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BRIEFING PAPER

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Brexit: some legal and constitutional issues and alternatives to EU membership

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Inside:

Contents

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Summary

EU Treaty provisions on withdrawal from the EU

Article 50 of the Treaty on European Union provides for a Member State to leave the EU, either on the basis of a negotiated withdrawal agreement or without one. The withdrawal agreement will probably contain transitional arrangements and it, or a separate agreement, will provide for the UK's future relations with the EU.

There is no precedent for such an agreement, but it will probably come at the end of complex and lengthy negotiations. These will not start until Article 50 is triggered by formal notification that the UK intends to leave the EU.

The new Prime Minister, Theresa May, has said she will not trigger the Article 50 process before the end of 2016. There has been a debate as to whether the UK Parliament needs to approve the triggering of Article 50.

The EU institutions and other EU leaders want to keep to the Article 50 procedure: no negotiation until notification. But German Chancellor Merkel has said the UK should be allowed time to define its negotiating stance.

Will the devolved administrations have a role in Brexit?

The new Prime Minister, Theresa May, has assured the leaders of the Devolved Administrations that they will be involved in Brexit. But how will this happen? It is not yet clear how the devolved Parliaments or the Westminster Parliament will scrutinise or be otherwise involved in the Brexit process.

Acquired rights

The withdrawal agreement is likely to cover many individual rights. But if there are areas not covered by a withdrawal agreement, or if the UK leaves without an agreement, would British citizens and businesses in Europe – and European citizens and businesses in the UK – be able to rely on any 'acquired rights' (also referred to as 'executed' or 'vested' rights), either under EU law or general international law? The EU Treaties say nothing about rights acquired during the currency of the EU Treaties automatically continuing after a Member State leaves the EU. There is no explicit 'survival clause' protecting acquired rights or covering the survival of claims based on EU law.

General international law principles of certainty, stability, non-retrospectivity and mutual interest suggest some kind of continuing protection for individuals when the UK leaves the EU. But with no EU 'survival clause', where would this protection come from? The 1969 Vienna Convention on the Law of Treaties probably protects only the rights acquired under a treaty by states, not by individuals; and customary international law might protect some individual rights acquired under a treaty, but the scope of these rights is not clear and might not extend to rights of residence, for example.

Alternatives to EU membership

The UK might seek to join the European Free Trade Association (EFTA), remain in the European Economic Area (EEA) and therefore continue to have access to the single market. But this would mean allowing the free movement of people and contributing to the EU Budget. Norway, for example, provided around £586 million in 2014, or £115 per capita; the UK's net EU budget contribution in 2014 was £9.8 billion, or £152 per capita.

Or the UK could decide to go it alone and negotiate bilateral agreements with the EU along the lines of the Swiss model.

The UK might decide to confirm and enhance its historic ties with other English-speaking nations in the 'Anglosphere'. The Government is already talking informally with Australia about future trade relations.[1]

[1] See for example The Telegraph, 16 July 2016, Brexit free-trade deals planned with the USA and Australia.

1. The withdrawal process

1.1 Article 50 TEU

The withdrawal process is discussed in some detail in Commons Briefing Paper 7551, Brexit: how does the Article 50 process work? 30 June 2016. The following is a summary of the procedure.

Article 50 of the Treaty on European Union (TEU) allows a Member State unilaterally to leave the EU 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.

The decision to leave does not need the endorsement or formal agreement of the other Member States. Withdrawal can happen, whether or not there is a withdrawal agreement, two years after the leaving State notifies the European Council of its intention to withdraw. However, the terms of Article 50 TEU imply an orderly, negotiated withdrawal.

A State wishing to withdraw must notify the European Council, which will consider the matter and set out negotiating guidelines. The Union conducts negotiations with the State based on the European Council Guidelines, and concludes an agreement setting out the arrangements for withdrawal and taking into account "the framework for its future relationship with the Union". The negotiating period can be extended if all the other 27 Member States agree.

The negotiations take place in accordance with Article 218(3) of the Treaty on the Functioning of the European Union (TFEU). The European Commission, taking into account the European Council's guidelines, submits a recommendation to the Council, which adopts a Decision authorising the opening of the negotiations and nominates the Union negotiator or the head of the EU's negotiation team.

During the negotiation, the withdrawing Member State continues to participate in other EU business as normal.

The EU Council, having obtained the consent of the EP, concludes the agreement, acting by a double Qualified Majority Vote (QMV – 20 out of the 27 other EU Member States). Transitional voting rules, whereby a Member State can request using the old QMV rules, come to an end on 31 March 2017. The old rules would make it slightly easier to adopt the agreement, as only 18 Member States would be needed. But it is likely that the negotiations will be on-going at this time, so the present rules

would apply. The passing of this deadline will not prevent the UK from leaving the EU.

The withdrawing State is released from its obligations under the Treaties upon entry into force of the withdrawal agreement, or two years after its notification to the European Council, unless an extension has been agreed.

Article 50(4) deprives the UK of a vote on the terms of the withdrawal agreement and of the right to take part in discussions about that agreement in either the European Council or the Council. Even though the UK has not yet triggered the Article 50 process, David Cameron was excluded from an informal European Council meeting about Brexit on 29 June 2016.

Under Article 50(5), if the UK wants to rejoin the EU in the future, it will have to re-apply under the procedure referred to in Article 49 TEU. In other words, it will be dealt with as if it were a new applicant, with no automatic right to rejoin and no special advantages.

EU appointments

Immediately after the UK referendum there was something of a turf war over which EU institution should lead the Brexit talks: the Council or the Commission.[2] This has not been fully resolved, but each institution has named its chief negotiator.

On 25 June 2016 European Council President Donald Tusk appointed a Belgian diplomat, Didier Seeuws, to head a Special Task Force on the UK. Seeuws was chief-of-staff to the last European Council President, Herman Van Rompuy, and a spokesman for Guy Verhofstadt when he was Belgian prime minister in 1999-2008.

On 27 July 2016 the Commission named Michel Barnier, a former French minister, as its Chief Negotiator in charge of the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50. A Commission press release stated:

> In line with the principle of 'no negotiation without notification', the task of the Chief Negotiator in the coming months will be to prepare the ground internally for the work ahead. Once the Article 50 process is triggered, he will take the necessary contacts with the UK authorities and all other EU and Member State interlocutors.

The Commission President, Jean-Claude Juncker, has said there can be no preliminary discussions before the UK notifies the European Council of its intention to leave: "no notification, no negotiation".[3] The French President Hollande wants the UK to act quickly in order to reduce financial uncertainty, but German Chancellor Merkel thinks the UK should have time to consider its options.

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2 See Politico, 28 June 2016, Brussels power struggle over Brexit negotiations.
3 New Europe, 29 June 2016.

1.2 The withdrawal agreement

What will a withdrawal agreement look like? Will it contain transitional provisions for the UK, allowing EU law and obligations to continue to apply until all loose ends had been tied up? What will the UK's relations with the EU institutions be during this period and what will happen to British staff working in them? Will the UK be subject to the jurisdiction of the EU Court of Justice? What about all the UK citizens living in EU States and EU citizens living in the UK?

It will not be possible to withdraw from, say, the Common Agricultural Policy overnight without causing enormous disruption for farmers. Transitional arrangements for an alternative regime to be put in place will have to form part of the withdrawal agreement. Similar problems will have to be dealt with in relation to projects, joint ventures etc, for example in the field of research, which are being funded by the EU as part of a long-term programme.

1.3 The withdrawal process in the UK

The withdrawal notice

Formal notice of withdrawal is unilateral and does not require the consent of the Council or the European Parliament, or consultation with the Commission. There is no time frame for submitting notice, and the new UK Prime Minister, Theresa May, has said it will not happen before the end of the year.

The UK constitutional requirements for triggering Article 50 have given rise to considerable and heated debate. Before the referendum, some experts had discussed the constitutional requirements for Brexit. For example, Alisdair Gillespie wrote:

> It is not clear what requirement would be required under English law. It is probably unlikely that the government would be required to seek an Act of Parliament authorizing them to serve notice as the signing and operation of treaties are normally a matter for the executive. An Act of Parliament would be required to formally leave the EU (not least because it would have to repeal all, or part of, the ECA 1972) but it may not be required for the purposes of Article 50(1).[4]

But soon after 23 June the matter of Parliament's role in the Article 50 process became a highly contentious constitutional issue, giving rise to legal challenges which are due to be heard in October 2016. Is notification a matter of Royal Prerogative or must it be approved by Parliament? The arguments are considered in Commons Briefing Paper 7551.

UK appointments

The Government has established a Department for Exiting the European Union, which will be led at Permanent Secretary level by Oliver Robbins, who was second permanent secretary at the Home Office. The new Secretary of State for European Union Relations, David Davis (the so-

4 Alisdair Gillespie, The English Legal System, 5th edition, 2015, p.608.

called Brexit Minister) gave the following reply to a question about the new Department on 20 July:

> The new Department will sit at the heart of government and be staffed by the best and brightest from across the civil service and will draw on external expertise if required. The unit will bring together officials and policy expertise from across the Cabinet Office, Treasury, Foreign Office, Business Department and the wider civil service.
>
> The department's Ministers are based in 9 Downing Street.

Does the withdrawal agreement need to be ratified?

There is no mention in Article 50 TEU of ratification of the withdrawal agreement by EU Member States, but this might be necessary under international legal norms.

The withdrawal agreement, assuming there is one, will not be subject to any of the constitutional safeguards in the European Union Act 2011, but, following the usual procedures for ratification, it will be laid before Parliament with a Government Explanatory Memorandum for 21 sitting days before it can be ratified, in which time either House could resolve that it should not be.[5] If the Commons resolves against ratification, the agreement can still be ratified if the Government lays a statement explaining why it should nonetheless be ratified and the House of Commons does not resolve against ratification a second time within 21 days (this process can in theory be repeated *ad infinitum*).

The withdrawal agreement will have to be implemented by an Act, or Acts, of Parliament. The European Communities Act 1972 (ECA) and other primary legislation implementing EU law will have to be repealed or amended. Secondary legislation whose enabling power is Section 2(2) ECA will have to be provided with a new enabling power if the Government wants it to remain in force; if not, any such legislation will no longer have legal effect once Section 2(2) ECA has been repealed.

1.4 Greenland's withdrawal from the EU

Greenland withdrew from the then European Community (EC) in 1985 after gaining a high level of internal autonomy from Denmark in 1979. The Greenland electorate voted on 23 February 1982 on whether to stay in the EC, deciding by 52% to 48% against continued membership (turnout 75%).

There were difficult and protracted negotiations between the Greenland Government and the Danish Government, and the Danish Government and the European Commission, particularly with regard to fisheries. The Council of Ministers adopted a Decision on the terms of Greenland's withdrawal on 20 February 1984, and Greenland finally withdrew from the EEC on 1 February 1985. Greenland became associated with the EU

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5 Part 2 of the Constitutional Reform and Governance Act 2010 put the 21-sitting day 'Ponsonby Rule' on a statutory footing and gave legal effect to a resolution of the House of Commons that a treaty should not be ratified.

as an Overseas Country and Territory (OCT) through the Greenland Treaty.[6] This kind of association would not be an option for the UK with Brexit.

The Treaty base for Greenland's withdrawal was former Article 236 of the Treaty of Rome (now Article 48 TEU), which provided for amendments to the EC Treaties and their entry into force following ratification by all Member States "in accordance with their respective constitutional requirements". The special status and commercial agreements linked to Greenland's withdrawal were agreed in protocols to the amendment treaty, and various legal instruments were agreed by all the Member States. Greenland continued to receive EU funding after withdrawal and had tariff-free access to the Community market for fisheries products in return for satisfactory EC access to Greenland waters for the duration of the fisheries agreement.[7] Articles 198 to 204 TFEU, *Association of the Overseas Countries and Territories*, apply to Greenland, subject to provisions set out in Protocol No. 34 annexed to the TFEU on special arrangements for Greenland fisheries.

Article 2 of the Protocol attached to the Greenland Treaty clarified that there would be a transitional period during which Greenlanders, non-national residents and businesses with acquired rights under EU law would retain these rights (see more on the subject of acquired or vested rights in Section 2 below):

> The Commission shall make proposals to the Council, which shall act by a qualified majority, for the transitional measures which it considers necessary, by reason of the entry into force of the new arrangements, with regard to the maintenance of rights acquired by natural or legal persons during the period when Greenland was part of the Community and the regularization of the situation with regard to financial assistance granted by the Community to Greenland during that period.

The terms of Greenland's withdrawal were the subject of a debate in the House of Commons in July 1984[8] and October 1984.[9] The implications of the withdrawal were also considered by the European Legislation Select Committee in its Fifteenth Report, HC78-xv, 1983/84.

6 OJ L 29, 1 February 1985.
7 Greenland representation in Brussels.
8 HC Deb 20 July 1984, cc671-83.
9 HC Deb, 31 October 1984, cc 1319-1334.

2. The Devolved Nations

2.1 Referendum results

In both Scotland and Northern Ireland a majority voted to remain, while in Wales the vote was to leave. The referendum results were as follows:

Nation	**Leave %**	**Remain %**
Wales	52.5%	47.5%
Scotland	38.0%	62.0%
Northern Ireland	44.2%	55.8%

2.2 Brexit talks with devolved leaders

Theresa May has already talked to devolved leaders about the implications of Brexit for their nations. On 15 July she met Nicola Sturgeon to discuss Scotland's role in the Brexit talks.[10] She told the First Minister that she would not trigger the Article 50 process until she had agreed a "UK approach"; but this would not amount to a Scottish veto. Many reports, however, seem to think Scotland could block triggering the formal process of notification.[11]

On 18 July the PM met the First Minister of Wales, Carwyn Jones, in Cardiff. She said she wants the Welsh Government to be "involved and engaged" in Brexit negotiations.[12]

On 25 July Mrs May held talks in Belfast with the Northern Ireland First Minister, Arlene Foster, and deputy First Minister, Martin McGuinness. She reassured them about the continuation of the Common Travel Area between the UK and the Republic of Ireland, saying "nobody wants to return to the borders of the past".[13]

> "Turning to the devolved Administrations, we must ensure that the interests of all parts of our United Kingdom are protected and advanced, so as we prepare for a new negotiation with the European Union we will fully involve the Scottish, Welsh and Northern Ireland Governments. We will also consult Gibraltar, the Crown dependencies and overseas territories, and all regional centres of power including the London Assembly".
>
> David Cameron's statement to Parliament on Brexit, HC Deb 27 June 2016, cc 22-6

10 BBC News, 15 July 2016, Brexit: PM is 'willing to listen to options' on Scotland.
11 See e.g. Independent, 18 July 2016.
12 BBC News, 18 July 2016, Brexit: Theresa May wants Welsh Government 'engaged' in talks; Wales Online, 18 July 2016, Carwyn Jones reveals he laid out Wales 'bottom line' on Brexit to Theresa May.
13 BBC News, 25 July 2016, Theresa May on NI post-Brexit: 'No-one wants return to borders of the past'.

2.3 Role for devolved administrations?

Devolution has been shaped in part by EU law and commitments, and suggestions have been made that the devolved legislatures may have a role in approving legislation associated with leaving. In Scotland the First Minister is exploring options to keep Scotland in the EU, while in Northern Ireland the deputy First Minister has spoken of a mandate in Northern Ireland to remain.

For Scotland the reservation of foreign affairs is contained in paragraph 7 of Schedule 7, Part I, to the Scotland Act 1998. This refers, depending on the reading, to "the European Union" or "relations with … the European Union":

> 7(1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

However, this does not reserve implementing international obligations and obligations under EU law:

> 7(2) Sub-paragraph (1) does not reserve—
>
> (a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,
>
> (b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.

"EU law" is defined in s126(9) as

> (a) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and
>
> (b) all those remedies and procedures from time to time provided for by or under the EU Treaties.

Scottish Ministers and the Scottish Parliament therefore have a basis to observe and implement obligations under EU law, including under rights, powers, liabilities, obligations and restrictions created by the Treaties or arising under them. This has been the basis for their implementing specific Directives.

They have a basis to observe and implement obligations under the remedies and procedures provided by or under the Treaties. They also have a basis to assist UK Ministers in relation to the matters in para 7(1), including the EU or relations with the EU, depending on the reading.

In invoking Article 50 TEU, some might argue that the Government would be exercising a right or power created or arising by or under the EU Treaties, and/or engaging in a remedy or procedure provided for by those Treaties, bringing devolved powers into view as a result.

The Government of Wales Act 2006 works in a different way, but the provisions in respect of Northern Ireland are broadly similar to those for Scotland.

2.4 Role for devolved legislatures?

The three main devolution Acts all include direct reference to EU law. It limits the competence of devolved institutions, and ministers in devolved areas implement some EU obligations. It is likely that those Acts would be amended to take account of Brexit. For instance, the legislative competence of the Scottish Parliament is set out in section 29 of the Scotland Act 1998. An Act of the Scottish Parliament is "not law" insofar as any of its provisions fit within the restrictions in sub-section 29(2). These include s29(2)(d): "it is incompatible with any of the Convention rights or with EU law." (The Convention rights are those in the ECHR.)

This means that EU law, and the separate matter of the ECHR, create a limit around the competence of the Scottish Parliament.

Virtually identical provisions are in place for Northern Ireland and Wales.

The matter of competence, and therefore of EU law, plays out in other ways throughout the main devolution Acts (for instance, as noted above, devolved ministers have the power to implement EU directives locally).

The Sewel Convention

The question has been raised: would any UK legislation to do with leaving the EU – for instance, an Act to repeal the 1972 Act - be subject to the Sewel Convention? This Convention holds that the UK Government will not normally invite Parliament to legislate on devolved matters or on the extent of devolved powers without first obtaining the consent of the relevant devolved legislature.

The Sewel Convention was reflected in the Scotland Act 2016, and is in the Wales Bill currently going through the House of Commons. There are technical arguments about the nature of the wording used in the Scotland Act. Section 2 of that Act recognises that Parliament will not normally legislate "with regard to devolved matters" without consent.

This is not quite the same as the Sewel Convention formula of not legislating on devolved matters nor on the extent of devolved powers.

Some concerns were raised by the SNP during the passage of the Scotland Act 2016 about the non-inclusion of an explicit undertaking to seek consent before changing the extent of devolved powers.[14]

Nevertheless, it is not absolutely clear that the Sewel Convention has been replaced by this statutory provision, and it would be open to interpretation as to whether "with regard to devolved matters" includes the extent of devolved powers. For Wales at present and for Northern Ireland, there is no statutory provision, only the existing Sewel Convention.

As noted above, the competences of the devolved legislatures and executives are circumscribed by EU law, and some positive responsibilities are placed upon the executives to implement that law.

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[14] See HC Deb 15 June 2015, c97, and Angus Robertson's contribution at cc102-3.

An argument might be made that the removal of these features on leaving the EU would *prima facie* alter devolved competence, and, insofar as it involved UK legislation, would require legislative consent from the devolved legislatures under the Sewel Convention.

Equally, an argument might be made that the Sewel Convention would apply if UK legislation were used to comply with, for instance, obligatory parts of the Article 50 process, or indeed the use of Article 50 if viewed as an obligatory mechanism for withdrawal. Again, this would turn on a reading of the devolved powers to assist UK Ministers, and to implement obligations.

One counter-argument would stress that international relations is a reserved matter. Schedule 5, para 7(1), to the Scotland Act 1998 states:

> International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

Equally, the Sewel Convention, whether in general or as recognised in the Scotland Act 2016, holds that the Government will not "normally" legislate on devolved matters without consent: to what extent is the current situation "normal"?

It should be noted that, even if the Sewel Convention were applied, it does not in itself prevent the UK Parliament from legislating on whatever it wishes – it merely creates a political obstacle. At present the statements from the UK Prime Minister appear to be the more compelling basis for devolved involvement.

Scotland

Potential for a second independence referendum

In 2014 the UK Government emphasised Scotland's access to the EU through its place in the UK. For instance, its paper Scotland analysis: EU and international issues included the following comment:

> Scotland benefits from and contributes to the UK's bilateral relationships and its representation in multilateral organisations, including the North Atlantic Treaty Organization (NATO), the United Nations (UN) and the EU.[15]

The paper went on to state:

> The UK uses its influence on behalf of Scotland on a whole host of issues of particular interest to people and businesses in Scotland, such as budget contributions, fisheries, agricultural subsidies and Structural Funds. Scotland benefits from this and from the UK's strong voice in Europe where it contributes to and participates in discussions and negotiations from its position within the UK.[16]

The UK Government stressed what it regarded as uncertainty surrounding future membership of the EU for an independent Scotland:

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15 Scotland analysis: EU and international issues, Cm 8765, January 2014, p6.
16 Ibid, p7.

> Since an independent Scotland would be a new state there is a strong case that it would have to go through some form of accession process to become a member of the EU. It would also have to enter into negotiations on the terms of its membership. It cannot be assumed that Scotland would be able to negotiate the favourable terms of EU membership which the UK enjoys. All new EU Member States have been required to commit to joining both the euro and the Schengen area. The Scottish Government's stated intention to retain the pound and join the Common Travel Area is at odds with the EU's rules for new members, and is not in the Scottish Government's gift.4 Some Member States may be unwilling to grant special opt-outs to Scotland on measures which they have had to adopt themselves. Others have their own independence movements to consider, which will influence how they view Scotland's membership of the EU. Scotland's negotiations to join the EU could be complex and long. It could not be guaranteed that an independent Scottish state's negotiations would be completed within the current Scottish Government's stated 18-month timeframe for joining the EU.[17]

The UK Government's 2014 pamphlet for voters, What staying in the United Kingdom means for Scotland, included the following:

> **An influential voice in important places**
>
> The United Kingdom is a leading member of the UN and the only country in the world that is also a member of NATO, the EU, the Commonwealth, the G7, the G8 and the G20. As one of the EU's "big four" nations, the UK is more able to protect Scottish interests in areas like agriculture and fisheries.

The SNP manifesto for the 2015 UK general election included reference to the EU referendum:

> If an in/out EU referendum does go ahead, we will seek to amend the legislation to ensure that no constituent part of the UK can be taken out of the EU against its will. We will propose a 'double majority' rule - meaning that unless England, Scotland, Wales and Northern Ireland each vote to leave the EU, the UK would remain a member state.[18]

Alex Salmond moved an amendment to the European Union Referendum Bill 2015-16 in committee to introduce a double majority requirement for leaving the EU, so that withdrawal would happen only if there were a majority across the UK as a whole and in each of England, Scotland, Wales and Northern Ireland.[19] He was asked by Kenneth Clarke whether he agreed that "if Scotland voted to stay in the European Union and England voted to leave, the end of the United Kingdom would probably be quite imminent?"

Mr Salmond said:

> … the right hon. and learned Gentleman does have a point, and the First Minister of Scotland has put her finger on it in her usual adroit fashion. If, across the United Kingdom, there was a majority vote against staying in the EU but Scotland had voted in favour, that could very well provide the material change in circumstances

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17 Scotland analysis: EU and international issues, Cm 8765, January 2014, p7.
18 Stronger for Scotland, SNP manifesto 2015, p9. See also pp18-9.
19 See European Union Referendum Bill 2015-16: progress of the Bill, CBP7249, 11 December 2015.

> that the First Minister would indicate made another constitutional referendum on Scottish independence well nigh inevitable.[20]

The amendment was negatived without a division.[21]

Before the referendum First Minister Nicola Sturgeon said that she would not seek to hold another referendum on independence unless there were a material change in circumstances and/or a shift in majority opinion. The 2016 SNP election manifesto confirmed that a Scottish vote to remain against a UK vote to leave would constitute such a change:

> We believe that the Scottish Parliament should have the right to hold another referendum if there is clear and sustained evidence that independence has become the preferred option of a majority of the Scottish people – or if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.

On 23 June Scotland voted by 62% to 38% stay in the EU.[22] Nicola Sturgeon said "the people of Scotland voted decisively to stay part of the European Union and their wishes must be respected". A second Scottish independence referendum was now "highly likely".[23]

When the SNP achieved a majority government at the 2011 Scottish Parliament elections and indicated its intention to hold a referendum on independence, the UK Government argued that this could not be done because the Union between Scotland and England was reserved under the *Scotland Act 1998*.

The two never quite reached common ground on this question, but they circumvented the difficulty by means of the Edinburgh Agreement of October 2012. This included an agreement that secondary legislation would be introduced under s30 of the 1998 Act, which allows the list of reservations in Schedule 5 to be modified, to devolve the power to hold a referendum by the end of 2014.

There is detail on the Edinburgh Agreement in Standard Note 6478, *Referendum on independence for Scotland*, 15 January 2013.

The referendum was held under legislation passed by the Scottish Parliament, the rules being modelled on the provisions of the UK *Political Parties, Elections and Referendums Act 2000*.

As a result of the s30 Order,[24] Schedule 5 included the following paragraph 5A at the time the referendum was held:

> 5A—(1) Paragraph 1 does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if the following requirements are met.

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20 HC Deb 16 June 2015, cc190-1.
21 HC Deb 16 June 2015, c235.
22 The results of the referendum are analysed in CBP 7639, European Union Referendum 2016, 29 June 2016.
23 BBC News, 24 June 2016.
24 *Scotland Act 1998 (Modification of Schedule 5) Order 2013*.

> (2) The date of the poll at the referendum must not be the date of the poll at any other referendum held under provision made by the Parliament.
>
> (3) The date of the poll at the referendum must be no later than 31st December 2014.
>
> (4) There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses."

Para 1, to which this refers, is as follows:

> 1 The following aspects of the constitution are reserved matters, that is—
>
> (a) the Crown, including succession to the Crown and a regency,
>
> (b) the Union of the Kingdoms of Scotland and England,
>
> (c) the Parliament of the United Kingdom,
>
> (d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal,
>
> (e) the continued existence of the Court of Session as a civil court of first instance and of appeal.

Paragraph 5A was repealed by the *Scotland Act 2016*.[25]

It is likely that a further referendum on independence for Scotland would be preceded by pressure for another s30 Order to create an uncontested legal base. It would be a matter for political argument if the UK Government did not agree to introduce an Order if requested by the Scottish Parliament. Were the Scottish Parliament to attempt a referendum without UK consent, there might be legal questions, but there would naturally be pressure to respond should a vote for independence be secured.

Mechanism for a second independence referendum

Scottish Affairs Committee Inquiry

The Scottish Affairs Committee has announced an inquiry into Scotland's place in Europe. Its terms of reference are:

- How will the EU referendum result affect Scotland's relationship with Europe?
- In light of the way Scotland voted in the EU referendum, what options exist for Scotland to remain a member of the EU?
- What role will Scotland have in the process of the UK's withdrawal from the EU?
- How will Scotland be included in the Government's Brexit negotiations?
- What future relationship with the EU would be best for Scotland?

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[25] Section 10(5).

- How will Scottish interests be represented in the negotiations regarding the UK's withdrawal from, and future relationship with, the EU?
- How will the UK's withdrawal from the EU affect Scottish devolution and Scotland's funding settlement?
- What consequences and opportunities exist for developing Scottish trade in Europe and beyond in light of the EU referendum result?

Further reading

Theresa May suggests Brexit delay as she says no Article 50 until Scotland gives go-ahead, Laura Hughes, Telegraph 25 July 2016

Brexit and Northern Ireland: key issues and possible consequences, Alan Whysall, The Constitution Unit 15 July 2016

Brexit and Wales: what happens now? Dr Jo Hunt, The UK in a changing Europe 6 July 2016

Independent Scotland joining EU could be part of Brexit "package deal", Tom Gordon, Scottish Herald 3 July 2016

UK, EU - or both? Scotland's options after Brexit, Glenn Campbell, BBC News 30 June 2016

Negotiating Brexit: with whom? Nehal Davison, Institute for Government 30 June 2016

Brexit consequentials: why the UK must involve the devolved governments in the process of leaving the EU, The Constitution Unit 25 June 2016

Brexit: Its Consequences for Devolution and the Union, Robert Hazell and Alan Renwick, UCL Constitution Unit Briefing Paper 19 May 2016

3. 'Acquired rights'

3.1 What is the issue?

When the UK leaves the EU, many individual rights are likely to be covered in a withdrawal agreement negotiated under Article 50 TEU.

But what if there were areas not covered by a withdrawal agreement, or if the UK left the EU without an agreement at all? Would British citizens and businesses in Europe – and European citizens and businesses in the UK – be able to rely on any 'acquired rights' (also referred to as 'executed' or 'vested' rights), either under EU law or general international law?

General principles of certainty, stability, non-retrospectivity and mutual interest suggest some kind of continuing protection for individuals when the UK leaves the EU. But where would this protection come from? EU law contains no 'survival clause'; the 1969 Vienna Convention on the Law of Treaties probably protects only the rights acquired under a treaty by states, not by individuals; and customary international law might protect some individual rights acquired under a treaty, but the scope of these rights is not clear and might not extend to rights of residence, for example.

3.2 Acquired rights under EU law?

There is nothing in the EU Treaties which states that any rights acquired during the currency of the EU Treaties would automatically continue after a Member State left the EU. Unlike many international treaties, there is no explicit 'survival clause' protecting acquired rights or covering the survival of claims based on EU law.

A former EU lawyer, Jean-Claude Piris, has suggested that protecting 'acquired' EU rights would lead to 'absurd consequences':

> Personally, I would not think that one could build a new legal theory, according to which "acquired rights" would remain valid for millions of individuals (what about their children and their grand children?), who, despite having lost their EU citizenship, would nevertheless keep its advantages for ever (including the right of movement from and to all EU Member States? Including the right to vote and to be a candidate in the European Parliament?). Such a theory would not have any legal support in the Treaties and would lead to absurd consequences.[26]

According to Mr Piris, the only EU laws that would apply to UK citizens abroad after withdrawal would be those giving rights to citizens of all non-EU countries:

> Therefore only EU laws that grant nationals of non-EU countries specific rights would benefit UK citizens. This would be the case for the right of residence or the right to work; the EU has

[26] Jean-Claude Piris ((former General Manager of the Legal Service of the Council of the EU), 'Should the UK withdraw from the EU: legal aspects and effects of possible options', Robert Schumann Foundation *European Issues* no355, 4 May 2015.

> adopted, for example, directives on family reunification, on long-term residents and on students.
>
> Therefore, after a Brexit, some public authorities, companies and individuals, from both the UK and other member-states, would no longer benefit from many rights established by Britain's EU membership. Moreover, companies and people from member-states that were established or permanent residents in the UK would no longer benefit from the protection of single market law.[27]

But in another view, EU case-law could be seen as creating acquired rights for individuals. This argument rests on the 1963 EU Court of Justice case of *van Gend & Loos*, which stated that EU law confers rights on the nationals of the Member States that become part of their 'legal heritage'[28]. Although this case did not concern a state leaving the EU, it has been argued that an individual's EU legal heritage could outlast the instrument that created it.[29]

If any EU rights are considered 'acquired', those individual rights which are directly enforceable in national courts (either horizontally between private individuals, or vertically by an individual against the state) are likely to be included. These appear in areas such as free movement of workers, free movement of goods and freedom of establishment.

However, even if there were any EU acquired rights, those operating in the UK could be removed in the future by domestic law (which would no longer be constrained by the Treaties) if removal was not in breach of domestic legal protections, for example protection against retrospective legislation and the protection of human rights.

There is also a separate argument that citizenship – including EU citizenship – cannot be withdrawn by the majority, and that EU citizenship is a 'durable bond' more robust than the Treaty which established this concept.[30] However, this view is not well established in the UK.

3.3 Acquired rights under international law

Where EU law does not provide an answer, it may be possible to turn to general international law.

The Vienna Convention

Under the 1969 Vienna Convention on the Law of Treaties, withdrawing from a treaty releases the States Parties from any future obligations to each other, but does not affect any rights or obligations 'of the parties' acquired under it before withdrawal:[31]

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27 Jean-Claude Piris, 'If the UK votes to leave: the seven alternatives to EU membership', Centre for European Reform Policy brief, 12 January 2016

28 ECJ, Case C-26/62, *van Gend & Loos*, 1963 ECR 1.

29 Jochum Herbst, "Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?", *German Law Journal* (6:2005), p1755.

30 Clemens M. Rieder, 'The withdrawal clause of the Lisbon Treaty in the light of EU citizenship: between disintegration and integration', *Fordham International Law Journal* 37 at 147 [2013].

31 Arts 65 to 72 of the Vienna Convention on the Law of Treaties set out the procedures for and the consequences of terminating or suspending a treaty. See

> Article 70. CONSEQUENCES OF THE TERMINATION OF A TREATY
>
> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) Releases the parties from any obligation further to perform the treaty;
>
> (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
>
> 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties

The Vienna Convention does not appear to protect rights acquired by individuals under the treaty.[32]

Moreover, as Tim Eicke QC[33] has pointed out, there is a 'real risk' that Article 70 would not apply if specific provisions trump the general provisions of the Vienna Convention, either:

- because the UK's withdrawal agreement contained its own provisions on acquired rights, or
- because of the clear provision in Article 50 of the Treaty on European Union (TEU) that the EU Treaties would cease to apply to the UK two years after it notified the EU that it intends to leave.[34]

Customary international law

Customary international law probably does protect some individual rights acquired under a treaty, but the scope of these rights is not clear, and might not extend to rights of residence, for example.

The doctrine of acquired rights is usually cited in the context of protecting rights created by domestic law which have been affected by state succession or expropriation.

But before the Vienna Convention, Lord McNair argued that the 'well-recognised principle of respect for acquired [vested] rights' also applied to rights acquired by States or individuals under a treaty. He suggested that rights and statuses created under a treaty that have already been executed and had their effect before withdrawal 'have acquired an existence independent of it; the termination cannot touch them'.[35]

The principle is most likely to cover property and contractual rights:

Rebecca MM Wallace and Olga Martin-Ortega, *International Law*, 7th edition, 2013, p289; Sir Gerald Fitzmaurice, *The law and procedure of the International Court of Justice*, 1986; AD (Lord) McNair, *The Law of Treaties*, 2nd edition 1961, p532; *Oppenheim's International Law*, Ninth Edition, p1311, para 657.

32 See for example Anthony Aust, *Modern Treaty Law and Practice*, 3rd edition, 2013, p266.

33 Who has just been appointed the UK's new judge to the European Court of Human Rights.

34 Tim Eicke, 'Could EU citizens living in the UK claim "acquired rights" if there is a full Brexit?', Lexis PSL, 11 April 2016.

35 Lord McNair, *The Law of Treaties*, 2nd edition 1961, pp531-2.

> a payment made under a treaty does not become repayable; a settlement of a dispute effected by a treaty does not become re-opened because the treaty is denounced; demarcated frontiers are not rendered indeterminate; cessions of territory are not cancelled, etc.[36]

It is least likely to cover 'continuing obligations' such as provisions 'to surrender alleged criminals of certain types, [or] to attribute a particular nationality to persons born in certain circumstances'.[37]

Whether it also protects individual liberties, for example freedom of trade or industry, is much less clear. In a recent Constitutional Law Association blog post, Sionaidh Douglas-Scott, Professor of Law at Queen Mary University of London, argues that rights of residence, healthcare rights and other benefits, as well as the freedom to work and trade, would not be protected as acquired rights under international law:

> There is some authority suggesting that, under customary international law, some treaty obligations continue to exist, protecting acquired rights notwithstanding the termination of a treaty. For example, in Certain German Interests in Polish Upper Silesia (1926), the Permanent Court of International Justice stated that 'the principle of respect for vested rights … forms part of generally accepted international law.' However, to the extent that acquired rights are recognised by customary international law, their scope is very narrow. For example Dörr and Schmalenbach, in their commentary on international law, assert (at p. 1207) that
>
> > 'Essentially the doctrine of acquired rights is confined in practice to private rights of individuals accrued under the municipal law and almost invariably occurred in the doctrine of State succession, investment law apart. Its extension to other rights of individuals is highly doubtful. For example, it cannot generally be said that rights occurring under treaties concerning the protection of human rights confer acquired rights to individuals that continue to exist even if the treaty is denounced. '
>
> Although some international lawyers (e.g. Rein Mullerson, International Law, Rights and Politics at p. 154) have argued that human rights treaties can bind successor states, (and this may be the case with the ECHR – see the 2009 case Bijelic v Montenegro and Serbia) in any event, most pressing issues of EU acquired rights are not strictly speaking human rights. They relate to EU citizens' exercise of their free movement, whether to work or to trade elsewhere, and these are not usually classified as human rights, and are often established or elucidated in secondary legislation, rather than in a treaty in any case.
>
> What is certainly clear is that international law does not treat all rights as worthy of respect as acquired rights, indeed it does not protect most rights as acquired rights. International law jurist, Pierre Lalive, writes ('The Doctrine of Acquired Rights' at p. 166):
>
> > 'However solemnly confirmed in international case law, notably by decisions of the World Court, the principle of respect for acquired rights in case of a cession of territory is subject to important limitations. First, the principle covers

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36 Sir Gerald Fitzmaurice, 33 British Yearbook of International Law (1957) p269, quoted in Lord McNair, *The Law of Treaties*, 2nd edition 1961, pp532.

37 Lord McNair, *The Law of Treaties*, 2nd edition 1961, pp531-2.

> only certain rights, mainly individual private rights… As for subjective rights of a public or political character, they usually do not enjoy the protection granted to acquired rights. This is true, at least, in general international law.'
>
> A distinction therefore exists between property and contractual rights (for example, ownership of a property in Spain, or a right not to have a work contract terminated) which are usually protected as acquired rights, and other rights (such as residence, healthcare rights and other benefits, as well as the freedom to work and trade, currently enjoyed by EU migrants) whose status is uncertain, to say the least.[38]

The Czech Constitutional Court in 2001 considered that the doctrine of acquired rights (at least in the context of state succession to treaties) was not even part of customary international law at all:

> The Constitutional Court of the Czech Republic … affirmed that regime of succession of States is regulated by international customary law, nevertheless, the doctrine of "acquired rights" has not attained a customary normativity. In consequence, there exists no norm of general international law prescribing the Czech Republic to assume the legal obligations of another State, including the predecessor, towards individual that had not been in any manner effectively linked with the newly emerging State or its territory and whose rights were founded upon regulations of administrative (public) character.

Applying international law in domestic courts

Even if there is a relevant international law protection of acquired rights, Professor Steve Peers of Essex University has cast doubt on its practical applicability in any national court:

> While Article 70 of the Vienna Convention on the law of treaties refers to guaranteeing 'acquired rights' of individuals in the event of termination of a treaty, it has never been applied in the context of a withdrawal from the EU pursuant to Article 50 of the TEU, since that TEU clause has never been used before. It is therefore open to question what 'acquired rights' means. Some literature argues that it applies only to property rights, not to public law issues like immigration status. There may be a better argument that it protects people who have already acquired permanent residence status as of the Brexit date, but it is not clear if it can logically apply to rights in the process of acquisition or which the person concerned would wish to invoke in future, such as those described above. Moreover, Article 70 does not apply if the treaty concerned sets out special rules for withdrawal, and it could be argued that the process referred to in Article 50 TEU does just that. It is also not clear whether Article 70 (or the rule of customary international law which it embodies) would in any event constitute a rule which could be invoked by individuals before a national court, in order to set aside a national or EU law rule which conflicted with it.[39]

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38 Professor Sionaidh Douglas-Scott, 'What Happens to "Acquired Rights" in the Event of a Brexit?', UK Constitutional Law Association blog, 16 May 2016.

39 Professor Steve Peers, 'EU Referendum position paper 9: The Impact of Brexit', ILPA, 17 May 2016.

It is important to remember that treaties cannot necessarily be invoked in the UK courts, as they do not automatically apply directly in UK law.[40] The position is different in some other EU countries, where treaties automatically become part of domestic law.

3.4 A withdrawal agreement could resolve issues around acquired rights

In practice, the UK and the EU will probably negotiate a withdrawal agreement under Article 50 TEU (see section 1.1 above). Rights of residence are very likely to form part of any withdrawal agreement and/or negotiations over UK's future relationship with the EU.

The one possible precedent is when Greenland (a Danish dependent territory) left the European Community (EC) in 1985, long before Article 50 appeared, (see Section 1.3 above). Then the European Commission saw transitional measures as essential for dealing with the rights acquired when Greenland was part of the EC:

> The proposed change of status may, of course, raise certain transitional problems. This applies in particular to the question of the rights acquired by Community nationals in Greenland and vice versa when Community law applied to Greenland. There might also be a need to review agreements concluded with non-member countries in matters for which the Community has exclusive responsibility, when the contents concern Greenland.
>
> The Commission is therefore of the opinion that the new arrangements must contain a clause allowing the Council, on a proposal from the Commission, to adopt such transitional measures as may be required.[41]

It clearly considered that workers and self-employed people from other EC countries already in Greenland at the time of withdrawal had vested rights. The Commission argued that Greenland should retain 'the substance' of free movement rights for them at least:

> **Retention of vested rights**
>
> Provision should be made for appropriate measures to protect companies and persons who have exercised the right of establishment as well as Community workers employed in Greenland. The extremely small number of persons affected and the case-law of the Court of Justice that has already been established in favour of the retention of pension rights acquired by workers during periods of employment in a territory which has subsequently ceased to belong to the Community give no reason to suppose that there will be any major difficulties in this area, even if the future status of Greenland were to rule out the principle of free movement. It would, however, be preferable to retain the substance of the Community rules, at least in respect of Community workers employed in Greenland at the time of withdrawal.[42]

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40 Lord Bingham of Cornhill, in his maiden speech in the House of Lords, set out six ways in which treaties can have indirect effect in the UK: HL Deb 3 July 1996 c1465ff.

41 Status of Greenland: Commission opinion, COM (83) 66 final, 2 February 1983, p12

42 Ibid, Annex A, p21.

In its May 2016 report on withdrawing from the EU, the House of Lords EU Committee concluded that the issue of acquired rights would be 'one of the most complex aspects' of the UK's exit negotiations:

> **Acquired rights**
>
> 26. One of the most complex aspects of the negotiations would be deciding which rights would qualify as 'acquired rights', and putting in place transitional provisions for individuals and companies whose rights might be phased out over time. Professor Wyatt described this issue as follows:
>
> > "It is estimated that 2 million Brits live in other EU countries … Take elderly people who have lived for 10 years in Spain. After five years, they acquired a right of permanent residence as citizens of the Union and that includes access to the Spanish healthcare system. If we leave, what do we do about vested rights? Do we recognise rights to permanent residents that have arisen? What transitional rights do we give somebody who has been working for four years in the UK and has children at school and so forth? Let us not forget that for every example in the UK there is an example of a UK citizen elsewhere. We would want to tidy that up. My guess is that the inclination of Government and Parliament would be to be generous as regards those who had already made their lives in the UK, knowing that it would be likely to be reciprocated."
>
> 27. Both witnesses thought that addressing these issues would be challenging. If the new relationship involved restrictions on the free movement of people, detailed arrangements would be necessary governing the rights of EU citizens resident in the UK and of UK citizens resident in the EU acquired prior to the UK's withdrawal. The arrangements would need to cover residence rights, rights to take up employment or self-employment, and rights to health care and social security. There would also have to be an agreement on the dates from which acquired rights would be recognised, and transitional arrangements for those not qualifying for acquired rights. On the other hand, if the new relationship preserved the free movement of persons, acquired rights could be maintained by a simple continuity clause.[43]

Human rights

A final point is that human rights law, such as Article 8 of the European Convention on Human Rights (right to respect for private and family life) could provide some protection for long-term residents, for example. Under EU law, continuous lawful residence for five years gives EU nationals an automatic right to permanent residence in another EU country.

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43 House of Lords Select Committee on the European Union, The process of withdrawing from the European Union, HL 138, 4 May 2016, paras 26-27.

4. Alternatives to EU membership

4.1 Introduction

There are a number of alternative models of trade with the EU already in existence. These include examples such as Turkey, Norway, Switzerland and Canada. These provide a starting point in considering what the UK's future relationship with the EU might look like. The Treasury Committee points out, however, that the UK's economic relationship with the EU may be different from these existing models:

> The UK's economic relationship with the EU is unlikely to be identical to that of any other country. As a large European country, the UK will seek, and probably be able to obtain, a unique arrangement. However, the terms of that arrangement would be constrained and conditioned by two forces: the views of other EU Member States and UK domestic opinion.[44]

The renegotiation of the UK's trading relationship with the EU will require a number of considerations to be balanced. These include access to the single market, free movement of people, contributions to the EU budget, the extent to which the UK needs to adopt EU rules and the extent of UK influence over those rules. According to a document published by the Government before the referendum, "none of the alternative relationships to full EU membership offer full access to the Single Market".[45]

4.2 European Free Trade Association (EFTA)

EFTA has four members: Iceland, Norway, Switzerland and Liechtenstein.[46] The original 1960 agreement was reached between countries that sought the benefits of trade without full membership of the then EEC. EFTA countries first lowered tariffs between themselves, and then signed bilateral free trade agreements (FTAs) with the EEC from 1973 onwards. The EEA Agreement superseded those with Norway, Iceland and Liechtenstein. A number of countries that are now EU Member States were formerly EFTA members. The UK was a founder EFTA member, alongside Denmark, Norway, Sweden, Austria, Switzerland and Portugal.

EFTA is a free trade area, rather than a customs union like the EU.[47] The EFTA states currently have 27 free trade agreements (covering 38 countries outside the EU).[48] EFTA Member States can pursue bilateral trade agreements if they wish – they are not required to pursue these as a group.[49]

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44 Treasury Committee, The economic and financial costs and benefits of the UK's EU membership, HC122, 27 May 2016, para 140.
45 HM Government, Alternatives to membership: possible models for the united Kingdom outside the European Union, March 2016, p11.
46 EFTA website
47 A customs union involves a common external tariff in addition to free trade between its members.
48 EFTA website, Free Trade Agreements
49 EFTA website

In evidence to the Foreign Affairs Committee, Dr. Johanna Jonsdottir, Policy Officer, EFTA Secretariat, pointed to an article in the *Economist* which referred to possible problems of a semi-detached status for a "larger and more assertive country" such as the UK, and which also said:

> ... being in with the outs while trading freely in Europe comes at a price. It means paying to administer and police the single market while the in-crowd makes the important decisions about how it works. For a noisy nation accustomed to a place at the table and having its voice heard, that could feel like a very un-splendid isolation'.[50]

In other evidence to the Foreign Affairs Committee, Professor René Schwok and Cenni Najy identified some of the advantages of joining EFTA:

- a far lower UK financial contribution, which would exclude the CAP;
- the UK Government would be free to set its VAT level;
- capacity to ratify free-trade agreements faster and with more partners than the EU and greater freedom of manoeuvre to sign free trade agreements worldwide;
- UK bilateral agreements with the EU would better protect British sovereignty, notwithstanding a loss of influence.[51]

They also identified some 'challenges':

- Joining EFTA could entail a difficult application process with possibility of veto from existing Member(s)
- EFTA is a homogenous bloc in terms of countries' size, economic development and trade preferences. The UK might not fit in or might change the dynamic of the group to the disadvantage of existing members.[52]

4.3 The 'Norwegian option': the EEA

The European Economic Area (EEA) is made up of the EU Member States plus Norway, Iceland and Liechtenstein. EEA membership gives substantial, but not complete, access to the single market. There is limited access to the single market in agriculture and fisheries.

Signed in 1992 and operational from 1994, the EEA Agreement extends the EU single market and free movement of goods, services, people and capital, together with laws in areas such as competition policy, state aid, consumer protection and environmental policy to include Norway, Iceland and Liechtenstein. In addition, the EEA Agreement covers cooperation in policies such as research and technological development, education, training and youth, employment, tourism, culture, civil

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50 "In with the outs", *Economist*, 17 December 2011 referred to in Foreign Affairs Committee, The future of the European Union: UK Government policy, 11 June 2013, HC 87-II, 2013-14, Ev 54.

51 Foreign Affairs Committee, The future of the European Union: UK Government policy, 11 June 2013, HC 87-II, 2013-14, Ev 134.

52 Ibid, Ev 135

protection, enterprise, entrepreneurship and small and medium-sized enterprises.

The Agreement does not cover the following EU policies:

- Common Agriculture and Fisheries Policies (CAP and CFP, although the Agreement contains provisions on various aspects of trade in agricultural and fish products)
- Customs Union
- Common Trade Policy
- Common Foreign and Security Policy
- Justice and Home Affairs (even though the EFTA countries are part of the Schengen area)
- Direct and Indirect taxation
- Monetary Union (EMU).[53]

EEA members do not benefit from the EU's trade agreements with other countries. If the UK were to adopt this model, it would be able to negotiate its own free trade deals with other countries. All of Norway's free trade agreements have been negotiated through EFTA. As they are outside the Customs Union, exports of goods from EEA members to the EU must comply with potentially costly customs procedures.

EEA members accept free movement of people. The Government's March 2016 report on the alternatives to EU membership noted, however, that there was a right to suspend free movement of people in certain limited circumstances. This could only be done in a reciprocal way, so for example, if Norway used it, this would remove the right of Norwegians to move to the EU.[54]

EEA members make a financial contribution to the EU (see below). They must also incorporate much EU law into their domestic legislation in return for access to the EU market:

> An independent study commissioned by the Norwegian Government in 2012 calculated that, in return for its access to the EU market, Norway has had to incorporate approximately three-quarters of all EU laws into its own domestic legislation.[55]

Liechtenstein, Norway and Iceland have no representation in any of the EU institutions and only indirect influence – including the right to be consulted – on EU proposals affecting them. The EFTA website explains how EEA members can influence EU legislation:

> The EEA Agreement does not grant the EEA EFTA States formal access to the decision-making process within the EU institutions. However, the EEA EFTA States can participate in shaping a decision at the early stages of preparing a legislative proposal. The EEA Agreement provides for input from the EEA EFTA side at various stages of the preparation of EEA-relevant legislation:
>
> First, representatives of the EEA EFTA States have the right to participate in expert groups and committees of the European

53 EFTA website
54 HM Government, Alternatives to membership: possible models for the united Kingdom outside the European Union, March 2016, para 3.16
55 Ibid, para 3.12

> Commission. They participate extensively in the preparatory work of the Commission and should be consulted in the same manner as EU experts. The Commission may seek advice from the EEA EFTA experts by phone or by correspondence, or in meetings. The experts may also be associated with the preparatory work through regular committee meetings.
>
> Second, the EEA EFTA States have the right to submit EEA EFTA comments on upcoming legislation.
>
> While the EEA EFTA States use these opportunities to contribute to the legislative process, they can neither sit nor vote in the European Parliament or the European Council.
>
> More information on this subject may be found in the EFTA Bulletin (2009) on Decision Shaping in the European Economic Area.[56]

Most experts think the UK would no longer be a member of the EEA on leaving the EU. It would have to seek to rejoin EFTA and apply to join the EEA.[57] Continued UK membership of the EEA would require the agreement of all EEA members, including Iceland, Liechtenstein and Norway.[58]

Some commentators have written in favour of this option. For example Wolfgang Münchau, writing in the Financial Times, argued that EEA membership was the most sensible option for the UK. This model had the advantage of existing already so would not need to be invented and would minimise the economic costs of Brexit. He noted that it would mean accepting the free movement of people and would entail contributions to the EU budget.[59] A leader in the Economist said the "Norwegian option would do the least damage to the economy."[60] Most studies of the economic impact of Brexit found this option would lead to lower economic losses compared with other options.[61]

Others have questioned whether this model is better than EU membership. For example, writing in the Financial Times, Martin Wolf said "…leaving the EU and seeking to retain current access to the single market, while accepting free movement of labour, would be mad. If the UK were willing to accept all this, it should stay inside the EU, since it would continue to possess a voice in the single market regulations that would affect it."[62]

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56 EFTA website
57 House of Commons Library Briefing Paper, Brexit: how does the Article 50 process work?
58 HM Government, Alternatives to membership: possible models for the united Kingdom outside the European Union, March 2016, para 2.4
59 "Brexit: The Norway option is the best available for the UK", Financial Times, 28 June 2016
60 "Adrift" [leader column], The Economist, 2 July 2016
61 IFS, Brexit and the UK's public finances, IFS Report 116, May 2016, p35
62 Martin Wolf, "Britain's best hope is to keep Europe waiting", Financial Times, 29 June 2016

4.4 The Swiss model

Switzerland is in EFTA and Schengen but is not a member of the EU or the EEA. Switzerland has negotiated over 100 separate agreements with the EU governing market access.[63]

Switzerland has limited access to the single market. Access is greatest for trade in goods, but tariffs remain on some agricultural goods. There is less access for trade in services and according to the UK Government, "no general access to the EU market in financial services".[64]

Switzerland is outside the EU Customs Union so does not benefit from the EU's trade agreements with other countries. Being outside the Customs Union also means exports of goods to the EU must comply with potentially costly customs procedures.

Switzerland is able to pursue an independent trade policy with countries outside the EU. Switzerland has 29 free trade agreements, covering 41 countries including China (although this requires Switzerland to reduce tariffs on imports from China more quickly than China will reduce them on imports from Switzerland).[65]

Switzerland makes a financial contribution to the EU (see below). Its bilateral agreements with the EU require free movement of people. Relations between the EU and Switzerland were made more difficult following a 2014 vote in Switzerland to impose immigration quotas with the EU. The European Commission said at the time that this breached the principle of free movement of people between Switzerland and the EU.[66] If Switzerland went ahead with migration quotas, the EU could end its privileged access to the single market.[67] The EU continues to warn Switzerland with it will lose access to the single market if it goes ahead with plans to impose controls on the free movement of EU citizens by February 2017.[68] A European Parliament factsheet outlines the current situation:

> Implementing the results of the vote would not only be incompatible with the Free Movement of People Agreement (FMOP) (part of Bilateral I), but it would also put at risk the country's entire series of bilateral treaties with the EU under the 'guillotine clause' — if one agreement is terminated, the other agreements would cease to apply. Faced with the EU's firm refusal to renegotiate the free movement agreement, the Swiss Government is facing difficulties in overcoming the political and legal impasse created by the initiative. Consultations to overcome the impasse continue between the Commission and the Swiss authorities.[69]

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63 HM Government, Alternatives to membership: possible models for the united Kingdom outside the European Union, March 2016, para 3.27
64 Ibid, para 3.29
65 Ibid, para 3.31
66 Euractiv, EU-Swiss relations in turmoil after immigration vote, 10 February 2014
67 HM Government, Alternatives to membership: possible models for the united Kingdom outside the European Union, March 2016, para 3.36
68 See Guardian, 3 July 2016.
69 The European Economic Area (EEA), Switzerland and the North, Aydan Bahadir & Fernando Garcés de los Fayos, 06/2016.

Some have argued that the UK would do well to follow the Swiss example. A paper published by Civitas said:

> Switzerland has a much smaller market to offer than Britain but has been able to secure advantageous terms in trade deals with economies much larger than its own. This is borne out well by close examination of its 2009 trade deal with Japan, from which Swiss exports have benefited significantly. Swiss exports of chocolate, cereal, cheese and watches to Japan all face lower tariffs now.
>
> UK trade would have much to gain if Britain took a similar approach to Switzerland, whose achievement has been considerable given Japan's historically protectionist approach, especially over food.[70]

But others have commented that the EU is not happy with its relationship with Switzerland:

> … the major problem for the UK in trying to pursue the Swiss model is that it would be entering unchartered [*sic*] waters. This is because the EU is unhappy with the state of its relationship with Switzerland and wants to change it.[71]

The Government has said:

> It is unlikely that the UK could secure an arrangement like Switzerland. Even if we wanted to do so, it is unlikely that the remaining EU Member States would be willing to offer the UK a similar arrangement. The EU-Swiss bilateral agreements are complicated, and increasingly controversial both with the EU and in Switzerland. Both the EU and the Swiss are calling the viability of this model into question.[72]

4.5 EEA and Swiss financial contributions to the EU

EEA

Since the entry into force of the EEA agreement in 1994, the EEA EFTA states (Norway, Iceland and Liechtenstein) have made financial contributions to the EU in two ways. Firstly, they contribute to broad EU regional policy goals by providing grants to "reduce social and economic disparities in the EEA".[73] Since the 2004 enlargement, funds have been provided under two schemes: 'EEA Grants', which Norway, Iceland and Liechtenstein all contribute to, and which is targeted at the thirteen newer Member States, plus Greece, Spain and Portugal; and 'Norway Grants', which Norway alone contributes to, and is targeted at the thirteen newer Member States only. €1.8bn was allocated to both

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70 Jonathan Lindsell, Lessons from Switzerland: How might Britain go about business outside the EU? Civitas, October 2015.

71 Jean-Claude Piris, If the UK votes to leave: The seven alternatives to EU membership, Centre for Economic Reform, January 2016, p8.

72 HM Government, Alternatives to membership: possible models for the united Kingdom outside the European Union, March 2016, para 3.43.

73 The scheme is also intended to strengthen relations between Norway and the beneficiary states, making it an instrument of Norwegian foreign policy.

schemes for the period 2009-14, to which Norway provides 97% of the total.[74]

Secondly, EEA countries contribute to the costs of the EU programmes in which they participate under the EEA Agreement, in proportion to their percentage of EU GDP. The EEA states have also committed to second national experts to the Commission as an 'in kind' contribution to these programmes.[75]

Norway, which by virtue of its relative size provides the vast majority of EEA contributions, provided around £586 million in 2014, or £115 per capita.[76] It is not possible to calculate a net contribution for Norway as complete data on receipts from the EU budget are not available. However, Norway participates in fewer EU programmes than the UK – for instance Norway is not part of Common Agriculture Policy – so it would be fair to assume that they would receive fewer receipts.

The UK made a net budget contribution to the EU budget in 2014 of £9.8 billion, or £152 per capita. If we assume that Norway's gross and net contributions aren't too dissimilar from one another, then if the UK left the EU and contributed to the EU budget on the same per capita basis as Norway, the UK's net contributions may fall by at least 25% per person. Further details are shown in the table below.

Norway and UK - contributions to the EU and EEA/EFTA in 2014

Norway [a]	£m	*£ per capita*
EEA/EFTA commitment to EU operational costs	296	*58*
EEA Grants	153	*30*
EFTA budget	8	*2*
Norway Grants	129	*25*
Total	**586**	***115***

UK [b]	£m	*£ per capita*
Net EU budget contribution	9,807	*152*
Gross EU budget contribution (after rebate)	14,346	*222*
Gross EU budget contribution	19,234	*298*

[a] contributions covereted to GBP at average exchange rate for 2014

[b] estimated outturn

Sources: EFTA Annual Report 2014; Agreement between the Kingdom of Norway and the European Union on a Norwegian Financial Mechanism for the period 2009-14; Protocol 38 B of the EEA Agreement; EEAgrants.org; HM Treasury European Union Finances 2014, Credit Swiss exhange rates

The Institute for Fiscal Studies (IFS) suggest that the UK's net contribution might fall by more than 25% if it entered into a Norway-style arrangement. Rather than assuming that the UK would contribute

74 The basis for these contributions is contained in Articles 115-117 of the EEA Agreement; the specifics of the 2009-14 arrangement can be found in the Agreement between the Kingdom of Norway and the European Union on a Norwegian Financial Mechanism for the period 2009-14, and Protocol 38 B of the EEA Agreement.

75 A list of the programmes that EEA states participate in under the agreement is available here.

76 These figures include Norway's contribution to the EFTA budget.

on the same per capita basis as Norway, the IFS assume contributions are made relative to national income. This approach suggests that the UK's net contribution may fall by more than 50%.[77]

Of course, in reality the UK's contribution upon entering a Norway-style arrangement would depend on negotiations.

Switzerland

Like the EEA countries, Switzerland contributes to both enlargement costs 'to reduce economic and social disparities', and the EU programmes in which it participates under its array of bilateral agreements. Its enlargement contributions are provided under multi-year frameworks. In 2009 Switzerland's contribution was around 600 million francs, £420 million per annum, or £53 per head.[78] It is difficult to reach any conclusions on what this might mean if the UK were to exit the EU today and contribute on the same basis as Switzerland – the UK's contribution has nearly doubled since 2009 whilst we have no information about the change in Switzerland's contribution.

4.6 The rebirth of the Anglosphere?

Some of those who want the UK to leave the EU argue that the 'Anglosphere' could in some ways provide an alternative to the EU and be a forum for economic and political partnership for a post-EU UK.

The idea that English-speaking countries form a natural community of which citizens feel a part, even without any formal organisation, is a powerful one. For proponents such as James C Bennett,[79] a US businessman and journalist, the defining characteristics of the 'Anglosphere' are the English language, Common Law, individualism, democracy, the rule of law and a strong civil society.[80]

Its supporters argue that the Anglo-Saxon culture is the root of democracy, limited government, individual liberty, private property and the rule of law, and that these, along with a shared language, are a better basis for partnership than geographical proximity to Europeans, whom the British still see as 'foreigners'.

'Anglospherists' argue that the relative safety of the island of Great Britain has allowed a culture of individualism and government by consent to develop. For Robert Conquest, historian and former speech writer for Margaret Thatcher, this meant that the state in Britain was never overwhelmingly strong:

> Since the collapse of Rome, there has never been any significant period in Britain when the state was strong enough to enforce its will without considerable concessions to the rights and liberties of

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77 Institute for Fiscal Studies. Brexit and the UK's Public Finances, May 2016, pages 13 - 15.

78 Based on information published by the Swiss Government in its 2009 brochure Bilateral agreements Switzerland-EU.

79 James C Bennett, The Anglosphere Challenge: Why the English-speaking Nations will Lead the Way in the 21st Century, 2004.

80 James C Bennett, An Anglosphere Primer, 2001.

> important sections of its subjects and without reliance upon consent.

Robert Conquest criticised the EU as divisive of the West and often explicitly anti-American,[81] and fans of the Anglosphere argue that by joining the EU, the UK separated itself from its historic partners, even that it 'betrayed' them.[82] But Bennett argued that there would be no formal Anglosphere union, along the lines of the EU; rather, cooperation building on existing institutions:

> The Anglosphere potential is to expand these close collaborations into deeper ties in trade, defense, free movement of peoples, and scientific cooperation, all bound together by our common language, culture, and values.
>
> Anglosphere theorists promote more and stronger cooperative institutions, not to build some English-speaking superstate on the model of the European Union, or to annex Britain, Canada, or Australia to the United States, but rather to protect the English-speaking nations' common values from external threats and internal fantasies.[83]

By building on the Anglosphere, its proponents argue, the UK would be joining a group of faster-growing economies, linked to Asia, and would escape the EU's tendency to over-regulation and protectionism. Daniel Hannan, a Conservative MEP and proponent of the Anglosphere, said of the UK's EU membership: "Far from hitching our wagon to a powerful locomotive, we shackled ourselves to a corpse". Supporters point out that in some measures economic integration between English-speaking countries is already strong.[84]

"Shackled to a corpse"

However, there have been criticisms of the concept. The historic basis for assertions that Anglo-Saxon culture was essential for the development of liberalism, pluralism and the separation of powers is controversial. For US conservative commentator, Daniel Larison, Anglospherists overstate the difference between English-speaking and other European cultures. He stresses the importance of Christianity.[85] Critics such as Larison point out that, contrary to assertions of the Anglospherists, the English monarchy was relatively strong and theories of absolutism were just as prevalent in England as on the Continent. One conservative commentator, John Laughland, says that liberalism, religious tolerance and prosperity are not the difference between Britain and the Continent; rather it is the orientation towards the sea:

> This maritime geo-economic orientation is the defining fact of English political culture, not liberalism. It is so strong, indeed, that "free trade" remains the single taboo which it is impossible to break in England.[86]

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81 'The 'Anglosphere'- Robert Conquest, reply by Michael Ignatieff', *New York Review of Books,* 11 May 2000.
82 'Boris "UK has betrayed Australia by joining the EU"', South Australia government press release, August 2013.
83 James C Nesbitt, An Anglosphere Primer, 2001, 2002.
84 Joel Kotkin, The New World Order, Legatum Institute, 2011.
85 Daniel Larison, 'Does the Anglosphere Make Any Sense?' *The American Conservative,* 14 January 2006.
86 John Laughland, 'Why the "Anglosphere" Is No Alternative for the EU', *The Brussels Journal,* 2 January 2008.

Laughland even suggests that euroscepticism is really a resurgence of anti-Catholicism, a theme that was taken up in an article in the *Financial Times,* comparing the move to leave the EU to England's break with Rome under Henry VIII.[87]

English-speaking countries may share some culture, but to what extent do they have shared interests? The Australian writer, Owen Harries, argued in 2001 that the Suez Crisis showed that even when elites of the US and the UK were much closer culturally and had just won a war together, hard calculations of national interest and political expediency resulted in the US publicly humiliating the UK and France, and stopping the attempt to retake the Suez Canal militarily from the Egyptian government.[88] Harries quotes former British Prime Minister Palmerston with approval: "We have no eternal allies and we have no perpetual enemies. Our interests are eternal and perpetual, and those interests it is our duty to follow".

Support for the Anglosphere?

The idea of the Anglosphere, from the coining of the term in 1990s, had a following wind. The collapse of the Soviet Union, another ideological continental empire – a traditional sort of adversary for the Anglosphere – left the US as the sole superpower. The so-called US 'unipolar moment' stretched from the fall of the Berlin Wall in 1989 until perhaps the end of the first George W Bush administration in 2005. It was no coincidence that this period saw the notion of the Anglosphere gain in popularity; the English-speaking world and its pragmatic, non-ideological, free market and democratic ethos seemed to be carrying all before it.

Military action in Afghanistan and Iraq may at first have strengthened such notions. It was English-speaking nations that took the lead in both campaigns, ostensibly against dangerous totalitarian ideologies.

Julian Lindley-French of the Atlantic Council argued that the relative decline of the US in the 21st Century might increase its need for political legitimacy and possibly some military assistance in a dangerous world. The idea that any such alliance should be based on shared culture would be a strength, but, he argued, it would be difficult to make it work, and he cautioned about swapping Brussels for dependence on a "dangerously dysfunctional" Washington.[89] Nevertheless, he suggests that the Queen could offer the Americans membership of the Commonwealth as a first step.

The euro crisis and the likelihood of further political integration in the Eurozone put a question mark over the UK's future membership of the EU. With the result of the referendum on UK membership of the EU, the idea of the Anglosphere may gain further traction as an alternative political and economic vision for the UK: a vehicle for the re-birth of

87 'Brexiters are 500 years behind the times', *Financial Times,* 22 June 2016.
88 Owen Harries, 'The Anglosphere illusion', *The National Interest,* Spring 2001.
89 Julian Lindley French, 'The Anglosphere: Two Hundred Years On', Atlantic Council, 18 June 2012.

Britain's free-trading traditions and a way to integrate with faster-growing economies across the world.

However, events have conspired to undermine the Anglosphere. Both the Iraq and Afghanistan conflicts began to show the limits of US power and became less popular with English-speaking publics. The US no longer looked omnipotent and the whole rationale for the Iraq war looked questionable. Parliament voted against military action in Syria in 2013, although it voted in favour of bombing ISIS in Iraq in 2014 and in Syria in 2015. ISIS/Daesh might provide the 'dangerous totalitarian ideology' to increase enthusiasm for joint military operations, but with limited UK defence expenditure, any 'sheriff and deputy' peacekeeping partnership between the US and the UK, surely a building block of the Anglosphere, looks questionable.

Financial crisis

The present economic upheavals may also have dealt a blow to the popularity of the concept. The world's worst financial crisis for some time and a global recession were triggered by a 'credit crunch' spreading from over-enthusiastic mortgage lending to 'sub-prime' home-buyers in the US, the subsequent securitisation of these loans and their sale on the bond markets. A preoccupation with owner-occupation and the deregulation of the financial markets are both seen as hallmarks of Anglo-Saxon financial capitalism and, in European countries at least, have been widely blamed for the global financial crisis. On the other hand, alternatives to the loosely-regulated financial capitalism model have not prospered after the financial crisis as much as might have been expected.

Other English-speaking views

Well-known figures who are reported to have been interested in the Anglosphere include John Howard (former Australian Prime Minister), Conrad Black (former owner of the *Telegraph* newspapers), Margaret Thatcher, Tony Abbott (former Australian Prime Minister) and former Canadian Prime Minister Stephen Harper. On the other hand, both the US and the Australian governments put it on record that they think the UK should remain in the EU.[90]

UK party views

No UK Government has ever made the Anglosphere UK policy in so many words, but in a speech setting out the UK's new foreign policy in 2010, the then Foreign Secretary William Hague echoed some of the themes and language used by Anglospherists. He placed increased emphasis on the Commonwealth, the English language and the importance of strengthening networks of contacts:

Commonwealth

> The case for the UK embracing the opportunities of the networked world is very strong. We are richly endowed with the attributes for success. We are a member of one of the world's longstanding global networks - the Commonwealth - which spans continents and world religions, contains six of the fastest growing

90 'Australia tells Britain not to forsake the European Union', *Reuters,* 23 July 2013; 'Barack Obama: Britain should stay in the EU', *Daily Telegraph,* 18 January 2013.

> economies and is underpinned by an agreed framework of common values.[91]

UKIP

In the run-up to the 2015 election, UKIP did namecheck the Anglosphere, making the fostering of Anglosphere ties one of five foreign policy priorities in its manifesto:

> Britain is not merely a European country, but part of a global community, the Anglosphere. Beyond the EU and even the Commonwealth are a network of nations that share not merely our language but our common law, democratic traditions and global trading interests. From India to the United States, New Zealand to the Caribbean, UKIP would want to foster closer ties with the Anglosphere.[92]

The Conservatives and Labour mentioned the Commonwealth in their 2015 manifestos but not the Anglosphere, while the SNP mentioned neither.

According to the Chatham House annual survey on the UK's international priorities, the British public is fairly evenly divided on whether the UK's closest ties should be with the US or the EU. In 2014, 30% opted for the EU and 25% for the US; this was a reversal of the position in 2012.[93]

Outlook

The US is less and less Anglo

The US is becoming increasingly Hispanic and Asian; the US Census Bureau estimates that non-Hispanic whites will be in a minority by 2043.[94] Of course no-one knows how much increasingly Hispanic-origin and other non-European Americans will adopt an English-speaking culture and how much they will change it. Joel Kotkin argues that immigration and the number of foreign students, for example, show the openness of the US and other Anglosphere countries to other cultures, and are a strength rather than a weakness.[95]

In 2007 Christopher Hitchens argued that English-speaking culture is powerful and that the significance of the growth of English as the world language is underestimated even by Anglospherists. Nevertheless, he thought any formalisation of the Anglosphere unlikely and undesirable:

> I myself doubt that a council of the Anglosphere will ever convene in the agreeable purlieus of postcolonial Bermuda, and the prospect of a formal reunion does not entice me in any case. It seems too close to the model on which France gravely convenes its own former possessions under the narrow banner of *La Francophonie*. It may not be too much to hope, though, that, along with soccer [...], some of the better ideas of 1649 and 1776 will continue to spread in diffuse, and ironic, ways.[96]

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91 Britain's Foreign Policy in a Networked World, Speech, Rt Hon William Hague, Thursday, 1 July 2010.
92 Believe in Britain: UKIP manifesto 2015.
93 Thomas Raines, Internationalism or Isolationism?: The Chatham House–YouGov Survey of British Attitudes Towards the UK's International Priorities, January 2015, Summary.
94 'Census: White majority in U.S. gone by 2043', *Associated Press,* 13 June 2013.
95 Joel Kotkin, The New World Order, Legatum Institute, 2011.
96 Christopher Hitchens, 'An Anglosphere Future', *City Journal,* Autumn 2007.

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