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BRIEFING PAPER

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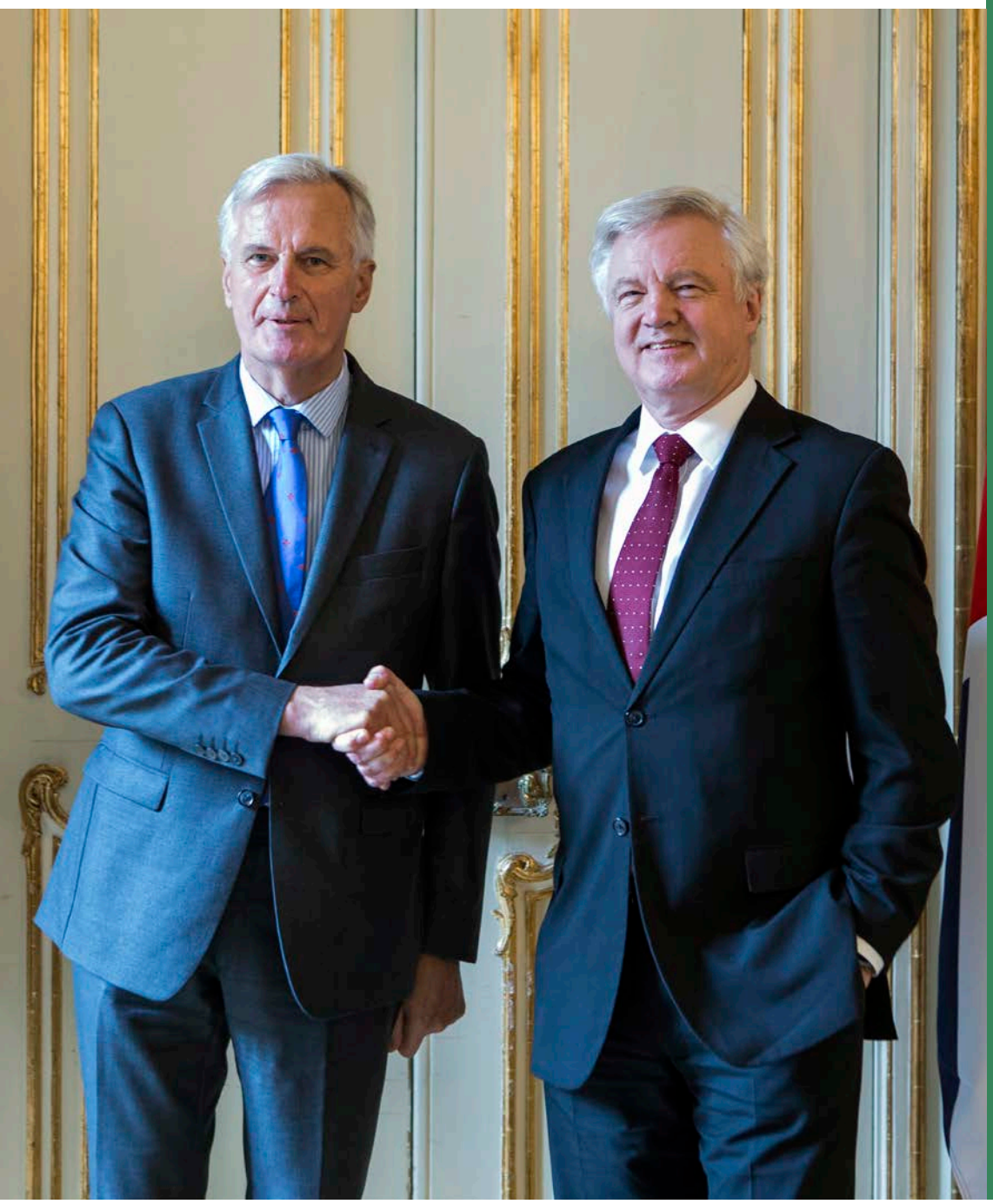
Brexit: the draft withdrawal agreement

By Library subject specialists



Contents:

Contents

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Summary

On 28 February the European Commission published a 119-page draft withdrawal agreement (WA). This put into legal language the conclusions of the negotiations in phase one, which were agreed in a Joint Report on 8 December 2017, but included other draft Articles on matters not covered by the Joint Report, as well as detailed provisions on broad areas of agreement. Amended versions were published on 15 and 19 March, and the latter will be the basis for discussion by the European Council on 22-23 March.

The structure of the draft withdrawal agreement

The draft WA contains six Parts and has two protocols attached to it. The protocols "form an integral part" of the WA and will have the same binding legal value as the main parts of the agreement.

Part 1 of the draft sets out definitions to be used in the remainder of the WA. While there may be further negotiations on the phrasing of some of the Articles in Part 1, it is unlikely to be controversial. Part 1 is considered in section 2 of this paper.

Part 2 of the draft contains the Commission's attempt to turn the December Joint Report's statements on citizens' rights into binding legal text. These rights, described as 'acquired rights' because they will last after the UK's departure from the EU, have been contentious, and are discussed in Section 3 of this paper.

Part 3, 'separation provisions', contains the first text covering withdrawal matters that the Joint Report flagged up but did not discuss in great detail, noting that these would be expanded on in Phase two of the negotiations. It contains provisions on market access for goods, ongoing customs, VAT and excise matters, intellectual property, ongoing police and judicial cooperation in both criminal and civil/commercial matters, the protection of data obtained before the end of transition, ongoing public procurement procedures, Euratom issues, ongoing EU judicial/administrative processes, privileges and immunities, and a few provisions relating to the functioning of the EU institutions.

The UK responded to Part 3 of the draft WA on 6 March in a Technical Note. Differences and similarities between the draft WA and the Technical Note are discussed in Section 4 of this paper.

Part 4 is on the Commission's proposals for a transition period. A draft of this text was released on 7 February 2018, and the UK responded to it with amendments to that text on 21 February 2018. A Commons Briefing Paper on the EU's negotiating directives discussed the Commission's two 'drafts' of the transition agreement in some detail. Transition is discussed in Section 5 of this paper.

Part 5 is a detailed annotation of the financial settlement, which was in principle agreed in the Joint Report in December 2017, but which has been expanded on in the Commission's draft text. While likely to remain controversial in the UK, Professor Steve Peers notes that it reflects the UK's commitments made in December; as such, the Commons Briefing Paper on the Phase 1 Agreement remains accurate as to what has been agreed on the financial settlement. Section 6 of this paper provides detailed analysis.

Part 6 contains institutional provisions as envisaged by the Commission. These provisions are likely to be contentious, as they preserve a role for the Court of Justice of the EU (CJEU) in oversight of the WA – which appears to cross one of the 'red lines' set by the UK Government. They are discussed in Section 7 of this paper.

Of the **two protocols** attached to the WA, one deals with Sovereign Base Areas in Cyprus and is discussed in Section 9 of this paper; the other deals with Ireland. The Ireland Protocol has already stirred up significant controversy in the UK, and is discussed in Section 8.

Negotiating and amending the withdrawal agreement

This is a draft of the Withdrawal Agreement text, and negotiations will continue in the coming months, with a view to agreeing a final draft in October 2019. The EU published an amended draft text on15 March and another draft on 19 March which contained, primarily in the section on transition, areas of agreement between the EU and the UK. If agreement on a WA text can be reached by the March European Council, the negotiations will at that point move on to discuss the future relationship between the UK and the EU. On 7 March the European Council published new draft guidelines for this phase, significant for not mentioning trade in financial services. An amended draft negotiating position was expected to include financial services for the first time in a new annex stating that the negotiations should aim for market access for UK-based financial firms via "reviewed and improved equivalence mechanisms".[1] According to Politico, the framework it outlines "falls far short of that favored by the UK government".[2] The new guidelines adopted on 23 March do not contain or refer to the annex.

Once a legal text has been agreed between the UK Government and the European Commission, it will then need to be approved by the EU institutions. Article 50 TEU also requires the European Parliament to approve the final text of the withdrawal agreement. If the EP approves the agreement by a simple majority, for it be concluded, it must be passed by European Council acting by qualified majority (20 of the other 27 Member States).

In the UK the Government has committed to holding a vote on a resolution in both Houses of Parliament, before the EP holds its vote, where each House will be asked to approve the withdrawal agreement.

Implementing the withdrawal agreement

If the withdrawal agreement is approved and concluded, the UK Government has said it will implement the agreement through a *Withdrawal Agreement and Implementation Bill*. This Bill would need to be passed before exit day, expected to be on 29 March 2019, in order to enable transition to take effect at the moment that the UK leaves the EU.

1 See Bloomberg, EU Digs In Over Banks' Post-Brexit Access, But Divisions Emerge, 20 March 2018
2 Politico, 20 March 2018

1. The state of negotiations

1.1 The draft Withdrawal Agreement

On 28 February 2018 the European Commission published a 118-page draft Withdrawal Agreement. This agreement is being negotiated under Article 50 of the *Treaty on European Union* (TEU) and will set out the terms and conditions for the UK's withdrawal from the EU. It will "take account of" the framework for the UK's future relationship with the EU, but will not regulate the long-term future EU – UK economic and trade relationship. This will be negotiated once the UK has left the EU and become a third country, and will be determined by a separate treaty (or treaties).

The political declaration on the framework for the future relationship

The UK and the EU will also negotiate a 'political declaration' on the framework for the future relationship, which will "accompany" the Withdrawal Agreement.[3] This will not be an international treaty, but is intended to provide an agreed set of objectives as to the content of a treaty on the future relationship, the detail of which will be negotiated and agreed during the implementation or transition period. The UK Government said in a written statement on 13 December that both Houses of Parliament will be asked to approve the political declaration on future relations at the same time as the withdrawal agreement, once the negotiations are concluded.[4]

Structure of the draft

The draft Withdrawal Agreement (WA) has 168 Articles in six parts, two protocols and several annexes. The substantive text includes introductory (common) provisions, citizens' rights, other separation issues (e.g. goods placed on the market before the withdrawal date), the financial settlement, transitional arrangements and institutional provisions. There is a protocol on Ireland/Northern Ireland and another on the Sovereign Base Areas in Cyprus.

In treaty terms, annexes and protocols are outside the main body of an agreement, but they are also legally binding. Political declarations are not usually legally binding.

Turning the Joint Report into legal text

The draft WA puts into legal language the conclusions of the negotiations in phase one, which were agreed in a Joint Report of 8 December 2017, taking into account new guidelines and negotiating directives for phase two.

The draft - and its subsequent iterations - was prepared by the Commission's Task Force 50, led by the EU's chief Brexit negotiator,

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3 Council of European Union, Draft Guidelines on the framework for the future relationship, 7 March 2018

4 David Davis, Written Statement Procedures for the Approval and Implementation of EU Exit Agreements, HCWS342 13 December 2017

Michel Barnier, and it can be amended by the 27 remaining EU Member States (the EU27).

The first draft text of 28 February 2018 was the basis for ongoing negotiations with the UK Government. In several areas, where there was no agreement or even discussion between the EU and the UK, the text reflected only the EU's position. The draft included Articles on matters not in the Joint Report, as well as provisions on outstanding matters which were not included in any detail in the Joint Report.

1.2 Amending the draft agreement: two new drafts

The draft WA text is not binding on either the EU or the UK – it is a starting point for further negotiations. The EU27 will continue to study it and may propose amendments, as can the UK Government. The content of the draft has been amended, significantly or to some degree, in advance of the European Council meetings on 22 – 23 March at which the negotiations on transition are intended to be 'concluded'.

On 15 March the Commission published an amended draft withdrawal agreement. On 19 March an agreed text on the transition period and several other draft Articles on which the EU and UK had reached agreement was published in an amended draft text.[5] This text is colour-coded, making it easy to see where agreement has been reached (green), agreed in principle (yellow) or not yet agreed (white).

Negotiations will continue with a view to reaching a compromise agreement in all areas of the negotiations by October 2018.

Changes made to the first draft WA in the amendments on 15 and 19 March include:

- The **title** of the agreement, 'Draft Withdrawal Agreement', was changed to 'Draft Agreement on the withdrawal of the UK …'
- **Article 4a**: a 'good faith' clause has been added, which commits both sides to respecting each other's interests.
- **Article 31**: the UK has secured a review mechanism for certain changes to EU rules on payment of benefits to EU nationals within the scope of the citizens' rights section.
- **Article 32**, precluding UK citizens' further free movement in the EU27, has been removed in this draft.
- **Article 121** now describes the transition period as "a transition or implementation period".
- **Article 124(4)** now makes clear that the UK may "negotiate, sign and ratify" international agreements in exclusive EU competence areas, "provided those agreements do not enter into force or apply during the transition period", unless authorised by the Union.
- **Article 152**: this provision comments on the UK 'Authority' that will oversee the Citizens' rights provisions in Part II in the UK. The article clarifies that UK supervisory authority will have

[5] The draft of 19 March was also published on the Government website.

equivalent powers to those of the Commission. A particular addition in the 19 March draft is **Article 152(3),** which states that after eight years, the functioning of the Authority will be considered by the Joint Committee, which can decide in good faith after that assessment to abolish the Authority.

- **Article 168**: the WA may not enter into force on 30 March 2019 unless ratification has been completed internally. If any Member State, when notifying ratification, raises issues about surrendering its own nationals to the UK under the European Arrest Warrant during the transition, the UK can, within one month of receiving the EU Member State declaration along those lines, declare it too will not surrender its nationals to that Member State.

Approving and implementing the withdrawal agreement in the EU and UK

EU procedures

Under Article 50 TEU the Council of the EU concludes ('ratifies') the withdrawal agreement by a qualified majority (20 of the EU27).

European Parliament resolution on the future relationship

The EP is not involved in the negotiating process, but has adopted resolutions on the negotiations, prepared by the Brexit Steering Group led by Guy Verhofstadt. Under the Article 50 procedure, the EP must give its "consent" to the WA by a simple majority before it can be "concluded on behalf of the Union" by the Council, so its views are important to the negotiators on both sides.

On 7 March the EP published a draft resolution on the framework for future EU-UK relations. The resolution confirmed earlier EP conditions, some of which do not accord with the UK vision of its future relationship with the EU, as set out by the Prime Minister in her Mansion House speech on 2 March. The EP debated the resolution at its plenary session on 14 March and adopted it by 544 votes to 110 with 51 abstentions.[6] Some key points of the EP resolution are:

- an EU-UK association agreement would be the "appropriate framework" for future EU – UK relations;
- the EP will assess the content of the political declaration on the framework for future relations when it is asked to give its consent to the Withdrawal Agreement;
- EU representatives on the Joint Committee "should be subject to appropriate accountability mechanisms involving the European Parliament";

[6] Of the 67 UK MEPs who voted, in the EFDD 19 voted against; S & D 19 abstained; GUE-NGL 1 in favour; EPP 1 abstained; ENF 1 against; ECR 16 against and 1 abstained; ALDE 1 in favour; NI 2 against and Greens/EFA 6 in favour. Source: Votewatch Europe, accessed 20 March 2018.

- a third country cannot have the same benefits as an EU or EFTA/EEA Member State;
- a deep and comprehensive trade deal must include "a binding interpretation role" for the CJEU and there can be no sectoral "cherry-picking";
- there must be a "level playing field" where EU standards are safeguarded and EU competition and state aid rules are adhered to;
- limitations in the cross-border provisions of financial services are "a customary feature" of free trade agreements;
- the EP's preferred option is for the UK to remain in the Single Market and customs union;
- The EP welcomes the Commission's draft withdrawal agreement proposal on Northern Ireland, according to which, if there is no solution to the border issue, Northern Ireland should remain in the EU customs union and maintain "full regulatory alignment";
- The UK could continue to participate in "civilian and military EU missions", but would not lead them.

UK procedures

The 'meaningful vote' to approve the withdrawal agreement

The UK Government has committed to holding a vote on a resolution in both Houses of Parliament, before the European Parliament holds its vote, where each House will be asked to approve both the withdrawal agreement and the political declaration on the framework for the future relationship.[7] The Government has said that if Parliament fails to approve the motion, the UK will leave without a deal on 29 March 2019.[8] The Government has said the vote will be held " as soon as possible" after a final text on the withdrawal agreement is agreed. [9]

The Withdrawal Agreement and Implementation Bill

If the withdrawal agreement is approved and concluded the UK Government has said it will implement the agreement through a Withdrawal Agreement and Implementation Bill.[10] This Bill would need to be passed before exit day, expected to be on 29 March 2019, in order to enable transition to take effect at the moment that the UK leaves the EU.

The Withdrawal Agreement and Implementation Bill is expected to contain domestic legislative provisions to give legal effect to the withdrawal agreement. The contents of the withdrawal agreement on citizens' rights and a transition period will requires provisions that are constitutional in nature. Depending on how these provisions are drafted, the Withdrawal Agreement and Implementation Bill could

7 Theresa May, HC Deb 13 December 2017 cols 387-388
8 David Jones HC Deb 7 February 2017 c 294
9 David Davis, Written Statement Procedures for the Approval and Implementation of EU Exit Agreements - HCWS342 13 December 2017
10 ibid

require changes to certain elements the European Union (Withdrawal) Bill (for example on the Court of Justice of the European Union).

2. Common provisions (Part 1)

The common provisions in an international agreement usually set out the purpose of the agreement, its territorial scope and other general provisions to aid interpretation of the treaty.

Articles 1 - 7, the common provisions, include definitions and references used in the draft WA which might need explanation or interpretation, such as who the contracting parties are, and, in this case, what is meant by the 'transition' or 'implementation' period, 'Union law' and 'Member States'.

Article 1 clarifies that the UK's withdrawal is from both the EU and the European Atomic Energy Community (Euratom).

Article 3 makes clear that the WA will apply to the UK and its Overseas Territories (listed in footnote 3) and Crown Dependencies, to which the EU Treaties currently to a greater or lesser extent apply. A footnote also recalls that "the territorial scope of the Withdrawal Agreement, including as regards the transition period, should fully respect paragraphs 4 and 24 of the European Council guidelines of 29 April 2017, notably as regards Gibraltar". The situation of Gibraltar with regard to Spain is discussed in section 9(2) of this paper.

Article 4 refers to the domestic primary legislation needed to ensure that any provisions of domestic legislation inconsistent with Part 2 of the WA on citizens' rights can be "disapplied" (paragraphs 1 and 2). This confirms that if approved, the withdrawal agreement will need to be implemented through primary legislation that allows for both transitionary arrangements and the enforcement of the rights in Part 2 of the WA.

The proposed *Withdrawal Agreement and Implementation Bill* (WAI Bill) is expected to contain provisions that enable transitional arrangements to take effect and provide instructions to domestic courts as to the constitutional status of the rights and duties within the Withdrawal Agreement. The WAI Bill might have to provide the domestic courts will the power to scrutinise the compatibility of primary legislation for the purpose of enforcing the relevant rights. It is likely that any such provisions will have implications for the operation of the legislative framework in the *European Union (Withdrawal) Bill*. Mark Elliott, Professor of Public Law at the University of Cambridge, has pointed out that "EU citizens' directly effective rights under the Withdrawal Agreement are intended to have a legal status in the UK that is at least the equal of the status presently enjoyed by directly effective EU law".[11]

Article 4(4) confirms that references to EU law in the WA must be interpreted in line with the judgments of the CJEU given before the end

[11] Mark Elliott, The Brexit agreement and citizens' rights: Can Parliament deliver what the Government has promised?, Public Law for Everyone, 11 December 2017

of transition.[12] Article 4(4) would appear to be inconsistent with clause 6 of the *European Union (Withdrawal) Bill*, which states (in clause 6(1)(a)) that domestic courts are not bound by Court of Justice judgments handed down after exit day. If Article 4(4) is given domestic legal effect, domestic courts will be under a duty to interpret provisions of the WA referring to EU law in line with CJEU judgments given *after* exit day but *before* the end of the transition period. **Article 4(5)** requires that judgments of the CJEU handed down after the end of transition should be given "due regard" by domestic courts.

A new **Article 4a** introduced in the amended draft on 15 March sets out a 'good faith' clause:

> The Parties shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.
>
> They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.
>
> This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation.

This was included at UK insistence, on which Steve Peers, Professor of EU and Human Rights Law at the University of Essex, comments:

> The UK government is particularly concerned about being bound by EU legislation adopted during the transition period without its involvement. The government's approach in its proposed definitions clause is simpler and clearer. The UK also wants a "good faith" clause to deal with new EU legislation it disagrees with, but has not publicly proposed a text for this.[13]

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12 Steve Peers, Dispute settlement and the ECJ in the draft withdrawal agreement, 9 March 2018

13 EU Law analysis, EU27 and UK citizens' acquired rights in the Brexit withdrawal agreement: detailed analysis and annotation, 13 March 2018

3. Citizens' rights (Part 2)

3.1 Free Movement Rights

In many ways, Part 2 of the draft WA reflects the agreement found in the Joint Report in December 2017. However, there were some outstanding issues when the Joint Report was agreed. A Q&A memo published by the European Commission identifies areas where the Commission's initial draft differed from the December Joint Report.

All of Part 2 is colour-coded green (agreement reached) in the 19 March draft. Nevertheless, EU/UK citizens' groups still maintain that significant outstanding issues related to citizens' rights remain. The 'British in Europe' coalition, which represents concerned British citizens living overseas, has published a detailed response on the Commission's draft WA which highlights various policy and drafting issues in the text. Along with its counterpart organisation 'The 3 million' (which represents the interests of EU citizens in the UK), it continues to call for the negotiations on citizens' rights to be ring-fenced, so that citizens can have certainty that their agreed rights will be guaranteed, irrespective of the outcome of the withdrawal negotiations overall.

Provisions in the draft WA

Articles 8 and 9 make explicit that all EU 'citizenship' rights will continue to apply to EU nationals and their family members (as defined by EU law, rather than domestic law) throughout the transition period.

There is still some uncertainty over whether certain categories of people would be covered by these provisions; the 19 March agreed text suggests that those carers for minors who are unable to exercise movement rights without their non-EU national parents (so-called '*Chen*' children) are covered by the draft WA, but third country national carers for minors who have not left their Member State of birth ('*Zambrano*' children) are not covered by the draft WA.

Article 14 confirms that EU/UK nationals and their family members would acquire the rights of 'permanent residence' after accumulating five years' continuous lawful residence in accordance with EU law, or the period specified in Directive 2004/38/EC (the 'Citizens' Directive), before or after the end of the transition period.

'Permanent residence' is an EU law concept, and some commentators have questioned the purpose of requiring EU citizens in the UK to subsequently apply for 'settled status' documents, since it will not give them any different legal rights.

Steve Peers has noted that the reference to EU law means that this Article could potentially benefit a broader range of people compared to reference made only to the Citizens' Directive. However, he also notes that certain other Articles in the draft WA do only refer to residence in accordance with the Citizens' Directive (e.g. Article 15).

Article 14 also provides that the right of permanent residence would be lost after more than five consecutive years' absence from the host State.

Groups representing EU and UK expats continue to argue that they should have a lifelong 'right of return' to the host State. Amongst other things, they maintain that this would be closer to the rights they currently have.

As had been agreed in the December Joint Report, **Article 17** specifies in greater detail a host of conditions and protections that any national registration system must adhere to. These would apply, for example, to the UK's proposed process for issuing 'temporary' or 'settled' status documentation to EU citizens and their family members living in the UK. The draft now confirms that such documentation "may be in a digital form".

The fact that the WA gives the UK (and other States) scope to make future rights to reside conditional on registration under a national scheme is highlighted by opponents as an example of how, contrary to pledges made during the campaign, the outcome of the referendum has adversely affected the rights of citizens who are exercising their free movement rights.

The provisions in this Article emphasise ensuring a user-friendly process for applicants. For example, the authorities in the host State are required to "help the applicants prove their eligibility and avoid any errors or omissions in the application; …give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omission".

In a change to earlier drafts (which had allowed for a longer timeframe), the text agreed on 19 March proposes that the deadline for applying for the necessary documentation "shall be not less than 6 months from the end of the transition period" for people who were resident before the end of the transition period, and that this should be "extended automatically by one year" in the event of the host State notifying its counterparts of technical problems delaying the processing of applications. British in Europe are calling for time extensions to apply automatically in any case where there is a delay in processing applications, citing a concern that a host State might otherwise choose not to make a formal notification, despite delays.

The draft WA does not remove the uncertainty over how the requirement to have 'comprehensive sickness insurance' will be applied. This issue is significant to many EU nationals who have been residing in the UK unaware that they are subject to the requirement.

Article 17 proposes that the Citizens' Directive's definitions be applied to EU nationals living in the UK, which would make having comprehensive sickness insurance mandatory for students and economically inactive people. Although the UK has unilaterally offered to forego this requirement, as confirmed by the then Minister of State for Immigration, Brandon Lewis, before the Lords EU Committee in December 2017, this is not reflected in the draft text. Professor Steve Peers has warned that "there is a risk that the Agreement could be interpreted as meaning that the persons concerned are not covered by it at all". He suggests amending the wording to clarify that EU citizens

living in the UK would satisfy the requirement by providing proof of registration with the NHS (which is contrary to the position on this requirement taken by the UK Government in the past).

The December Joint Report identified a few unresolved issues related to citizens' rights. One of these, the recognition of professional qualifications, is dealt with in **Articles 25-27** of the draft WA (reflecting the Commission's views).

Article 32 (as per the first two versions of the draft WA) covered an issue not addressed by the Joint Report from December, and was of significant disappointment to many UK nationals:

> In respect of United Kingdom nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the right of establishment in the territory of another Member State, or the right to provide services on the territory of another Member State or to persons established in other Member States.

Steve Peers suggested that this Article should be entirely redrafted, since it "profoundly violates the principle of ensuring acquired rights as much as possible". It has particular implications for UK citizens already living and working in EU Member States (discussed in 'Areas of potential controversy' section below).

Article 32 is missing from the amended draft text agreed between the EU and UK negotiators on 19 March (the number sequencing jumps from Article 31 to 32), although it is still referred to elsewhere in the text. The implications of this for future free movement rights are not yet clear, but MEPs from the Conservatives, Labour, Liberal Democrats, Greens, SNP and Plaid Cymru have written to David Davis asking for clarification.[14]

Article 34(2) states that while equal treatment between EU nationals and UK nationals is expected in all areas covered in the draft WA (in terms of rights and benefits), the arrangements stemming from the Common Travel Area between the UK and Ireland (which frequently surpass the EU 'free movement' rules in generosity) stand separately and can continue to function.

Part 2 concludes with **Article 35**, noting that:

> The persons covered by this Part shall enjoy the rights provided for in relevant Titles of Part Two for their lifetime, unless they cease to meet the conditions set out in those Titles.

The draft WA may consequently generally be superseded by a 'future relationship' treaty between the UK and the EU, following transition and withdrawal, but the citizens' rights provisions will remain in force until the last EU/UK national benefitting from 'acquired' EU law rights passes away. This goes beyond what had been agreed in the December Joint Report (which only referred to lifelong family reunion rights).

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[14] See Independent, 20 March 2018

Areas of potential controversy

Rights of citizens during the transition period

The UK Government published a policy statement on 28 February 2018 making clear that it was seeking to restrict the rights of EU nationals moving to the UK after Brexit day (29 March 2019). In particular, it wanted to limit the rights of family reunification, receipt of child benefit, and continued oversight by the CJEU. The draft WA agreement, however, makes explicit that the entire EU citizenship *acquis* continues to apply throughout the transition, and any EU nationals moving to the UK during transition will benefit from the EU *acquis* for, effectively, their lifetimes. The EP had already made clear that it saw limiting the citizenship rights of EU nationals who move during transition as an unacceptable form of discrimination.

UK Government's initial position on the rights of citizens who move during transition

The Government initially disagreed with the Commission's proposal that EU/UK citizens who move during the transition period should be covered by the Withdrawal Agreement. Its policy paper argued that:

> The expectations of EU citizens arriving in the UK after our exit will not be the same as those who moved here before our withdrawal, and the same will be true of UK nationals moving to an EU Member State.

Instead, the Government wanted the UK and individual Member States to be free to decide what rights to remain those citizens would have after the end of the transition period. It did not make any detailed proposals on behalf of UK citizens who move to EU countries, apart from encouraging the other Member States to match the UK's offer to EU citizens who arrive in the UK during the transition period.

The Government published a short policy statement setting out its proposals in respect of EU citizens arriving in the UK during the transition period. It proposed that:

- During the transition period, EU citizens and their family members would be able to move to the UK on the same basis as currently. This would be reflected in the Withdrawal Agreement.
- Those who arrived during the transition period and chose to stay for longer than three months would be required to register with the authorities, in accordance with existing provisions in EU Directive 2004/38/EC (Article 8).
- EU citizens and their family members who arrived in the UK, had registered and were resident in the UK during the transition period, would have been able to apply for a temporary status in UK law up to three months after the end of the transition period. This would have enabled them to lawfully remain in the UK as a worker, student or self-sufficient person after the end of transition.
- They would have become eligible to apply for Indefinite Leave to Remain after they had accumulated five years' continuous and lawful residence.
- Family members joining these EU citizens after the end of the transition period would have been subject to the same

immigration requirements as family members of British citizens (e.g. English language proficiency, minimum income requirement, etc.)
- Frontier workers would also have had an option to apply for permission to continue to work on that basis after the end of the transition period.
- The rights afforded to these EU citizens would have been enforceable in the UK legal system.

The effect of the UK's proposals would have meant that, during the transition period and beyond, there would have been some differences between the status, entitlements and obligations of the EU citizens and family members who arrived before the start of the transition period compared to those who arrive during transition.

A third category of EU nationals, again with distinct status and entitlements, might have been created after the end of the transition period (depending on the nature of the post-Brexit immigration control framework for EU nationals the Government chose to apply).

Loss of free movement rights for UK citizens living in Europe

The potential loss of EU free movement rights for UK nationals living in an EU Member State at the time of Brexit is also proving to be controversial, though it is not yet clear what either side is proposing on this issue. The full implications of **Article 32**, which was included in the Commission's first two drafts, are as follows:

- UK nationals resident in an EU Member State before the end of transition (as covered by Part 2 of the draft WA, under Article 9(b)), as well as UK nationals resident in an EU Member State who are exercising rights as frontier workers in one or more Member States (under Article 9(d)), would continue to hold the rights they are exercising at the moment the transition period ends: but *only* with respect to the Member State that they then reside in (if covered by Article 9(b)) or are then 'frontier workers in' (if covered by Article 9(d)). What this would mean in practice is that any UK national in those positions would have all EU citizenship rights (including the right to work, access to benefits on equivalent terms as nationals of the state they live in/work in, and so forth) but only in the Member State they reside in or work in *at the end of the transition period*. Within that Member State, they are free to change status (e.g. go from employed to studying or retiring) without a loss of the rights the WA extends to them (according to Article 16(1)) – but these 'acquired' EU rights do not travel with them to a new Member State.
- The UK government has made clear that its goals for the negotiations are to make visa-free travel throughout the EU possible as part of the future relationship it wishes to negotiate, and if successful, Article 32 will not stop those UK nationals resident in the EU from going on vacation or short business travel in the Schengen area. However, should they wish to work, 'establish' (e.g. set up a company), or provide services in or to a

new EU Member State following the end of the transition period, the earlier draft WA suggested that in doing so, they would be subject to the rules governing 'third country national' (TCN) settlement in those Member States, rather than the EU laws currently governing these 'freedoms'.

- In terms of moving as an individual to work or simply live in a new Member State, the UK nationals in question will be subject to domestic immigration law (incorporating the limited EU rules on TCN immigration) in that Member State. These laws are generally significantly less generous than the EU free movement of workers/persons rules, and so it is likely that these UK nationals – upon wishing to move to a new EU Member State – would need to meet conditions such as having secured employment and meeting earning or savings thresholds. Their stay in the new Member State may also be time-limited.
- Regarding the establishment of businesses and the provision of services, domestic law again governs the rules applicable to TCNs. The WTO rules on provision of services that the EU has signed up to, as a minimum requirement of what the EU Member States must enable regarding TCNs wishing to engage in the provision of services or setting up businesses, are highly complicated but significantly less generous than the EU rules on establishment and services. Without further clarity on the future relationship, at most it can be noted that the ability to work and engage in business in other EU Member States will be as limited or open to UK nationals already resident in an EU Member State as they will be to UK nationals who did not exercise their free movement rights while the UK remained a member of the EU.
- British in Europe have argued that the proposals mean that "the right to work that the Joint Report aims to guarantee in the host state will be meaningless for large numbers of self-employed people". They contend that a "UKinEU translator or IT consultant based in Germany, asked by a French company to provide it with translation or IT services remotely…would have to refuse simply because the client was established elsewhere and not physically present in Germany".

Securing the interests of UK citizens living in the EU

Groups representing British citizens living in the EU have complained of being inadequately represented by the Government in the withdrawal negotiations.

In the immediate aftermath of the referendum result, the Government said that it could not make a unilateral offer to protect the status and entitlements of EU citizens living in the UK because it needed to ensure reciprocal rights for UK citizens living in the EU27. However, some have argued that the Government's desire to gain the freedom to restrict the rights of EU citizens in the UK has left it unable to protect the rights of UK citizens in the EU - as reflected in the Commission's hardened stance towards future free movement rights for UK citizens.

An article authored by the Chair of British in Europe explains why they are still lobbying to retain their free movement and cross-border working rights:

> To those who say British people lived and worked across Europe long before the UK joined the EU, the answer is yes, some did…but it was a hell of a lot harder to do without money behind you, and you didn't have automatic permission to just go and do something entrepreneurial in another EU country. Not to mention the paperwork.
>
> (…)
>
> We're constantly told to take citizenship in the country where we live, as if this were automatic and easy to do. But that is not an option for many Brits in EU 27 countries, either because they don't yet meet the criteria or because the country they live in doesn't allow dual citizenship, meaning that they would have to give up their UK citizenship and have no right to go back to the UK if they need to return one day and look after sick or elderly parents.

EP response to the draft WA

The motion drafted by the EP's Brexit Steering Group broadly supported the citizens' rights provisions in the Commission's draft WA.

It sought guarantees that certain rights would be protected (namely, future free movement rights for UK citizens currently resident in Member States, voting rights in local elections for citizens covered by the WA, protection against expulsion of disabled EU citizens and their carers, and certain procedural rights related to expulsion).

Citizens' rights in the future UK-EU relationship: EP proposals

The EP resolution suggested that the future relationship between the UK and EU "should include specific provisions concerning the movement of citizens from the EU to the UK and from the UK to the EU after the transition period, which should be at least commensurate to the degree of cooperation in the four pillars" (trade and economic relations; foreign policy, security cooperation and development cooperation; internal security; and thematic cooperation).

It also highlighted the "strong opposition" felt by many UK citizens to the loss of their EU citizenship rights, and called on Member States to consider how the EU might be able to mitigate this.

3.2 Coordination of social security

Provisions in the draft WA

Articles 28 – 31 are about the coordination of social security. **Article 28** makes clear that every EU national and UK national covered by the draft WA (e.g. they were legally resident in the UK or in the EU respectively before the end of the transition period) will continue to be covered by the EU rules on social security coordination and aggregation.

These rules are laid down primarily in Regulation 883/2004, which determines which EU Member State is responsible for the calculation and payment of social security benefits for mobile EU citizens who move within the Union. Such citizens are, in principle, entitled to use the local benefits system on the same basis as nationals of their host Member State, including unemployment benefit, child benefit and state pensions, as well as having a right to access short- and long-term healthcare.

Under **Articles 30 and 31** of the draft WA, the UK would continue to need to comply with EU social security coordinating legislation for the duration of the lives of the EU nationals benefitting from this legislation. To facilitate this, Article 30 outlines mechanisms by which administrative cooperation between the UK and the EU should remain possible. The UK would have observer status at the Administrative Commission for the Coordination of Social Security Systems, which was set up under Regulation 883/2004. It is composed of one representative from each Member States plus the European Commission and deals with administration and interpretation of the rules and promoting collaboration. Steve Peers comments:

> In practice, it relies on a network of national competent authorities, which share information so that they can effectively coordinate their activities. There is an Electronic System which supports exchange of social security information. EU data protection law applies here.
>
> Coordination of social security is also an area where there is a great deal of litigation: the rules are complex, and the CJEU is regularly called on to interpret what they mean.[15]

The UK will continue to take part in the Electronic Exchange of Social Security Information (EESSI) and "bear the related costs".

Moreover, to ensure uniform treatment, the UK has also undertaken to incorporate changes to the Regulation 883/2004 into the Withdrawal Agreement, meaning the Government would have to apply any changes adopted by the EU to that Regulation to persons covered by the citizens' rights chapter of the Agreement for the duration of their lifetime.

However, the version of the WA dated 19 March contains a new provision for certain exemptions to this presumption that future changes to EU legislation in this area will always be incorporated into the WA. The new article 31(2)) stipulates that in case of:

- changes to article 3 of the Regulation (which lists the types of benefits covered by the coordination system); or
- any amendments to the extent to which cash benefits covered by the Regulation (such as child or unemployment benefit) can

[15] EU Law Analysis, The implications of the Revised European Commission Draft Withdrawal Agreement text for health, part 1: patients and reciprocal healthcare (Updated 18 March 2018)

be 'exported' (i.e. drawn on)[16] from the UK to an EU country or vice versa,

For such amendments to Regulation 883/2004, the UK-EU Joint Committee can decide (within 6 months of adoption of the amending legislation at EU-level) that the UK will not be required to implement the changes to the Regulation for citizens within scope of the Agreement. However, that this article will only take effect after the post-Brexit transitional period. During that period, the UK will have to apply all new EU legislation as if it were still a Member State. If the end date of 31 December 2020 for the transitional arrangement is maintained, article 31(2) would apply only to changes to Regulation 883/2004 that take effect after that date.

The Member States and the European Parliament are currently considering a significant amendment to various parts of Regulation 883/2004, including on rights of access to unemployment benefits. It is not yet clear whether it will take effect before or after December 2020.[17]

The UK Position

Continued alignment with the EU social security coordination rules looks unlikely to be controversial. The EU rules have never stopped the UK from organising its social security system in a particular way, but merely obliged it to extend any benefits given to a UK national to qualifying EU nationals in a similar position. Articles 30 and 31 are coloured green in the 19 March draft, indicating EU and UK agreement.

However, the 19 March draft has introduced a few other changes to the scope of social security coordination the Withdrawal Agreement commits to. **Article 28(2)** thus now reads that social security coordination rules will only continue to apply if there is no "interruption" to the described situations; this means that the rights set out are not 'permanently portable', but instead remain with the EU or UK migrant only so long as they continue to live or work where they did at the end of the transition.

Article 31, furthermore, introduces Joint Committee control over assessing whether social security coordination changes should be applicable to the UK if they alter what benefits are covered by the EU social security rules, or if they make benefits either not exportable or exportable. Such decisions are to be made by the Joint Committee in 'good faith', considering how well social security coordination would function without the changes.

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16 The draft Agreement defines 'exportable' as "payable under Regulation (EC) No 883/2004 to or in relation to a person residing in a Member States other than that in which the institution responsible for providing the benefit is situated".

17 See the European Scrutiny Committee's Report of 10 January 2018 for more information on the current proposal to amend Regulation 883/2004.

If the Joint Committee agrees within 6 months, the relevant updated EU law referred to will not apply to the Withdrawal Agreement. While providing a review mechanism, the new provision therefore does not give the UK the right to unilaterally refuse to apply new EU social security legislation (even where it would expand its scope to new categories of benefits or make a previously un-exportable cash benefit exportable).

4. Separation provisions (Part 3)

Articles 36 - 120 of the draft WA cover 'separation issues' that were not fully agreed upon during the Phase 1 negotiations. In brief, these 'Other Separation Issues' relate to processes in a variety of areas that may be ongoing when the transition period ends, and Part 3 provisions set out how these 'ongoing processes' will then in the EU's view be resolved.

The policy areas covered by Part 3 are market access for goods, ongoing customs, VAT and excise matters, intellectual property, ongoing police and judicial cooperation in both criminal and civil/commercial matters, the protection of data obtained prior to the end of transition, ongoing public procurement procedures, Euratom issues, ongoing EU judicial/administrative processes, and privileges and immunities, and a few final provisions relating to the functioning of the EU institutions.

The UK and the EU discussed aspects of the matters flagged up in this part of the draft WA in some of their future partnership policy papers. On 6 March 2018, the UK responded directly to Part 3 of the draft WA in a Technical Note on Other Separation Issues.

4.1 Goods placed on the market

Draft **Articles 36 - 42** cover goods placed on the UK / EU market before the end of the transition period that remain in the market after the end of transition. Page 8 of the UK Government's Technical note sets out the UK's approach.

Previous documents and agreement

Both the Commission and the UK had previously published position papers on this area. The Commission published its Position paper on Goods placed on the Market under Union law before the withdrawal date in July 2017. The UK published a position paper, Continuity in the availability of goods for the EU and the UK, in August 2017.

The December Joint Report included high-level agreement on this area:

> On ensuring continuity in the availability of goods placed on the market under Union law before withdrawal both Parties recognise the need to provide legal certainty and minimise disruption to business and consumers. Both Parties have agreed the principles that the goods placed on the market under Union law before withdrawal may freely circulate on the markets of the UK and the Union with no need for product modifications or re-labelling; be put into service where provided in Union law, and that the goods concerned should be subject to continued oversight.

The EU proposals

The draft WA proposes a wind-down procedure for goods put on the market before the transitional period ends but which are exported to the other's territory after that date:

- Goods that have been placed in the EU or UK markets before the end of transition may circulate in those markets until they

reach their end users, and may be used ('put into service') in the EU or UK;

- Live animals and animal products could be moved between the UK and an EU Member State if they depart before the end of the transition period, but will additionally be subject to certain EU laws on movements of such products within the EU;[18]
- Businesses would be responsible for proving, if necessary, that goods were on the market before the end of transition period (if they want to rely on free circulation);
- Certain information would be shared between supervisory bodies in the UK and those in the EU in relation to the goods that continue to be on the market after the end of transition, for example, information on tests on goods (conformity assessment).

The UK approach

In its Technical note the UK Government states that its objective is to minimise disruption to business and consumers and facilitate cooperation that allows UK and EU authorities to take action on unsafe products.

The note also states that the arrangements the UK and the EU put in place as part of the future partnership for goods "will determine whether any wind down procedures are required for goods that are already on the market", but the Government "thinks it unlikely that they will be required". However, after the UK leaves the Single Market and the Customs Union, it is highly unlikely that any new free trade agreement would see the EU treating UK exports in the same preferential way they are at present (e.g. with respect to value added tax, excise or product safety checks). When the UK fully becomes a 'third country', goods outside the scope of the WA's winding-down procedures exported from the UK to the EU will in principle become subject to border formalities that those within the scope of those procedures would not.

The UK technical note also raises one main set of transition issues beyond what has already been agreed – the Government would like to see compliance activity carried out in the UK and the EU prior to the withdrawal date recognised as valid by the EU and UK after exit, whether or not the goods have already been placed on the market. The EU's draft WA focusses on goods that have already been placed on the market. The draft WA also suggests that the UK should pass

[18] The European Commission has previously stated that, in view of the health risks, any exports of animal products from the UK should become subject to "official controls" at the border when entering the EU as soon as the UK leaves the Single Market, even if their transport began *before* withdrawal. This would, in particular, mean that the UK as a whole would need to be formally listed as a safe country of origin, and individual producers would have to be inspected by the Commission before they could export meat products to the EU as of 1 January 2021.

information on compliance activity that is ongoing (the day before the before the WA comes into force) to authorities in Member States.

Compliance activity includes, for example, inspection of medicines and food safety assurance procedures. The Government points to precedents for recognition of the validity of certificates on the termination of other types of agreements (in certain of the EU's mutual recognition agreements).[19]

4.2 Ongoing customs procedures

Draft **Articles 43 - 46** cover ongoing customs procedures – in other words, customs procedures that apply to goods moving between the UK and EU that start before the end of the transition period and end afterwards. Page 12 of the UK Government's Technical note sets out the UK's approach.

The Commission published a Position Paper on Customs related matters needed for an orderly withdrawal of the UK from the Union in September 2017.

The EU proposals

The Union Customs Code would continue to apply to Union goods[20] moving between the UK and the EU customs territory, if the movement started before the end of the transition period and ended after it. Proof may be required in certain circumstances that (a) the goods concerned are Union goods and (b) that the movement started before the end of the transition period.

Certain forms that were lodged before the end of the transition period would continue to be valid afterwards in the UK and the EU customs territory, and certain procedures that were started can be concluded. Customs debts could arise and be collected.

The UK approach

The UK government has said it "agrees with the broad principle put forward in the EU's paper that movements of goods which commence before the UK's withdrawal from the EU Customs Union should be allowed to complete their movement under the rules which were in place at the start of their movement",[21] and that it looks forward to discussing the practical application of this in more detail with the EU.

The UK also suggests that "the payment of customs debt to the EU should be considered alongside negotiations on the wider financial

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19 Technical note on other Phase 2 separation issues

20 "Union goods" means goods which:
a) are wholly obtained in the customs territory of the Union and do not incorporate goods imported from countries or territories outside the customs territory of the Union;
(b) are brought into the customs territory of the Union from countries or territories outside that territory and released for free circulation; or
(c) are obtained or produced in the customs territory of the Union, either solely from goods referred to in point (b) or from goods referred to in points (a) and (b);

21 UK Government Technical Note: other separation issues – Phase 2, para. 37

settlement".[22] This may relate, at least in part, to an ongoing debate about UK liabilities associated with reduced customs takes for imported Chinese textiles and footwear following alleged fraud. The Commission argues that the EU Budget received £1.4 billion less as a result of this fraud, and that the UK should compensate the EU for the evaded customs duties. The UK disputes the figure and is in talks to settle the matter.[23]

4.3 VAT and excise duty

Articles 47-49 of the draft WA cover ongoing VAT and excise duty matters.

Taxation is very largely a Member State competence.[24] The major exception to this generalisation is indirect tax: VAT – for which there is a substantive body of EU law establishing common rules across Member States – and, to a lesser extent, excise duties. It has long been recognised that the harmonisation of indirect taxes is an essential element to the achievement of an effective single market.[25] The main legislation for VAT is the EU Principal VAT Directive (Directive 2006/112/EC) and the main legislation for excise is the Excise Directive (Directive 2008/118/EC).[26]

Although it is anticipated that Brexit will see the UK having its own VAT and excise regime, no specific details have been published yet. The Government's general position has been "the administration of the VAT and excise regimes following EU exit will remain largely as it currently is, in so far as this is desirable and practicable".[27] The Treasury has also told the European Scrutiny Committee that it is assessing proposed changes to the VAT Directive which take effect in 2022 or later for their potential impact on the UK VAT regime, suggesting some form of close alignment with EU VAT law may be envisaged.[28]

Article 47 states that the current EU VAT arrangements, as set out in Directive 2006/112, will apply to goods dispatched or transported from the UK's territory to the territory of a Member State, or vice versa, where the dispatch or transport started before the end of the transition period and ended afterwards. Absent an agreement to the contrary, goods exported from the UK to the EU after the end of the transition would attract VAT on entering the EU as an import tax, necessitating

22 Ibid, para. 38
23 European Scrutiny Committee, Eleventh Report of Session 2017-19: Documents considered by the Committee on 24 January 2018 (HC 301-xi), published 30 January 2018 – see Section 11 UK customs controls and the EU budget
24 For details see, HM Treasury, Taxation report: review of the balance of the competencies, November 2012
25 On the historical development of the EU's VAT & excise regime see, *Fiscal Harmonisation*, Library Research Note 92/102, 23 November 1992.
26 For details see, Taxation (Cross-border Trade) Bill, Explanatory Notes, paras 30-32
27 Taxation (Cross-border Trade) Bill Impact Assessment, 20 November 2017, para 39
28 See for more information the Treasury's Explanatory Memorandum to the European Scrutiny Committee on a European Commission proposal on VAT rates.

customs formalities that are currently absent.[29] The reverse would also be true on goods exported from the EU to the UK.

Article 48 makes equivalent provision for EU excise arrangements, as set out in Directive 2008/118 for fuel, alcohol and tobacco products. After the transition, exports of excisable products from the UK to the EU will be subject to customs formalities before they can be moved within the EU.

Article 49 provides that to meet these requirements, the UK may have access to relevant network and information systems and databases.

As noted above, the Government's Technical Note on 'other separation issues' notes UK agreement with the "broad principle" and that it wants to discuss with the EU how this principle will be applied practically after the UK's withdrawal "so that the requirements applying to traders and customs officials at the border are clear".[30] Apart from this, these provisions do not appear to have attracted any substantive commentary.

4.4 Intellectual property

Provisions of the draft WA

Articles 50-57 of the draft WA set out the Commission's proposed provisions covering intellectual property right arrangements. The provisions, in summary, aim to ensure that the UK's withdrawal from the EU does not result in intellectual property right holders losing those rights in either the UK or the EU following Brexit.

Article 50(1) proposes that any holder of an EU-originating intellectual property right in the UK will be "without any re-examination" granted a "comparable and enforceable" UK intellectual property right.

Article 50(2) would similarly require that all holders of so-called 'geographical indication' guarantees that are protected on the last day of transition should be entitled to use, from the last day of transition and without any re-examination, a UK law-based right that provides the "same level of protection".

The remaining provisions in Article 50 propose that these UK-based property and geographical indication rights operate under identical terms to their EU equivalents, including on issues such as duration of registration and commencement of trade mark status.

The 15 March draft amended Article 50(3) to provide for a derogation from the requirement that the UK declare intellectual property rights invalid in the UK, where the grounds for doing so are only applicable in the EU.

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[29] As part of the Single Market, cross-border business-to-business sales of goods within the EU are zero-rated, and VAT paid by the buyer as part of their regular VAT return. This allowed for the abolition of VAT controls intra-EU borders.

[30] Department for Exiting the European Union, Technical note: other separation issues - phase 2, 6 March 2018 p12

Article 51 sets out the registration requirement for the new UK-based property rights; the Commission proposal here is to make UK-based registration in the first instance, post-transition, free of charge and not contingent on residence or proof of address in the UK. Further renewal charges and requirements will be within the purview of UK law, however.

Article 52 sets out an EU promise to continue to honour those in the UK who indicated the EU as relevant jurisdiction in registering a trademark or a design in international law.

Article 53 extends this commitment to unregistered Community designs, which are to be protected by an equivalent status in UK law for an equivalent duration.

Likewise, **Article 54** requires a UK equivalent status to be granted to EU right-holding databases (as a form of intellectual property).

Article 55 proposes a mechanism for dealing with pending applications for first-time EU trademarks and Community plant variety rights. The provisions in Article 55 set out that anyone who filed such an application in the EU before the end of the transition period will have, within UK law, a 'right to priority' on identical goods or services for a period of 6 months in transition – precluding any other legal persons from registering a trademark or plant variety right in the UK within that six-month period. This is a reflection of obligations the UK and the EU will both hold under international and regional intellectual property law, including the Paris Convention for the Protection of Industrial Property, and the WTO's TRIPs.

Article 56, meanwhile, ensures that applications for supplementary protection certificates for plant protection products and for medicinal products filed in the UK before the end of the transition period will be handled in line with currently existing EU law obligations.

Article 57 concludes by noting that rights exhausted in both the EU and the UK before the end of the transition period shall remain exhausted, as determined by EU intellectual property law in both the EU and the UK.

In the 19 March draft, the majority of the intellectual property provisions are colour-coded green. The exceptions to this, which remain white, include:

- Article 50(2) - geographical indication guarantees;
- Article 51 – re-registration in the UK of existing EU rights;
- Article 56 – applications for supplementary protection certificates for plant protection products and medicinal products

The UK Position

The UK Technical Note of 6 March indicates that broad agreement has been reached on the treatment of intellectual property rights post-transition: "in many areas, the UK's position is closely aligned to that set out by the EU".

It highlights that the EU position – of preserving certain EU and EU-derived intellectual property rights (including geographical indications) – has been known since the publication of a September 2017 paper on intellectual property rights, and that the UK's own ambition is to have a "substantial future relationship on intellectual property". The UK Government consequently feels that the 'separation' provisions are unlikely to be used, as new intellectual property rights arrangements, set out in the 'future relationship' agreement, will take their place. The Technical Note concludes that "where the UK does not have existing domestic legislation to protect certain types of rights, it will establish new schemes", which will aid this 'future relationship' goal. A commitment to establish domestic legislation on relevant rights currently not covered in the UK will also satisfy many of the provisions set out in the draft WA on intellectual property rights.

4.5 Ongoing police and judicial cooperation in criminal matters

Provisions in the draft WA

Title V of Part 3 of the draft WA considers ongoing police and judicial cooperation in criminal matters. **Articles 58-61** set out the following proposals, applying both in the UK and in the EU Member States in situations involving the UK.

Under **Article 58(1)**, currently applicable EU law will continue to apply with respect to the following measures, where appropriate, if initiated by the relevant competent authorities before the end of the transition period:

- European Arrest Warrants[31]
- freezing orders
- the mutual recognition of financial penalties
- confiscation orders
- prisoner transfers
- criminal records
- requests for information about convictions. The 15 March draft amended Article 58(1)(h) to provide that replies to such requests cannot be transmitted after the end of the transition period under the European Criminal Records Information System (ECRIS)[32]
- European Supervision Orders
- European Protection Orders

[31] However, an additional sub-paragraph was inserted into Article 122(5) in the 15 March draft, and subsequently transferred to Article 168 in the 19 March draft, providing that Member States may refuse to surrender their own nationals under an EAW during the transition period, and that the UK may declare a corresponding refusal to surrender its own nationals. This is highlighted yellow.

[32] In accordance with Article 7, which specifies that after the end of the transition period, the UK will lose access to "any network, any information system, any database established on the basis of Union law".

- European Investigation Orders
- Joint Investigation Teams

The 15 March draft inserted a new paragraph 1(a) to Article 58, providing that the Convention on Mutual Assistance in Criminal Matters and the associated Protocol should apply to mutual legal assistance requests received before the end of the transition period.

Regarding ongoing law enforcement cooperation, police cooperation and exchange of information, **Article 59** provides that:

- the existing Schengen Implementing Convention and TEU provisions on mutual assistance and cooperation will continue to apply to any requests for cross-border surveillance and cooperation received before the end of the transition period.
- existing measures will also cover:
  - the exchange of information and intelligence between law enforcement agencies before the end of the transition period, and the exchange of supplementary information where there was a hit before the end of the transition period on an alert issued in the second generation Schengen Information System (SIS II);
  - requests made by Financial Intelligence Units and Asset Recovery Offices;
  - requests in relation to the use of passenger name record (PNR) data received during the transition period.

In cases of doubt as to when judicial decisions, requests, or arrests are covered by these provisions in the draft WA, any competent authority can request a confirmation of receipt "within 10 days after the end of the transition period" to confirm date on which the judicial decision or request was received, or the arrest took place. This was amended to seven days in the 19 March draft (**Article 60**).

The main substantive provisions, contained in Articles 58 and 59, have not been agreed and remain white in the 19 March draft. Articles 60 and 61 (concerning the provision of interpretation and translation in relevant legal proceedings) are colour-coded green.

The UK Position

On police and judicial cooperation in criminal matters, the UK's Technical Note stresses that the UK and the EU "broadly agree on the principle" that ongoing cooperation procedures should be completed "under Union law" if past a certain threshold. The UK's approach sets out a desire for a "clear process for cases already underway" at the end of the transition period, and would like "certainty" in this area. **Articles 58 - 61** of the draft WA may provide such certainty, in that they suggest that all police and judicial cooperation in criminal matters commenced before the end of the transition period continues as set out in relevant EU laws. This appears to address the UK concerns.

Generally, the UK Government's position is as set out in its Security, law enforcement and criminal justice - a future partnership paper of 18 September 2017: "the UK has ambitions for a deep and special future partnership in this area", and consequently anticipates that the above provisions in the draft WA will generally be superseded by the 'future partnership' agreement.

4.6 Ongoing judicial cooperation in civil and commercial matters

Provisions in the draft WA

Articles 62 – 65 set out proposals for regulating ongoing judicial cooperation in non-criminal matters**.**

In the UK, the relevant EU laws covering contracts and damages in non-contractual matters – known as the Rome I and II Regulations - will apply to all contracts concluded and events giving rise to damage that have taken place before the end of the transition period (**Article 62**).

In the UK and in the EU Member States, in those situations involving the UK, all legal proceedings commenced before the end of the transition period will be completed in line with relevant applicable EU law concerning jurisdiction and the mutual recognition of judicial decisions (**Article 63**). EU law will also continue to apply to the recognition and enforcement of all legally binding decisions taken before the end of the transition period, and to all requests made by relevant authorities before the end of the transition period as part of ongoing judicial cooperation procedures (**Article 64**).

EU laws on legal aid and mediation agreements will also apply to all requests for legal aid and requests/orders for mediation received before the end of the transition period (**Article 65**).

In the 19 March draft, Article 62 on contractual and non-contractual matters, Article 64 on ongoing judicial cooperation procedures, and Article 65 covering legal aid and mediation agreements, are colour-coded green.

The UK Position

The March 2018 Technical Note states that "[t]he UK expects to be able to reach agreement on the right approach to the recognition and enforcement of judgments, the way in which existing choice of court clauses are dealt, and ongoing judicial cooperation procedures at the point of exit, as well as a limited number of outstanding secondary issues".[33]

On these matters, **Articles 62 - 65** suggest the current EU rules should continue to apply to all judicial cooperation commenced before the end of transition. It is unclear whether the UK will agree to these proposals.

As with police and judicial cooperation in criminal matters, the Technical Note stresses that judicial cooperation in civil and commercial matters is

[33] Ibid, paragraph 27.

also an area where the UK will seek a "deep and special future partnership", and consequently anticipates the draft WA provisions will largely be superseded by provisions in the 'future partnership' agreement. This is set out in Providing a crossborder civil judicial cooperation framework - a future partnership paper, published on 22 August 2017.

4.7 Data and information

Background

The EU's data protection framework is changing from May 2018:

- The General Data Protection Regulation ('GDPR')[34] will apply from 25 May 2018
- The Police and Criminal Justice Directive (the 'Law Enforcement Directive' (LED))[35] has to be transposed into law by 6 May 2018

The GDPR is the main piece of EU data protection law and applies to the general processing of citizens' personal data. The LED applies to the processing of personal data for law enforcement purposes. The European Commission website has a range of material on the reforms.

Third countries

Under the EU's data protection framework, any country other than the EU and EFTA-EEA Member States is classed as a 'third country'.

Personal data can only be transferred to a third country when an adequate level of protection is guaranteed. One option is for the European Commission to make an "adequacy decision" so that data can flow from EU/EEA Member States to third countries (or one or more specific sectors in those countries).

Further detail on transfers to third countries and international organisations is available the European Commission website.

The EU proposal

Articles 66-69 of the amended draft Withdrawal Agreement cover data processed or obtained before the end of the transition period or on the basis of the Agreement.

Article 66 states that "Union law on the protection of personal data" means:

- the GDPR[36]
- the LED
- the Privacy and Electronic Communications Directive 2002/58/EC (the ePrivacy Directive)
- any other provisions of EU law governing the protection of personal data.

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34 Regulation 2016/679 EU
35 Directive 2016/680/EU
36 With the exception of Chapter VII on Cooperation and consistency

Article 67 states that Union law shall apply in the UK in respect of the processing of the personal data of people outside the UK, provided that the personal data:

- were processed in accordance with Union law in the UK before the end of the transition period; or
- are processed in the UK after the end of the transition period on the basis of the Agreement.

Under **Article 68** the mutual assistance provisions of the GDPR[37] and the LED[38] will apply to data obtained by the UK before the end of the transition period. The text on Article 68 is agreed on the policy objective but drafting changes or clarifications are still required. Discussions on the other Articles are ongoing.

Under **Article 69** the provisions of EU law on confidential treatment, restriction of use, storage limitation and requirement to erase data will apply to data obtained by the UK either before the end of the transition period or on the basis of the WA.

The UK approach

The Government has stressed that it wants to maintain the unhindered flow of data between the UK and the EU after Brexit.[39]

In an August 2017 position paper, the Government said that it "wanted to explore a UK-EU model for exchanging and protecting personal data that could build on the existing adequacy model":

> (…) The UK starts from an unprecedented point of alignment with the EU. In recognition of this, the UK wants to explore a UK-EU model for exchanging and protecting personal data, which could build on the existing adequacy model, by providing sufficient stability for businesses, public authorities and individuals, and enabling the UK's Information Commissioner's Office (ICO) and partner EU regulators to maintain effective regulatory cooperation and dialogue for the benefit of those living and working in the UK and the EU after the UK's withdrawal.[40]

The Data Protection Bill

The Data Protection Bill [HL] 2017-19 will, among other things, bring the GDPR and the LED into UK law and, according to the Government, "ensure that the UK is prepared for the future after we have left the EU".[41] A Library Briefing Paper (CBP 8214, 1 March 2018) gives further detail on the Bill.

Technical note (March 2018)

The Government's Technical Note (March 2018) refers to the *Data Protection Bill* and says that UK data protection law will be aligned with EU law at the point of exit. On this basis, the UK will seek a basis for the

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37 Articles 61(1)-(7)
38 Article 50
39 See, for example, Matt Hancock (the then Minister for Digital), Oral evidence to the Select Committee on the European Union Home Affairs Sub-Committee, 1 February 2017, p1
40 HM Government, *The exchange and protection of personal data: a future partnership paper*, August 2017, p2
41 DCMS, *Data Protection Bill Factsheet – Overview*, September 2017, p1

continued free flow of data between the EU and UK until more permanent arrangements can be put in place:

> 47. The UK has strong domestic standards, and will continue to play a leading global role in the development and promotion of high data protection standards and cross-border data flows. It is important to note that UK law will be aligned with Union law at the point of exit. The Government is progressing the UK's new Data Protection Bill, which will replace the 1998 Data Protection Act so as to give effect to the EU's new data protection framework (General Data Protection Regulation (GDPR) and Law Enforcement Directive).
>
> 48. On this basis, the UK's objective is to agree early in the process a basis for the continued free flows of data between the EU (and other EU adequate countries) and the UK from the point of exit until such time as new and more permanent arrangements come into force. The UK believes this is in the interest of both the UK and the EU.

4.8 Ongoing public procurement

Articles 71-74 of the draft Withdrawal Agreement cover:

- public procurement procedures launched before the end of the transition period and not yet finalised on the last day of it, and
- the award of contracts made under framework agreements where the procurement of the framework agreement was launched before the end of the transition period until the framework expires (or is terminated).

Page 11 of the UK Government's Technical note sets out the UK's approach.

The Commission published a Position paper on On-going Public Procurement Procedures in September 2017.

Background

Current rules

Most public procurement in the UK is currently subject to a range of EU-derived rules – in particular:

- EU Treaty principles – general principles which apply to much procurement. These lead to general requirements such as advertising procurement opportunities and opening up procurement opportunities to suppliers located in other EU Member States.
- EU directives and the UK regulations that implement them – these are detailed rules that apply to much procurement above certain thresholds. They set out for example what procedures must be followed, the criteria that can be used to select suppliers and where procurement opportunities must be advertised. They offer businesses opportunities for challenge and remedies where rules have not been followed, via the High Court.

The EU (Withdrawal) Bill, as currently drafted, would allow both the principles and the regulations to continue to apply in the UK after Brexit

(as EU retained law). They might then be changed through UK legislation.

Framework agreements

Many public sector contracts today are made under framework agreements. These are arrangements with a provider, or a list of providers, to provide a certain type of good or service – for example to provide temporary staff. The framework agreement defines what will be purchased (such as maximum price and quality of services) and is valid for a certain number of years. Organisations can use a framework to buy common goods and services either directly, or by conducting a short competition among the framework suppliers.

The EU proposal

The Commission has proposed that the detailed rules and the general principles – including non-discrimination based on nationality – that apply to public procurement in EU Member States and the UK will continue to apply to:

- public procurement procedures launched before the end of the transition period and not yet finalised on the last day of it; and
- the award of contracts made under framework agreements (see above) where the procurement of the framework agreement was launched before the end of the transition period until the framework expires (or is terminated).

It is worth noting that this may in certain cases last for a number of years after transition ends, particularly because framework agreements can be for up to four years (and more in exceptional circumstances).

Under the February version of the draft WA, the EU Publication Office would have published details of contract awards for public procurement procedures launched before the end of the transition period and not yet finalised on the last day of it (as it would for contract awards in Member states normally) – this was not in the 15 March version of the draft WA.

The UK approach

The UK's priority is to ensure that "public procurement continues to function as smoothly as possible, avoiding disruption to public procurement markets for the benefit of suppliers and procurers".[42]

The Government states that it "broadly agrees with the EU's position", but will be seeking:

- Further reassurances about the ability of UK companies to bid into EU-level procurement exercises organised by the EU institutions before the date of withdrawal, and to be treated equally, without discrimination.
- An extension to cover ongoing procurement contracts with both the EU Member States and the EU institutions.

There is some ambiguity in the UK's Technical Note about its position on ongoing procurement where the EU principles apply rather than the

[42] UK Government Technical Note, para 28

detailed rules that have been transposed into UK law. This is a particular issue for smaller procurements, under the thresholds where the detailed regulations apply.[43]

4.9 Euratom

Background

the European Atomic Energy Community (Euratom) was founded to contribute to the formation and development of Europe's nuclear industries, to guarantee high safety standards and to prevent nuclear materials intended principally for civilian use from being diverted to military use.

Euratom provides the basis for the regulation of civilian nuclear activity, implements a system of safeguards to control the use of nuclear materials, controls the supply of fissile materials within EU Member States and funds leading international research into nuclear fission and nuclear fusion.

The UK became a member of Euratom 1 January 1973 and announced on 26 January 2017 that it intended to withdraw from Euratom as part of the Brexit process. In the UK, the Office for Nuclear Regulation (ONR) is currently responsible for regulating nuclear safety and security, and will take on the regulation of nuclear safeguards, currently provided by Euratom, after Brexit.

An overview of Euratom is available in the Library briefing paper on Euratom, 12 March 2018

EU draft withdrawal agreement

Articles 75 - 81 of the draft WA relate to the UK's exit from Euratom.

The Joint Report published in December 2017 stated in Article 89 that both parties had agreed on the future of nuclear safeguards in the UK and had agreed the principles of ownership of and responsibility for special fissile material, spent fuel and radioactive waste.

Further details of the UK's view on departure from Euratom are set out in:

- a position paper on Nuclear materials and safeguards issues published on 13 July 2017;[44]
- a Written Statement from the Secretary of State for the Department for Business, Energy and Industrial Strategy, Greg Clark, on 11 January 2018;[45]

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43 The UK Technical Note says "in practical terms ongoing procurement procedures should continue to be carried out under the relevant provisions of national law applicable at the moment of launching the procedure in question, in accordance with Union law governing public procurement procedures". It is the focus on national law – as opposed to the principles, which are in the EU Treaty – that has raised questions. See Telles. EU, The UK Technical Note on Other Separation Issues [Public Procurement], 6 March 2018

44 HM Government, *Nuclear materials and safeguard issues*, Position Paper, 13 July 2017

45 Written Statement [Energy Policy] HCWS399, 11 January 2018

- the Technical note on 'other separation issues' for the phase 2 negotiations published on 6 March 2018 following the publication of the Commission's draft Withdrawal Agreement.

All three state an ambition to maintain "a close and effective" relationship with Euratom.

The draft WA sets out the EU's perspective on the UK's departure and future relationship with Euratom. Some aspects of the Euratom relationship, such as research, are not mentioned.

The European Commission's updated draft document made minor changes, largely to make the Articles in the draft agreement more specific. The 19 March draft WA identified all articles relating to Euratom as "agreed at negotiators' level"; they would be subject only to "technical legal revisions" except Article 79 (see details below).

Nuclear Safeguards

Articles 76 and 77 relate to nuclear safeguards. Nuclear safeguards are measures to verify that countries comply with their international obligations not to use nuclear materials for nuclear weapons.

The UK's response to fulfilling its nuclear safeguarding responsibilities after leaving Euratom was to introduce the *Nuclear Safeguards Bill* in October 2017. The Bill aims to implement a domestic safeguard regime when the UK leaves Euratom and is currently at Committee Stage in the House of Lords, having passed through the Commons unamended. The Government have described this Bill as a 'contingency' measure, as they want to see maximum continuity of existing arrangements, but also to ensure that primary legislation is put in place in good time.[46] More information is available in the Library briefing paper on the Nuclear Safeguards Bill 2017-19.

Responsibility for material and equipment

Articles 78 – 81 refer to the responsibility for and ownership of materials and equipment in relation to third countries and Euratom Member States. The Commission proposes in Article 79 that any special fissile material belonging to Euratom in the territory of the UK will cease to belong to Euratom and will instead be the property of whoever had the right of use and consumption of the material. If that 'person' is a Euratom Member State, the Commission wants the rights under the Euratom Treaty, relating to the deposition, sale and transfer of materials, to be preserved after the UK leaves Euratom.

In the 19 March draft WA Article 79 is the only article which the UK has identified as "text proposed by the Union on which discussions are ongoing".

The Commission also wants the UK to purchase from Euratom any equipment and other property related to the provision of safeguards in the UK as it implements its own safeguards regime.

Additionally, the UK would be responsible for continuing to fulfil obligations with third countries. As such, if a third country had made an

46 HC Deb 16 October 2017 c617

agreement with Euratom that related to nuclear material or equipment in the UK, then after the transition period the UK would be responsible for continuing its obligations to that third country, unless alternative arrangements with the third country are made. The UK would also continue to be responsible for its nuclear waste, even if it is on another Member State's territory.

UK Government view

The UK Government said in its March 2018 Technical note:

> Both parties have also agreed the principles of ownership for special fissile material (save for material held in the UK by EU entities) and responsibility for spent fuel and radioactive waste.

The Government also said they expected to reach an agreement whereby the Euratom Community could retain some limited rights over material held in the UK after withdrawal:

> Agreement has already been reached on most of the Euratom separation issues. The UK expects to be able to reach agreement on the few remaining issues. This will cover the rights of the Euratom Community whereby the Community could retain some limited rights over material owned by EU entities and held in the UK on the date of withdrawal; the transfer of ownership of Euratom safeguards equipment to the UK; and reciprocity in relation to responsibility for radioactive waste whereby the UK and EU both reaffirm their commitment to meeting their existing international obligations.

A number of the Articles in the draft WA refer to a Euratom transition period. A Government written statement in January said they "will seek to […] include Euratom in any implementation period negotiated as part of our wider discussions".[47] The draft WA makes clear in Article 1 that this is the case.

4.10 Fisheries

When the UK joined the European Economic Community (EEC) in 1973 it was agreed that Member States would have exclusive national fishing rights to 12 nautical miles, unless other Member State could prove historic fishing activity between 6 to 12 miles.[48] This changed when it was agreed under international law that countries had further rights over the sea up to 200 nautical miles from their shores.[49] When these new Exclusive Economic Zones (EEZs) were introduced in the 1980's, EU competence for fisheries was extended to 200 miles off the coast.[50]

Commons Fisheries Policy: quota setting

Fisheries in the UK and EU are currently managed under the Common Fisheries Policy (CFP). As set out by the Commission, the policy aims to ensure that fishing is "environmentally, economically and socially sustainable" and to allow fair competition between fishers. The stated

47 Written Statement [Energy Policy] HCWS399, 11 January 2018
48 House of Lords European Union Committee, The Progress of the Common Fisheries Policy, 22 July 2008, HL 146-i.
49 ibid
50 ibid

aim is that between 2015 and 2020 catch limits should be set that are sustainable and maintain fish stocks in the long term.[51] Under the CFP, every year, the European Commission proposes a total allowable catch (TAC) for each commercial species for each fishery area within the EU 200-mile limit. TACs are then shared between EU countries in the form of national quotas. The TACs for each area are agreed by the Council of Ministers at the Agriculture and Fisheries Council, based on scientific advice on sustainable catch levels and the principle of maximum sustainable yields (MSY).[52]

The principle of equal access and relative stability are applied under EU Regulation 1380/2013 on the Commons Fisheries Policy. This sets out that "fishing opportunities allocated to Member States shall ensure relative stability of fishing activities of each Member State for each fish stock or fishery". A fixed percentage of each TAC is allocated to each Member State based on their agreed historic fishing activity, and Member States share access to fishing grounds from 12-200 miles from the coast based on this principle of relative stability.[53]

Article 16 of EU Regulation 1380/2013 allows each Member State to decide how its share of the fishing opportunities (or TACs) are allocated to vessels flying its flag. In addition, Article 17 requires that Member States "use transparent and objective criteria including those of an environmental, social and economic nature" in doing so.[54]

Member States set their own criteria for allocating fishing opportunities for their flagged vessels (which may or may not be foreign owned). In the UK, TACs are divided among the devolved administrations who set individual fishing quotas. Quotas are allocated to vessels according to their historical landings. These quotas, or licence entitlements, are transferable and can be bought and sold with each vessel, or when a vessel sinks, is scrapped or deregistered.[55,56] These sales are commercial transactions in which the regulators do not get involved.

There has been criticism of the CFP from a range of stakeholders, which is summarised by the Institute for Government. These include the criticisms that it is an overly centralised, top-down approach for managing fisheries and not responsive to local stock levels; that it allows too much access to vessels from other EU countries, and that it does not offer enough protection to the marine environment and fish stocks.[57]

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51 The Common Fisheries Policy (CFP), European Commission [website on 5 December 2017]
52 ibid
53 EU Regulation 1380/2013 on the Commons Fisheries Policy
54 ibid
55 NEF, Who Gets to Fish? The Allocation of Fishing Opportunities in Eu Member States, May 2017 (p11)
56 MMO, Fishing vessel licence requirements, 5 August 2014
57 IFG, Commons Fisheries Policy, [website on 19 March 2018]

Commons Fisheries Policy: other provisions

In addition to fisheries management, the CFP covers negotiation and co-operation with non-EU countries, marketing and trading standards for fishery products, and aquaculture.

The CFP also provides funding to support a transition to more sustainable fisheries and support for coastal communities. This is provided through the European Maritime and Fisheries Fund (EMFF), which runs from 2014 to 2020, and includes fisheries and aquaculture. The UK investment package for this period is €309m with an EU contribution of €243m.[58] The fund:

- helps fishermen in the transition to sustainable fishing;
- supports coastal communities in diversifying their economies;
- finances projects that create new jobs and improve quality of life along European coasts; and
- makes it easier for applicants to access financing.

A 2016 NAO report shows that the largest share of this funding has been allocated to Scotland (€108 million), followed by England (€97 million), Northern Ireland (€24 million) and Wales (€15 million).

In response to a question on an EMFF replacement after Brexit, the Government stated that:

> Decisions on allocations to Departments for replacement EU funding are yet to be taken. This includes the European Maritime and Fisheries Fund. Decisions will be made in light of wider UK strategic priorities and other domestic spending decisions.[59]

There were 4,000 businesses in the fishing industry in 2016. These businesses employed 24,000 people and contributed £1.4 billion to the UK economy in terms of Gross Value Added (GVA – a measure similar to GDP). The fish processing and preserving part of the industry employed more people than the fishing part of the industry – 15,000 compared with 8,000. But the processing industry was less significant in terms of overall economic output and involved fewer businesses.[60] Further information on the UK fisheries industry can be found in the Commons Briefing Paper on UK Sea Fisheries Statistics

Brexit negotiations

Following Brexit, the UK will take full responsibility for fisheries in the UK's EEZ, including quota setting.[61] However, it will still have to comply with any agreement reached with the EU on access for EU vessels to UK waters, and vice versa.

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58 EU Commission, EU adopts €310m investment package for the UK fisheries and aquaculture sectors, 3 December 2015

59 Written question 117530, 13 December 2017

60 Data are from the ONS *Annual Business Survey*, and the ONS *Business register and employment survey* which ask businesses about their financial status each year. Employment data refer to Great Britain.

61 Article 61(1) of the UN Convention on the Law of the Sea (UNCLOS) states that: "The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone."

The UK would also have to comply with the requirements of the UN Convention on the Law of the Sea (UNCLOS) in relation to the management of fisheries. UNCLOS requires coastal states to give other states access to the surplus of the allowable catch in its EEZ and emphasises the need to minimise economic dislocation in States whose nationals have habitually fished in the zone. It also imposes an obligation to co-operate with other coastal states on the management of shared stocks or stocks of associated species.[62]

UK Position

The Fisheries Minister, George Eustace, gave evidence to the Lords Energy and Environment Sub Committee on 21 February 2018. In his evidence he provided detail of the Government's expectations for fisheries and access to the UK's EEZ. With regard to co-operating with neighbours on shared stocks, he stated that the UK "absolutely intend to do that".[63] He also referred to the introduction of changes to quota allocations for neighbouring countries and the "need to do that over time".[64]

He set out the Government's aim with regard to annual fisheries negotiations with third parties such as Russia, Greenland, the Faroes and Norway:

> What everybody recognises is that it is legally very difficult to envisage a situation where the EU would continue to represent the UK when we cease to be a member of the EU. Therefore, we need something different and a bit special in how we handle fisheries. […] We need to make sure that that is considered and reflected in any transition deal.[65]

The Minister also raised the issue of the North East Atlantic Fisheries Commission, which requires notice to join, which the UK will not technically be allowed to do until it leaves the EU.[66]

The Prime Minister referred to fisheries in her Mansion House speech on 2 March 2018:

> We are also leaving the Common Fisheries Policy.
>
> The UK will regain control over our domestic fisheries management rules and access to our waters.
>
> But as part of our economic partnership we will want to continue to work together to manage shared stocks in a sustainable way and to agree reciprocal access to waters and a fairer allocation of fishing opportunities for the UK fishing industry.[67]

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62 UN Convention on the Law of the Sea (UNCLOS)

63 House of Lords Select Committee on the European Union, Energy and Environment Sub-Committee, Uncorrected oral evidence, Minister of State for Agriculture, Fisheries and Food, Wednesday 21 February 2018, Q2

64 HM Government, Draft Text for Discussion: Implementation Period

65 Ibid, Q4

66 Ibid, Q6

67 Prime Minister's Office, PM speech on our future economic partnership with the European Union, 2 March 2018

EU draft Withdrawal Agreement

The EU position is that fisheries should form part of the transition agreement, with the UK complying fully with the CFP until the transition period ends.[68] Quotas are set on a calendar year basis. A 21-month transition period coincides with the 2019 quota year end, and removes the need for reaching agreement on how to set quotas for the first three months of 2020.

The Commission's first draft withdrawal agreement in February 2018, included a reference in **Article 125** to consulting the UK on setting UK fisheries opportunities during any transition period:

> **Article 125 Specific arrangements relating to fishing opportunities**
>
> As regards the fixing of fishing opportunities within the meaning of Article 43(3) TFEU for any period prior to the end of the transition period, the United Kingdom shall be consulted by the European Commission in respect of the fishing opportunities related to the United Kingdom, including in the context of the preparation of relevant international consultations.[69]

The UK Government response proposed agreement with the EU, rather than consultation, on the setting of fishing quotas for 2019. It also proposed that the UK "shall participate alongside the EU and other coastal States in international fisheries negotiations".[70]

The second EU draft included significant amendments, setting out in detail how the EU intends to consult the UK when setting fishing quotas. It also stipulated that the EU may "exceptionally" invite the UK to be part of the EU delegation at international negotiations. It now also makes clear the intention to maintain quota allocation based on the relative stability principle:[71]

> **Article 125 Specific arrangements relating to fishing opportunities**
>
> 1. As regards the fixing of fishing opportunities within the meaning of Article 43(3) TFEU for any period falling within the transition period, the United Kingdom shall be consulted in respect of the fishing opportunities related to the United Kingdom, including in the context of the preparation of relevant international consultations and negotiations.
>
> 2. For the purpose of paragraph 1, the Union shall offer the opportunity to the United Kingdom to provide comments on the Commission Annual Communication on fishing opportunities, the scientific advice from the relevant scientific bodies and the

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68 The Guardian, EU to hold Britain to fishing quotas during Brexit transition, 11 January 2018

69 Eu Commission, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community TF50 (2018) 33 , 28 February 2018

70 HM Government, Draft Text for Discussion: Implementation Period, 21 February 2018.

71 Relative stability allocates a fixed percentage of total allowable catches (TACs) to Member States based on their agreed historic fishing activity

> Commission proposals for fishing opportunities for any period falling within the transition period.
>
> 3. Notwithstanding Article 124(2)(b), with a view to allowing the United Kingdom to prepare its future membership in relevant international fora, the Union may exceptionally invite the United Kingdom to attend, as part of the Union delegation, international consultations and negotiations referred to in paragraph 1 of this Article, to the extent allowed for Member States and permitted by the specific forum.
>
> 4. Without prejudice to Article 122(1), the relative stability keys for the allocation of fishing opportunities referred to in paragraph 1 of this Article shall be maintained.[72]

Press reports on 17 March suggested that the Government had accepted that the UK will comply with the CFP until the end of the transition period.[73] The above text remained unchanged in the draft agreement of 19 March, falling under the category of agreed at negotiators' level, subject to technical legal revisions.

Beyond the transition period, the maintenance of current arrangements for sharing fisheries resources after Brexit was referred to in the European Council's draft negotiating guidelines for a future trade deal. This sets out continued existing reciprocal access to fisheries as part of the proposal for a zero-tariff trade agreement:

> Trade in goods, with the aim of covering all sectors, which should be subject to zero tariffs and no quantitative restrictions with appropriate accompanying rules of origin. In this context, existing reciprocal access to fishing waters and resources should be maintained.[74]

A zero-tariff trade agreement is important to the UK fish processing industry and exports, as noted by the House of Lords European Union Select Committee report Brexit: Fisheries:

> Trade in fish and seafood is essential to the wider seafood industry, which relies heavily on importing raw goods at reduced or zero tariffs for domestic consumption, and on exporting domestic catches and production. Any disruptions to the current trading patterns could have profound effects on both the catching and processing sectors.[75]

4.11 Immunities and privileges

When the UK leaves the EU the status of UK nationals currently working in EU institutions or agencies[76] and of EU staff working in EU bodies in the UK will change. On 29 January UK Commissioner Julian King and Commissioner Gunther Oettinger told UK staff working in the EU

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72 Eu Commission, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33/2, 15 March 2018

73 Financial Times, UK set to back down over fishing quotas during Brexit transition, 17 March 2018

74 European Council, European Council (Art.50) (23 March 2018) Draft guidelines, XT 21022/18, 7 March 2017

75 House of Lords, EU Committee, Brexit: Fisheries, 17 December 2016 - HL Paper 78

76 According to Commission statistics for 2017, 1,046 UK nationals were working for the EU (3.2% of total staff).

institutions there would be no discrimination towards them while the EU Treaties apply to the UK (e.g. in appointments and promotions), and new contracts or contract renewals signed before Brexit would run beyond 29 March 2019, in line with existing rules.[77]

Articles 96 – 114 of the draft WA aim to settle certain rights and obligations in respect of people, property, assets and benefits.

Current rights and obligations of EU officials and other agents

A study requested by the EP's Committee on Legal Affairs in 2017 outlined the legal bases for the rights and obligations of officials and other agents of the EU:

> The rights and obligations of all officials and agents of the EU are governed by primary law including Treaty provisions (e.g. Articles 336, 298 TFEU), the Charter of Fundamental Rights of the EU (CFR,3 Article 6(1) TEU), Protocols (Article 51 TEU) especially Protocol No 7 to the TEU and TFEU on the Privileges and Immunities of the European Union. Equally protected on the level of primary law are fundamental rights as they arise from General Principles of EU law (Article 6(3) TEU) as well as other General Principles of EU law such as the protection of legitimate expectations and the principle of proportionality.
>
> Further specific rules on the rights and obligations of EU staff members arise from Union legislation including most importantly the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Union.[78]

Nationality requirement

EU nationality is a general pre-condition for the employment of EU staff members, as set out in the Staff Regulations and Conditions of Employment of other servants of the European Union (CEOS). The Hofmann report (see above) outlines the situation after Brexit for UK officials and other agents as follows:

> Under the legislation in force, the two main categories of EU staff – officials and agents – are treated differently. The employment of EU officials of UK nationality may cease under the rules of the Staff Regulations in the event of Brexit. The employment contracts of EU agents of UK nationality automatically end in the case of Brexit-induced loss of EU citizenship under the rules of the CEOS.

Under Article 90(1) of the Staff Regulations, EU officials and agents of UK nationality have a right to ask their appointing authorities to take a decision to clarify whether they qualify for an exception to the nationality requirement.

Continuing immunities and privileges

Protocol No 7 to the EU Treaties, on the Privileges and Immunities of the European Union, includes rules on individual rights of residence and

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77 Information Meeting for UK Staff with Commissioners Gunther H Oettinger and Julian King, 29 January 2018, posted on u4unity website

78 The impact of Brexit on the legal status of European Union officials and other servants of British nationality, Herwig C.H. Hofmann, Professor of European and Transnational Public Law, University of Luxembourg, November 2017, revised December 2017

taxation. This Protocol will not apply in the UK after Brexit. But the December 2017 Joint Report outlined at para. 95 the commitment agreed by the negotiating parties to protect immunities and privileges:

> On issues relating to the functioning of the Union institutions, agencies and bodies, both Parties agree that an arrangement which closely mirrors Union privileges and immunities should remain applicable to activities that took place before withdrawal and as regards new activities foreseen in the Withdrawal Agreement; …

Provisions in the draft WA

Article 101 stipulates that existing rights to immunity from prosecution under Article 8 of the Protocol will apply in the UK "in respect of opinions expressed or votes cast by members of the European Parliament, irrespective of their nationality, including former members, in the performance of their duties before the end of the transition period". Several draft Articles in this Title would continue the EU rules granting EU officials, judges and politicians immunity from prosecution and tax obligations until the end of the transition period.

This and other commitments to staff include the following:

- the continuation of privileges and immunities for staff working for the EU before the end of the transition period and after the end of the transition period in connection with activities of the EU;
- the UK will not be able to exclude the staff of the European Central Bank or European Investment Bank, or expropriate assets or render them unrepatriable, due to exchange restrictions during any transition period;
- avoidance of double taxation;
- the payment of EU unemployment benefit to all staff who contributed to the scheme;
- the transfer of pension rights;
- The Convention defining the Statute of the European Schools on 29 March 2019 will continue to apply to UK staff and family members until 31 August 2021 - the end of the school year ongoing at the end of the transition period.

Professional secrecy and classified information

The December 2017 Joint Report committed the parties to "ensure compliance with obligations of professional secrecy; and that classified information and other documents obtained by both sides whilst the UK was a Member State retain the same level of protection as before withdrawal". **Articles 115 – 120** ensure that these obligations continue.

UK position

The UK Government published a position on Privileges and Immunities on 13 July 2017, and on Confidentiality and Access to Documents on 21 August 2017.

5. Transition and entry into force (Part 4)

5.1 Transition

The EU and UK have agreed that they wish to negotiate a transition (or implementation) period of around two years after 29 March 2019 – David Davis has now conceded that 21 months is acceptable for the UK - and have broadly agreed that the majority of the existing EU *acquis* will continue to apply to the UK until the end of that transition period. However, there are disagreements as to the full extent of the application of EU law to the UK, and on various other aspects of a transition period.

The table below summarises the UK and EU positions as articulated in the 21 February 2018 UK amendments to the EU's proposed transition agreement text, and Part 4 of the draft WA as set out on 15 March respectively.[79]

Area of negotiation	UK Position	EU Position	Agreement?
Duration	'Strictly time-limited' – but with a possibility to extend.	Until December 2020	**Negotiation needed**: the UK wants more flexibility here than the EU has offered.
Applicability of EU Law: General	Full acquis, with some exceptions, without new Treaty amendments, and with the possibility for opt-ins in JHA and Schengen.	Full acquis, including new introductions, but no more opt-ins for JHA legislation (where UK formally has an opt-out).	**Negotiation needed:** there is agreement generally, but not on exceptions/Treaty amendments/JHA legislation opt-ins.
Applicability of EU Law: Free Movement of Persons	Home Office/DExEU February 2018: UK domestic law limitation to rights for EU nationals to bring family members during transition, and no CJEU oversight.	Full acquis applicable during transition, including as applicable to family members, child benefit and including CJEU oversight.	**No:** the EU position has been described as non-negotiable, but the UK seeks to negotiate it.
Applicability of EU Law: Direct Effect and Supremacy	Applicable during transition in full.	Applicable during transition in full.	**Domestic action needed:** Withdrawal and Implementation Bill will need to cover this if ECA 1972 repealed.
Applicability of EU Law: Customs Union, Common	No ability for UK to 'become bound by' new trade agreements during transition, unless it has EU authorisation or unless the	No ability for UK to 'become bound by' new trade agreements	**Negotiation needed:** general agreement that negotiation is possible but

[79] Adapted from the Commons Briefing Paper 'Brexit: Council Directives for Negotiations on Transition', updated on 5 March 2018.

Area of negotiation	UK Position	EU Position	Agreement?
Commercial Policy	trade agreement in question 'rolls over' an existing EU agreement.	during transition, unless it has EU authorisation.	ratification is not; however, UK wishes exception for 'rolling over' third country FTAs.
Applicability of EU Law: Third Country FTAs to be 'Rolled Over'	Wishes for UK be treated *as if* a Member State – with EU help to persuade third country partners.	Willingness to help UK suggested by April 2017 European Council guidelines but no formal statement since then.	**Negotiation needed:** success here is also dependent on third countries.
Enforcement of EU Law: CJEU Role	Applicable during transition.	Applicable during transition in full.	**Negotiation needed:** future dispute resolution mechanism not yet developed.
UK Participation in EU Institutions / Bodies / Agencies	The UK *should have* consultation rights in Comitology, expert committees, and discussions concerning international agreements etc, and to have decision-making powers where this results in the effective operation of EU law/Withdrawal Agreement during the transition. Also wishes for Parliament to be informed about new EU legislation.	No general institutional representation during transition; perhaps case-by-case, exceptional involvement, *may be* offered by EU. During transition, UK parliament not to be treated as a 'national parliament' and offer Reasoned Opinions on draft EU laws, and UK not automatically present during EU-level discussions with its third country partners. It also sets that EU MS can opt out of extending the EAW to the UK – and thus not surrender their nationals to the UK during transition.	**No:** the UK wants significantly more institutional involvement than the EU appears to be offering. It is unclear if the position on the EAW is mutual.
Fishing Quotas	The UK wishes for a discussion on the UK's fishing quota *before* the official Council meeting in December.	The Commission will 'consult' the UK during the official Council meeting in December. The UK will be offered the possibility to comment on relevant Commission proposals when applicable to the transition period.	**Negotiation needed:** the UK wishes to discuss its fishing quota before formal decisions are taken, not to be consulted during that decision-making process. The EU appears to have accommodated this to some extent since the 28 February draft.
Defence and security	UK wants to continue to cooperation with the EU	Possibility that defence and security agreement could be negotiated and agreed before end of	**Unclear**: the scope of the EU's offer is difficult to determine

Area of negotiation	UK Position	EU Position	Agreement?
		transition period. In this case, TEU provisions on common foreign and security policy and EU defence policy (primarily Chapter 2 of Title V TEU) would cease to apply to UK on entry into force of new agreement.	from the wording of the draft WA.

The table and comments made by Michel Barnier on 9 March make clear that at that time, there were still a number of areas in which disagreement remained. In Michel Barnier's words, those were the request from the UK to opt into new parts of the JHA *acquis*; the limitations on free movement rights for EU nationals and their family members proposed during transition, the UK's institutional participation, and particularly the UK request to have a say on proposed EU legislation during the transition period.

The 19 March version of Part 4 the draft WA, however, makes clear that there is now agreement between the parties on transition matters. Compromises have been reached on all these points, in the following ways:

- **Duration of 'transition':** Article 121 confirms that the "transition or implementation period" will not last beyond 31 December 2020.
- **Applicability of General EU Law:** the entire EU *acquis* will be applicable to the UK, with the exception of areas of enhanced cooperation; this is set out in Article 122. In terms of opt-ins on JHA matters, Article 122(5) states that the UK may be invited to cooperate with new Justice and Home Affairs laws as a 'non-EU country'.
- **Applicability of Free Movement of Persons Law**: during the transition, there are no exceptions to EU free movement of persons law applying to the UK. The limitations on family reunification and CJEU oversight suggested by the Home Office and DExEU in February 2018 are not reflected in this agreed draft.
- **Applicability of the CU and the CCP:** Article 124(4) now states that the UK may "negotiate, sign and ratify" international agreements in areas of exclusive EU competence, "provided those agreements do not entire into force or apply during the transition period".
- **Applicability of EU foreign policy and participation in EU foreign policy:** the text now agrees to an option for the UK to not apply EU decisions on foreign policy if, "for vital and stated reasons of national policy" this is needed, in Article 124(6). In terms of participation, Article 124(b) includes additional UK

consultation mechanisms when EU foreign policy decisions are taken to what was in earlier drafts.

- **On 'rolling over' third country FTAs:** a footnote to Article 124(1) now states that the EU will tell non-EU trading partners that the UK is to be treated as a Member State during transition. It should be stressed, however, that this is at best a request, and the third country trading partners do not have to agree to it.
- **CJEU enforcement during transition:** the parties have agreed to CJEU jurisdiction on all matters during the transition period in Article 122(3); all provisions on alternative enforcement mechanisms (see Section 6.1 above) are to commence only following the transition period.
- **UK participation in EU agencies/bodies/institutions:** various provisions of the 19 March text have enhanced the UK's ability to participate in EU decision-making, though not to the extent that it would be able to participate as a Member State. Article 123 thus makes it possible for the UK to be consulted on EU legislative proposals during transition, although it is not clear whether this includes all proposals for secondary legislation.
- Article 124(2)(b) makes clear that UK representatives may be invited to attend meetings of EU bodies/agencies/institutions, if participation by non-EU Member States is permitted by the agreements applicable to those bodies/agencies/institutions.
- **Regarding the applicability of the European Arrest Warrant:** Article 168 continues to set out that Member States can object to surrendering their citizens to the UK on the basis of a European Arrest Warrant during the transition period, if they raise issues related to the "fundamental structures" of the Withdrawal Agreement. However, the provision is now reciprocal, in that the UK can also stop surrendering its nationals to that Member State if it gives notification of this decision within one month of the Member State's objection. The UK could be invited to cooperate with the new defence policy "permanent structured cooperation" (which it opted out of) as a non-EU country.
- **Fishing quotas:** Article 125 reflects the concession already made by the EU in the 15 March draft, where the UK will be consulted on the allocation of fishing quotas during the transition period, whether at the EU level or in international fora.
- **Defence and Security Cooperation:** there are no amendments to the 15 March text that set out possibilities for further cooperation between the EU and the UK in the area of defence and security.

5.2 Entry into Force

The draft WA sets out a firm start date, agreeing implicitly with the UK choice of exit day as 29 March 2019. As stated in Article 168: "This Agreement shall enter into force on 30 March 2019".

As the WA will cover both a transition period *and* an exit from the EU, **Article 168** goes on to further specify that different parts of the agreement will start applying at different times. The following parts of the draft WA will not commence until the end of the *transition* period:

- The majority of the provisions on citizens' rights in Part II;[80]
- The 'separation provisions' in Part III;
- Title I of Part 6, which sets out CJEU jurisdiction and UK participation in CJEU cases on Parts II and III following transition, so as to ensure 'consistent interpretation';
- CJEU oversight of the WA as set out in Articles 162-164;
- The Protocols on Ireland/Northern Ireland[81] and the Sovereign Base Areas in Cyprus.

Other provisions spell out the shift from a *transition period* to a period 'after' transition in more detail; they address specific scenarios that will take place in both periods, and consequently do not have a clean 'start' and 'end' date. A number of these relate to CJEU jurisdiction:

Article 82 confirms that jurisdiction of the CJEU will extend to the UK and all cases involving the UK during transition. It clarifies that UK courts will continue to have a right to request preliminary references (or an obligation to request these, in the case of the Supreme Court) until the end of the transition period. As long as documentation relating to a case has been 'registered' before the end of 2020, the case will fall within the CJEU's jurisdiction; when the case concludes, in other words, is not relevant for the agreement.

Article 83 states that the jurisdiction of the CJEU in terms of enforcing EU law also continues to apply to the UK during the transition period – both Member States and the European Commission can commence proceedings if they believe the UK has not complied with any aspect of the EU *acquis* during the transition period. **Article 83(2)** notes that the relevant point in time regarding preliminary references is when the *facts* of a given case occurred: as long as this falls within the transition period, the case will be referable to the CJEU. This condition is presumably included to account for the possible duration of judicial proceedings, and the fact that it may be an appeal court wishing to refer a question of EU law rather than a court of first instance.
Article 85 makes clear that any cases over which the CJEU has jurisdiction per Articles 82 and 83 will have binding effect on and in the UK 'in their entirety'. In other words, where CJEU proceedings do not conclude until after the transition period ends, but were commenced in line with Articles 82 and 83, the outcome of such cases will be binding on/in the UK. Where there is non-compliance with those judgments, the pecuniary penalties set out in the Treaties may be applied to the UK.

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[80] The exceptions are Article 30(1) of the draft WA, which sets out an 'observer status' for the UK from the date of exit in the Administrative Commission (explained in section 3.2 above); and Article 40 of the draft WA, which requires the UK to send all documentation related to ongoing goods assessments procedures to a designated Member State by 30 March 2019.

[81] The exception is Article 10 of the Ireland/Northern Ireland Protocol, which establishes the 'Special Committee' overseeing the Protocol.

Article 86 indicates that the UK may intervene in and submit written observations to all CJEU cases, as long as there are cases that involve the UK that remain 'in progress' at the end of the transition period. Only when all the UK's CJEU proceedings have been resolved does the right to intervene in other CJEU proceedings end.
Article 87 makes clear that those **qual**ified in the UK and involved in CJEU proceedings that commenced before the end of the transition period, or any enforcement procedure that involves the UK, may continue to represent or assist the Member State (or the UK) for the duration of those proceedings, according to Article 87. This is a stop-gap to cover for the fact that general mutual recognition of qualifications is a matter for the future relationship.

Article 126 is the basic 'transition' CJEU provision: it sets out that the CJEU will have the jurisdiction it has under the Treaties in respect of the UK and its inhabitants "as regards the interpretation and application of this Agreement".

In its report published on 20 March, 'EU Withdrawal: Transitional provisions and dispute resolution', the European Scrutiny Committee (ESC) questioned whether CJEU jurisdiction "should extend to any other parts of the Withdrawal Agreement" – i.e. beyond the continuation of existing EU legislation - and asked the Government to "clarify what the practical effect might be of the proposed stipulation in Article 126 […] that it should also extend to the interpretation and application of other provisions of the Withdrawal Agreement". The ESC thought that "[f]ar from incorporating a safeguard mechanism to protect UK interests", "the EU has proposed mechanisms to sanction the UK if it does not follow the rulings of the CJEU during the implementation period. These include suspending the benefits of participation in the internal market".

6. Financial provisions (Part 5)

Broadly speaking, each subject addressed in the financial settlement reached in the Joint Report is included in Articles in the draft WA. The table below shows where different areas of the financial settlement feature in the Joint Report and the draft WA.

The Library briefing Brexit: the exit bill, updated 15 March 2018, has more information on what was agreed in the Joint Report and other issues related to the financial settlement.

As well as converting the financial settlement to legal text, the draft WA attempts to flesh out some of the details and logistics of the financial settlement.

Treasury officials do not have significant differences of opinion on the draft WA, but are engaging in a process to understand exactly how the Commission is translating the political agreement into a legal text.[82]

6.1 What does the WA say in areas where agreement hasn't been reached?

The draft WA attempts to fill in some of the details as to how the financial settlement will operate. Some of the detail proposed by the draft WA are highlighted below and the few subjects included in the draft WA that did not appear in the joint report are also discussed.

Budgets 2019-2020 and revenue adjustment

Article 128 sets out that the UK's contribution to and participation in the 2019 and 2020 EU Budgets will be in accordance with the rules set out for the transition period. However, the UK will not have a vote over the 2020 EU budget (which will be decided between the Member States and the European Parliament in late 2019).

EU Budgets are subject to corrections or adjustments after the year is over. **Article 129** says that this process shall apply to the UK after 31 December 2020 for the financial years up to 2020. **Article 129(3)** suggests how the process for adjustments could work after 2020, including how the UK's share could be calculated, and that:

- any required payments requested should be made available as part of the next scheduled payment
- the UK will be able to attend meetings of EU committees that could impact on resource corrections or adjustments. UK representatives can attend upon invitation, on a case-by-case basis, without voting rights.
- corrections or adjustments based on revisions to VAT or GNI will be time limited

[82] European Scrutiny Committee, Oral evidence: EU Withdrawal, HC 763, 5 March 2018, Q204

Financial settlement subjects discussed in the joint report and the draft withdrawal agreement: cross reference		
Subject	Paragraph(s) in the Joint Report	Article in draft withdrawal agreement
The financial settlement will be drawn up in €	68	127
UK participation in the Union annual budgets to 2020	59	128
The annual revenue adjustment process	60	129
UK participation in programmes of the MFF 2014-2020	71	130
UK respecting all relevant Union legal provisions in order to participate in Union programmes	71	131
Calculating the UK's share	67(b)	132
Outstanding commitments	61	133
Fines decided before 31 December 2020	footnote 5	134
Union liabilities at the end of 2020	62	135
Contingent financial liabilities related to loans for financial essistance, EFSI, EFSD etc	63 & 64	136
Financial instruments financed by programmes of MFF 2014-2020 (or earlier)	63 & 64	137
Reimbursement of UK's share of assets of European Coal and Steel Community	65	138
Reimbursement of UK's share of Union's investment in EIF	65	139
Logistics for payments after 2020	…	141
Reimbursement of UK's ECB paid-in capital	82	142
UK shall not be eligible for new financial operations from the EIB reserved for Member State after withdrawal	81	144
The UK will remain party to the European Development Fund	84	145
Facility from the EDF will be returned as the investment matures	85	145(4)
Reuse of EDF decommitments	85	146
Facility for Refugees in Turkey and Trust Funds	83	148
UK obligations arising from Agencies of the Council and Common Security and Defence Policy	Footnote 9	150
The UK will honour its share of outstanding commitments made under previous EDFs	84	147
UK's share of callable capital in the ECB	75	Article 143, 143(3)
UK's share of paid-in capital in the ECB	76	Article 143, 143(4)
EIB calls on the callable capital and paid-in capital	78	Article 143(5) & 143(6)

sources:

European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union

UK participation in EU programmes in 2019 and 2020

Article 130 stipulates that the UK's participation in EU programmes will be in accordance with the rules set out for the transition period. The UK will be able to participate in programmes under the current 2014-2020 budget plan and previous budget plans. The UK shall be eligible for financial operations provided that the relevant instruments were established by the EU before the date the WA comes into force.

Article 131(2) lays out the EU laws the UK must adhere to while still receiving funding from EU programmes. **Article 131(3)** suggests that the UK will be able to attend meetings of EU committees that assist the Commission on the implementation and management of EU programmes. UK representatives will attend upon invitation, on a case-by-case basis, without voting rights.

Outstanding commitments (RAL)

Article 133 suggests that in addition to the EU's outstanding commitments on 31 December 2020, the UK will contribute to commitments made in 2021 that were carried over[83] from the 2020 Budget.

Article 131(1) provides that the outstanding commitments will not include those related to areas where the UK has an opt-out, or those areas that are financed by specific revenues (assigned revenues).[84]

Articles 131(2), 131(3) and 131(4) put forward a possible approach for dealing with future payments for outstanding commitments. The draft WA suggests that the EU will provide a list of each outstanding commitment and the amount outstanding to the UK. This list will be updated for payments and decommitments in the previous year, and at the same time the UK will be provided with an estimate of expected payments in the current year.

Liabilities

Article 135 provides an approach for dealing with the UK's contribution for EU liabilities outstanding at the end of 2020. **Article 135(3)** proposes that in each year from 2021 the EU will give the UK an overview of payments made for outstanding liabilities during the previous year and the UK's contribution.

Article 135(4) proposes that in each year from 2021 the EU shall send the UK a document on EU pensions that will include, amongst other things:

- the remaining liabilities for EU staff divided into tranches of 5 years on the basis of their age

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83 Exception to the principle of annuality in the EU Budget in so far as appropriations that could not be used in a given budget year may, under very strict conditions, be exceptionally carried over for use during the following year.

84 For more on assigned revenues see European Parliament Research Service, Assigned Revenue in the EU Budget, 15 September 2017

- the remaining liabilities linked to retirement benefits and those linked to the Joint Sickness Insurance Scheme
- the evolution of the remaining liability in terms of mortality, retirement dates etc
- a detailed calculation of the UK's payments made in the previous year and expected payments for the current year

Article 135(5) sets out how the liabilities for pensions and other employee benefits may be established. Different methods are suggested for MEPs and EU high-level public office holders, and EU staff.

Contingent liabilities for loans related to financial assistance and the EIB

Article 136 puts forward a possible approach for dealing with contingent liabilities relating to loans for financial assistance, financial operations managed by the EIB (such as the European Fund for Strategic Investment) and the European Fund for Sustainable Development.

Article 136(1) provides that on 31 July 2019 the UK will be given a report providing, for each type of instrument:

- financial liabilities arising from those financial operations on the date when the WA comes into force
- any provisions[85] held to cover the financial liabilities, on the date when the WA comes into force

Article 136(4) provides that from 2021 the UK will receive information annually from the EU on the financial operations of each instrument, including:

- the liabilities arising in the previous year and payments made
- payments made in the previous year
- the UK's current provisioning and provisioning rate
- reimbursements made to the UK in the previous year

Article 136 also sets out an approach for instruments that require provisioning from the EU Budget. This includes the process for returning the UK's share as the need for provisioning declines.

Contingent liabilities arising from financial instruments of EU programmes

Article 137 sets out an approach for dealing with contingent liabilities arising from financial instruments of EU programmes.

Article 137(1) states that on 31 July 2019, the EU will provide the UK with details of:

- the liabilities arising from the instruments before the date of the WA entering into force
- payments made by the EU for the instrument and the amount committed and not yet paid at that date

[85] Provisions are amounts, arising from past events, that will probably have to be paid by the EU budget in the future.

Article 137(2) provides that from 2021 the UK will receive information annually from the EU on the financial operations of each instrument, including:

- financial liabilities arising from the operations decided before the date the WA enters into force
- payments made related to the financial operations
- amounts paid back to the EU and returns on resources of the financial instruments
- provisions not disbursed and received by the EU

Article 137(4) suggests a way for dealing with liabilities, payments etc that cannot be directly attributed to a particular financial operation because of overlaps.

Contingent liabilities for legal proceedings

Article 140 proposes that each year the EU shall let the UK know of any payments arising from legal proceedings and the UK's share of any subsequent recoveries.

Payments after 2020

Article 141 proposes practicalities for payments between the UK and EU after 2020. The Joint Report said only that these issues would be agreed during the second phase of Brexit negotiations.

Article 141 proposes that after 31 December 2020, transactions between the EU and UK arising from the items agreed in the financial settlement shall have a reference date of 30 June and 31 October each year. Payments with a reference date of 30 June will be made in four equal monthly instalments. Payments with a reference date of 31 October will be made in eight equal monthly instalments.

On 16 April and on 16 September of each year the EU will provide the UK will the relevant amount expressed in pounds and euros. The conversion rate will be the rate applied by the European Central Bank on the first working day of the month. Interest will be due on any late payments.

The financial settlement agreement is underpinned by the assumption that the UK will cease to be bound by the EU's budgetary instruments by the end of 2020. As the draft WA does not make explicit the possibility of an extension of the transitional arrangement beyond 31 December 2020 (the end of the EU's current long-term budget or multi-annual financial framework), it equally does not make provision for any additional financial obligations on the UK under the next long-term budget from 2021 onwards if the transition were to stretch into the EU's next budgetary cycle. The Government has not ruled out that such liabilities might arise, but said they would be subject to negotiation.[86]

[86] Evidence given by the Chancellor of the Exchequer to the European Scrutiny Committee on 5 March 2018.

European Investment Bank: continued liability of the UK

Article 143 proposes an approach for decreasing the UK's share of callable capital (uncalled subscribed capital) in the EIB. **Article 143(6)** suggests how any triggered liabilities will be dealt with.

Article 143(4) confirms the approach in the joint report for repaying the UK's paid-in capital: eleven instalments of €300 million and a final instalment of €195.9 million.

European Development Fund

The Joint Report agreed that the UK would continue to participate in the European Development Fund (EDF), which is the EU's main instrument for providing development aid overseas. The UK will honour its commitments to all unclosed funds. The current EDF will run from 2014 to 2020. **Article 145(2)** states that the UK may participate, as observer, without voting rights, in the EDF Committee and the Investment Facility Committee.

In March 2017, the Department for International Development told the European Scrutiny Committee that approximately £4 billion of UK contributions to the EDF remained outstanding for the 2007-13 and 2014-2020 budgetary periods.[87] This would be in addition to the £35-£39 billion financial settlement related to the UK's contributions to the general EU budget.

Article 145(4) provides that as the EDF Investment Facility matures, the UK will be reimbursed using the same method as for financial instruments arising from EU programmes. **Article 146** sets out that funding will not be re-used and the UK's share will be reimbursed in cases where funding has not yet been committed to projects in previous EDFs and where money has been decommitted in the current EDF. Contingent liabilities arising

Trust Funds and Facility for Refugees in Turkey

In the joint report the UK agreed to honour the commitments it has made on the Facility for Refugees in Turkey and the EU Emergency Trust Funds. **Article 148** stipulates that this commitment extends to any future EU Emergency Trust Fund created before the WA comes into force. As the Joint Report suggested, the UK's obligations to the schemes will remain the same as those of the Member States. **Article 148(2)** allows the UK to participate, as a third country, in bodies related to the Facility for Refugees in Turkey.

Defence related agencies

Under **Article 149**, during the transition period the UK will continue to contribute to the funding of several defence-related agencies, including the European Defence Agency (EDA), and any CSDP operations. That

[87] See for more information the European Scrutiny Committee's Report of 25 April 2017.

funding will continue on the same basis as at present.[88] During the transition, the UK will no longer have its current veto over the annual budget of the EDA.

Article 150 states that beyond 31 December 2020 the UK will be required to pay (by June 2021) its share of the pension liabilities for personnel of the EDA and other defence-related agencies, assuming that it has not already done so by the end of the transition period.

Other areas

Article 138 provides that the EU will make five payments to the UK for its share of the liquidated net assets of the European Coal and Steel Community on 31 December 2020. Five equal payments will be made on 30 June of each year starting on 30 June 2021.

Article 139 proposes a similar arrangement for the European Investment Fund (EIF): the UK will receive five equal payments for its share of the EU's paid-in capital of the EIF. The payments will be made on 30 June of each year starting on 30 June 2021.

[88] CSDP operations are financed through the Athena mechanism ; while contributions to the EDA budget are made by Member States according to a GNI-based formula, whereby contributions are proportional to the share of each Member State's GNI within the total GNI aggregate of the participating states.

7. Institutional Provisions covering Judicial and Administrative Procedures (Part 6)

Institutional Provisions: administering the Agreement

Articles 157 – 159 set out the institutional arrangements specific to the WA.

In line with UK proposals (as contained in a footnote in the amended transition text of 21 February 2018), the draft WA proposes setting up a Joint Committee for the oversight of the WA in **Article 157**. The proposed Joint Committee is to meet annually; **Article 157(3)** describes its jurisdiction as covering all interpretation, application and implementation concerns that either party may have concerning the WA.

The Joint Committee's role is to oversee the agreement as a whole, and it can adopt binding decisions in light of this function. Having a 'committee' as the primary governing institution is how most international agreements (including EFTA and the Swiss-EU bilateral agreements) operate: representatives from both (or all) parties make up a steering committee which, by consent, takes decisions regarding the agreement signed between the parties.

Article 158 proposes the creation of a number of 'Specialised Committees', functioning under powers delegated by the Joint Committee. The Specialised Committees proposed by the Commission cover the following parts of the draft WA:

- Citizens' rights
- Other separation provisions
- The Protocol on Ireland/Northern Ireland
- The Protocol on Sovereign Base Areas in Cyprus
- The financial provisions

The Specialised Committees are to be composed of experts in the relevant areas covered, and will ordinarily also meet once a year under the Commission's proposals. This contrasts with the Joint Committee, whose membership is described only as "comprising representatives of the Union and of the UK", and not necessarily experts in any of the specific parts of the WA.

Article 159 makes clear that the Joint Committee, and not the parties to the WA, is intended to govern the WA once concluded. It can take decisions that are binding on both parties and issue recommendations to the parties. This is less controversial than it sounds, however, as the Joint Committee is composed of representatives of both parties, and per Article 159(3), is intended to take all decisions "by mutual consent".

UK Government and Parliament concerns

In its draft text for discussion on the implementation period, 7 February 2018, the Government proposed text on the functioning of the Commission's proposed Joint Committee to oversee the withdrawal agreement. It stated:

> The UK agrees with the EU that a Joint Committee should be established to supervise the Withdrawal Agreement. The Joint Committee should have specific functions in relation to the implementation period, including resolving any issues which might arise concerning the proper functioning of the Agreement, having regard to the duty of mutual good faith which should apply between the UK and the EU, for example, in relation to acts of Union law adopted during the implementation period. Arrangements will need to protect the rights and interests of both parties.

The good faith clause has been inserted as Article 4a of the draft WA of 19 March.

The European Scrutiny Committee (ESC) found the Government's proposed text for the operation of the Joint Committee mechanism under the transitional arrangement "very vague", and did not think it made clear "whether the UK is seeking a similar unilateral right to that under the EEA Agreement to refuse to implement new EU law".[89]

The ESC report published on 20 March, EU Withdrawal: Transitional provisions and dispute resolution expressed concerns about the Government's proposals for a Joint Committee:

> More information is needed about the Government's proposals for the Joint Committee during the transitional arrangement. In particular, we consider that greater detail is required on what unilateral safeguards would be available to the UK if it had to apply new EU law which it considered to be detrimental. The need for such safeguards will become more pressing the longer the actual length of the implementation period. We support the Government's intention to seek assurances that new legislation would not be fast-tracked to the detriment of the UK during any transition period and ask how this could be contemplated given the repeal of the European Communities Act 1972 in the House of Commons. (Paragraph 51)
>
> 3. We ask the Government to demonstrate how the Joint Committee will ensure a high level of transparency and accountability. (Paragraph 52)
>
> 4. We also ask the Government to explain how the Joint Committee would deal with the large amounts of tertiary EU legislation which the UK would have to implement during the transition, given that the time between publication and entry into force of such acts is usually only a few months. This should include not only the manner in which these would be dealt with in the Joint Committee under the Withdrawal Agreement, but also how Parliament would be given a meaningful opportunity for scrutiny of these measures when it can no longer rely on the Government's representatives to vote on these measures in the Comitology system and the Council. (Paragraph 53)

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89 ESC, EU Withdrawal: Transitional provisions and dispute resolution, Nineteenth Report of Session 2017–19, para. 22

The European Parliament has called for the EU representatives on the Joint Committee to be "subject to appropriate accountability mechanisms involving the European Parliament".[90] But it remains to be seen whether the UK Parliament will have a similar level of involvement in the Joint Committee process.

Institutional Provisions: Enforcement and Dispute Resolution

Provisions reflecting the Joint Report

Many of the institutional provisions in Part 6 address aspects of the Joint Report of December 2017.

Articles 151 and 152 set out the monitoring and enforcement provisions agreed regarding citizens' rights, whereby UK courts would have the power to refer questions about the EU law referred to in Part 2 of the draft WA for a period of eight years following the end of transition, and UK compliance with Part 2 of the WA would be monitored by an independent authority set up by the UK for that purpose. An addition to Article 152 in the 19 March draft, however, introduces the possibility for this independent UK monitoring authority to be abolished (by agreement in the Joint Committee) at any point later than 8 years following transition. It is unclear what consequences this will have for the enforcement of Part II of the agreement.

Article 151 sets out the provisions giving the CJEU jurisdiction over citizens' rights queries, and gives UK courts the power to refer preliminary references (questions on the interpretation of EU law) for a period of 8 years post-transition. The text of Article 151 confirms that the CJEU's judgments on the interpretation of the articles on Citizens' Rights would be binding on domestic courts, as it states that the referral procedure would have the same legal effect as the Article 267 TFEU procedure which currently binds domestic courts.

This provision directly reflects paragraph 38 of the Joint Report. If Article 151 was implemented through the WAI Bill, this could mean that clause 6 (1)(b) of the EUW Bill, which provides that domestic courts cannot make references to the CJEU after exit day, may either have to be repealed, amended or not brought into force.

Article 155 similarly sets out conditions agreed in the Joint Report, regarding Commission participation in UK cases concerning Part 2 of the draft WA.

New Provisions on CJEU Jurisdiction

Part Three (Separation Provisions) and Part Five (Financial Provisions) both cross-reference significant parts of the EU *acquis*.

Article 153 makes clear that where there are any questions about the meaning (interpretation and application) of the law in question, these fall within the jurisdiction of the CJEU – meaning that enforcement actions (Articles 258 - 260 TFEU) and preliminary references (Article 267

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90 EP Resolution on the framework of the future EU-UK relationship, 14 March 2018

TFEU) in light of them will remain possible for the UK as well as the EU Member States. This too is unlikely to be controversial; as these parts of the agreement are time-limited and deal only with 'ongoing' procedures following transition, it seems logical that the CJEU would retain jurisdiction over the interpretation of EU law regarding those procedures.

However, other provisions of Part 6 set out a more general jurisdiction for the CJEU. The first example of this is **Article 154**, which suggests that the other Member States would be able to refer questions about the WA to the CJEU for interpretation. This does not appear time-limited; and as Part 2 of the draft WA is intended to last for the lifetime of the EU and UK nationals covered by its provisions, this would mean that the CJEU would remain able to pronounce on the meaning of commitments contained in the WA (with the UK able to submit observations) for almost another century. It is not entirely clear how this fits with the role of the Joint Committee, which (per Article 157) appears to have concurrent jurisdiction on the interpretation of the WA.

Dispute settlement

Title III of Part 6, **Articles 160 – 165**, covers dispute settlement. After setting out a general provision promising cooperation and (de facto) good faith negotiation between the parties in **Article 160**, it comments further on the intended future jurisdiction of the CJEU.

Article 162 was not alluded to in the Joint Report, but sets out a three-step dispute resolution procedure for any conflicts arising under the withdrawal agreement, should consultation and cooperation (as in Article 160) not lead to a mutually agreed solution.

First, notwithstanding the ability for the CJEU to hear any disputes about the interpretation and application of Parts Three and Five of the WA, both the UK and the EU can take any disputes to the Joint Committee administering the WA and ask it to resolve a dispute the parties are having. Under **Article 162(2),** the Joint Committee may issue a 'recommendation'. The procedure outlined sounds like non-binding mediation; Article 162(2) does not suggest that the 'recommendation' is binding on either party, but only that the Joint Committee will seek to find a solution acceptable to both parties.

Of greater interest is **Article 162(3)**, which makes clear that where a dispute has been brought to the Joint Committee, it is effectively out of the hands of the parties to the agreement. The Joint Committee will either, as per Article 162(2), put forth a recommendation, or if it cannot find a solution that will prove acceptable to both parties, under Article 162(3), it may *at any time* refer the dispute to the CJEU for a binding ruling (on the interpretation and application of the WA). Jurisdiction of the CJEU here is automatic and perpetual: the parties cannot opt out of such a reference, and the ability for the Joint Committee to refer questions about the WA is not time-limited.

There is a degree of sovereign decision-making implied in Article 162(3), in that it might be the UK who refers a dispute to the Joint Committee

in the first place, and thus 'consents' to it referring questions to the CJEU. However, **Article 162(1)** makes clear that either party can refer a dispute to the Joint Committee. It may consequently not be the UK who engages this process, but it will nonetheless be party to it.

Article 162(4) builds on this same referral process. Where either party has taken the dispute to the Joint Committee, should the Joint Committee fail to resolve the dispute or refer the dispute to the CJEU within three months, either party to the agreement may then refer it to the CJEU. In practice, the EU is perhaps more likely to exercise this option than the UK. All the same, the UK and the EU will both be aware of this possibility once a dispute is referred to the Joint Committee, per the text of Article 162. This provision goes beyond the analogous section of the EEA Agreement, under which a dispute can only be referred to the CJEU with the consent of the EFTA-EEA states.[91]

Where either the Joint Committee or one of the parties has referred an Article 162 dispute to the CJEU, and the 'losing party' to the dispute has not complied with the binding CJEU ruling resulting from that referral, the 'winning party' can bring a case before the CJEU. The CJEU will again have binding jurisdiction over such cases.

Article 163(2) makes clear that the CJEU could impose a lump sum or penalty payment on the 'losing party'. Where non-compliance has taken place, and presumably before the CJEU has responded with a lump sum or penalty payment, **Article 163(3)** makes clear that the 'winning party' can suspend parts of the agreement *other* than the citizens' rights part, as well as parts of any future agreement struck between the UK and the EU. Such suspension needs to be proportionate to the breach itself, and the CJEU will have the jurisdiction to judicially review any such suspension of benefits.

The WTO would suggest suspensions of benefits will be time-limited and should be supplanted by a CJEU ruling of lump sum/pecuniary penalty as well as belated compliance, but that is not made clear in Article 163.

The UK Position

Articles 162 onwards conflict with a clear UK 'red line': namely, the ending of the jurisdiction of the CJEU in the UK. Under these proposals, the 'appeals' mechanism that the WA will function under will always be the CJEU. This appears to be unprecedented in international law: in no international agreement is the neutral 'decision-making' authority the (de facto) constitutional court of one of the parties. There is consequently sympathy amongst commentators for UK opposition to this part of the Commission's draft.

There are further controversies in Part 6 of the text. **Article 165** appears to contain a more detailed version of the controversial "footnote 4" that was found in the Commission's draft text on transition of 7 February 2018. Where the EU determines the UK has not complied with an EU law obligation as determined in a CJEU judgment (whether

[91] See article 111(3) of the EEA Agreement.

enforcement procedure or preliminary reference procedure), and where this jeopardises "the functioning of the internal market, of the customs union, or the financial stability of the Union or its Member States", the Union "may suspend certain benefits deriving for the United Kingdom from participation in the internal market". This suspension of benefits would be time-limited (though possibly renewable) and appears to apply irrespective of any Union referral made about non-compliance to the CJEU.

The 'footnote' on which Article 165 is based was controversial when it appeared in the Commission's 7 February 2018 draft text, and has been softened slightly in that it now requires a CJEU judgment before sanctions can be applied. Inclusion of Article 165 might reflect on the combined fact that the CJEU works slowly and the UK will not technically be a Member State during transition, and consequently can be subjected to slightly separate and more stringent rules.

As with every part of the draft WA, the UK can object to this EU proposal in negotiations. Various commentators appear to think that it is an unreasonable inclusion on the part of the EU, in that subjecting the UK to both the CJEU and a 'back-up' mechanism is, again, unprecedented. Steve Peers has noted that "[t]he UK could argue that this is excessive and one-sided".

The 19 March draft WA

Where the UK and the EU have managed to find broad agreement on a wide variety of institutional matters set out in the draft WA, including on the creation and role of the Joint Committee as set out above and oversight of Part II of the agreement, the provisions on dispute resolution have indeed proven to be contentious. Beyond a general agreement to attempt consultations before seeking more formal dispute resolution in Article 160, and that the only possible means of dispute resolution applicable to the agreement will be found in the agreement in Article 161, none of the other provisions on dispute resolution have been agreed in principle. They also have not been amended, however, so it remains speculative what the UK response to the enhanced CJEU role proposed has been.

8. Protocol on Ireland/Northern Ireland

8.1 Introduction

How we got here

The Northern Irish border provides one of the greatest challenges to the Brexit negotiations.

Negotiations on the border have continued to be separated from other withdrawal issues. In June 2017 when formal negotiations began, talks on the border were separated into a 'dialogue.'

The December Joint Report also 'fudged' the issue. Instead of proposing one solution, it set out three scenarios. The first, and the UK Government's favoured option, is for the Irish border issue to be settled as part of the overall UK - EU future relationship. The second is that the UK will propose specific solutions to solve the Irish border issue. The third is where there is no agreed solution; in these circumstances the Joint Report committed the UK to:

> Maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.

The Protocol on Ireland and Northern Ireland is the EU's legal text for how this third or 'backstop' scenario could operate.

At the heart of the difficulties over Northern Ireland is that any proposed solution needs to try and reconcile three seemingly irreconcilable objectives:

- Avoiding a hard border in Ireland, including physical infrastructure to carry out customs and regulatory checks on goods flowing in either direction
- Allowing the UK to diverge from EU regulations
- Avoiding regulatory divergence between Northern Ireland and the rest of the UK.

In August 2017 the UK published a position paper on Northern Ireland and Ireland. It proposed two solutions to solve the border problem: firstly, a Customs Partnership. This solution envisaged the UK "would act on the EU's behalf when handling goods from the rest of the world", collecting EU tariffs at UK ports, supported by a new customs system.[92] The UK acknowledged in the position paper that it was an "innovative and untested approach".

The second approach was a "highly streamlined customs arrangement" utilising technology and online pre-screening checks as well as

[92] Financial Times, 'Can Theresa May's customs plan resolve Brexit dilemma?' 15 March 2018

expanded "trusted trader" schemes, to minimise border checks and infrastructure as much as possible.

They have both been rejected by the EU as insufficient to prevent a hard border. Neither position paper comprehensively addresses border checks not related to customs, such as the EU law requirement that all imports of live animals or animal products can only enter the Union via officially-designated 'Border Inspection Posts', where compliance with EU animal health and food safety law can be verified.

Debate on the technological solutions that might comprise such a stream-lined system have been heavily influenced by a report for the European Parliament's Constitutional Affairs Committee (AFCO) 'Smart Border 2.0.'

On 15 March, DExEU Minister Suella Fernandes said in a response in the Commons to a question on the Smart Border paper:

> The report to which he refers is an interesting document, but it does not go as far as the commitment made by the United Kingdom. Our unwavering commitment is to not introduce any physical infrastructure at the border. We have explicitly ruled that out. The report is interesting, but it does not go all the way.[93]

Leo Varadkar, the Irish Prime Minister, said on 12 March that using pre-registration schemes "is not a solution that we envisage".[94]

The conclusion of the Northern Irish Affairs Committee report on the border published on 13 March was that:

> We have had no visibility of any technical solutions, anywhere in the world, beyond the aspirational, that would remove the need for physical infrastructure at the border.[95]

Reaction to the Protocol

Commentary on the Protocol has been sharply divided. The Prime Minister has said that "no Prime Minister [of the UK] could ever agree" to what the Commission proposed in the Protocol.

Some politicians, including the former DExEU Minister David Jones, have said what the EU proposes amounts to an 'annexation' of Northern Ireland.

Arlene Foster, the leader of the Democratic Unionist Party, thanked the PM for her intervention and agreed that the Commission's draft Protocol was "constitutionally unacceptable", as it would create a hard border in the Irish Sea.

However, in response to some of these criticisms the Northern Irish Secretary, Karen Bradley, in evidence to the Northern Ireland Affairs Committee, emphasised that the Protocol only accounts for the 'backstop' solution provided for in the Joint Report:

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93 HC Deb 15 March 2018 c980

94 BBC News Online, 'Varadkar rules out post-Brexit border pre-registration,'12 March 2018

95 Northern Irish Affairs Committee, The land border between Northern Ireland and Ireland, 13 March 2018, HC 329, 2017-19, Page 54 para 8

> It is important to note that this is an initial attempt by the European Union to codify option C, which is the fall-back option if we are unable to resolve the border through the overall relationship or through the overall relationship in option B with some specific solutions for recognising the unique circumstances in Northern Ireland.[…] This is the EU's document.[96]

Leo Varadkar also made clear that this backstop solution was not the preferred solution of the Irish government, telling a news conference:

> I've always said that my preference is to avoid a hard border through a wider future relationship between the United Kingdom of Great Britain and Northern Ireland and the European Union.
>
> We're committed to playing our part in exploring this option, or alternative specific solutions, in a way that respects the structure of these negotiations and that will of course require further detailed progress to be put forward by the UK government.
>
> However, we must have certainty that if a better option proves unachievable, the backstop of maintaining full alignment of Northern Ireland with those rules of the single market and customs union that apply in order to protect north-south co-operation and avoid a hard border.[97]

Addressing the point on the EU 'annexing' Northern Ireland, Tony Connelly, RTE's Europe editor, wrote in the Financial Times:

> Those who accuse the EU of attempting to "annex" Northern Ireland might consider the much longer list of EU competences that are not explicitly covered: free movement of services and capital, employment and social policy, education, public health, consumer protection, tourism, civil protection and so on.[98]

8.2 Preamble

The Preamble to the Protocol largely recalls commitments already made by the UK and the EU and mirrors the language of the Joint Report.

Preambles are not legally binding. However, they do provide context for how legal provisions in the main body might be interpreted. Some of the preamble text is worth highlighting:

- There are two references to the "unique challenge" and the "unique circumstances" to/of the island of Ireland. This underlines two points. Firstly, the solutions offered by the EU do not form a precedent and will not be offered to other Member States or third countries. Secondly, that these creative solutions won't be available to other parts of the UK, such as Scotland, who wish to have greater access to the Single Market. The 15 March draft WA put another reference to "uniqueness" in the Preamble.
- The preamble refers to the "UK's commitment to North-South co-operation, guarantee of avoiding a hard border including any physical infrastructure, checks and controls and this must be compatible with the overall Withdrawal Agreement". These commitments were all made by the UK government in their

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96 Northern Irish Affairs Committee, 'Devolution and democracy in Northern Ireland – dealing with the deficit inquiry', 28 February 2018, HC 613, 2017-19, Q400

97 BBC News online, 'Ireland first, 'says Tusk after Varadkar meeting, 8 March 2018.

98 Financial Times, 'As Brexit approaches, the gulf between Britain and Ireland widens', Tony Connelly, 2 March 2018

position paper on Northern Ireland and Ireland. They set a challenging set of criteria for avoiding a hard border.

- The preamble also refers to "the people of Northern Ireland" in relation to citizenship and states that the definition is based on Annex 2 of the British-Irish Agreement - the International treaty between Ireland and the UK which forms part of the Good Friday Agreement. This Annex sets out that the people of Northern Ireland include:

> All persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

A group of academics at Durham, Birmingham and Newcastle Universities (de Mars et al) believe this definition will result in inconsistencies in how people living in Northern Ireland are treated:

> It appears from the definition that such individuals would not have to reside in Northern Ireland to be one of 'the people of Northern Ireland' – they only have to be born on the territory under the conditions above. As well as affording benefits to some groups and not others within Northern Ireland (e.g. EU or non-EU nationals in NI without permanent residency), this definition will allow those born NI who have since moved away from the country to reassert their Irish (and EU) or UK rights into the future.[99]

The definition of who the people of Northern Ireland are will have long-term impacts. A recent court case where a Belfast Court found against the Home Office in respect of an Irish citizen born in Northern Ireland trying to exercise her rights under freedom of movement, shows how complex definitions of citizenship can be in the region.

8.3 Chapter I: Rights of individuals

Article 1: Rights of individuals

This Article is based on the language of the Joint Report and upholds the principle that Brexit will not lead to a "diminution of rights" in Northern Ireland. It alludes to the fact that not all the provisions on human rights in the Good Friday Agreement have been fulfilled - for example, introducing a Bill of Rights in the region.

Unlike the Joint Report, Article 1 refers to an Annex which is meant to specify which provisions of Union law for the "protection against discrimination" are to be included in the "no diminution" pledge. However, this Annex has yet to be provided.

The question of whether the UK's withdrawal from the EU will lead to a diminution of rights is explored in more detail in Library briefing paper Brexit: 'sufficient progress' to move to phase 2 (pages 39-40).

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99 Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement, A 'Constitutional Conundrums: Northern Ireland, the EU and Human Rights' Project Report, by Sylvia de Mars (Newcastle University), Aoife O'Donoghue (Durham University), Colin Murray (Newcastle University), Ben Warwick (Lecturer, University of Birmingham)

Professor Dagmar Schiek of Queen's University Belfast states that Article 1 gives the EU an increased future role in guaranteeing the Good Friday Agreement:

> These two paragraphs, in their main substance, go beyond preserving any existing commitments under EU law, and elevate the European Union to a formal co-guarantor of the 1998 Agreement.[100]

8.4 Chapter II: Movement of persons

Article 2: Common Travel Area

Provisions on the Common Travel Area (CTA) have remained a relatively uncontentious part of the negotiations, partly because the CTA is a bi-lateral agreement, so this Article is largely based on the language of the Joint Report.

However, it also expands the obligation set out in the Joint Report that the UK respect the CTA "without affecting the obligations of Ireland under Union law, in particular with respect to free movement for Union citizens", by adding "and their family members, irrespective of their nationality, to, from and within Ireland". This added provision is a clarification rather than a new right, as freedom of movement across the EU is already applied to family members irrespective of nationality.

Article 2 does allow the UK and Ireland to:

> [m]ake arrangements between themselves relating to the movement of persons between their territories, while fully respecting the rights of natural persons conferred by Union law.

Professor Schiek explains the effect of this clause:

> Ireland would be barred from giving UK citizens special rights in Ireland which EU citizens do not enjoy. However, there would be little to hinder Ireland to give UK citizens the same rights as EU citizens enjoy.[101]

This Article has now been agreed by both negotiating teams.

8.5 Chapter III: Common regulatory area

Article 3: Establishment of a common regulatory area

Article 3 brings into being a common regulatory area (CRA) "comprising the Union and the United Kingdom in respect of Northern Ireland". The CRA "shall constitute an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected in accordance with this Chapter".

The CRA is the EU's solution to translating the provisions of the Joint Report, which called for a 'backstop' scenario that would arise if the UK could not provide a solution to leaving the Customs Union and Internal

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100 'The island of Ireland and the UK's withdrawal from the EU –a legal political critique of the draft withdrawal agreement.' Professor Dagmar Schiek, Queen's University Belfast, March 2018, Page 2

101 Ibid, page 4

Market, while not imposing a hard border. The Joint Report mandated that:

> The **United Kingdom** will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all island economy and the protection of the 1998 Agreement

Several commentators have drawn parallels between this text and Article 14 TFEU which regulates the EU's Internal Market and includes the text "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".

However, Professor Schiek argues that the CRA is a new and unique legal solution that does not have any direct parallel in existing EU law.[102]

The key phrase in Article 3 whose interpretation is likely to be contested is "in respect of Northern Ireland". The language of the Joint Report quoted above mandates that the whole UK would need to maintain full alignment. Article 3 anticipates there could be different regulatory regimes between Northern Ireland and the rest of the UK. The EU's view is that how the UK wishes to regulate its economy outside Northern Ireland is a matter for the UK. The UK Government would argue that this is providing a solution they unilaterally committed to avoiding in the Joint Report.

It is not entirely clear which areas are covered by "North-South cooperation". The Joint Report mentions the Good Friday Agreement, which identified six areas for cross-border cooperation: transport, agriculture, education, health, environment and tourism. Article 8 of this Protocol extends the areas of coordination to energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport.

Professor Schiek believes this raises questions, as it extends the CRA to include areas beyond the movement of goods, areas that:

> [m]ainly comprise services under Article 56 TFEU, with the exception of (higher) education, access to which is a right of economically inactive citizens as well. This raises the question whether the implementation process may lead to extending the common regulatory area beyond free movement of goods. Given that justice and security encompass lawyers' services, the question also could be raised whether freedom of establishment (through establishing a branch in either Ireland or Northern Ireland) is also comprised. Further, given the fact that both employers and trade unions have highlighted the importance of continuing access to labour especially for the agro-food sector, which of course raises the question in how far free movement of workers will be encompassed by the protocol. For all these aspects, more clarity on whether the implementation of the protocol may imply an extension of the common regulatory area would have been desirable.[103]

Article 4: Free movement of goods

[102] Schiek, page 5.
[103] Ibid, page 7.

This Article regulates how the free movement of goods will operate on the island of Ireland in the 'backstop scenario'.

Many of the Protocol's provisions draw upon EU law relating to the movement of goods in the Single Market. Annexes are referred to throughout Article 4, but are not yet filled. These Annexes will include specific goods that will be covered by the WA (Annex 2.1), and specific EU law relating to customs legislation (Annex 2.2), VAT legislation (Annex 2.3) and customs duties (Annex 2.4) that will apply.

Professor Schiek summarises the provisions relating to goods, with reference to the relevant EU Treaty Articles:

> To take full advantage of the EU Customs' Code, which only in 1993 enabled all Member States to abolish border controls of goods, Article 4 encloses Northern Ireland in the Customs Code (Regulation 952/2013 EU as amended), as well as into the VAT legislation, transforming the UK customs authorities competent for the territory of Northern Ireland into EU customs authorities. Implementing Article 4, including the collection and distribution of revenue, becomes the task of the Subcommittee of the Joint Committee for supervising the withdrawal agreement (Article 157 Withdrawal Agreement). Article 4 also references the prohibition of customs duties, of quantitative restrictions on imports and exports, on discriminatory and protective taxation complete with exceptions from the TFEU (Article 4 paragraphs 3-6 of the draft protocol on Ireland/Northern Ireland withdrawal agreement roughly correspond to Articles 30, 34, 35, 36, 110 TFEU).[104]

There are few points worth highlighting. Firstly, the provisions in Article 4 aim to ensure there remains a frictionless, invisible border between Northern Ireland and Ireland that entails no checks at the border. They take no account of the UK Government's commitment to "no new regulatory barriers" between Northern Ireland and the rest of the UK, as set out in paragraph 50 of the Joint Report. Although the UK did provide for an option for "distinct arrangements" if the Northern Irish Executive and Assembly consented. These provisions are also excluded.

Article 4(2), which states that the territory of Northern Ireland "shall be considered to be part of the customs territory of the Union," excludes the territorial waters of the UK. Mars et al say the consequence of this exclusion is:

> That all fish caught in the territorial waters of a Member State are treated as being EU customs goods, which can move freely throughout the EU. Until the future relationship between the UK and the EU is agreed upon, it is not clear if fish caught in the UK territorial waters will be treated as EU customs goods or as UK customs goods.[105]

This provision will also allow Northern Ireland to leave the Common Fisheries Policy (after the transition period) and for the UK Government

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104 Schiek, page 6

105 Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement, A 'Constitutional Conundrums: Northern Ireland, the EU and Human Rights' Project Report, by Sylvia de Mars (Newcastle University), Aoife O'Donoghue (Durham University), Colin Murray (Newcastle University), Ben Warwick (Lecturer, University of Birmingham)

to set a new UK-wide fisheries policy, should this be provided for in the future relations agreement.

Article 4(10) provides for "a mechanism for revenue collection and distribution". Professor Steve Peers suggests "the allocation of revenue could well be a contentious issue".[106] There would also have to be "reliable estimates of the percentage of goods entering Northern Ireland ports which are destined for Ireland".[107] This is because at present revenue collection and distribution is monitored and calculated at a national level.

Articles 5, 6 and 7

Articles 5, 6 and 7 set out how the CRA will operate in respect to agriculture and fisheries the Single Electricity Market and the environment.

All three Articles are implementing mechanisms that will ensure the relevant EU law will apply in Northern Ireland in respect to these areas. The specific legislation is supposed to be laid out in an Annex for each Article; these are yet to be provided. Rather than replicating the entire EU *acquis* in each of these areas, the EU will probably suggest specific regulations that they believe should apply to Northern-Ireland post-Brexit.

Agriculture and fisheries, and in particular the sanitary and phytosanitary regime, are of particular importance to trade across the island of Ireland, as the Northern Irish Affairs Committee reported in March this year:

> Dependency on cross-border trade is most notable in the agri-food sector. The Government acknowledges that North-South cooperation on agriculture means the island of Ireland has become "a single epidemiological unit for the purposes of animal health and welfare."[108]

As noted in Article 4, the customs territory will not include the territorial waters of Ireland, allowing for a Northern Irish fisheries regime that could be outside the Common Fisheries Policy.

On the issue of energy, the Prime Minister committed in her Mansion House Speech, to continued cooperation with the EU:

> On energy, we will want to secure broad energy co-operation with the EU. This includes protecting the single electricity market across Ireland and Northern Ireland - and exploring options for the UK's continued participation in the EU's internal energy market.[109]

Article 8: Other areas of North-South cooperation

Article 8 sets out areas beyond those mentioned in Articles 4-7, where cooperation, and therefore some shared legal provisions, will need to

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106 'The Return of the Border? Analysis of the Irish border provisions in the Brexit withdrawal agreement', Professor Steve Peers, University of Essex, 5 March 2018

107 Ibid

108 Northern Irish Affairs Committee, The land border between Northern Ireland and Ireland, 13 March 2018, HC 329, 2017-19, para 39

109 Prime Minister's Office, 'PM speech on our future economic partnership with the European Union', 2 March 2018

apply across the island of Ireland. The areas are the environment, health, agriculture, transport, education and tourism, as well as energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport.

However, the measures will only be required to "maintain the necessary conditions for continued North-South cooperation". So the full EU *acquis* will not need to apply in these areas. There are no specific obligations as to how this cooperation should operate.

Article 8 also provides for the UK and Ireland to make new arrangements on North-South cooperation, "building on" the Good Friday agreement, but says these arrangements should be "in full respect of Union law".

The Article also provides roles for the Joint Committee - it will monitor the "necessary conditions for North-South cooperation"- and the Specialised Committee, which can recommend specific measures to the Joint Committee. However, beyond making recommendations to the EU and UK, the Joint Committee is not endowed with any specific powers to enforce these, suggesting a looser supervisory system than the areas covered by Articles 4-7.

This Article has now been agreed by both negotiating parties.

Article 9: State Aid

This Article ensures that EU state aid laws will continue to apply to Northern Ireland, though only for "measures that affect trade" between Northern Ireland and the EU. Again, reference is made to an Annex that is blank, so it is not clear to what extent EU state aid law might potentially apply to Northern Ireland.

However, state aid is one of the areas where the Government has indicated it is prepared to remain closely aligned with the EU. In her Mansion House speech the Prime Minister announced: "we may choose to commit some areas of our regulations like state aid and competition to remaining in step with the EU's".[110]

This approach contrasts with the Labour Party, who while committing to create a customs union with the EU, have said they would also:

> [s]eek to negotiate protections, clarifications or exemptions, where necessary, in relation to privatisation and public service competition directives, state aid and procurement rules and the posted workers directive.[111]

8.6 Chapter IV: Institutional provisions

Article 10: Specialised Committee

[110] Prime Minister's Office, 'PM speech on our future economic partnership with the European Union', 2 March 2018.
[111] The Guardian, 'Jeremy Corbyn to confirm Labour wants a Customs Union with EU', 26 February 2018

This Article sets out how the Specialised Committee on Northern Ireland will operate. It is one of five specialised committees created by the draft Withdrawal Agreement.

The Committee will be composed of representatives from both the UK and EU. It excludes reference to any representative from Ireland. The Committee can examine proposals from the North-South bodies set up under the Good Friday Agreement, which is presumably how the bi-lateral UK/Ireland relationship is supposed to intersect with it.

The Specialised Committee can discuss issues relating to the Protocol and make recommendations to the Joint Committee in relation to the Protocol. Overall these are fairly limited roles, and the Specialised Committee is more of a forum than a decision-making body.

The Committee is also created to "facilitate the implementation and application of this Protocol". However, it is not given any specific enabling powers to do so, or to enforce any solutions. It will rely on escalating matters to the Joint Committee for action to be taken.

How important this Committee will be is likely to be influenced by the level of representatives sent by the UK and the EU (this is not specified in the Article), and whether North-South bodies decide to submit issues for it to discuss.

Article 11: Supervision and enforcement

Article 11 provides for enforcement mechanisms to regulate the common regulatory area. This Article would mean that the EU institutions and the CJEU would continue to have authority over the UK and its residents. De Mars et al explain what they believe is the basis for such a provision:

> In relation to a Common Regulatory Area on the island of Ireland, the EU institutions would have continuing authority over the UK and its individuals (to the extent allowed by EU law). The Court of Justice of the European Union would have judicial oversight over the exercise of those powers in the entirety of the UK. This is necessary if NI is inside a Common Regulatory Area, as there would need to be EU governance over that area to preserve its integrity and operation. Not all legislation that relates to the functioning of the Common Regulatory Area will be produced in Northern Ireland, given the UK's constitutional arrangements.[112]

Article 11 of the Protocol mirrors the language of Article 126 in the main body of the WA. However, Article 126 applies only during the transition period. Article 11 would apply in perpetuity to Northern Ireland after the transition period, unless otherwise amended.

An issue that requires further analysis is that Article 11 is applied to the whole UK, while Article 3 of the Protocol says the CRA only applies "in

[112] Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement, A 'Constitutional Conundrums: Northern Ireland, the EU and Human Rights' Project Report, by Sylvia de Mars (Newcastle University), Aoife O'Donoghue (Durham University), Colin Murray (Newcastle University), Ben Warwick (Lecturer, University of Birmingham)

respect of Northern Ireland". This extension to the whole UK may be deemed necessary as the UK will continue to have to legislate for non-devolved competencies in Northern Ireland. It is not clear why this provision does not make clear that such supervision by the CJEU and EU is only required for Northern-Irish matters.

Article 11 demonstrates the reach of the 'backstop scenario' and its implications for the whole UK.

Steve Peers questions why the EU bodies and the CJEU require such extensive powers, "given that the EU and Turkey agreed a customs union without equivalent provisions". He also points to the fact that Article 162 of the draft WA provides for a dispute resolution mechanism that includes a role for the CJEU, and argues that would be sufficient for enforcement of the CRA.

Dagmar Schiek lays out other implications that would arise from implementing Article 11:

> This would, for example, mean that any decisions and directives the EU Commission issues in relation to state aid have direct effect in Northern Ireland, and that the decisions of the European Court of Justice will have to be complied with for Northern Ireland as if the UK was still a Member State. Further, the Commission could continue to raise infringement actions against the UK for Northern Ireland's non-compliance with the protocol, and Northern Irish courts could refer cases to the Court of Justice of the European Union within the ambit of the protocol.[113]

8.7 Chapter V: General and final provisions

Article 12: Common provisions

Article 12 sets out which of the provisions of the main Withdrawal Agreement apply to the Northern Ireland Protocol. There are a few exceptions that are worth highlighting.

Firstly, Article 12(3) allows the Protocol to be updated should an EU act it refers to be amended or replaced. Once the Annexes are completed, the scope of the EU *acquis* applying to Northern Ireland, and how often the protocol might be amended, will be clearer.

Secondly, Article 12(4) creates an exception to Article 6 of the WA. Article 6 means the UK has 'no seat at the table' when the EU and its institutions make decisions. This part of the Protocol allows UK officials to attend meetings if an EU body is discussing UK residents, EU law relating to the Protocol, or where the UK's participation is needed by the EU. As elsewhere in the WA, UK representatives will have to be invited by the EU, by "exception" on a "case-by-case" basis, and the representatives will have no voting rights.

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[113] The island of Ireland and the UK's withdrawal from the EU –a legal political critique of the draft withdrawal agreement.' Professor Dagmar Schiek, Queen's University Belfast, March 2018, Page 7

Article 12 also states that the Protocol is to come into force after the transition period ends. This applies to all parts except for the setting up of the Specialised Committee, which is created when the WA is signed.

Article 13: Safeguards

Article 13 is modelled closely on the language of the 1994 EEA Agreement - specifically Articles 112 and 113. It is a mechanism that allows both Parties to take unilateral action, i.e. actions not prescribed by the Protocol, if "serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist" occur. However, these difficulties must be caused by the application of the Protocol; they cannot be put in place to remedy any emergencies on the Island of Ireland.

This power is also contained in provisions which call for such actions to be proportional to the harm being caused, and provisions that the other Parties may undertake their own reciprocal measures to counter-balance the effect of the emergency measures.

The safeguarding and rebalancing measures will be governed "by the procedures and dispute settlement arrangements set out in Annex 3". However, Annex 3 is yet to be completed and published.

We can, however, look to the EEA Agreement as the rest of Article 13 of the draft WA draws so heavily upon it. Article 114 of the EEA Agreement provides:

> 4. The Contracting Party concerned shall, without delay, notify the measures taken to the EEA Joint Committee and shall provide all relevant information.
>
> 5. The safeguard measures taken shall be the subject of consultations in the EEA Joint Committee every three months from the date of their adoption with a view to their abolition before the date of expiry envisaged, or to the limitation of their scope of application.
>
> Each Contracting Party may at any time request the EEA Joint Committee to review such measures

It is likely that the Joint Committee established by the WA will have a similar role to the EEA Joint Committee.

Article 14: Protection of financial interests

This Article is a commitment that both parties will "counter fraud and any other illegal activities" affecting their financial interests. It is an acknowledgement that the unique solutions required to keep the Irish border frictionless may lead to increased possibilities for smuggling and fraud.

The Northern Irish Affairs Committee report on the border states that smuggling has always been a feature of the border, and it continues today largely because of the existence of different excise and VAT regimes in Ireland and the UK. The Committee heard evidence that

increased smuggling could lead to a rise in paramilitary activity.[114] However, this will in part depend on the degree of difference in the UK's and EU's future tariff regimes. The Government's desire to pursue an independent trade policy would suggest that over time there is likely to be increased divergence in the UK's and EU's tariffs.

Steve Peers has suggested that Article 14 may require more detail, similar to that found in Article 325 TFEU, on which this Article is modelled. Article 325 calls for "co-ordinating actions" between Member States, and tasks the Commission to submit an annual report to the European Parliament and Council to show what action Member States are taking. If either Party proposes amending this Article similarly, then the Joint Committee could play a role in the monitoring of anti-fraud and smuggling activities.

Article 15: Subsequent agreement

Article 15 underlines that the Protocol is meant to be a backstop scenario and is not the preferred outcome of either party. Should the UK Government provide its own solution to reconcile its desire to leave the Single Market and Customs Union while avoiding a visible border with Ireland, then the Protocol will not be enabled. But Article 15 reiterates that whatever solution is found, it must address "the unique circumstances on the island of Ireland, avoiding a hard border and protecting the 1998 Agreement in all its dimensions".

This Article has now been agreed by both negotiating teams.

On 19 March the Prime Minister wrote to Donald Tusk to express her support for the Withdrawal Agreement text and to set out what areas still needed further work.

On Northern Ireland she remained hopeful that the future trading relationship would provide the solution to the border issues, but committed to exploring further solutions should it fall short:

> I continue to believe, as I set out at the Mansion House, that we can achieve a close partnership that provides for such a deep trading relationship between the UK and the EU that specific measures in relation to Northern Ireland are not required. This would be in the best interests of Northern Ireland and, of course, of Ireland. If our future partnership cannot completely resolve the issues in such a way as to meet our commitment on the border, I will want to explore additional specific solutions that can address those unique circumstances. I am committed to agreeing in the Withdrawal Agreement operational legal texts for at least the so-called 'backstop option' set out in the Joint Report, in parallel with discussion of these other scenarios.

[114] Northern Irish Affairs Committee, The land border between Northern Ireland and Ireland, 13 March 2018, HC 329, 2017-19, paras 105-6.

8.8 What next?

The Prime Minister's letter to Donald Tusk reiterates the UK's Government view that an agreement on future relations should be the focus of efforts to solve the Northern Irish border issue.

Analysis by Dr Katy Hayward and Professor David Phinnemore at Queen's University Belfast suggest that a 'deep and comprehensive Free Trade Agreement' is insufficient to avoid a hard border.[115]

The UK Government's approach is in contrast to that of the Irish Government, and Tony Connelly argues this will continue to cause tension and possibly a breakdown of the talks:

> The option of alignment is the radioactive core of the breakdown. Dublin believes Michel Barnier's negotiating mandate, granted by 27 EU leaders, provides for a generous interpretation of north-south co-operation. London believes that the interplay between north-south co-operation and the EU rule book is much more limited.
>
> The EU's mantra is that Brexit needs to be an "orderly withdrawal". The scope for a disorderly withdrawal on the island of Ireland is ample, so the border, in Dublin's view, is a withdrawal treaty imperative, not a free trade issue to be tackled later. The Irish government would prefer the border to be resolved through a free-trade agreement if possible, but believes a "backstop" must be in place in the meantime.
>
> That argument has been drowned out by the hue and cry over the draft treaty. With Mrs May boxed in so badly, few in Dublin expect the chemistry to get better any time soon.[116]

The Commission has published a schedule of meetings between the negotiating teams. An opening session at co-ordinators level took place on 14 March. The next meeting on customs, goods regulation, and sanitary and phytosanitary regimes is due to take place on 26 March.

Further Reading:

- The Conversation, EU Brexit withdrawal proposal: a lawyer explains the detail, Steve Peers, 1 March 2018.
- Politico, Brexit withdrawal text: What it says and what it means, 28 February 2018, updated 2 March 2018.
- Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement, A 'Constitutional Conundrums: Northern Ireland, the EU and Human Rights' Project Report, by Sylvia de Mars (Newcastle University), Aoife O'Donoghue (Durham University), Colin Murray (Newcastle University), Ben Warwick (Lecturer, University of Birmingham), March 2018.
- The island of Ireland and the UK's withdrawal from the EU – a legal political critique of the draft withdrawal agreement.' Professor Dagmar Schiek, Queen's University Belfast, March 2018.

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115 'The Northern Ireland/Ireland Border, Regulatory Alignment and Brexit: Principles and options in light of the UK-EU Joint Report of 8 December 2017', Dr Katy Haywood and Professor David Phinnemore, Queen's University Belfast, February 2018

116 Financial Times, 'As Brexit approaches, the gulf between Britain and Ireland widens', Tony Connelly, 2 March 2018

9. Provisions relating to UK Sovereign Base Areas in Cyprus, Gibraltar, the Channel Islands

9.1 The Draft Protocol relating to Sovereign Base Areas in Cyprus

The Commission's revised draft Withdrawal Agreement of 15 March 2018 includes an incomplete draft Protocol relating to the British military bases in Cyprus. The current legal base for the economic administration of the bases is a Protocol (Protocol 3) attached to the Treaty of 2003 whereby Cyprus acceded to the European Union. The need to address this issue in the light of Brexit has been acknowledged previously. The European Council's Guidelines of 29 April 2017 defining a framework for negotiations under Article 50 include, among others:

> Regarding UK Sovereign Base Areas in Cyprus, bilateral arrangements between UK and Cyprus should be respected if compatible with EU law (especially regarding EU citizens resident/working in Sovereign Base Areas).

However, the Joint Report of 8 December 2017 did not refer to Cyprus.

The new text goes some way towards filling the gap by indicating the principles to be applied ("the objectives set out in Protocol 3") and creating a "placeholder" for new mechanisms to be defined. The aim is stated to be to "ensure the proper implementation of the applicable Union law in relation to the Sovereign Base Areas in Cyprus following the withdrawal of the United Kingdom from the Union".

Cyprus was ceded to the British Empire by the Ottoman Empire in 1878, originally as a protectorate, in return for British support for the Ottoman Empire against Russian encroachments. It was redefined as a military occupied area in 1914 and later as a Crown Colony from 1925. When Cyprus became independent in 1960 the UK retained the two main military bases of Akrotiri and Dhekelia and surrounding land as "sovereign bases" which were recognised as such by Cyprus, Greece and Turkey in the Treaty of Guarantee. From the beginning the UK agreed to use the bases only for military purposes and not to install customs posts around them. This meant that although day to day mechanisms for administration were agreed directly between the UK Ministry of Defence and the government of Cyprus, the arrangements needed to be formalised and amended in international law when first the UK and then Cyprus joined the EU.

The two bases together cover 98 sq. miles. According to the MOD there are approximately 7,000 Cypriot residents, around 3,000 UK service personnel and around 3,500 dependants of service personnel. Most of the Cypriot residents work at the bases or provide goods and services to them.

Protocol 3 attached to the Accession Treaty whereby Cyprus joined the EU does not contain a set of "objectives" as such, but the preamble to

the Protocol notes that "one of the main objects to be achieved is ***the protection of the interests of those resident or working in the Sovereign Base Areas, and considering in this context that the said persons should have, to the extent possible, the same treatment as those resident or working in the Republic of Cyprus***". It further notes "the commitment of the United Kingdom ***not to create customs posts or other frontier barriers between the Sovereign Base Areas and the Republic of Cyprus*** and the arrangements made pursuant to the Treaty of Establishment whereby the authorities of the Republic of Cyprus administer a wide range of public services in the Sovereign Base Areas, including in the fields of agriculture, customs and taxation". [emphasis added]

Since there is general agreement between all the parties that the status of the UK bases should not be materially altered by Brexit, the main issue for negotiation concerns the detailed mechanisms for which a placeholder has been left in the draft Withdrawal Agreement.

This is because the current mechanism, contained in Article 6 of the 2003 Protocol, assumes that both the UK and Cyprus are members of the EU and that the Council has the power to amend the detailed provisions:

> Article 6
>
> The Council, acting unanimously on a proposal from the Commission, may, in order to ensure effective implementation of the objectives of this Protocol, amend Articles 2 to 5 above, including the Annex, or apply other provisions of the EC Treaty and related Community legislation to the Sovereign Base Areas on such terms and subject to such conditions as it may specify. The Commission shall consult the United Kingdom and the Republic of Cyprus before bringing forward a proposal.

With the agreement of the Commission, the UK and Cyprus commenced bilateral negotiations to resolve these issues in October 2017. According to the Cypriot CNA news agency, the foreign minister of Cyprus told his Parliament that "what is being sought is to safeguard the same rights that Cypriot nationals enjoy under the current regime". Bloomberg news agency reported him optimistic that a solution would be found and his main concern was that in the event of a "hard Brexit" with no withdrawal agreement, the status of the sovereign bases and their residents could be left in "limbo".

9.2 Gibraltar

Background information on Gibraltar's status within the EU and the outcome of the 2016 referendum was provided in Library Briefing Paper 7963 Brexit and Gibraltar in May 2017.

Gibraltar joined the EU in 1973 as an external European territory of the UK. It was exempted from the Customs Union and certain other provisions, but has otherwise enjoyed full access to the Single Market. Gibraltar did not join the Schengen group. The consequence of these arrangements has been that the freedoms of the Single Market generally apply at the Spain/Gibraltar border, but there are exemptions

in place for certain goods and Spain is entitled to carry out customs checks and checks on people crossing. A new agreement will be required to reflect the circumstances of Brexit.

The Commission's revised draft WA of 15 March 2018 defines the territorial scope of the Agreement as including Gibraltar "to the extent that Union law was applicable to it before the date of entry into force of this Agreement" and a footnote recalls paragraphs 4 and 24 of the European Council guidelines of 29 April 2017 regarding Gibraltar. Article 4 of those guidelines set out the general principle that withdrawal should be orderly and minimally disruptive. Article 24 referred specifically to Gibraltar and stated:

> After the United Kingdom leaves the Union, no agreement between the EU and the United Kingdom may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom.

A new agreement applying to Gibraltar is likely to take the form of a separate Protocol alongside the main Withdrawal Agreement, but there is as yet no "placeholder" for this in the Commission draft. Nor is there a proposal for a specialised committee to oversee arrangements relating to Gibraltar in the way that is proposed for the Cyprus sovereign bases and for Ireland (draft Article 158).

The *Financial Times* reported on 26 February 2018 that it had been told by the Spanish foreign minister Alfonso Dastis that Spain wants a bilateral deal with the UK that includes "managing the airport together" as well as greater co-operation on tax fraud and tobacco smuggling. Mr Dastis had also said that he would be prepared to accept representatives of Gibraltar itself in the UK delegation in future talks. The airport has long been a bone of contention because Spain claims that it is built on land (the isthmus which joins Gibraltar to the mainland) which was not covered by the Treaty of Utrecht and therefore rightfully belongs to Spain. Mr Dastis told the *FT* that he did not expect bilateral agreement with the UK in time for the March 2018 EU Summit, but the negotiation would have to be completed by the autumn of 2018.

According to the Spanish newspaper *El Pais* on 2 March 2018, there have been three "technical" meetings on this subject between senior FCO and Spanish Foreign Ministry officials over the past year and the talks are said to be "on track". It reported, however, that the Spanish side has reasserted that there must be bilateral agreement between the UK and Spain in accordance with Article 24 of the European Council guidelines before this can be incorporated in the WA.

UK ministers have declined to comment in detail on these discussions other than to offer general reassurance. In answer to an oral question about the Spanish "veto" on new arrangements for Gibraltar on 1 March, the Leader of the House (Andrea Leadsom) responded "I hope I can give my hon. Friend the assurance from the Dispatch Box that Gibraltar's interests will be protected, as will every other part of the UK and our dependencies".

The UK/Gibraltar Joint Ministerial Council (JMC) met in London on 7 March 2018. Following the meeting the UK Government released a statement concerning ongoing economic and other relationships between Gibraltar and the UK in the context of Brexit, but questions concerning discussions with Spain and Gibraltar's future relationship with Spain and the EU were not addressed. In a parliamentary written statement of 12 March, however, Robin Walker (Parliamentary Undersecretary) reiterated the outcomes of the JMC and added: "The UK remains committed to fully involving Gibraltar as we leave the EU. We will continue to work together through the JMC process to ensure we take account of Gibraltar's priorities in our negotiations with the EU".

On the same day a Lords Parliamentary Question about the reported interest of Spain in negotiating joint management of the Gibraltar airport was answered by Lord Ahmad on behalf of the Government in the following terms: "The UK and Gibraltar continue to support the 2006 Cordoba Agreement on Gibraltar Airport which already provides for its enhanced use to benefit communities in both Gibraltar and Spain. We believe that a thriving Gibraltar airport can help deliver shared prosperity for the wider region".

On 20 March there were press reports (e.g. *Guardian* online, *El Pais* online) indicating that Spain is one of the Member States that has yet to signal its agreement to the draft WA. This would be because there is still only an indirect reference in a footnote to Article 3 on territorial scope to the fact that the Commission's negotiating guidelines required Spain to give its separate agreement to the proposed arrangements for Gibraltar.

9.3 The Isle of Man and the Channel Islands

The Isle of Man and the Channel Islands (the UK Crown Dependencies) did not join the EU with the UK in 1973 and their citizens (unlike those of Gibraltar which is part of the EU) had no vote in the 2016 referendum. Instead, the Isle of Man and the Channel Islands have enjoyed a relationship with the EU which is governed by Protocol 3 attached to the UK Accession Treaty. This provides, among other things, that the Isle of Man and the Channel Islands are within the EU Customs Union and benefit from free movement of agricultural and industrial goods between themselves and the EU.

The House of Lords EU Committee published a report in March 2017 on Brexit – The Crown Dependencies. The report was debated on 23 January 2018. Replying to the debate on behalf of the Government, Baroness Goldie gave the following update:

> A number of noble Lords asked how we represent the Crown dependencies in negotiations and how we take full account of their priority interests in that process… The Crown dependencies have identified six priority areas where the UK's exit from the EU is likely to have the greatest implications for their jurisdictions. They are: justice, security and migration; agriculture and fisheries; customs; financial services; transport; and the digital single

> market. We are committed to remaining engaged with the Crown dependencies on these areas.
>
> (…)
>
> In conclusion, we remain fully committed to getting the best possible deal in negotiations on Brexit, not just for the United Kingdom but for all British jurisdictions, including the Crown dependencies. Our ongoing, regular engagement at both ministerial and official levels demonstrates this. We remain fully committed to continuing to work closely with the Governments of the Crown dependencies to ensure that their priorities are taken into account throughout the exit process and beyond.

The Isle of Man and the Channel Islands are mentioned in the draft WA only in Article 3 which defines the territorial scope of the agreement. Draft Article 3 establishes that these territories, along with Gibraltar and the UK sovereign bases in Cyprus, will be within the scope of the Agreement "to the extent that Union law was applicable to them before the date of entry into force of this Agreement".

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