two examples to refer to actual tariffs which would apply, rather than simply refer to “tariffs”. There are two reasons for this. One is that referring to tariffs without giving some indication of how high they would be might leave the reader wondering whether tariffs on trade with the EU would make much difference. The second reason is that citing an *average* tariff conceals the large variations in rates which go to make up the average, and the potentially damaging effects of relatively high tariffs in some sectors, for example, 10% on cars, and 30–40% on some agricultural products.

#### Hypothetical Example No 7

N plc is a manufacturer of cars in the UK. N imports components (tariff-free and paperwork-free) from other EU countries, and incorporates these parts into its finished products. It exports 60% of its cars (tariff-free and paperwork-free) to other EU countries, 8% to EEA countries Norway, Iceland, and Liechtenstein, (tariff-free but not paperwork-free) and a further 4% of its production (tariff-free but not paperwork-free) to a non-EU country, C, with which the EU has a free trade agreement.

What will be the position in the event of an unplanned Brexit?

68. The UK and the EU, trading on WTO terms, will impose a 10% tariff on imports of cars. N’s cars will thus face a 10% tariff on its exports to EU countries. The UK will in turn impose tariffs of approximately 5% on parts imported from the EU. N might request the UK to exempt imported parts from customs duties. The UK might give what is called “inward processing relief” to car parts imported from outside the UK which are incorporated into products exported from the UK, but this relief would have to be applied irrespective of the origin of the products to comply with WTO MFN rules.

69. N will also face increased paperwork on the import of parts into the UK and the export of its cars to the EU, but this would happen in any event unless the UK remains in the EU customs union, which the government has ruled out. Within the customs union, trade in products and parts over the EU’s internal frontiers are for practical purposes “paperwork-free”, and customs checks to establish dutiable status are confined to external frontiers. The UK has ruled out remaining within the EU customs union, because it wishes to be free to conclude its own trade agreements with countries outside the EU. That being the case, if the UK concludes a free trade agreement with the EU, that agreement will be

29 <https://www.sussex.ac.uk/webteam/gateway/file.php?name=briefing-paper-1.pdf&site=18>

confined to products originating in the EU and the UK (i.e., wholly or mainly produced in the EU or the UK), and it will be necessary to have customs checks between the UK and the EU to determine the tariff status of goods crossing borders, since excessive non-originating content in a product could attract a tariff.

70. In the example, N plc exports to EFTA countries Iceland, Norway and Liechtenstein, which are parties to the EEA agreement, which extends the EU single market (but not customs union) to the three countries concerned. In the event of an unplanned Brexit, the EEA agreement will cease to provide a basis for tariff-free trade between the UK and those three countries. It is likely that in the longer term, the UK will conclude a free trade agreement with these three EFTA states, in similar terms to those which it agrees with the EU. In the immediate aftermath of an unplanned Brexit, however, the UK would wish to carry on trade with these countries as if the EEA agreement were still in force. The UK might achieve this by an exchange of notes, in the international law sense,<sup>30</sup> with the countries concerned, agreeing to conduct their trade by reference as far as possible to the EEA agreement, as if it were still in force between the parties concerned. This would in effect amount to a transitional arrangement as regards the UK and the three countries concerned, to be superseded in due course by a free trade agreement between the UK and the EFTA countries. It is true that the UK is a party to the EEA agreement, but it is so in its capacity as an EU country, which is not a sufficient basis for it to continue to rely upon the agreement, post Brexit, either as against the three EFTA countries, or as against EU countries. Some of the comments in the following paragraphs are also applicable to this question.

71. In the example of the UK carmaker, N plc exports to the EU, to the three EFTA countries of the EEA, and to a hypothetical non-EU country C with which the EU has concluded a free trade agreement.<sup>31</sup> Pre-Brexit, N exports cars tariff-free to country C. Post-Brexit, there are two possibilities for the treatment of N's car exports.

72. One possibility is that the UK continues to trade with country C on the same basis as set down in the trade agreement between the EU and C, for the same reasons as suggested above in the case of the EFTA countries. The agreement is a "mixed" agreement, but the fact that the UK is a party to the FTA does not ensure it will retain rights under the agreement after Brexit. In fact the UK is unlikely to claim that it is so entitled. The short way of putting this is to say that the UK is only party to the agreement in its capacity as an EU country. The longer legal equation is as follows. Let us suppose the agreement contains a fairly standard provision (similar to that in the EEA agreement between the EU and the three EFTA countries) on the definition of the parties which makes the EU and individual EU countries parties to the agreement to the extent of their respective competences under the EU Treaty.<sup>32</sup> This would mean that it was the EU and not the UK which was party to the provisions on tariff-free trade (which is within EU competence). In the aftermath of

30 That is to say, a binding international agreement in the simplified form of an exchange of correspondence containing or incorporating by reference the terms of agreement.

31 There are 30+ countries to which the UK exports tariff-free under agreements between the EU and non-EU countries.

32 For example, as in the EU-Chile agreement, "For the purposes of this Agreement, the Parties shall mean the Community or its Member States or the Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, on the one hand, and the Republic of Chile, on the other." For completeness we add that the UK could not derive rights from such an agreement against the EU, since the UK is a co-party with the EU (and the other EU countries) on the one side of the agreement, with the non EU country on the side of the agreement. The agreement does not purport to give rights of free trade to EU countries against themselves.

Brexit, the EU's position would be that the trade agreement no longer applied to the UK, and the EU was no longer responsible for ensuring the UK complied with the agreement. Country C would be entitled to renounce the agreement vis-à-vis the UK, on the grounds that there had been a fundamental change of circumstances, and that the EU could no longer fulfil its free trade obligations in respect of the UK.<sup>33</sup> In fact country C might be keen to carry on trading with the UK on the same basis after Brexit, but would be unlikely to see the trade agreement with the EU as a secure legal platform for that trade. The UK would also wish to continue trading with C on the same basis as under the EU FTA, but would also want to put the arrangement on a sounder legal footing. It might achieve this by agreeing in an exchange of notes (in the international law sense) with country C to continue trade after Brexit on the same terms as before, referring to the agreement in question, and to any clarifications or modifications necessary to ensure continuity of performance of the trade obligations under the treaty. By such means, the UK might avoid WTO trade on the one hand, and putting a wholly new trade agreement in place, on the other, which would take time, and would not be achievable before Brexit. It is not certain that in all cases this form of simplified agreement would work, either for technical<sup>34</sup> or political reasons.

73. Another possibility is that the UK loses the benefit of that FTA, and N's exports to C are subject to its normal WTO tariff of 6%.<sup>35</sup> C might not be keen to continue trading with the UK on the same basis as before, and might renounce the FTA vis-à-vis the UK on the grounds of fundamental change of circumstances.

74. The UK enjoys tariff free access to the markets of numerous non-EU countries via EU agreements with those countries.<sup>36</sup> It might be that even in the case of an unplanned Brexit, the UK could in most cases continue to trade on the same basis with those countries, if it could secure simplified agreements to do so, on the terms indicated above. In the event of a planned Brexit, transitional arrangements might maintain the UK's

---

33 See Articles 61 and 62 of the Vienna Convention on the Law of Treaties. The third country might say that it is the EU, and not the UK, which is a party to the provisions of the agreement relating to the abolition of customs duties on trade with the UK, since those provisions fall within the competence of the EU, and not the UK. After Brexit, the EU could be said to be party to the agreement in respect of free trade obligations it could no longer perform, because they involved imports into the UK, which was no longer an EU country, while the UK could not rely on those provisions in respect of its exports, because it had never been a party to them. It might be said that the Treaty should be given a dynamic interpretation, so that the EU and individual EU countries are parties to the agreement in accordance with their respective competences from time to time, since the respective scope of such competences do not necessarily stand still. This argument has more force while the EU and individual EU countries share responsibility for performance of a mixed agreement such as that under discussion, than it would once an EU country has left the EU, and the EU no longer had any competence at all in respect of the territory of the country concerned. In such circumstances, the non-EU party to the free trade agreement might say that the extent of its obligations to the EU and the UK have been radically transformed by Brexit, and that the UK's membership of the EU constituted an essential basis for its being bound by the Treaty in respect of the UK.

34 There might be constitutional procedures to be completed in country C which militate against a speedy agreement to continuation of the status quo.

35 This part of the example is loosely based on sales of Minis from BMW's Oxford plant to buyers in Chile. For the EU-Chile agreement, see [http://eurlex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535f1074175eaf0.0004.02/DOC\\_2&format=PDF](http://eurlex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535f1074175eaf0.0004.02/DOC_2&format=PDF) BMW has said of exports of Minis from its Oxford plant that success has been a result of "high customer demand in almost 80 countries around the world, from Chile to China..." [https://www.press.bmwgroup.com/united-kingdom/article/detail/T0020037EN\\_GB/a-million-minis-exported-from-plant-oxford?language=en\\_GB](https://www.press.bmwgroup.com/united-kingdom/article/detail/T0020037EN_GB/a-million-minis-exported-from-plant-oxford?language=en_GB) For general information on trade with Chile, see <https://www.gov.uk/government/publications/exporting-to-chile/doing-business-in-chile-chile-trade-and-export-guide>

36 <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/> It is to be noted that not all trade agreements between the EU and non-EU countries provide for tariff-free trade in goods.

access to these markets for a further period of years, which would give the UK and the countries concerned an opportunity to put in place any necessary adjustments to their trading relationships.

#### Hypothetical Example No 8

O is a farmer in Northern Ireland who exports (tariff-free and paperwork-free) beef, lamb and dairy products to Ireland and to other EU countries.

What will be his position in the event of an unplanned Brexit?

75. O would face tariffs of between 30% and 40% on meat and dairy produce.<sup>37</sup> Tariffs at this high level might deprive O of some of his customers in Ireland and elsewhere in the EU. The effect on Irish exports to Northern Ireland and the rest of the UK would be equally severe (or more severe if the £ sterling remains weak against the €). We note that 65% of Ireland's exports of cheddar cheese go to the UK, and 54% of Irish meat and livestock exports go to the UK.<sup>38</sup> Such high tariffs could seriously disrupt patterns of trade whereby, for example, Northern Ireland dairy farmers export milk to Irish farmers, who use the milk to product yoghurt, which they export to Northern Ireland.

76. The need to impose tariffs and in some cases high tariffs on goods traded in each direction across the land border between Ireland and the UK, and the incentives for traders to circumvent tariffs, would be a challenge to the declared aim of the UK and Irish governments to avoid putting in place a "hard" border between Ireland and Northern Ireland, and we refer to that further below, in Part B of our evidence.

#### *(b) Restrictions on cross-border business of UK financial institutions*

77. One effect of an unplanned Brexit would be on the "passporting" rights of UK financial institutions (banks, insurance companies, etc.) providing cross-border services to clients in the EU. What "passporting" means is that a UK financial operator capitalised and regulated in the UK can carry on business throughout the EU either directly or through branches, without the need for subsidiaries in other EU countries to be capitalised and regulated in those countries.

78. We do not attempt in this brief treatment to distinguish between the various legal regimes which apply to the various types of financial operator, and we do not attempt to offer a hypothetical example, in the way we have for pensioners or tourists, car makers or farmers. We confine ourselves to making two points.

79. The first is that if unplanned Brexit leads to trade on WTO terms, this would lead to immediate loss of passporting rights for UK financial services providers, because such rights are available under EU single market legislation, but would not be guaranteed under WTO rules. It is only right to say that this loss might occur in due course anyway, since there is no guarantee that a future trade agreement between the UK and the EU will provide for passporting, and indeed, no EU trade agreement with non-EU countries has to date done so. But unplanned Brexit would be more likely to bring with it a transitional arrangement prolonging the period during which UK financial operators could rely on their passporting rights. This would allow the UK a breathing space to seek to negotiate

37 Source: [http://www.civitas.org.uk/reports\\_articles/potential-post-brexit-tariff-costs-for-eu-uk-trade/](http://www.civitas.org.uk/reports_articles/potential-post-brexit-tariff-costs-for-eu-uk-trade/)

38 Source: <http://www.bordbia.ie/corporate/press/Documents/2016/BrexitBriefingInformation.pdf>

passporting rights, either based on current single market arrangements, or on “equivalence regimes,” or perhaps amounting to an enhanced equivalence regime<sup>39</sup> for the future, should it wish to or be able to do so. For its part, the White Paper says that a future trade agreement may “take in elements of current single market arrangements”,<sup>40</sup> and it is clear from the Prime Minister’s Lancaster House Speech, that this reference was intended to cover financial services.<sup>41</sup>

80. Loss of passporting rights in March 2019, for a UK financial institution relying on those rights to carry on cross-border business in the EU, would lead to immediate termination of such business unless the institution in question had set up a subsidiary which was capitalised and regulated within the EU.

81. The second point we would make is that the prospect of such a loss of passporting is leading to UK banks and other financial institutions safeguarding their positions by making contingency plans to set up subsidiaries within the EU post Brexit. It has, for example, recently been reported that Lloyds of London has made plans to set up a subsidiary within the EU, to secure its EU insurance business post-Brexit.<sup>42</sup> If an unplanned Brexit begins to look likely, rather than possible, financial institutions may feel under pressure to pre-empt unplanned Brexit by activating their contingency plans in order to maintain their EU business.

82. This might in turn reduce the incentive for the UK Government to invest negotiating capital in seeking to maintain passporting or enhanced equivalency rights in a future trade agreement. A point might be reached where the achievement of that goal would seem like shutting the stable door after the horse had bolted. It might still be said, however, that on a longer term view, achieving passporting or enhanced equivalence rights for UK financial service providers as part of a future trade agreement with the EU would be worth having. London will remain the EU’s leading financial centre. EU facing business which has been transferred from London by UK financial operators could be transferred back again and that eventuality seems worth providing for.

*Unplanned Brexit would decouple EU agencies which currently figure in the UK regulatory and supervisory framework from the markets and activities for which they are responsible*

83. Unplanned Brexit would create gaps in the UK legal system, where EU law has established regulatory bodies (in this context we use the word “regulatory” loosely to cover both rule-making and “supervision”, or monitoring, applying and enforcing rules) which play an active role in regulating the UK market. When the UK leaves the EU, the EU bodies in question will no longer take decisions in respect of the UK, and the UK will either have to ensure that new or existing home-grown agencies can fulfil these responsibilities, or seek to maintain links with the relevant EU bodies after Brexit. Although there are 40 or

39 TheCityUK, which champions the interests of the financial services industry, has said that “It is in the economic interests of the UK and the EU to continue to provide and have access to the widest possible range of financial and related professional products and services without the need to establish a commercial presence in both markets. This will require the UK and the EU to agree: a framework for the mutual recognition of regulatory regimes, building on and going beyond the existing equivalence regimes...” <https://www.thecityuk.com/assets/2017/Reports-PDF/Brexit-and-UK-based-financial-and-related-professional-services.pdf> point 10.

40 White Paper, paragraph 8.3.

41 <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

42 <http://www.cityam.com/258619/could-luxembourg-lloyds-london-insurance-market-narrows>

so EU agencies described as “working for you” in an EU brochure of that name published in 2015, only a handful of these regulate UK business activities in the UK in a way that would be immediately missed in the event of an unplanned Brexit. We would identify the following in particular: the European Medicines Agency, the European Aviation Safety Agency, the European Chemicals Agency, the European Food Safety Agency, and the European (Financial Services) Supervisory Agencies. The Brexit White Paper refers to these agencies, and says that “[as] part of exit negotiations the Government will discuss with the EU and Member States our future status and arrangements with regard to these agencies.”<sup>43</sup>

### *The European Medicines Agency*

84. The European medicines regulatory system is based on a network of around 50 regulatory authorities from the 28 EU countries plus Iceland, Liechtenstein and Norway, the European Commission and the European Medicines Agency (EMA). A centralised procedure allows the marketing of a medicine on the basis of a single EU-wide assessment and marketing authorisation which is valid throughout the EU. Pharmaceutical companies submit a single authorisation application to EMA. The Agency’s Committee for Medicinal Products for Human Use (CHMP) or Committee for Medicinal Products for Veterinary Use (CVMP) then carries out a scientific assessment of the application and makes a recommendation to the European Commission on whether or not to grant a marketing authorisation. Once granted by the European Commission, the centralised marketing authorisation is valid in all EU countries. The use of the centrally authorised procedure is compulsory for most innovative medicines, including medicines for rare diseases.

85. For a company to hold an EU wide marketing authorisation it must be established in the EU.<sup>44</sup> UK companies could retain the benefits of holding existing and seeking new EU wide marketing authorisations by maintaining or setting up a place of business within the EU. This would not necessarily be convenient in all cases. The UK could choose to continue to recognise marketing authorisations granted by the Commission. But for those authorisations for marketing in the UK which are currently handled by the EMA and the Commission, the UK would need to empower a UK body to evaluate, grant and monitor authorisations.

### *European Aviation Safety Agency (‘EASA’)*

86. The EASA, based in Cologne, regulates aviation safety at EU level. Safety standards are policed through a system of certification of equipment, aircrew, and undertakings involved in civil aviation.<sup>45</sup> Responsibility for issuing certificates is generally entrusted to the EASA, which may act itself or through national aviation authorities.<sup>46</sup>

87. EASA itself takes direct responsibility for certifying aeronautical products and aircraft types, and for certifying airline operators registered in non-EU countries.<sup>47</sup>

43 Paragraph 8.42.

44 Regulation (EC) No 726/2004 of the Parliament and the Council, Article 2, para 2 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:136:0001:0033:en:PDF>

45 All EU countries are members of the EASA, as Iceland, Norway, Switzerland and Liechtenstein. References to “EU countries” in the text cover these countries too.

46 Regulation (EC) No 216/2008 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008R0216-20130129>

47 Commission Regulation (EU) No 452/2014 of 29 April 2014 laying down technical requirements and administrative procedures related to air operations of third country operators.

The national authorities of EASA member countries certify aircraft, organisations and personnel located within their territories. In the UK this responsibility is exercised by the Civil Aviation Authority (CAA). Certification by national authorities is subject to EASA monitoring. All certificates, whether issued by EASA itself or by the national authorities subject to its monitoring, are valid throughout the EU, to ensure uniform standards of safety and equal access to the market for operators throughout the EU.

88. The EASA is also responsible for providing advice and recommendations on policy issues to the Commission, which may form the basis for new specifications and legislation that would apply across the EU (including where relevant to undertakings located in non-EU countries, but operating aviation services in EU countries).

89. In the event of Brexit, the UK would have to take over the regulatory functions which are currently carried out by EASA. This could be achieved by transferring those functions to the CAA. The UK would also have to take steps to maintain recognition in EU countries of UK regulatory certificates which are currently recognised throughout the EU, which could be achieved through an agreement between the EU and the UK.<sup>48</sup> Obtaining recognition should not be problematic at least from a technical point of view, since UK law is currently fully compliant with EU law. But new arrangements would take time to make, and in the meantime unplanned Brexit could lead to a regulatory gap and to uncertainty and delays.

#### Hypothetical Example No 9

P Ltd is an airline registered in the UK. It operates several aircraft with which it provides holiday flights between airports in the UK and destinations in EU countries. It is registered in the UK and holds an Air Operator Certificate (AOC) granted by the CAA, which is recognised in all EU countries.

Would the position change in the event of an unplanned Brexit?

90. P Ltd's AOC would no longer be valid for EU countries. Since P Ltd would now be an airline registered in a non-EU country, it would be required to apply for an authorisation from the EASA to operate into the EU. It would be likely to receive such authorisation, but in the short term there could be a regulatory gap, with the possibility of uncertainty and delays for the airline.

#### *European Chemicals Agency (ECHA)*

91. The EU has adopted complex rules to regulate the manufacture and use of chemicals: the Registration, Enforcement, Authorisation and Restriction of Chemicals Regulation, or "REACH".<sup>49</sup> The REACH regulation requires firms to provide information on chemicals used in certain quantities to the Helsinki-based ECHA, so as to allow the chemicals to be registered, scrutinised, controlled and approved. The object of the exercise is to protect human health and the environment.

48 As provided for by the EASA legislation: Regulation (EC) No 216/2008 of the Parliament and Council, Article 12(1) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0216&from=EN>

49 Regulation (EC) No 1907/2006. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1907-20140410> The REACH regime applies to EU countries and Iceland, Norway and Liechtenstein.

92. The REACH regulation imposes obligations on manufacturers of chemicals who are located within the EU, and on importers of chemicals who are located within the EU when they import chemicals from non-EU countries.

93. The ECHA reviews the chemicals registered by manufacturers and importers. National authorities have responsibility for evaluating substances of particular concern and determining any restrictions on use. A failure to register chemicals and to comply with any measures imposed under the REACH Regulation renders the marketing or use of those chemicals prohibited in the EU.

94. Registration of chemicals is obligatory for manufacturers of chemicals, and importers of chemicals into the EU, if they are established in the EU.<sup>50</sup> A business located outside the EU which manufactures a chemical imported into the EU and has no place of business in the EU may appoint a sole representative based in the EU, who is responsible for discharging all the duties of registration that would otherwise be borne by a manufacturer or importer established within the EU.<sup>51</sup>

#### Hypothetical Example No 10

Q plc manufactures chemicals in the UK, and has registered 30 products under the EU's REACH Regulation (designed to protect public health and the environment) which has ensured they can be marketed throughout the EU. Q acts as the sole representative for registration purposes of a number of chemical manufacturers based outside the EU who market their products in the EU.

In the event of unplanned Brexit, can Q plc continue to market its products in the EU, and to act for its clients outside the EU?

95. Q plc will no longer be established in the EU and will no longer be able simply to rely upon the registrations under the REACH Regulation which it has made. In order for Q plc to retain its right to market its products in the EU, its options are to appoint a sole representative established in the EU, who will undertake responsibility for registration of its chemical products, or to rely upon its customers in the EU to do so.

96. ECHA's data indicates that UK undertakings have so far made more than 5,000 registrations under REACH, second only to Germany. 40% of these registrations have been made on behalf of firms in third states, for which the UK undertaking acts as their sole representative.

97. There could be significant practical and financial consequences for the UK's chemicals industry if an unplanned Brexit occurred. In the short term, UK businesses would have to appoint sole representatives within the EU in order to maintain their ability to market their products in the EU, and there might be something of a scramble to arrange this, given the large numbers of UK businesses which have current registrations under REACH,

50 See the definition of "registrant" in Article 3(7) of the Regulation, and 3(9) and 3(11) which makes it clear that a manufacturer or importer must be established in the EU.

51 Article 8. The English text refers, quaintly, to an "only representative", which in the French text is rendered as "représentant exclusif". The reader might prefer the more normal "sole representative."

though many companies are likely to make contingency plans. The appointment of sole representatives in the EU might turn out to be the only available long term solution for the companies concerned.

#### *European Food Safety Authority*

98. The EFSA is an expert scientific body based in Parma, Italy. Its remit is to evaluate products involved in the food chain and to provide scientific advice and opinions to the Commission and to EU countries. It provides technical support for EU rules and policies in all fields which have a direct or indirect impact on food safety.<sup>52</sup>

99. The decision whether a product may be placed on the market is one for the Commission or the competent authorities of the various EU countries (depending on the type of product). The processes of scientific assessment, and risk assessment, are deliberately separated so as to ensure that the EFSA's role remains independent. EFSA assesses products and provides scientific advice that the decision-maker then takes into account. In the case of pesticides, for example, maximum residue levels designed to avoid harmful effects on human or animal health are set by the Commission at EU level. If a national authority receives an application for use of a pesticide which might require modification or addition to current rules it forwards the application to the EFSA and the Commission.<sup>53</sup> The EFSA conducts an assessment of the proposed maximum residue level and provides it to the Commission which must take that assessment into account when taking a decision on the application.<sup>54</sup> A similar process of scientific assessment by EFSA, followed by a final regulatory decision by the Commission or national bodies, is made for a range of food-related products, such as GM products, feed additives, and claims as to the health effects of foods.

100. In the event of an unplanned Brexit, EU food safety legislation would (at least initially) be re-enacted in domestic law, under which certain proposals must (on the face of the legislation) be referred to EFSA when an act for which approval is needed is proposed. It would therefore be necessary for the UK to decide whether to replicate the work done by EFSA at UK level, to seek to remain within the EFSA system, or to pursue a new model of regulation.

#### *European (Financial Services) Supervisory Agencies*

101. Several EU agencies and institutions have a regulatory or policy function in relation to financial services, which overlap and interact with the functions of national authorities. The European Securities and Markets Authority (ESMA), and the European Banking Authority (the EBA) and the European Insurance and Occupational Pensions Authority, are European supervisory authorities within the European system of financial supervision ('ESFS'). The ESFS includes the European Systemic Risk Board. The European Central Bank (the ECB) also has regulatory functions.

---

52 Regulation (EC) No 178/2002, Article 22(2) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02002R0178-20140630>

53 Regulation (EC) No 396/2005, Article 8.

54 *Ibid.*, Article 14.

102. The roles of the three European supervisory authorities are for the most part advisory and policy-oriented,<sup>55</sup> but there is also some direct regulation of financial institutions. National banking regulators and the ECB have shared responsibilities for the regulation and supervision of “credit institutions”, which include banks, building societies and any undertaking whose business is taking deposits from the public and lending.<sup>56</sup> An application for a banking licence is submitted to national authorities and scrutinised by those authorities for compliance with national law rules, and then by the ECB for compliance with EU level rules.<sup>57</sup> The ECB then has ongoing supervisory powers as regards credit institutions to ensure their compliance with regulatory and prudential rules.<sup>58</sup>

103. ESMA has responsibility for the direct licensing and supervision of credit ratings agencies and trade repositories which are involved in derivatives trading.<sup>59</sup> The direct regulation of financial institutions is otherwise largely a matter for national authorities. However, national regulators presently apply a suite of rules made at the EU level in which these agencies do have a role, and the authorisations granted by national regulators have effect throughout the EU. Taking firms offering investment services as an example, under the existing Markets in Financial Instruments Directive (“MIFID”), and under the new MIFID rules (“MIFID II”), which will take effect over the coming 12 months, an authorisation granted by a national authority will be valid throughout the EU.<sup>60</sup> The conditions for the grant of the authorisation are laid down in rules made at the EU level, and the application of those rules is subject to supervision by EU institutions.

104. In the event of an unplanned Brexit, the ECB would no longer have a role in authorising the licensing of UK credit institutions. To the extent that any EU-level rules currently applied by the ECB are thought appropriate, it would be necessary to transfer responsibility for administering those rules to the UK authorities. As regards credit ratings agencies, and trade repositories (currently regulated by ESMA), it would be necessary for such entities based in the UK to seek renewed approval from ESMA as entities located in non-EU countries for their services to be used in the EU, and the UK would also have to decide how such bodies would be regulated domestically in the future. The ability of UK-based financial institutions to operate throughout the EU on the basis of authorisations granted by the UK’s regulators—passporting—would be removed (as discussed above).

---

55 As the Commission explains, their functions are (Report from the Commission to the Parliament and Council, 8 August 2014, COM(2014) 509 final, pp.3–4): Developing draft technical standards and issuing guidelines and recommendations, respecting better regulation principles; issuing opinions to the European Parliament, the Council, and the European Commission; resolving cases of disagreement between national supervisors, where legislation requires them to co-operate or to agree; contributing to ensuring consistent application of technical rules of EU law (including through peer reviews); a coordinating role in emergency situations; in the case of ESMA, exercising direct supervisory powers for Credit Rating Agencies and Trade Repositories; and collecting the necessary information to carry out their mandate.

56 Regulation 575/2013, Article 4(1).

57 Council Regulation (EU) No 1024/2013, Article 14.

58 *Ibid.*, Article 16.

59 see Article 8(1)(l) of Regulation (EU) No 1095/2010 (establishing the ESMA) and Article 15 of Regulation (EC) No 1060/2009.

60 Directive 2014/65/EU, Article 6(3).

*B—The consequences of unplanned Brexit for the UK Government—could it turn an unplanned Brexit into a planned Brexit? Could it manage the impact of trade tariffs on the open border between Ireland and Northern Ireland?*

*Brexit without a withdrawal agreement would not mean that negotiations on a withdrawal agreement would come to an end*

105. We say above that the shock for the UK and the EU of Brexit without a withdrawal agreement, and without a future trade agreement, could lead to renewed attempts to deal with outstanding issues, including international arbitration on post-Brexit liability (though we think that would be fairly unlikely), and the putting in place of a transitional trade agreement.

106. There might be several different reasons for Brexit occurring without a withdrawal agreement having been put in place. One possibility would be delay in formally concluding an agreement which had been reached in principle. The European Parliament might delay in giving its consent, which would in turn prevent the Council concluding the withdrawal agreement. A delay on the UK side could not be ruled out. On this hypothesis, Brexit might occur because of the lapse of the two year period specified in Article 50, but a withdrawal agreement might shortly follow, putting in place a transitional period, and allowing negotiations on a future trade agreement to go forward, and/or preparations for a smooth transition to the future trade agreement.

*Could the Council still act by qualified majority under Article 50 after Brexit?*

107. The above scenario (a withdrawal agreement and transitional arrangement concluded shortly after Brexit) raises a technical legal question, which could have some political consequences: would Article 50 remain available as a legal basis for the EU to conclude a withdrawal agreement with the UK after Brexit? As indicated above, the conclusion of an Article 50 withdrawal agreement requires (on the EU side) a super qualified majority vote in the Council and the consent of the European Parliament. That is not to say that the EU could not find any other legal basis to conclude a withdrawal agreement which included a transitional trading arrangement, but such a basis might require unanimity in the Council (depending on the content of the agreement, including its transitional arrangements), and it might be a mixed agreement, requiring the individual consent of all EU countries. If Article 50 remained applicable, it would certainly simplify the process of recovering from an unplanned “hard” Brexit.

108. We think that Article 50 might continue to be applicable, even if a withdrawal agreement has not been concluded at the time of Brexit. There is nothing in Article 50 which expressly rules this out. And it might seem arbitrary that a delay in concluding a withdrawal agreement, by even a matter of days, could be said to remove the power of the EU to act under this provision, which has been designed to make provision for all the nuts and bolts of the withdrawal process. It is true that if agreement were within reach, a unanimous decision of the Council could authorise the extension of the two year period specified in Article 50. But one or two EU countries at risk of being outvoted under the Article 50 procedure might refuse to extend the two year period, in the hope of putting the withdrawal agreement, and the transitional arrangements, onto a footing which might

require unanimity in the Council, and perhaps the agreement of national parliaments, if the agreement, considered outside the framework of Article 50, could be regarded as containing mixed elements of EU competence and national competence.

*Could a withdrawal agreement under Article 50 turn out to be a “mixed” agreement, requiring the consent of the parliaments of all EU countries as well as a qualified majority in Council and the consent of the European Parliament?*

109. It is also appropriate to comment on another, connected question, could a withdrawal agreement made under Article 50 be characterised as a “mixed” agreement, requiring the consent of national parliaments, as well as a vote in Council and in the EP? Our view is that Article 50 bestows an exclusive competence on the EU to conclude all arrangements incidental to the withdrawal of an EU country from the EU, including transitional arrangements to ensure smooth transition to a future trade agreement, even if a trade agreement of that kind with a non-EU country would normally require the participation of all individual EU countries as well as the EU. If a withdrawal agreement containing transitional arrangements could be regarded as a mixed agreement, there would be no certainty that the transitional arrangements could fulfil their purpose of ensuring a smooth transition to a future trade agreement, since there could be no certainty as to when the agreement might be concluded, or come fully into force. The better view is that Article 50 bestows exclusive competence on the EU, and leaves no room for the doctrine of mixity.

### *A potential impasse over UK liabilities—could the EU sue the UK?*

110. One reason for an unplanned Brexit might be an impasse in negotiations on the terms of the withdrawal agreement. There have been press reports that the EU might claim a sum of €60 billion from the UK in respect of EU commitments for which the UK is alleged to be responsible. The EU might claim the UK is liable for amounts in settlement of its exit liabilities which the UK regards as unacceptable, and/or a timescale for payment which the UK regards as unacceptable. Locked in argument, the UK and the EU might fall over the “cliff edge” of the two year period specified in Article 50. If this happened, the consequences identified in Part A of our evidence would have to be addressed. But neither the UK nor the EU would be likely to find this a satisfactory outcome. Negotiations might continue in order to resolve the impasse, to put in place a transitional agreement, and to bring an end to trade on WTO terms.

111. There is no international court or tribunal with compulsory jurisdiction over the UK before which the EU could sue the UK for its alleged exit liabilities. EU law would not bind the UK after it has left the EU, and EU law would not be determinative of alleged UK liabilities which arise because the UK has withdrawn from the EU. The law applicable to any claim by the EU would be public international law.

112. One possibility is that the UK and the EU might seek to break an impasse over liabilities by submitting the issue to arbitration. This might be done before Brexit by a provision in the withdrawal agreement. We think this is fairly unlikely. In the first place, the dispute would be wholly or mainly an argument about amounts or a timescale for payment. In principle, public international law would govern the arbitration. There would

be no precise legal rules in play, and a submission to arbitration might smack of being a submission to the arbitrators' political judgment,<sup>61</sup> though this might be avoided or mitigated if the UK and the EU specified the criteria to be applied by the arbitrators.

113. Arbitration could also pose technical legal problems on the EU side. The EU could submit the question of the UK's liabilities to arbitration, but it could not submit issues of EU law to arbitration—that would be incompatible with the exclusive jurisdiction of the EU Court of Justice.<sup>62</sup> While the UK's liability would be governed by international law, the assessment of that liability would involve consideration of the UK's participation in EU procedures, and EU rules relating to the multiannual financial framework, and the pensions of civil servants. The drafters of any agreement between the EU and the UK to submit UK financial liabilities to arbitration would need to ensure that it respected the exclusive jurisdiction of the EU Court of Justice.

114. While the above considerations tend to argue against arbitration, the possibility of arbitration cannot be ruled out. It might be the only way of breaking an impasse over quantum and/or time to pay, and moving on to other issues, such as activating transitional arrangements and designing a future trade agreement.

115. What is perhaps more likely is that the pressure caused by unplanned Brexit would concentrate the minds of both the UK and the EU and produce an agreement on exit liabilities, and a transitional arrangement. Unplanned Brexit could lead to a short, sharp shock, rather than a lengthy period of economic dislocation and political acrimony. But a favourable outcome would be far from certain.

### *Worst case scenario in attempts at further negotiations after an unplanned hard Brexit*

116. While efforts to negotiate a withdrawal agreement, and a transitional agreement, might continue, if serious differences remained, the negotiations might fail. The prospect of a prolonged period of trade on WTO terms could lead to inward investors such as Nissan reconsidering their commitment to the UK. Much of the EU-facing business of UK financial services providers could be relocated to the EU, leading to significant job losses in the UK, while taxes previously paid in the UK would be paid in other UK countries. Public opinion on both sides might harden. Relations between the UK and the EU might deteriorate to an extent which impinged on crucially important non-trade issues such as co-operation over internal and external security. This is a worst case scenario, but it is a scenario which cannot be completely ruled out.

---

61 Rules and principles of public international law on state succession would be relevant, at any rate by analogy, but the rules are unsettled. The Vienna Convention on Succession of States in respect of State Property Archives and Debts, applied by analogy, would suggest that the passing of EU liabilities to the UK would be by agreement and in the absence of agreement be apportioned on an equitable basis, see, e.g., Article 37. It should be noted, however, that the Vienna Convention has only been ratified by 7 states, and is not in force, and that it cannot be said with confidence that the principle in question could be regarded as one of customary international law. The fact that the relevant rules of international law are difficult to identify does not however cast doubt on the applicability in principle of public international law to a dispute over exit liabilities.

62 See e.g., Article 344 TFEU.

### *Managing the impact of unplanned Brexit on the open border between Ireland and Northern Ireland*

117. We note that the UK and Irish governments have the same policy on the land border between Ireland and the UK - that policy is to maintain an open border. The Brexit White Paper says that “[a]n explicit objective of the UK Government’s work on EU exit is to ensure that full account is taken for the particular circumstances of Northern Ireland.”<sup>63</sup> Before considering the impact of an unplanned Brexit on the border, we shall address the impact of a planned Brexit, followed by a FTA between the UK and the EU.

118. We note that Ireland’s EU Commissioner, Phil Hogan, stated in January 2017 that:

*“The return of a “hard border” between Northern Ireland and the Irish Republic looks inevitable if Britain leaves the European Union’s single market.”*<sup>64</sup>

119. Even an orderly and planned Brexit will require some creative thinking if the open border between Ireland and Northern Ireland is to be maintained. In the event of an unplanned Brexit, the need to impose tariffs, and in some cases substantial tariffs, on trade in both directions between Ireland and Northern Ireland, would be much harder to reconcile with a policy of avoiding a “hard” border between north and south.

*Maintaining the open border will be a challenge even if there is a smooth transition from the status quo to a free trade agreement between the UK and the EU*

120. If we imagine a planned and orderly Brexit, in which there is a smooth transition from the status quo to a free trade agreement between the UK and the EU, there are two potential problems to be surmounted if an open border is to be maintained. One arises from the need to check imports of products in either direction, and the other relates to the need to check people moving in either direction.

121. It seems certain that in any future trade agreement between the UK and the EU, free trade in goods will be confined to goods *originating* in the UK or the EU. That is the pattern for the EU’s free trade agreements, including those with the EFTA countries. It is an inevitable pattern which could only be avoided if the UK remained in a customs union with the EU, which the Government has ruled out, because in a customs union with the EU the UK would be unable to negotiate its own free trade agreements with countries outside the EU. It follows that at frontiers between the UK and EU countries, including Ireland, originating goods have to be distinguished from non-originating goods, and non originating goods are liable to be subject to whatever external tariffs are applied by the UK and EU respectively.

122. By way of a possible comparison with the Ireland/Northern border after Brexit, David Anderson QC has described border procedures between EFTA/EEA country Norway and EU country Sweden as follows:<sup>65</sup>

63 Paragraph 4.10.

64 <http://uk.reuters.com/article/uk-britain-eu-ireland-idUKKBN14T0U1>

65 David Anderson QC, Brick Court Chambers Brexit Law Blog, Brexit and the Border <https://brexit.law/2017/01/09/brexit-and-the-border/>  
<https://brexit.law/2017/01/09/brexit-and-the-border/>

“The situation of Norway is instructive, as described in a fact-finding report in *The Times* from October 2016. In the single market but outside the customs union, Norway operates automatic number-plate recognition on each of its 80 road crossings to Sweden, and designates some of them as “green lanes” which are closed to dutiable goods. (There were, similarly, approved crossing points and crossing times in force at the Irish border pre-1973). But commercial vehicles are also obliged to stop at customs stations to make a declaration (occupying on average 8 minutes, even though Norway and Sweden have been able to negotiate dual controls). There are spot checks, X-ray facilities and warehouses for contraband at the border, and occasional 30-minute tailbacks are reported where there is intelligence of smuggling operations.

“If a Canada-type FTA arrangement is negotiated, the UK will be outside the single market as well as the customs union. There will thus be further reasons for border checks including food safety, plant safety, pharmaceutical safety and packaging rules. This would also be the case, of course, in the event of a truly hard Brexit in which trade would continue on WTO terms.”

123. We note that a forecast of the Ireland/UK border after Brexit that would be close to David Anderson’s description of the Norway/Sweden border has appeared recently in the *Irish Examiner* (6 February 2017). The authors of the article seem to contemplate a “hard border” in the form of border posts:

*“Furthermore, Ireland and the UK could agree that there is only one border stop so that an export from Ireland is treated at the same time as an import into the UK, and vice versa.*

*“This can be achieved either through a joint border office in which officials from both countries are working, or by empowering, eg, the customs officials of Ireland to act also on behalf of the UK.”<sup>66</sup>*

124. In the event of a FTA between the UK and the EU of either an EEA type (with harmonised standards for food safety and plant safety, etc.) or a Canada-type (tariff-free trade for originating products but no harmonisation of standards), it is possible that a lighter touch than that applied at the Norway/Sweden border could be applied to the Ireland/UK land border, with reliance on automatic number-plate recognition, designation of most road crossings as “green lanes”, and spot checks in the vicinity of the border but not at the border. Commercial vehicles could be required to make declarations at customs depots but these depots could be located away from the border. Such a system would not be watertight, but no system at the Ireland/UK land border could be.<sup>67</sup>

*Trade on WTO terms would test the open border policy to its limits*

125. A system along the above lines would be severely stretched if, in the wake of an unplanned Brexit, trade between Ireland and Northern Ireland were conducted on WTO terms, with tariffs of up to 40% on products regularly traded in both directions. Tariff

66 <http://www.irishexaminer.com/viewpoints/analysis/the-irish-border-after-brexit-will-be-real-but-can-be-simplified-442136.html>

67 The border is twice the length of the English-Welsh border and three times the length of the English-Scottish border, with nearly 300 formal crossing points and many informal ones, see Anderson, op. cit..

levels as high as this might in some cases bring lawful cross-border trade to a standstill, and provide huge incentives for smuggling. There is no doubt the UK would make every effort to maintain the status quo and avoid any semblance of a “hard” border, as would Ireland, but Ireland would not be a free agent, having to account to the EU for its collection of tariffs on UK exports to Ireland, 80% of which would amount to “own resources” of the EU.<sup>68</sup>

126. And then there is the question of the free movement of people across the Ireland/UK land border. David Anderson QC recently summarised the current position as follows:

“Since its establishment in 1922, the Common Travel Area (CTA) has enabled UK and Irish nationals to travel freely to each other’s countries. These arrangements are permitted by Protocol 20 to the TFEU and there seems to be no reason why they should not be continued after Brexit.

“But as the twists and turns of the CTA have shown over time, it has depended for its survival on significant policy coordination and practical cooperation between the UK and Ireland where non-UK and Irish nationals are concerned. Thus, the controls in place between 1939 and 1952 on Irish Sea crossings were lifted only when Ireland and the UK agreed to operate similar immigration policies.

“Such coordination and cooperation have been achieved in recent years where third-country nationals are concerned (e.g. by visa data exchange, and joint visa schemes for India and China, introduced in 2014). Where EU nationals are concerned, the free movement rules in the Treaty have rendered such coordination largely automatic.”<sup>69</sup>

*“Operation Gull” provides checks on movement of persons and seeks to compensate for the lack of a hard border*

127. Illegal movements of non-EU nationals across the Ireland/UK land border are currently addressed by co-operation between the UK and Irish authorities designed to address abuse of the Common Travel Area. Methods used include the interviewing of suspected persons at airports and ports in the UK including Northern Ireland.<sup>70</sup> The description “Operation Gull” is often attached to this cooperation, or to elements of it. As regards ports, according to the UK Border Agency.

*“Immigration officers in Northern Ireland check the status of passengers arriving from, or leaving for, Great Britain targeting routes shown to be most at risk.”<sup>71</sup>*

128. In 2008 a British government proposal to introduce passport checks for those who fly from Belfast to the rest of the UK was dropped after strong opposition from Conservatives

68 Council Decision 2014/335/EU, Euratom, Article 2(1)(a) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0335&from=EN>

69 David Anderson QC, Brick Court Chambers Brexit Law Blog, Brexit and the Border <https://brexit.law/2017/01/09/brexit-and-the-border/>

70 <http://www.belfasttelegraph.co.uk/news/northern-ireland/concern-at-illegal-immigrant-advice-28770129.html>

71 UK Border Agency COMMON TRAVEL AREA Review of New Arrangements at Northern Ireland Sea Ports [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257182/cta.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257182/cta.pdf)

and Ulster Unionists.<sup>72</sup> On the Irish side, there are reports of Irish police setting up checkpoints in the vicinity of the border and detaining illegal entrants who have crossed the border from Northern Ireland.<sup>73</sup>

129. There has been criticism of Operation Gull on the UK side by human rights groups. It has been accused of racial profiling in its identification of individuals selected for interview in UK ports and airports.<sup>74</sup>

130. We noted in Part A of our evidence that if the UK did impose visa requirements on the nationals of any EU country, this would conflict with the UK Government's aim of maintaining free movement without passport checks across the border between Ireland and Northern Ireland. In practice EU nationals requiring a visa to enter the UK would be able to cross from Ireland into Northern Ireland without having such a visa. The Secretary of State for Northern Ireland has been reported as saying that Operation Gull would be expanded to close any potential back door to Britain post Brexit.<sup>75</sup> There must be a strong policy argument for all EU nationals to be allowed short stay visa-free access after Brexit, whatever the position as regards the rights of EU nationals to work or reside in the UK. The monitoring of EU nationals entering the UK from Ireland without a passport check or stamp would be facilitated if the UK adopted for EU nationals the scheme which the EU is planning to introduce for non-EU nationals with visa-free access to the EU, i.e., online authorisation to travel, subject to a modest fee (see paragraph 52 above).

### **The return of a hard order cannot be ruled out if there is any prolonged period of trade on WTO terms**

131. We think that the imposition of tariffs on trade in goods between Ireland and Northern Ireland would pose a greater threat to the open border than divergences between immigration rules between Ireland and the UK. The impact of divergences in immigration rules could be mitigated by the UK giving short stay visa-free access to nationals of EU countries, and by application of a system of online authorisation/advance notification of travel. "Leakage" could probably be contained by expansion of Operation Gull.

132. Similarly, we think it likely that the level of customs checks needed to monitor a free trade agreement between the UK and the EU, where trade is confined to originating products, could be achieved without fixed customs posts at the border between Ireland and Northern Ireland.

133. But enforcing the payment of high tariffs on trade in goods which are currently regularly traded across the open border without any restrictions whatsoever could be a different matter. Devices such as spot-checks, and customs depots away from the border, might be enough, but they might not. It is true that policy decisions to accept fairly large scale evasion of tariffs might be made, on both sides of the border. After all, there would be fairly large scale evasion in any event, given the porous nature of the border. But Ireland would not be a free agent in the matter, and there might be limits on the EU's tolerance of

---

72 <http://www.theguardian.com/uk/2009/jan/15/uk-irish-republic-border-passports>

73 <http://www.independent.ie/irish-news/gardai-man-checkpoints-on-north-border-to-grab-illegals-31448868.html>

74 <http://www.lawcentreni.org/policy/policy-briefings/203.html>

75 <https://www.theguardian.com/politics/2016/oct/09/ireland-could-carry-out-britain-passport-checks-post-brexit>

evasion of the EU's common external tariff. It is impossible to avoid the conclusion that an unplanned hard Brexit followed by trade on WTO terms would place maintenance of the open border seriously at risk.

*The Bar Council Brexit Working Group*

*Professor Derrick Wyatt QC*

*Hugo Leith*

## Appendix 2: Submission by Professor Kenneth Armstrong, University of Cambridge

---

### EU Agencies and the European Administration

#### *Executive Summary*

- Member States of the European Union cooperate in policymaking and law-making through the formal institutional structures of the EU. Withdrawal from the EU will mean that UK ministers and UK MEPs will no longer participate in the EU legislative process. The aim of the Great Repeal Bill, however, will be to seek to maintain convergence between UK and EU legislative requirement until such time as Parliament decides to make changes.
- Maintaining regulatory convergence through the Great Repeal Bill is not the same as ensuring **effective regulatory cooperation**. Underneath the visible level of legislation lies a more hidden and more complex world of administrative and regulatory cooperation between national and EU executive arms. **EU agencies** form part of this multi-level administrative framework.
- Together with the European Commission and national authorities, EU agencies support administrative cooperation that includes:
  - Reviewing, approving, denying **authorisations** to place products on, or offer services in, national and European markets
  - Creating procedural mechanisms and institutional structures for the **resolution of disputes** arising from the implementation of EU rules at an administrative level
  - Agreeing post-legislative technical specifications or guidance to ensure a **uniform implementation** of EU legislation
  - Funding **research collaboration** between UK and EU-partner universities
  - **Sharing information** in the fight against international crime and terrorism.
- There is scope to manage future relationships with EU agencies through the international strategies of agencies. However, that type of cooperation is often pursuant to **international agreements** between the EU and non-Member States. The simplest example is where the EU has an 'association agreement' with the non-Member State covering a range of areas of policy cooperation. In her Lancaster House Speech, the Prime Minister has seemingly rejected this type of overarching cooperation agreement.
- A future 'Deep and Comprehensive' style of **Free Trade Agreement** could perhaps substitute for an association agreement. However, should that agreement

fail to materialise or its agreement be delayed significantly beyond the date of withdrawal—and without any transitional arrangements in place—there are obvious risks for both government and for businesses.

- If the UK leaves the EU without any sort of 'deal' in place there will be **clear and immediate effects on both tariff and non-tariff barriers**. It is the potential costs, complexities and uncertainties from non-tariff barriers that is deserving of significant attention. This report highlights non-tariff barriers in the context of the work of EU agencies.

## Context

1. European Union agencies are part of a complex administrative landscape. Their role relates primarily to the post-legislative implementation, application and elaboration of EU policy and regulatory frameworks.

2. On 2 February 2017, the Government published a White Paper on 'The United Kingdom's exit from and new partnership with the European Union' (Cm 9417). The White Paper (para 8.42) briefly states the position of the Government in terms of the future relationship with European Union (EU) agencies:

*There are a number of EU agencies, such as the European Medicines Agency (EMA), the European Chemicals Agency (ECHA), the European Aviation Safety Agency (EASA), the European Food Safety Authority (EFSA) and the European (Financial Services) Supervisory Authorities (ESAs), which have been established to support EU Member States and their citizens. These can be responsible for enforcing particular regulatory regimes, or for pooling knowledge and information sharing. As part of exit negotiations the Government will discuss with the EU and Member States our future status and arrangements with regard to these agencies.*

3. During the Committee stage of the European Union (Notice of Withdrawal) Bill, amendments to the Bill were proposed that, if accepted, would require the Government within 30 days of the coming into force of the Act—to report to Parliament on the UK's future participation in, and relationship to, a number of EU agencies. The amendments were not called. It is in the context of uncertainty as to the UK's future relationship with EU agencies—whether or not there is a final 'deal' with the EU—that this report identifies the role played by EU agencies and the implication of Brexit for that role when the UK leaves the EU.

4. Three points should be clarified at the outset:

- EU agencies are a novel feature of the European landscape and their current role and function varies and continues to evolve across policy areas.
- The European administrative landscape is more extensive and multi-faceted than agencies and includes:
  - the continuing central role of the European Commission, not least in the adoption of post-legislative delegated and implementing acts even in areas where EU agencies have decision-making powers;

- the on-going work of expert groups and committees of national representatives in giving a national and expert dimension to European administration;
  - the highly significant role played by national competent authorities (including national regulators) in administering EU legal frameworks including in cooperation with other national authorities and also with EU agencies.
- There are distinct interests at stake. In areas of regulatory policy there are the economic interests of firms and companies that need to comply with EU regulatory requirements when seeking to provide goods and services on the EU market. Access to authorisations—whether Union-wide or national, but subject to mutual recognition in other EU states—are at the heart of their concerns. From a policy point of view, existing structures of decision-making both within agencies and beyond, rely on the representation of national interests in agency management boards, standing committees, working and expert groups. Loss of Member State status has a particularly significant effect in terms of a loss of a capacity to represent those interests both when decisions are being made that affect the interests of applicant firms and companies but also in the elaboration of the technical guidance which puts the flesh on the bones of EU legislation.

5. As the UK prepares to withdraw from the EU, it will be faced with the difficult task of seeking to maintain or replicate regulatory structures which derive from, or are connected to, EU legislation. That is the task of the Great Repeal Bill and it will be an enormous task. However, the scale of the undertaking in respect of the post-Brexit administrative landscape has probably been underestimated with too much attention focusing on the legislative side and too little on the administrative side. Moreover, the very different roles played by different EU agencies produces a highly variegated pattern of engagement between, on the one hand, economic interests and, on the other hand, national and European administrative structures.

6. Understanding the role played by EU agencies is, therefore, a necessary but not a sufficient basis for evaluating the administrative challenges following the UK's withdrawal from the EU.

### *Origins*

7. Agencies were not an original feature of the institutional landscape of the European Communities before UK membership and emerged only gradually in the years immediately following its membership. It was not until the 1990s and the 2000s that European agencies became a significant institutional innovation. There are thirty three working agencies listed on the EU's website (See glossary).

8. Prior to their emergence, 'European' administration was centralised within the European Commission (and on occasion within the Council of the EU). Given that tasks had been delegated to the European Commission, further delegations of power to other bodies and agencies was limited not least by a narrow interpretation of ECJ case law on the capacity to further delegate discretionary powers. However, in order to ensure that the European Commission was responsive to national interests, its capacity to exercise

implementing powers was under the supervision of committees of representatives of national administrations and national experts. It was this system of 'comitology' rather than agencies that was the dominant institutional feature of the administrative framework.

9. Nonetheless, the number and role of EU agencies has steadily grown reflecting:

- The changing constitutional and legal environment in which agencies are embedded;
- Increasing demands to meet the functional needs of administration;
- The desire for better divisions of responsibilities and accountability for decision-making that either requires expertise or the application of that expertise to concrete situations.

### *Constitutional and Legal Environment*

10. There is a sizeable legal literature on the process of 'agencification' of the European administrative landscape (a brief literature review is included at the end of the report). A common finding of that literature is that EU agencies have grown despite a relatively hostile constitutional and legal environment which apparently restricted the capacity to delegate powers to bodies and agencies outside of the formal institutional structures of the EU. The Lisbon Treaty significantly altered the constitutional basis for the exercise of executive power:

- Articles 290 and 291 TFEU now distinguish between the exercise of delegated powers by the European Commission (subject to consultation with expert groups rather than comitology), and the exercise of implementing powers where comitology still applies.
- Agencies and other bodies are now expressly subject to the supervisory jurisdiction of the EU courts.

11. The new legal context of European administration is illustrated in the judgment of the Court of Justice arising from a legal challenge brought by the UK to the powers of the European Securities and Markets Authority (ESMA) to control 'short-selling'. The Court confirmed that the EU legislature does have the power to delegate specific tasks to EU agencies with judicial review ensuring that agencies remain within the boundaries of the mandate given to them. Once the UK leaves the EU, it will no longer have access to the mechanism of judicial review that brought about this case in the first place (see para 48 below).

12. Another point to draw is that agencies are creatures of EU legislation. Significantly, the extent to which agencies work with non-EU interests is to be found at this legislative level. Indeed, there has been a movement to standardise the provisions in EU legislation that relate to their relationship with non EU states (see paras 29–31 below).

### *Executive Agencies*

13. A key distinction can be drawn between 'executive' and other EU agencies. Six 'executive' agencies are identified:

- Education, Audiovisual and Culture Executive Agency (draws together funding under a wide range of EU programmes).
- European Agency for SMEs (administers a range of funded programmes targeting SMEs).
- European Research Council Executive Agency (European Research Council awards research grants).
- Consumers, Health, Agriculture and Food Executive Agency Work includes running the EU Health programme).
- Research Executive Agency (manages Horizon 2020 programme).
- Innovation and Networks Executive Agency (manages Connecting Europe facility).

14. What these agencies have in common is that they administer funding under a wide variety of EU programmes. They help establish a division of responsibilities between the formal EU institutions that makes decisions as to policy goals and budgets, and the agencies which then ensure the proper implementation of the programmes. They were popularised following the resignation of the Santer Commission with a view to enhancing the transparency or, and accountability for decision-making. What is also noteworthy about these executive agencies is that they are governed by a 'horizontal' instrument: Regulation 58/2003.

15. The extent to which these executive agencies might matter to the United Kingdom post-Brexit depends on whether the UK seeks to continue to participate in one or more of the funding programmes for which executive agencies are responsible. It may be that the UK will simply repatriate some of these activities to national institutions. However, the work of the executive agencies supporting EU research, science and technology programmes is particularly important to the future of collaborative research between the UK and its EU partners.

16. Non-EU states can collaborate in research with EU partners but the extent and nature of that collaboration depends on the specific legal context of the relationship between the non-EU state and the EU. A broad distinction we can make is between those states that have the status of 'associated countries'—where the EU and the non-EU state collaborate pursuant to an association agreement—and non-associated countries where the cooperation is pursuant to a Science and Technology Cooperation Agreement. Associated countries have the same rights as EU states except they do not have a vote in the programme management committee.

17. The Prime Minister's Lancaster House speech together with the White Paper suggests that there will not be an association agreement governing the UK's future relationship with the EU. Instead, the basis of any agreement would be a Free Trade Agreement not dissimilar to the recently agreed Canada-EU Trade Agreement (CETA). Canada has participated in research collaboration with the EU as a non-associated state since 1996, based on a Science and Technology Cooperation Agreement. Canadian researchers can participate in Horizon 2020 programmes but do not have direct access to EU funds (resources are pooled from EU and Canadian researchers). In October 2016 an 'Implementing Agreement' was

concluded between the European Commission and the Canadians to facilitate research collaboration between Canadian researchers and European Research Council-funded researchers. The agreement is administered on the EU side by the European Research Council Executive Agency.

### *Common Foreign and Security Policy/Common Security and Defence Policy—European Defence Agency*

18. The European Defence Agency was established in 2004 as a '2nd pillar' agency by the Council of the EU. Its legal basis is now to be found in Council Decision 2011/411/CFSP. This highlights an important difference between this agency and others, namely that it is an extension not of the executive power of the European Commission but that of the Member States' governments cooperating in the Council—through national defence ministers—together with the High Representative.

19. There are Framework Partnership Agreements (FPAs) which allow non-EU states to participate with EU countries in defence matters. While the budget of the Agency derives from Gross National Income (GNI)-generated contributions within a three-year financial framework agreed unanimously by the Council, 'earmarked' revenues can also be received by the Agency from third countries.

### *Police Cooperation—Europol*

20. Established in 2009 as a creature of intergovernmental cooperation in the sphere of Justice and Home Affairs, in 2016, the European Parliament and the Council enacted Regulation 2016/794 to give Europol a clear legal basis in the post-Lisbon Treaty legal framework. In November 2016—following the referendum result—the UK signalled its intention to exercise its right to opt-in to JHA matters by agreeing to be bound by the new Regulation. The Government's position was questioned by the House of Commons European Scrutiny Committee who considered such a move to be 'an anomaly at a time when the UK is seeking to loosen rather than strengthen its ties with EU institutions and agencies'.

21. Article 23 of the 2016 Regulation permits Europol to establish and maintain cooperative relations with the authorities of third countries. Europol has cooperation agreements with Russia, Turkey, Ukraine, Bosnia and Herzegovina. Each party pays its own expenses for participation and any disputes fall to be settled between the parties. Participation does not create a right to participate in the management of Europol.

22. Importantly, Article 25 of the Regulation identifies the legal basis upon which information may be shared between Europol and third countries:

- On the basis of an 'adequacy decision' adopted by the European Commission on the basis of Directive 2016/680; or
- An international agreement under Article 218 TFEU; or
- A cooperation agreement concluded by 1 May 2017 under the old legal framework.

23. In the context of withdrawal from the EU, given the post-referendum commitment to working with Europol, it is hard to conceive how this could be achieved without an agreement. Indeed, one would expect that one or other of the agreements that will be adopted via Article 218 TFEU to make provision for the UK's departure from the EU would serve the purposes of Article 25 of the Regulation.

### *Decentralised Agencies*

24. The broadest generic category of agencies is the so-called 'decentralised' agencies. The primary feature of EU agencies is their functional variety and differentiation. Different typologies are to be found within the academic literature but even these have had to keep track of the growth and diversity of agencies. Moreover, agencies will often perform more than one function.

25. The Commission has sought to clarify the different functions of decentralised agencies. Adapting that typology and with some illustrative examples, we can begin to see the different roles and functions of EU agencies:

- Agencies adopting individual decisions which are legally binding on third parties (the regulatory agencies—European Chemicals Agency, the European Medicines Agency, the European Aviation Safety Agency, the European Agency for the Cooperation of Energy Regulators, European Banking Authority, European Securities and Markets Authority—and the two agencies certifying trademarks and new plant varieties—the EU Intellectual Property Office and the Community Plant Variety Office);
- Agencies providing direct assistance to the Commission and, where necessary, to the Member States, in the form of technical or scientific advice and/or inspection reports, or draft technical rules/guidance for implementation: (e.g. European Food Safety Authority, European Railways Agency, European Maritime Safety Agency, European Medicines Agency, European Banking Authority, European Securities and Markets Authority);
- Agencies in charge of operational activities: (e.g. FRONTEX, EUROJUST, EUROPOL);
- Agencies responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information/networking: (e.g. European Environment Agency, European Food Safety Authority, European Agency for Safety and Health at Work).

26. There is no 'horizontal' instrument for EU decentralised agencies despite proposals from the European Commission for the adoption of an 'inter-institutional agreement'. In 2012, the European Commission, Council and Parliament agreed on a common approach to decentralised agencies. The aim was to provide greater coherence and consistency across the agencies, not just in terms of nomenclature but also the internal organisation and structure of agencies and the use of standard clauses in the instruments establishing agencies. A series of 'roadmaps' was agreed to structure the incremental alignment of agencies and to guide the establishment of future agencies.

27. In the context of the UK's withdrawal from the European Union, the extent to which decentralised agencies are important depends upon their function and, therefore, their relevance to different sectors of industry. The examples of agencies identified in the White Paper are good indications of sectors where firms and companies may wish to continue to utilise common EU-wide regulatory structures. Their capacity to do so does not directly depend on the UK remaining a Member State of the EU or on the UK concluding a withdrawal agreement. After all, non-EU companies regularly apply for authorizations to place their goods on the EU market. Nonetheless, much depends on the precise nature of the regulatory set up in a given sector.

28. From the perspective of political representation in decision-making, the management boards of agencies are formed from representatives of Member States. Participation at other levels depends on the structure of international cooperation to be found within each agency.

### *Decentralised Agencies and International Engagement*

29. As part of the strategy to standardise terms within the legal instruments establishing agencies, model clauses have been developed to define the international engagement strategies of agencies. The Regulation establishing the European Agency for the Cooperation of Energy Regulators contains a clause that is not atypical for EU agencies. It states in Article 31:

- (1) *The Agency shall be open to the participation of third countries which have concluded agreements with the Community whereby they have adopted and are applying Community law in the field of energy and, if relevant, in the fields of environment and competition.*
- (2) *Under the relevant provisions of those agreements, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of those countries in the work of the Agency, including provisions relating to financial contributions and to staff.*

30. The working assumption behind this clause is that the working relationship between the agency and a third country is, nonetheless, pursuant to a 'concluded agreement' between the EU and that state.

31. A rather different example of an international engagement clause highlights that the relationship between an agency and a third country may have more specific and direct regulatory implications. Article 33 of the Regulation establishing the European Securities and Markets Authority states:

- (1) *Without prejudice to the respective competences of the Member States and the Union institutions, the Authority may develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries. Those arrangements shall not create legal obligations in respect of the Union and its Member States nor shall they prevent Member States and their competent authorities from concluding bilateral or multilateral arrangements with those third countries.*

- (2) *The Authority shall assist in preparing equivalence decisions pertaining to supervisory regimes in third countries in accordance with the acts referred to in Article 1(2).*

### Budget

32. The budgets of decentralised agencies are funded principally from the EU budget with additional contributions payable where EFTA states make contributions as part of their involvement with the European Economic Area agreement.

Agency	EU Budget Contribution	EEA/EFTA Contribution
EUROPOL	100 million euro	
FRONTEX	238 million euro	15.2 million euro
EFSA	77 million euro	2 million euro
ACER	15.8 million euro	
EMSA	53.3 million euro	1.4 million euro
ERA	26.7 million euro	700,000 euro

33. However, some agencies are partially-funded by fees and charges paid by industry: European Chemicals Agency, European Medicines Agency, European Aviation Safety Agency. These agencies may also receive contributions from non-Member States that are parties to the EEA agreement or, like Switzerland, are EFTA states but not a party to the EEA. The 2016 budget for these three agencies breaks down as follows:

Agency	Fees and Charges	General Budget	EEA/EFTA
ECHA	33.5 million euro	71.6 million euro	2.2 million euro
EMA	277 million euro	26 million euro	676,000 euro
EASA	96 million euro	36.3 million euro	2 million

34. Some agencies are entirely self-funded like the European Union Intellectual Property Office (2016 budget of €400 million); the Community Plant Variety Office (2015 budget of €12.8 million).

35. The three agencies that together comprise the European Supervisory Authorities (ESA)—the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA)—are publicly co-funded bodies. In 2016 their budgets were:

Agency	EU Budget	EEA/EFTA	Other Contribution
EBA	14.6 million euro	646,000 euro	22.7 million euro
EIOPA	8.4 million euro	367,000 euro	12.9 million euro
ESMA	10.2 million euro	447,000 euro	15.7 million euro

### *Relationship Between EU Agencies and the Wider European Administrative Landscape*

36. The original institutional architecture of the EU—in contrast to the US—was one in which administrative tasks were delegated to the Commission through the comitology system rather than to independent agencies.

37. The comitology system came under strain for a number of reasons:

- Bureaucratic and expensive
- Lack of clarity between political decision-making and the role of expertise (particularly scientific expertise)
- Expansion of EU regulatory policy into new fields
- Need for clearer legislative oversight over delegation of powers.

Agencies were seen as a way of tackling some of these problems.

38. However, agencies are embedded, horizontally, within the wider EU institutional framework including comitology, and vertically, in their collaboration with national administrations and regulators. These horizontal and vertical relationship give a more 'networked' dimension to the work of agencies than may be appreciated. Indeed, the Agency for the Cooperation of Energy Regulators (ACER) is an evolution from its earlier manifestation as a network of domestic regulators.

39. The interaction between agencies and EU institutions and national authorities can be illustrated by considering two different case studies: the authorisation of 'biocides' and the regulation of 'credit ratings agencies'.

#### **Case Study I: Biocides**

Legislative Framework: EU Biocides Regulation 528/2012

Aim: to require a form of authorisation before placing a biocide on the market

#### **Scenario (a)–National Authorisation–Article 29**

Application can be made for a national authorisation to place a biocide on the market of the national territory of a Member States. A mutual recognition application can also be made either at the same time ('in parallel') or following authorisation ('in sequence') to allow the biocide to have access to the market of another Member State.

Although it is the national competent authority—in the UK this is the Health and Safety Executive—which processes the application, the electronic procedure for making

the application is on ECHA's 'R4BP' site which transmits applications to the national competent authorities. There is also a common register of biocides which means that if a product is already authorised in a Member State, an application could then be made for mutual recognition to allow it to be authorised in another Member State.

Rejections of applications for mutual recognition are referred to a 'coordinators groups' (composed of representatives of the Member States and the Commission, with a secretariat provided by ECHA). If unresolved, the matter is referred to the European Commission which will adopt an 'Implementing Decision' through the comitology procedure after seeking an opinion from the Standing Committee on Biocidal Products (composed of representatives of the Member States) and, if necessary, after receiving a scientific evaluation from ECHA.

### **Scenario (b)—Union Authorisation—Articles 41 et seq**

Unless a biocide (or a biocide of a particular family) is excluded, it is possible to seek a single Union authorisation for products 'which have similar conditions of use across the Union' (the Commission is to establish 'Guidance' on what this means). Union authorisation permits the product access to the Union market as a whole without the need for mutual recognition of national authorisations. In situations where a Union authorisation is permissible, there is a choice whether to seek national authorisation or Union authorisation.

Although the application is made to ECHA, it will be one of the national competent authorities that will carry out the evaluation of the product. On the basis of this evaluation, the Biocides Products Committee of ECHA then prepares an opinion on the product for transmission to the Commission.

In light of the Opinion, the Commission will draft an implementing measure and, under the comitology procedure that applies, the Standing Committee on Biocidal Products will be consulted. If authorised, the Commission adopts an 'Implementing Regulation' and if not authorised, it will adopt an 'Implementing Decision'.

### **Case Study II: Authorisation of Credit Rating Agencies**

Legislative Framework: Regulation 1060/2009 as amended

Aim: establishes a common regulatory approach to credit ratings agencies with ESMA as the single supervisor.

Registration: Article 14—agencies established in one of the Member States shall apply for registration. Registration is effective for the entire EU. Registration is undertaken by ESMA's Board of Supervisors consisting of representatives of the national competent authorities.

Third countries: Article 6—the European Commission may adopt an 'equivalence decision' recognising the supervisory system of non-EU countries as being equivalent to those required under EU law. ESMA will enter into a cooperation agreement with that country via memorandums of understanding.

### *Post-Legislative Rulemaking*

40. There is another dimension to the work of European agencies that often receives very little attention and that is the work that agencies do either in the production of guidance—used by national authorities and by industry in their interpretation and application of formal rules—or, more directly, in drafting technical norms which are then formally adopted as implementing rules by the European Commission.

41. Post-legislative guidance is produced by at least half of the EU agencies and is an important means of elaborating on the application of formal legislative and delegated rules. This is one area where the representation of national interests in the policy work of EU agencies may be both highly significant but also under-appreciated.

42. The European Securities and Markets Authority has a more direct role in producing draft technical rules. In light of its own consultations with stakeholders, ESMA draft standards which are transmitted to the Commission for adoption as binding 'regulatory' standards or 'implementing' standards.

43. A key issue for the UK following its withdrawal from the EU will be whether national regulators and civil servants will have means of influencing the content of these different forms of post-legislative rulemaking.

### *Judicial Review*

44. There are two general mechanisms by which the jurisdiction of the EU courts can be engaged in respect of the acts of EU agencies and bodies.

45. Under Article 263 TFEU a **direct action** may be brought before the EU courts to review the legality of acts intended to produce legal effects for third parties. Actions brought by Member States or the EU's own institutions are heard by the Court of Justice. Actions brought by natural or legal persons are heard before the General Court. The capacity of individuals and companies to challenge legal acts is further limited by Article 263 TFEU. A challenge is only admissible if:

- The act is addressed to the applicant, or
- The act is of direct and individual concern, or
- The act is a 'regulatory act' which is of direct concern and does not entail implementing measures.

An act is addressed to a party either because it is explicitly and formally addressed to that party or substantively it is clear that the author of the act intends to create legal effects for an identified party by bringing about a change in that party's legal position. Accordingly, the EU courts have ruled that a party that intervened in proceedings of the Board of Appeal of the European Chemicals Agency and who was notified of the outcome of the Board's decision was not the addressee of the decision. This meant that the applicant had to satisfy either of the other tests on standing. Applicants often fail to meet the strict standing rules imposed by the EU courts.

It should also be noted that there is a strict two-month time limit for bringing proceedings.

The effect of these strict procedural requirements is—except in situations where the applicant is the addressee of the legal act being challenged—that litigants may be left to seek remedies in national courts.

46. Under Article 267 TFEU, the legality of agency acts is open to challenge in **indirect actions** brought in the national courts, with the national court referring any question as to the validity of an EU measure to the Court of Justice under the preliminary ruling mechanism.

47. As Article 263 TFEU also makes clear, the legal acts establishing EU agencies and bodies may lay down specific rules regarding the jurisdiction of the courts in respect of actions brought by non-privileged parties seeking to challenge the acts of agencies 'intended to produce legal effects in relation to them'. Key examples of this specific jurisdiction are reviews of decisions of the Community Plant Variety Office (CVPO) and decisions of the European Union Intellectual Property Office (EUIPO formerly OHIM).

48. One of the defining objectives of Brexit appears to be to remove the jurisdiction of the EU courts. Certainly, once the UK ceases to be a Member State, the UK government will no longer have standing to challenge the actions of EU agencies. However, to date there have only been two relevant legal actions brought by Member States against agencies: one case involved Cyprus and a challenge to a decision of OHIM on trademarking the word 'Halloumi' and a staff dispute case brought by Spain against Eurojust.

49. Non-privileged applicants will still be able to bring direct actions to the EU courts provided they meet the strict standing test and bring their claims within two months. Indeed, companies in non-Member States are not infrequent litigators before the EU courts. In situations where agencies do adopt legal acts that create legal effects for third parties—this would include decisions refusing an authorization or refusing to register a trademark or a plant variety—UK companies will still have a right to bring direct legal challenges before EU courts. However, they will no longer be able to raise challenges to the validity of the acts of EU agencies via indirect challenges in the national courts unless the preliminary ruling mechanism is retained for these types of validity challenges.

50. When we consider all the actions for annulment brought against EU agencies we find three things. Firstly, many of these actions relate to the procurement and tendering practices of the agencies rather than their regulatory work as such. Secondly, some of the legal actions relate to the application of EU rules on access to documents. Thirdly, once we strip out the case law generated by trademarks and plant variety cases, the bulk of cases relate to the work of the European Chemicals Agency (ECHA), followed by the European Medicines Agency (EMA), with a smaller number of cases involving the European Food Safety Authority (EFSA) and the European Aviation Safety Agency (ASEA). Very few cases are successful and tend to focus on procedural defects such as failures to give adequate reasons or imposing disproportionate fees.

51. It is evident that the extent to which judicial review of EU agencies really matters depends on the particular functions exercised by agencies. Not every agency will produce acts that create legal effects for third parties. Indeed, the task of agencies may be to undertake technical work in respect of applications that are made to, and decided by, the European Commission or the national authorities. For example, the European Food Safety Authority provides scientific support to the European Commission with

decisions on the authorisation of food additives, food enzymes and food flavouring subject to a common authorisation procedure conducted by the European Commission in cooperation with the Standing Committee on the Food Chain and Animal Health. These Standing Committees are composed of the representatives of the Member States and is chaired by the Commission. In formal terms, then, the decision-making remains within the 'comitology' system—decisions taken by the Commission but with Member States exercising influence and control through the committee system—and with agencies performing tasks of scientific evaluation.

52. The concentration of litigation around a small number of agencies reflects the delegation of specific decision-making competences to these agencies.

## *Glossary*

Agency for the Cooperation of Energy Regulators (ACER)

Office of the Body of European Regulators for Electronic Communications (BEREC Office)

Community Plant Variety Office (CPVO)

European Agency for Safety and Health at Work (EU-OSHA)

European Border and Coast Guard Agency (Frontex)

European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA)

European Asylum Support Office (EASO)

European Aviation Safety Agency (EASA)

European Banking Authority (EBA)

European Centre for Disease Prevention and Control (ECDC)

European Centre for the Development of Vocational Training (Cedefop)

European Chemicals Agency (ECHA)

European Environment Agency (EEA)

European Fisheries Control Agency (EFCA)

European Food Safety Authority (EFSA)

European Foundation for the Improvement of Living and Working Conditions (Eurofound)

European GNSS Agency (GSA)

European Institute for Gender Equality (EIGE)

European Insurance and Occupational Pensions Authority (EIOPA)

European Maritime Safety Agency (EMSA)

European Medicines Agency (EMA)

European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)

European Union Agency for Network and Information Security (ENISA)

European Union Agency for Law Enforcement Training (CEPOL)

European Police Office (Europol)

European Public Prosecutor's Office (in preparation) (EPPO)

European Union Agency for Railways (ERA)

European Securities and Markets Authority (ESMA)

European Training Foundation (ETF)

European Union Agency for Fundamental Rights (FRA)

European Union Intellectual Property Office (EUIPO)

Single Resolution Board (SRB)

### *Selective Literature*

#### *Academic*

M. Busuioc, *European agencies: Law and practices of accountability* (Oxford University Press, 2013)

E. Chiti (2009). "An Important Part of the EUs Institutional Machinery: Features, Problems and Perspectives of European Agencies." *Common Market Law Review* **46**(5): 1395–1442.

D. Levi-Faur (2011). "Regulatory networks and regulatory agencification: towards a Single European Regulatory Space." *Journal of European Public Policy* **18**(6): 810–829.

M. Thatcher (2011). "The creation of European regulatory agencies and its limits: a comparative analysis of European delegation." *Journal of European Public Policy* **18**(6): 790–809.

S. Vaughan (2015) "Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies." *Cambridge Yearbook of European Legal Studies* **17**: 66–91.

#### *Official Sources*

European Commission, *European Agencies—the way forward* COM (2008) 135

European Commission, *Progress Report on the Implementation of the Common Approach on EU Decentralised Agencies* COM (2015) 179.

# Formal Minutes

---

**Tuesday 7 March 2017**

Members present:

Crispin Blunt, in the Chair

Ann Clwyd	Adam Holloway
Mike Gapes	Daniel Kawczynski
Stephen Gethins	Ian Murray
Mr Mark Hendrick	Andrew Rosindell

Draft Report (*Article 50 negotiations: Implications of 'no deal'*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 61 read and agreed to.

Two Papers were appended to the Report as Appendices 1 and 2.

*Resolved*, That the Report be the Ninth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 14 March at 3.15pm]

## Witnesses

---

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Tuesday 13 December 2016

**Ian Bond**, Centre for European Reform and **Professor Richard G. Whitman**, Chatham House

[Q276–330](#)

### Tuesday 7 February 2017

**Professor Kenneth Armstrong**, Professor of European Law, University of Cambridge, **Professor Derrick Wyatt QC**, Brick Court Chambers, Emeritus Professor of Law, University of Oxford, on behalf of the Bar Council, and **Hugo Leith**, Barrister, Brick Court Chambers, on behalf of the Bar Council

[Q331–368](#)

### Tuesday 7 February 2017

**Jonathan Faull**, former Director-General, European Commission

[Q369–452](#)

## Published written evidence

---

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

REU numbers are generated by the evidence processing system and so may not be complete.

- 1 British Council ([REU0018](#))
- 2 Daniel Keohane ([REU0026](#))
- 3 Department for Exiting the European Union ([REU0021](#))
- 4 Dr Frank O'Donnell ([REU0001](#))
- 5 Dr Tim Oliver ([REU0003](#))
- 6 Foreign and Commonwealth Office ([REU0027](#))
- 7 Government of Jersey ([REU0014](#))
- 8 HM Government of Gibraltar ([REU0007](#))
- 9 Isle of Man Government ([REU0002](#))
- 10 London First ([REU0023](#))
- 11 Mr David Lucas ([REU0020](#))
- 12 Mr Peter Gardner ([REU0009](#))
- 13 Professor John Ryan ([REU0011](#))
- 14 Professor Kenneth Armstrong ([REU0025](#))
- 15 Professor Derrick Wyatt QC ([REU0022](#))
- 16 Tate & Lyle Sugars ([REU0024](#))
- 17 The Bingham Centre for the Rule of Law ([REU0010](#))
- 18 The Royal Society ([REU0016](#))
- 19 The States of Guernsey ([REU0008](#))
- 20 Tom Keatinge ([REU0004](#))
- 21 UCL ([REU0012](#))
- 22 Universities UK ([REU0015](#))

## List of Reports from the Committee during the current Parliament

---

All publications from the Committee are available on the [publications page](#) of the Committee's website.

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2016–17

First Report	The UK's role in the economic war against ISIL	HC 121 (HC 680)
Second Report	Equipping the Government for Brexit	HC 431 (HC 704)
Third Report	Libya: Examination of intervention and collapse and the UK's future policy options	HC 119
Fourth Report	The use of UK-manufactured arms in Yemen	HC 688
Fifth Report	The future operations of BBC Monitoring	HC 732 (HC 921)
Sixth Report	'Political Islam' and the Muslim Brotherhood Review	HC 118
Seventh Report	The United Kingdom's relations with Russia	HC 120
Eighth Report	'Political Islam', and the Muslim Brotherhood Review: Government Response to the Committee's Sixth Report	HC 967
First Special Report	The UK's role in the war against ISIL following the Cessation of Hostilities in Syria in February 2016: Government Response to the Committee's Third Report of Session 2015–16	HC 209
Second Special Report	The FCO's administration and funding of its human rights work overseas: Government Response to the Committee's Fourth Report of Session 2015–16	HC 545
Seventh Special Report	Committees on Arms Export Controls: unauthorised disclosures of draft Report on Use of UK-manufactured arms in Yemen	HC 935

### Session 2015–16

First Report	The FCO and the 2015 Spending Review	HC 467 (HC 816)
Second Report	The extension of offensive British military operations to Syria	HC 457
Third Report	The UK's role in the war against ISIL following the Cessation of Hostilities in Syria in February 2016	HC 683
Fourth Report	The FCO's administration and funding of its human rights work overseas	HC 860

Fifth Report	Implications of the referendum on EU membership for the UK's role in the world	HC 545
First Special Report	The FCO and the 2015 Spending Review: Government response to the Committee's First Report of Session 2015–16	HC 816