

REPORT

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**Negotiating Brexit:**  
*The Legal Landscape*

By Richard Gordon QC and Alastair Sutton

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## CONTENTS

About the Authors	4
Executive summary: key points	5
Background	7
Approach of this paper	8
Essential terms in understanding the negotiations	9
The European Council guidelines	11
The mandate	14
Position papers, future partnership papers and other policy documents	22
General approach of the EU to the Brexit negotiations	24
Article 50 - The legal framework for the negotiations: its practical implications	32
Article 50: legal and constitutional aspects	35
The future of UK/EU relations after 29 March 2019: A transitional phase?	36
A future partnership?	41
EU Withdrawal Bill and Brussels negotiations	45
The negotiations and the devolved administrations	49
The Crown Dependencies and Overseas Territories	61

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## ABOUT THE AUTHORS

Richard Gordon QC is a practising barrister specialising in constitutional and administrative law. He has given evidence to several select committees on constitutional matters and was appointed as a specialist adviser to the Public Administration Select Committee in respect of its inquiry into civil service impartiality. He is the author of many works in this area including *Repairing British Politics: A Blueprint for Constitutional Change* (Hart, 2010) and (as a contributor) to the festschrift for Vernon Bogdanor *The British Constitution: Continuity and Change* (Hart, 2013). He has co-authored five previous papers for the Constitution Society: *Select Committee Powers: Clarity or Confusion* (2012), *Parliamentary Privilege: Evolution or Codification?* (2013), *Brexit: The Immediate Legal Consequences* (2016), *Using the Prerogative for Major Constitutional Change* (2016), *Preparing for Brexit: The Legislative Options* (2017). He was leading counsel for Wales in the high-profile Brexit case of *Miller v. Secretary of State for Exiting the European Union* (judgment, January 2017) and has also advised the Electoral Commission over the conduct of the 2016 EU referendum and the 2017 general election and, more recently, the Welsh Government over the DUP deal following the general election. In company with Lord Neuberger (former President of the UK Supreme Court) he gave oral evidence to the Constitution Committee of the House of Lords on the EU (Withdrawal) Bill on 1 November 2017.

Alastair Sutton has been immersed in European Union Law for nearly 40 years, as an EU official and as a practitioner. His practice is primarily advisory and covers a broad spectrum of EU law issues, in particular the internal and external law of the Single Market. Alastair Sutton was the legal advisor to the Commission Vice President responsible for the launch of the Single Market project between 1985 and 1990 and his legal practice over the last 20 years has reflected this experience. He advises both private entities and State entities (including those outside the EU) on a wide range of EU law areas including EU constitutional law, the internal and external law of the Single Market (especially financial and related services), business taxation, competition, state aids, external relations, energy, environmental protection and international economic law. He has experience in appearing before the European Courts and also assisting in domestic litigation.

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## EXECUTIVE SUMMARY: KEY POINTS

1. Brexit is a development of substantial political, economic and constitutional importance to Europe as a whole. Its effect will greatly influence both internal and external relationships of the United Kingdom for many years.
2. It is therefore important to ensure an understanding of the issues arising in the Brexit negotiations in Brussels not only from a domestic but also from an EU perspective. In contrast to most of the coverage of Brexit in the UK (whether by academics or the media) much of the analysis here is from a European perspective, including an outline of the framework provided by EU law and procedure for the implementation of Article 50 of the Treaty on European Union.
3. The EU is well prepared for the negotiations and has issued several foundational documents including Guidelines, Negotiating Directives ('mandate') and several Position Papers which inform its approach.
4. The EU approach is different from that of the UK in several important respects. The EU regards the continuation of the *acquis* (the body of EU law since 1958 up to the present day) as important in areas of continuing relevance (such as citizens' rights). With that stipulation comes the necessary continuing jurisdiction of the Court of Justice of the European Union ('CJEU').
5. The mandate reflects the fact that the EU's approach to Brexit as to other negotiations with third countries, is based on the Union *acquis*. It is important (but certainly difficult) for the UK to understand that negotiations with the EU27 do not start - on a basis of equality - with each party having adopted its negotiating position and then proceeding to a compromise. The political and economic weight of the EU (as the world's biggest economic entity) and the procedural complexity of its decision-making means that once the EU has agreed a common position for negotiations, making significant changes in the course of negotiations can be difficult and time-consuming.
6. The UK approach is more pragmatic, less well prepared and more preoccupied with political considerations than the EU. It does not appear to discern the difference between the parties' differing perspectives.
7. These differences will become increasingly important as time runs out under Article 50 (the provision of the Treaty on European Union under which the UK, as a Member State, instigated in March 2017 the two-year phase under which exit negotiations are taking place).
8. There may now be insufficient time to negotiate even a transitional phase whereby EU law in only selective respects continues after Brexit. Such difficulties might, however, be avoided by a short transitional phase whereby the entirety of the EU *acquis* continued even after our exit from the EU enabling a longer time for negotiations under Article 50 to continue without the need for an extension of time for Brexit by the remaining 27 Member States under Article 50(3).

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9. However, whether or not a ‘selective’ transitional phase is possible (and there are fundamental doctrinal differences between the UK and EU as to what might be included in such phase) there will be no alternative but to leave the EU on or before March 29 2019 unless the UK’s notification under Article 50 is revoked (it is uncertain whether it may be revoked) or the remaining 27 Member States agree to an extension of time (this seems improbable in the extreme even if the UK wanted it).
  10. If a transitional phase is not agreed there will be no alternative but to revert to WTO rules. This carries serious economic risks for the UK.
  11. The EU (Withdrawal) Bill is the legislation crafted to ensure that Brexit works in UK law. However, there are many uncertainties about the drafting of the Bill and, indeed, whether it will survive its path through Parliament. Already, a full debate on the Bill has been delayed.
  12. Moreover, the Withdrawal Bill does not obviously promote the continued application of EU law in the UK after Brexit for a transitional period.
  13. The political position (and hence the success of the negotiations from a UK perspective) is further complicated by the fact that the approach of the UK government is in many respects contrary to the perceived interests of the devolved administrations.
  14. There is an urgent need to involve the devolved governments in the Brexit negotiations given that some of the threshold issues are tied into their interests and the Brussels negotiations cannot proceed to trade negotiations without these issues being resolved. If they are not resolved it is possible that Scotland (at least) and perhaps Wales may refuse to give legislative consent to the Bill. At present, the mechanisms for involving the devolved governments in the outcome of the Brussels negotiations are weak.
  15. Little attention has, thus far, been given to the position of the crown dependencies and overseas territories. This needs to be addressed on a case-by-case basis and with far more attention than has so far been devoted to it.

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## BACKGROUND

The UK invoked Article 50 of the Treaty on European Union ('TEU') on March 29 2017 giving notice to the European Union ('EU') of its intention to leave the EU. Subject to any extension of time granted by all the remaining Member States, Article 50 mandates a maximum of 2 years from the giving of that notice before the EU Treaties cease to apply to the UK. During that time negotiations have taken place, are taking place, and will continue to take place to try to determine the terms of exit and the future relationship between the UK and the EU.

This paper contributes to the discussion in the UK, in Europe and beyond on this process of withdrawal of the UK from the European Union. Politically, economically, legally and strategically 'Brexit'<sup>1</sup> is among the most important developments in Europe since the fall of the Berlin Wall (and the reunification of Germany and EU accession of a number of former Communist states). In terms of UK foreign policy, it ranks, in importance, alongside developments leading to the First and Second World Wars. Domestically, UK withdrawal is likely to influence for decades the constitutional relationship of the UK with its devolved regions, Overseas Territories ('OTs') and Crown Dependencies ('CDs') and indeed the wider world, not least the Commonwealth.

In contrast to most of the coverage of Brexit in the UK (whether by academics or the media) much of the analysis here is from a European perspective, including an outline of the framework provided by EU law and procedure for the implementation of Article 50 of the Treaty on European Union ('TEU'). Viewing Brexit from an EU perspective is a salutary reminder that the Brexit process is one of negotiation rather than domestic legislative prescription.

Prior to the giving of notice by the UK under Article 50, the EU was a mere spectator to the internal political wrangling following the result of the EU referendum on June 23 2016. However once Article 50 was invoked, the EU response was both rapid and co-ordinated.

On April 29 2017 the European Council adopted *Guidelines* (explained below) defining the framework for the negotiations and outlined the EU's overall position and principles. Michel Barnier was appointed as Chief Negotiator for the 27 EU countries. As explained on the Commission's website, his taskforce at the Commission '*co-ordinates the work on all strategic, operational, legal and financial issues relating to the negotiations.*'

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1 The term 'Brexit' is used in this paper as shorthand for the withdrawal of the UK from the EU under Article 50 TEU.

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## APPROACH OF THIS PAPER

In what follows, we cover the following topics:

- (i) Essential terms in understanding the negotiations.
- (ii) The European Council Guidelines.
- (iii) The Negotiating Directives ('mandate').
- (iv) Position papers, future partnership papers and other policy documents.
- (v) General approach of the EU to the Brexit negotiations.
- (vi) Article 50 – the legal framework for the negotiations: its practical implications.
- (vii) Article 50 – legal and constitutional aspects.
- (viii) The future of UK/EU relations after March 29 2019: a transitional phase?
- (ix) A future partnership?: The 4 options
- (x) The WTO option: back to 1972?
- (xi) The EU (Withdrawal) Bill and the Brussels negotiations.
- (xii) The negotiations and the devolved administrations.
- (xiii) The Crown Dependencies ('CDs') and Overseas Territories ('OTs').

Our paper takes into account the results of the European Council or 'Summit' held in Brussels on 19-20 October 2017, following recent intensive diplomacy by the UK Prime Minister with a number of her colleagues in other Member States (particularly Chancellor Merkel) and a discussion over dinner in Brussels with Commission President Juncker and his negotiating team.

This activity on the part of Theresa May has led to the European Council at least opening the door to a discussion of the future bilateral relationship between the UK and the EU27 early in 2018. Thus the Summit instructed the Council and the Commission to start internal preparatory discussions on the framework for the future relationship and on possible transition arrangements,<sup>2</sup> with the next European Council in December assessing progress and deciding whether to issue additional guidelines for the next phase of negotiations.

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<sup>2</sup> 'which are in the interest of the Union and comply with the conditions and core principles of the guidelines of 29 April 2017'

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## ESSENTIAL TERMS IN UNDERSTANDING THE NEGOTIATIONS

All negotiations between the 28 Member EU and third countries (most recently those for free trade area, economic partnership or association agreements with Canada, Korea, Japan and Ukraine) are massively time-consuming, legally and technically complex and above all – given the diversity of interests of the 28 Member States – politically sensitive.

Withdrawal negotiations under Article 50 are however of a rather different order. They are uniquely challenging, not least because they fall into at least two (and, as it now appears in the case of the UK) three stages: (i) ‘divorce’, (ii) entering into a new relationship and (iii) a ‘bridging arrangement’ between the two (the so-called ‘transitional period’).

For each stage, at least one *mandate* is legally required on the EU side.<sup>3</sup> Each mandate requires a Commission proposal, agreement of the Council (and, in practice if not in law, consultation of the Parliament). On the UK side, not least because the UK is the ‘*demandeur*’ in the process, clear instructions must be given to the UK negotiator on the goals to be sought in all three phases of the withdrawal process, following whatever internal procedures the British Government is required constitutionally to follow.

In order to understand the practical impact of Article 50 as the legal framework for the negotiating process a few other terms also require explanation at this stage,

In the special case of Article 50, over-arching *Guidelines* (preceding the mandate) have been provided by the European Council. Neither the guidelines nor the mandate are binding in the same way as, for example, other EU instruments such as regulations, directives or decisions. Indeed, as negotiations progress, and the EU’s negotiator is faced with alternative or compromise proposals from the other side, flexibility is likely to be required to reach a mutually acceptable compromise. For this purpose, the Commission is in constant contact with Member States in the Article 50 Working Party, as well as the European Parliament, given the requirement for the latter’s consent to the final Article 50 agreement. It may, indeed, be expected that, as negotiations progress, the need for adaptations might become greater, especially on the economic and trade aspects of any transitional arrangement.

The term *third country* is also important in EU jargon. Experience over the last 44 years, with 7 enlargements of the EU from 6 to 28 States has demonstrated to the acceding States the crucial difference between membership and non-membership of the ‘club’. The explanation lies in the legal nature and origin of the EU as a preferential trading area under GATT Article XXIV.

Thus, when allegations are made in the UK that the EU wishes in some way to discriminate against the UK as a withdrawing Member State, this is more the inevitable consequence of leaving a preferential trading system than any desire by the 27 to punish the UK or deter other Member States from following the UK’s example.

In the case of Article 50, the reality is that the withdrawing Member State becomes – in fact if not in law - a third country by virtue of the operation of Article 50(4), under which the UK (in this case) is excluded from discussions of the European Council and Council or in decisions concerning it on all issues relating to withdrawal. Experience so far shows that although the UK

<sup>3</sup> See Article 218 TFEU (mandate is the colloquial term for a *negotiating directive*: see Article 218(1)).

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Prime Minister has referred to the UK's intention to take its seat in the European Council until the end of March 2019, in practice the UK does not participate in EU27 discussions on the Union's future work programme up to and beyond 2020.

The political and practical consequences of being treated as a third country by the EU have not been fully understood in the UK. This is perhaps not surprising after 44 years as an EU Member State. However, third countries such as Switzerland (a near neighbour of the EU), Canada, Korea and Japan (all of which have recently negotiated – or are still negotiating - trade agreements with the EU) are well aware of the difficulties involved in negotiating with a bloc of 27 sovereign and diverse States, which seek to speak with a single voice in the negotiations.

This is a 'secondary' status<sup>4</sup> which the UK may find even more difficult to accept than did the EFTA/EEA countries which joined the EU in 1995, principally because of the advantages of being 'at the table' when the Single Market was being discussed and not 'outside looking in'. In its statement of 'core principles' however, the Council reiterates that, although the EU seeks to have the UK as a 'close partner', a non-Member of the Union, *'that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member.'*

A further important piece of terminology is voting in the Council (or the European Council) in the Article 50 process. Article 50 (2) provides that the *'agreement setting out the arrangements for [its] withdrawal shall be concluded on behalf of the Union by the Council, acting by a qualified majority after obtaining the consent of the Parliament'*. In this context, the qualified majority is to be calculated, in accordance with Article 238(3)(b) TFEU, excluding the votes of the UK. In practice and in this highly political case, it is likely that the Council would not vote in the formal sense but would seek to find a consensus embracing all Member States. To the extent that the Article 50 agreement includes transitional arrangements covering matters outside the exclusive competence of the Union, the agreement would in any event require unanimity in the Council.

Finally the term *acquis communautaire* (often referred to as the *acquis*) requires comment. The material scope of the *acquis* (the accumulated body of EU law obligations from 1958 to the present day) which the UK may seek to preserve in a transition or even definitive agreement as a non-member State, will be crucial and may well be difficult to define with legal precision.<sup>5</sup> When a third country seeks access to the EU market, for example in a customs union, free trade or association agreement, the starting point for the EU, on a sector by sector basis<sup>6</sup> is the body of EU law applicable in that sector. This is particularly the case for negotiations with the EU's 'near neighbours' with their particular dependence on access to EU markets, but also for potential partners such as the United States, where the ultimate objective is mutual recognition of rules, standards, procedures, decisions etc. Ultimately, the extent to which a third country (like the UK) can rely on its own *acquis* as a basis for access to EU markets depends on market power and the extent to which the UK market is important to its partners and whether the EU is prepared to recognise UK laws, regulations and procedures as equivalent to those in the EU.

There is no doubt that, both for the transitional arrangement and for the definitive bilateral 'future

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4 'Secondary' in the sense that, both in bilateral and multilateral negotiations and relations more generally, the EU gives absolute priority not only to achieving agreement amongst its Member States and Institutions (including the European Parliament), but also to securing maximum respect for the *acquis communautaire*.

5 The reason for this is explained below but has to do with the 'integrated' nature of EU law, especially under the Lisbon Treaty since December 2009.

6 E.g. pharmaceuticals, food products, electronics, automobiles, banking, insurance etc.

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arrangement’, the UK will be required to comply with the EU’s evolving *acquis*<sup>7</sup> in order to secure market access in the EU, whether this is in goods, services, professional qualifications or other areas (e.g. civil aviation). A helpful point of reference for identifying the *acquis* on a sector by sector basis are the 34 Chapters of the EU *acquis* which are used by acceding States in their screening and accession negotiations. It may be essential for the UK to make use of these ‘Chapters’ when identifying the precise sectors in the ‘Single Market and Customs Union’ where the UK ostensibly wishes to retain market access for a transitional period after withdrawal.

## THE EUROPEAN COUNCIL GUIDELINES

The Guidelines identify four possible phases to the withdrawal process. These are:

- (a) to provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the UK’s withdrawal and to ‘*settle the disentanglement*’ of the UK from the EU.
- (b) Once the European Council has decided that ‘*sufficient progress*’ has been made under (a) above, to engage in ‘*preliminary and preparatory discussions*’ on the framework for the future relationship between the UK and the EU.
- (c) ‘*[T]o the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interests of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made. Any such transitional arrangements should be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply.*’
- (d) As far as the future relationship is concerned, once the UK has left the Union and become a ‘third country’, the Council Guidelines indicate that whilst a ‘*close partnership*’ is desirable, going beyond trade, this cannot amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning. In addition, the Guidelines underline the need for any future arrangement to protect the EU27’s interests in areas such as competition, state aids, tax, environmental, social and regulatory measures and practices.

Against this background, Article 50(2) TEU provides that:

*‘In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.’*

The Guidelines were formally adopted by the European Council on 29 April 2017, precisely one

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<sup>7</sup> The EU’s *acquis* evolves of course almost on a daily basis with new regulations, directives and decisions, new rulings of the European courts and new ‘soft law’ emerging from the (literally) thousands of specialised committees which manage and administer the *acquis* on a sectoral basis.

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month after the UK's formal notification of withdrawal on 29 March. They had of course been in preparation for far longer, allowing the development of a strong consensus between the 27 Member States, as well as the three main EU Institutions. The guidelines (which will be updated by the European Council as the need arises) stress the need for the Union to maintain its unity and to *'act as one'* in the negotiations. The Council emphasises the exclusive nature of the *'unified approach'* in ruling out *'separate negotiations between individual Member States and the UK on matters pertaining to the withdrawal of the UK from the Union.'* Although Brexit presents novel challenges to the EU, there are some material parallels between the Article 50 process and the EU's approach to negotiations with third countries<sup>8</sup> generally, for example in the field of trade policy under Article 207 TFEU.

Crucially - but understandably – the Guidelines aim, first and foremost, at the protection of the interests of the EU27. This is perhaps an obvious point, although the treatment of the Brexit process in the UK media (as well as in UK political circles) tends to give the impression that Brexit primarily concerns the UK's interests. Thus, the Guidelines provide that *'the Union's overall objective in these negotiations will be to preserve its interests, those of its citizens, its businesses and its Member States.'* It is no surprise therefore that the future legal status of EU citizens and businesses in the UK after withdrawal, has proved to be one of the most difficult issues in the early stages of the withdrawal negotiations.

The Guidelines emphasise the legal uncertainty, both in the EU and in the UK, which the UK's decision has created.<sup>9</sup> With this in mind, the European Council decided on a phased approach to the negotiations, giving priority to an orderly withdrawal.<sup>10</sup> This *'phased approach'* has caused frustration in the UK, where the need for clarity on the future bilateral relationship between the EU27 and the UK has top political priority. For the EU however, it seems obvious that resolving the internal legal, financial and administrative issues caused by the UK's (unilateral and unsought) decision to withdraw, will predominate as a first priority.

This remains the EU's first priority, although in response to a plea from the British Prime Minister, the European Council on 19-20 October 2017 invited the Council and the Commission to start internal preparatory discussions on the framework for the future relationship and possible transitional arrangements.

It is useful to summarise some of the ten points covered by the European Council under the heading of *'arrangements for an orderly withdrawal'*.

The **first** priority (coming even ahead of the financial settlement) for the EU is an agreement on *'reciprocal guarantees to safeguard the status and rights derived from EU law'* of EU and UK citizens.

**Secondly**, recognising the dangers to UK and EU businesses of Brexit, negotiations should seek *'to prevent a legal vacuum'* and address legal uncertainties.

**Thirdly**, there should be a *'single financial settlement'* ensuring that the UK respects obligations *'resulting from the whole period of the UK membership of the Union'*.

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<sup>8</sup> The treatment of the UK as a 'third country' virtually from the start of the formal Article 50 negotiations is dealt with below. The political significance of this has largely been missed in the UK (see above).

<sup>9</sup> "Citizens who have built their lives on the basis of rights flowing from British membership of the EU face the prospect of losing those rights. Businesses and other stakeholders will lose the predictability and certainty that come with EU law."

<sup>10</sup> Emphasising in particular the absence of a legal vacuum.

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**Fourthly**, on the island of Ireland, the EU commits to seeking *'flexible and imaginative solutions'*, with the aim of avoiding a hard border but *'while respecting the integrity of the EU legal order'* and above all preserving intact the peace and reconciliation process enshrined in the Good Friday Agreement and the Peace Process.

Arrangements for the Sovereign Base Areas in Cyprus are a **fifth** priority for orderly withdrawal.

The **sixth** issue set out in the Guidelines is the disengagement of the UK from the EU's agreements with third countries, with the UK honouring all the commitments it assumed as a Member State in such agreements.<sup>11</sup> Other areas of cooperation such as judicial cooperation (the **seventh** issue), and law enforcement and security (the **eighth** issue) are also included in the first phase of withdrawal negotiations. The same is true for the transfer of EU agencies located in the UK, such as the European Medicines Agency and the European Banking Authority (the **ninth** issue).

A **tenth** 'action point' included in the first phase of the Article 50 negotiations concerns EU court and administrative procedures pending on the date of UK departure. All such cases should be allowed to continue until final decisions are made, either by the European courts or by the Commission, for example in the case of competition, state aid or infringement procedures. Likewise, court or administrative procedures involving the UK should be made possible after Brexit in respect of facts occurring before the end of March 2019. All these measures aim at ensuring continuity and the absence of a legal vacuum after withdrawal.

Finally, the withdrawal agreement should include *'appropriate dispute settlement and enforcement mechanisms'* regarding the application and interpretation of the withdrawal agreement, as well as "duly circumscribed institutional arrangements" allowing for the adoption of measures to deal with situations not foreseen in the withdrawal agreement.

The final section of this part of the Guidelines reflects a consistent concern of the EU to protect the *acquis* throughout the Brexit process. This does not necessarily mean that the European courts must be given exclusive jurisdiction in matters arising from the withdrawal agreement. However, in the negotiations for the European Economic Area Agreement in 1994, the ECJ ruled that *'the system of judicial supervision which the agreement proposes to set up is incompatible with the Treaty establishing the EEC'*. As is discussed below under the heading of possible transitional arrangements, it will be vital as regards the governance of the transitional arrangement (and, *a fortiori*, the definitive agreement) that any system of dispute settlement respects the principles laid down in the EEA Opinion.<sup>12</sup>

In adopting a phased approach to the application of Article 50, the European Council retained the right to monitor progress in the first phase and to determine when *'sufficient progress has been made'* to allow negotiations to proceed to the next phase. There appears to be an assumption, at least in the UK but not specifically denied by the Commission, that in order to allow discussions to be initiated on *'an overall understanding on the framework for the future relationship'*, it is only on the first three issues (citizens' rights, the financial settlement and Ireland) that "sufficient progress" needs to be made. Clearly, the European Council retains a measure of discretion in this

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<sup>11</sup> It is not clear what, if any, progress has been made in this area, which is indispensable to the UK being in a legal position to negotiate trade agreements with third countries immediately after withdrawal. Another example of the massive legal and practical complexities involved in the withdrawal process.

<sup>12</sup> Opinion 1/91 of 14 December 1991

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matter, but it is worth noting that there are 10 areas to be covered in the first phase of negotiations currently underway.

Certainly, the European Council (as demonstrated in the conclusions from its Summit meeting on 19-20 October 2017) appears to place higher importance on citizens' rights, the financial settlement and Ireland (possibly in that order), in deciding to review progress in these issues in December. Nonetheless, even if progress in these issues is a condition for moving to the next phase, this does not of course mean that they are without importance for the overall agreement under Article 50.

## THE MANDATE

### *Overview*

The mandate reflects the fact that the EU's approach to Brexit as to other negotiations with third countries, is based on the Union *acquis*. It is important (but certainly difficult) for the UK to understand that negotiations with the EU27 do not start - on a basis of equality - with each party having adopted its negotiating position and then proceeding to a compromise. The political and economic weight of the EU (as the world's biggest economic entity) and the procedural complexity of its decision-making means that once the EU has agreed a common position for negotiations, making significant changes in the course of negotiations can be difficult and time-consuming.

The way in which the UK now seems to be approaching Brexit suggests that for a transitional period, the UK appears to be seeking to remain 'in the Single Market and customs union', whereas, for the definitive bilateral framework (the permanent relationship with the EU), the Prime Minister at least has spoken of '*a deep and special partnership*'<sup>13</sup> but one that expressly excludes participation in the Single Market and Customs Union.

As far as the first phase of the Article 50 negotiations is concerned, the agenda items contained in the mandate fall broadly under two headings. First, the legal, administrative and financial measures necessary to 'clear the accounts'. The financial settlement is an example of such an issue. Secondly however, ensuring legal certainty for EU citizens and businesses in the UK after withdrawal is an issue which goes further and (like the case of the border between Northern Ireland and the Irish Republic) falls not only under the first phase of the negotiations, but also forms a necessary part of the new bilateral relationship. And in this respect of course, it is as important for the EU27 as it is for the UK to reach an early agreement for a new relationship, preceded by a 'bridging arrangement', to safeguard the rights of EU citizens and businesses in the UK.

Against this background, we now turn to the issues currently under negotiation in the first phase of the Article 50 process, with priority clearly being given – especially by the Commission, to citizens' rights, the financial settlement and Ireland/Northern Ireland.

### *Citizens' rights*

In this area more than perhaps any other, the fact that more than 3 million EU citizens will continue to reside in the UK and 1 million UK citizens in the EU after withdrawal – with the EU's insistence that, directly or indirectly EU law will continue to apply indefinitely – illustrates the

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<sup>13</sup> Prime Minister's speech in Florence 22 September 2017

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challenge for the UK in reaching a withdrawal agreement that excludes all continuing jurisdiction of the Court of Justice of the European Union ('CJEU').

The mandate reflects this and provides that the Article 50 agreement should safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date (e.g. rights related to old age pensions) as well as rights which are in the process of being obtained, including the possibility to acquire them under current conditions after the withdrawal date (e.g. the right of permanent residence after a continuous period of five years of legal residence which started before the withdrawal date). This should cover, reciprocally, both EU27 citizens who are currently residing (or who have resided) in the UK and/or working (or having worked) in the UK and, *mutatis mutandis* their UK counterparts in the EU27. The principle of equal treatment as set out in the Union *acquis* should apply both to UK citizens in the EU27 and their EU counterparts in the UK. These rights should be protected as directly enforceable vested rights for the lifetime of those concerned.

For the EU, the personal scope of the agreement should be the same as that in the relevant EU *acquis*.<sup>14</sup> The minimum scope of the rights to be protected includes rights of residence and free movement derived from Articles 18, 21, 45 and 49 of the TFEU and relevant secondary law. Crucially, the EU also insists that any document to be issued in relation to residence rights should have a declaratory nature and be issued '*under a simple and swift procedure either free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents*'.

In addition, the EU seeks to include in the agreement the *acquis* on the coordination of social security systems, the free movement of workers (including access to the labour market, social and tax advantages, training, housing, collective rights and access to educational, apprenticeship and vocational training courses) and the right to take up and pursue self-employment. Professional qualifications (including those obtained in a third country and recognised in any EU Member State before the date of withdrawal) should also be protected in accordance with the *acquis* in force before the withdrawal date. The EU also insists on the coverage of third country nationals married to EU citizens, as set out in CJEU decisions, as well as the indefinite continued jurisdiction of the CJEU.

The contrast with the approach adopted by the UK is sharply defined in the UK paper '*Safeguarding the position of EU citizens living in the UK and UK nationals living in the EU*', published in June 2017.<sup>15</sup> In this paper, the UK stated that:

*'after we leave the EU, we will create new rights in UK law for qualifying EU citizens resident here before our exit. Those rights will be enforceable in the UK legal system and will provide legal guarantees for these EU citizens. Furthermore, we are also ready to make commitments in the Withdrawal Agreement which will have the status of international law. The Court of Justice of the European Union (CJEU) will not have jurisdiction in the UK. .....We guarantee that qualifying individuals will be granted "settled status" in UK law.'*

The paper then sets out the procedure whereby, immediately after UK withdrawal, EU citizens will be granted 'blanket permission' to stay in the UK, whilst they complete the necessary administrative formalities to obtain a residence document.

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<sup>14</sup> Essentially that set out in Directive 2004/38 and Regulation 883/2004

<sup>15</sup> Cm 9464

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It appears that, despite the difference in conceptual approach to the negotiations, agreement has been reached on many issues, even if the crucial role of the CJEU has not been agreed.

It is not possible in the scope of this paper to discuss all of the 60 ‘topics’ identified in the latest joint technical note produced by the UK and the Commission. It is clear that considerable progress has been made over the five negotiating rounds. Agreement in principle appears to have been reached in areas such as the use of EU law concepts in the Withdrawal Agreement (to be interpreted in line with CJEU case law on the date of withdrawal), the treatment of EU citizens lawfully resident before the cut-off date, frontier workers and current family members. Agreement has also been reached on residence issues such as eligibility criteria, temporary residence, permanent residence and continuity of residence.

Hitherto politically sensitive issues in the UK such as ID documents and fees for these have been resolved. Social security issues appear to be largely resolved.

Unresolved issues (at the time of writing) include family reunion and the treatment of future family members post-exit, where the EU is insisting that what is at stake is not equal treatment but the preservation of rights under EU law. This is worth mentioning because it illustrates the EU approach based on the preservation of the *acquis* and the UK’s reliance on ensuring equal treatment for EU citizens with their UK counterparts. This of course links to the EU’s insistence that the Withdrawal Agreement must be subject to the jurisdiction of the CJEU, in line with the ECJ’s Opinion 1/91 on the compatibility of the proposed EEA Agreement with EU law.

As far as free movement rights are concerned, the UK is insisting that UK nationals in the EU who move after a specified date should keep all existing rights, including for cross-border activities. In return the UK is prepared to offer a guaranteed right of return to those EU citizens who have acquired permanent residence status.

Disagreement also exists on the treatment of those convicted of crimes post-exit. Once again the EU insists on limiting deportations to public security situations under the relevant EU directive, whereas the UK insists that UK immigration rules should apply. Differences also exist on the administrative procedures (including costs) for residence documentation, voting rights, the export of benefits other than pensions and certain aspects of the mutual recognition of professional qualifications.

Although citizens’ rights is very much an area where the ‘devil is in the detail’ (especially for example in the field of social security), it appears from the available documentation that significant progress has been made, despite the EU’s insistence on using the preservation of the *acquis* as a starting point. The future role of the CJEU is of course a ‘red line’ for the EU as it still is for the UK, although whether this is the case for any transitional period is more difficult. Apart from this major issue of principle, it is difficult to imagine that, on substance, this area could be an obstacle to the conclusion of the Withdrawal Agreement. Certainly, the ‘open letter’ written by the UK Prime Minister to EU citizens in the UK on 18 October reflects a will to provide political reassurance to EU citizens in the UK, even if it is not (yet) clear that the necessary level of legal certainty has been provided for the EU as regards its citizens.

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## *Financial settlement*

The Mandate calls for a ‘*single financial settlement*’<sup>16</sup> which ensures that the UK and the EU ‘*respect the obligations resulting from the whole period of the UK membership of the Union*’. The settlement should cover the Union budget, the termination of UK membership of ‘*all bodies established by the Treaties*’ and should be based on the principle that the UK must ‘*honour its share*’ of the financing of all the obligations undertaken whilst it was a Member of the Union. As far as the scope of these obligations is concerned, the mandate refers to the applicable *acquis*, especially the Financial Regulation<sup>17</sup>. In addition, the UK is to ‘*fully cover the specific costs related to the withdrawal process such as the relocation of the agencies or other Union bodies*’ (such as the European Medicines Agency and the European Banking Authority, currently based in London).

The calculation method is to be based on the own resources decision ‘*in all its dimensions*’ and the ‘*modalities of payments should be agreed in order to mitigate the impact of the withdrawal on the budget for the Union and on its Member States*’. Against this background, the Agreement should contain:

- (a) A global calculation of all the obligations which the UK has to settle to honour its obligations, subject only to ‘*limited future technical adjustments*’.
- (b) A schedule of payments and practical modalities for making them.
- (c) Transitional rules ‘*to ensure control by the Commission*’<sup>18</sup> and the power to adjudicate of the CJEU for past payments/recovery orders to UK beneficiaries and any payments made to UK beneficiaries after the withdrawal date to honour all legal commitments authorised before the withdrawal date.
- (d) Possible arrangements for legal commitments or future legal commitments made towards UK beneficiaries after the withdrawal date and
- (e) Specific rules on contingent liabilities assumed by the Union budget or institutions (e.g. financing from the EIB and the EIF).

The provisions in the Commission’s negotiating directives/mandate were elaborated in a Commission working paper entitled ‘*Essential Principles on Financial Settlement*’ dated 24 May 2017. This area, even more than citizens’ rights, is difficult to understand for anyone other than the relatively few civil servants in Brussels and London with practical experience of the operation of the EU budget.

As at the time of writing, the two sides seem far apart so far as the total legal liability of the UK is concerned. The annex to the Commission paper mentioned however sets out an exhaustive list of bodies or funds included in the financial settlement, as well as a list of around 70 basic acts which provide the legal basis for EU funding.

The details of the negotiations so far are of course not public. However, it is hard to avoid the impression that the EU side have followed a stricter accounting methodology, whilst the UK

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<sup>16</sup> Including issues resulting from the multiannual financial framework (MFF) as well as those relating to the European Investment Bank (EIB), the European Development Fund (EDF) and the European Central Bank (ECB)

<sup>17</sup> Regulation 966/2012

<sup>18</sup> Including the Parliament, the Court of Auditors and OLAF

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approach tends more to a political assessment of how much it would be fair for the UK to be asked to pay. To the extent that the difference between the UK and the EU derives from amounts allegedly owed by the UK after the date of withdrawal, it is possible that the provision for a transitional period during which the UK continues to benefit (at least so far as the Single Market and customs union are concerned) from EU membership, may alleviate some of the political difficulties currently faced by the UK.

Once again however, this area of negotiations tends (at least in European eyes) to underline the difference of approach by the EU and the UK to the Article 50 negotiations as a whole - the former relying on a legal (if not legalistic) approach based on the *acquis*, with the UK, apparently less well-prepared and coordinated internally, taking a more pragmatic line.

#### *The situation of goods placed on the market and the outcome of procedures based on EU law*

In essence, the aim of this part of the negotiating directives/mandate is to ensure, to the greatest extent possible, continuity and the avoidance of a legal vacuum for economic operators. Thus, goods lawfully placed on the market before the withdrawal date can continue to be made available after that date in the UK and EU27 based on applicable EU law before the withdrawal date. The treatment of services is reserved to '*subsequent sets of negotiating directives*'.

Given the importance of services (especially financial and related services) to the UK economy and the need to avoid a legal vacuum after March 2019, the time taken by the EU to settle its Mandate for this part of the withdrawal agreement is clearly crucial. Although the treatment of 'goods on the market' is in the first phase of the Article 50 process, it – like the treatment of Northern Ireland - actually overlaps with the third and final phases when the transitional and definitive economic arrangements will be negotiated.

#### *Northern Ireland*

Both the European Council Guidelines and the Council directives highlight the importance of preserving the process of peace and reconciliation enshrined in the Good Friday Agreement and the Peace Process. The Commission in its position paper<sup>19</sup> setting out guiding principles for the withdrawal negotiations recalls that the Good Friday Agreement was actually concluded against the background of EU membership by Ireland and the UK and that the common framework of EU law and Union policies underpins the operation of many of its institutions.

A practical example of the EU's engagement in Northern Ireland was the establishment in 2007 of a Northern Ireland Task Force (NITF)<sup>20</sup> in the Commission, following a visit by Commission President Barroso to the incoming First Minister (Ian Paisley) and his Deputy (Martin McGuinness). Today, the NITF comprises 17 of the Commission's departments that have a role in fostering socio-economic development in the broadest sense.

The prominence given to this issue by the EU in the UK withdrawal process reflects the importance of the role which Ireland has come to play in the European Project over the last 44 years.<sup>21</sup>

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19 Commission paper TF50 (2017) 15 of 20 September 2017

20 The Task Force has published regular reports. See in particular the report for 2007-2014.

21 The fact that, alone amongst the 27 Member States, Spain was able to persuade the European Council to adopt a specific provision on the status of Gibraltar in any future UK-EU27 Agreement illustrates the extent to which other Member States have gained sympathy and support, even on "domestic" issues in the UK.

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The EU accepts that the ‘island of Ireland’ presents unique challenges and that *‘flexible and imaginative solutions will be required, including with the aim of avoiding a hard border’*. The EU<sup>22</sup> also recognises that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens<sup>23</sup>, that existing agreements between the UK and Ireland (such as the Common Travel Area) which are in conformity with EU law, should be recognised and that issues such as the transit of goods across Northern Ireland (as part of a third country) need to be addressed.

It is clear that, primarily as a result of the goodwill towards Ireland - as a fully-committed European partner – by the 27, the EU will make all possible efforts to ensure that UK withdrawal does not disrupt the process of peace and reconciliation. However, the Commission has made it clear that:

*‘the onus to propose solutions which overcome the challenges created on the Island of Ireland by the UK’s withdrawal from the EU and its decision to leave the customs union and the internal market remains on the United Kingdom’.*<sup>24</sup>

Thus, the Commission places the responsibility squarely on the UK to *‘take into account and protect the very specific and interwoven political, economic, security, societal and agricultural context and frameworks on the island of Ireland’*.

Specifically, the Commission calls for the *‘interlocking political institutions which reflect the totality of the relationships on the islands of Great Britain and Ireland’* to continue to operate effectively. A ‘hard border’ without physical infrastructure, is also to be avoided, in a way which ensures that Ireland’s place in the internal market and customs union is unaffected.

Implicit in the Commission’s position paper (and indeed in the guidelines and negotiating directives) is the EU’s view that the UK must carry full responsibility for putting in jeopardy the still fragile peace process in Ireland. Thus the Commission notes that cooperation in areas such as agriculture, education, transport, environment, waterways, social security/social welfare, relevant EU programmes, inland fisheries, aquaculture and marine matters, health and urban and rural development, are all intrinsically bound up in EU cooperation and funding programmes. The Commission notes that:

*‘It will be necessary for the EU and the UK to examine whether and if so how the fact that EU law ceases to apply in the UK after withdrawal might impact on continued cooperation and whether specific provisions need to be inserted in the Withdrawal Agreement’.*

Other areas related to the Good Friday Agreement and the Peace Process to be addressed include provisions on Rights, Safeguards and Equality for Opportunity based on equality and non-discrimination under EU law (which must not be diminished after withdrawal) and the need for the UK and Ireland to honour their commitments under the EU’s Multi-annual Financial Framework after withdrawal.

Finally, the EU is committed to preserving the Common Travel Area, which underpins the Peace Process and the Good Friday Agreement, in particular the citizenship and identity provisions.

The EU notes the commitment of the UK to ensuring that all the existing arrangements affecting relations between Ireland and the UK as regards Northern Ireland can continue after withdraw-

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22 Including the European Parliament in its Resolution of 5 April 2017

23 The need for Irish citizens on both sides of the border to continue to enjoy their rights as EU citizens after withdrawal is spelled out in the Commission’s ‘Guiding Principles’ paper.

24 Commission Guiding Principles for the Dialogue on Ireland/Northern Ireland - TF50 (2017) 15

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al, ‘without compromising Ireland’s ability to honour its obligations as an EU Member State, including in relation to free movement for EEA nationals to and from Ireland’. However, there is perhaps no other area in the Article 50 negotiations which illustrate so vividly the technical and legal complexity, as well as the political sensitivity of “unpicking” the fruits of decades of cooperation. It is not surprising that Ireland and the other 26 Member States sometimes question whether the UK authorities were fully aware of the potentially disastrous consequences of their decision to accept, without further question or examination, the outcome of the referendum.

### *Continuation of the *acquis* in other areas*

Although the continued application of the *acquis* after withdrawal is crucial for the EU on citizens’ rights, the EU insists that the same applies (including the jurisdiction of the CJEU) in a number of other areas. This is of course crucial to prevent a legal vacuum after withdrawal but is likely to disappoint those who seek a ‘clean break’ or a ‘hard Brexit’. These areas are as follows:

#### ***Judicial cooperation***

Judicial cooperation proceedings in civil, criminal and commercial matters, which are ongoing at the date of withdrawal, will remain governed until their completion by relevant provisions of Union law. Similarly, the recognition and enforcement of national judicial decisions handed down in the UK or the EU27 before the withdrawal date, will remain governed by relevant provisions of EU law. Rules on choices of forum and of law made before the withdrawal date will also be made subject to the continuing application of EU law.

#### ***Administrative and law enforcement cooperation***

Continuity is also provided for ongoing administrative and law enforcement cooperation procedures under Union law. Rules needed to be negotiated in the withdrawal agreement to cover the protection of personal data and classified information, including security data held both by the UK and EU authorities. As in the case of judicial cooperation, EU law (and the jurisdiction of the Commission and CJEU) will continue to apply to procedures initiated before withdrawal.

#### ***Ongoing Union judicial and administrative procedures***

The same principles as those discussed above (continuity, the absence of a legal vacuum together with the continuing jurisdiction of the Commission and CJEU) will apply to:

- (a) Judicial proceedings pending before the CJEU involving the UK and UK natural and legal persons, including preliminary references;
- (b) Ongoing administrative procedures in Union institutions, bodies, offices and agencies concerning the UK and UK legal and natural persons, including infringement, state aid and competition procedures;
- (c) The possibility to commence administrative or judicial procedures after withdrawal based on facts which occurred before that date, including the possibility for UK courts and tribunals to make preliminary references in cases arising before withdrawal;

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- (d) Continued enforceability of Union acts imposing pecuniary obligations (e.g. fines imposed by the Commission or the recovery of illegal state aids) before withdrawal.

### *Other administrative issues relating to the functioning of the EU*

A constant theme of the EU's Guidelines and directives/Mandate for the first phase of the Article 50 process is (perhaps unsurprisingly) the need to protect the interests of the Union and its Member States. The Union will therefore seek a commitment from the UK to protect the property, funds, assets and operations of the Union (and its institutions, bodies, personnel and their families) as provided for in EU law.<sup>25</sup> This section of the mandate deals with the transfer of special fissile materials, whether these are in the UK<sup>26</sup> and belong to the EU or in the EU and where the "right of use" belongs in the UK. At the same time, provision is to be made for the UK to assume its own obligations (especially as regards safeguards) under the IAEA.

### *Governance of the Agreement*

Ensuring the continued primacy of the EU's legal order in the day-to-day operation of the withdrawal agreement is a priority for the EU. The role of the CJEU is crucial in this respect, although the mandate stops short of insisting that the CJEU should have exclusive power to interpret the withdrawal Agreement.

In Opinion 1/91, the CJEU underlined the fundamental differences (in 1991) between the EC (as it then was) and the proposed EEA agreement. The EEA Agreement is essentially an advanced form of free trade agreement, between the 3 EFTA States and the EU and its Member States. It does not establish a customs union. It does not incorporate Article 26(2) TFEU which is the legal basis for the total abolition of frontiers (and their related costs) in the EU. Thus, to the extent that the UK seeks, in the Article 50 agreement, to remain 'inside' the Single Market and the customs union, the CJEU's Opinion in 1991 would continue to apply. In essence this would mean that interpretation and enforcement mechanisms envisaged in the 'governance' provisions of the Article 50 Agreement must ensure - as a matter of law - that "the desired legal homogeneity [will be] achieved".<sup>27</sup>

The mandate provides that the agreement should '*set up an institutional structure to ensure an effective enforcement of the commitments under the Agreement, bearing in mind the Union's interest in effectively protecting its autonomy and legal order, including the role of the CJEU.*' There is an echo of the EU's approach to its relations with other European 'near neighbours' such as the EEA countries and Switzerland<sup>28</sup> when the mandate provides that the Agreement should contain appropriate institutional arrangements allowing for the adoption of measures (presumably by agreement) to deal with unforeseen situations not covered in the Agreement and '*for the incorporation of future amendments to Union law in the Agreement when this is necessary for the proper implementation of the Agreement.*'

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25 Especially Protocol 7 on the Privileges and Immunities of the EU.

26 Euratom property in the UK used for the purpose of providing safeguards in accordance with the Euratom Treaty

27 See para. 25 of Opinion 1/91

28 Micro-States such as Monaco, Andorra and San Marino could also be mentioned, although the EU's relations with these nominally sovereign jurisdictions cannot be compared with the future bilateral relationship between the EU27 and the UK.

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As far as dispute settlement is concerned, the Agreement will cover:

- (a) The continued application of Union law;
- (b) Citizens' rights and
- (c) The application and interpretation of the other provisions of the Agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations.

It is clear that, in the EU's view, for dispute settlement and enforcement, both the jurisdiction of the CJEU and the supervisory role of the Commission should be maintained at least for those provisions of the Agreement which relate to Union law. For other provisions, *'an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the CJEU'*.<sup>29</sup>

Further, as regards the case law of the CJEU, the mandate provides that *'any reference to concepts or provisions of Union law made in the Agreement must be understood as including the case-law of the CJEU interpreting such concepts or provisions before the withdrawal date.'* Finally, to the extent that an alternative dispute settlement system is established for certain provisions of the Agreement, *'a provision according to which future case-law of the CJEU intervening after the withdrawal date must be taken into account in interpreting such concepts and provisions should be included'*.

## **POSITION PAPERS, FUTURE PARTNERSHIP PAPERS AND OTHER POLICY DOCUMENTS**

In addition to the EU's guidelines and negotiating directives – and in the spirit of transparency to which both parties adhere in this unique negotiation - both the EU (Commission) and the UK authorities have adopted a series of official papers on different aspects of the negotiation.

For the UK, in February 2017, before the UK's formal notice under Article 50 was sent to the President of the European Council, a paper was published setting out the UK's overall position on EU withdrawal entitled "The United Kingdom's exit from and new partnership with the European Union". After negotiations started, other papers have been published by the UK, entitled "position papers" and "future partnership papers". Other papers take the form of general policy documents, for example "Preparing for our future UK trade policy".

The UK's position papers cover ongoing Union judicial and administrative proceedings, nuclear materials and safeguards issues, privileges and immunities, confidentiality and access to documents, continuity in the availability of goods for the EU and the UK, Northern Ireland and Ireland and safeguarding the position of EU citizens living in the UK and UK nationals living in the EU.<sup>30</sup>

None of the papers published, either on the UK or EU side, are "binding" in the sense that they create legal obligations. But "position papers" do set out the approach being adopted in negotia-

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<sup>29</sup> Taking into account Opinion 1/91

<sup>30</sup> The paper on citizens' rights is not labelled as a position paper, although it clearly sets out the position of the UK in the first phase of negotiations with the EU.

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tions. Future partnership papers on the other hand indicate the policy goals being pursued by the UK in seeking a “new, deep and special partnership with the EU”.

Future partnership papers have been produced by the UK on providing a cross-border civil judicial cooperation framework, the exchange and protection of personal data, security, law enforcement and criminal justice, foreign policy, defence and development, collaboration on science and innovation and enforcement and dispute resolution.

On the EU side, position papers have been produced on governance, the functioning of the Union Institutions, Agencies and Bodies, customs related matters needed for an orderly withdrawal of the UK, intellectual property rights (including geographical indications), on-going public procurement procedures, the use of data and protection of information obtained or processed before the withdrawal date, ongoing police and judicial cooperation in criminal matters, judicial cooperation in civil and commercial matters, goods placed on the market before the withdrawal date and ongoing Union judicial and administrative procedures.

In addition, the Commission has published successive joint technical notes setting out the stage reached in negotiations on citizens’ rights, papers setting out the EU’s guiding principles for the dialogue on Ireland and Northern Ireland and a working paper setting out essential principles on financial settlement. These three areas are of course currently under negotiation in the first “divorce” phase of the Article 50 process.

It is an open question whether the publication of these papers actually assist the negotiating process. Arguably, there is no disadvantage for the Commission in publishing its position papers, since these merely elaborate on the guidelines and directives set, respectively, by the European Council and the Council. On the other hand, for the UK, whilst the publication of papers reflecting a conservative approach in negotiations (for example rejecting a continuing role for the CJEU after withdrawal) may not raise difficulties internally, publication at a later stage may make finding compromises in the negotiations more difficult. In any event, this exercise in transparency in arguably the most important negotiation undertaken by the UK in peacetime, at least clarifies the issues at stake (if not the solutions in sight) for “stakeholders” and other interested parties.

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## GENERAL APPROACH OF THE EU TO THE BREXIT NEGOTIATIONS

### *Organisational*

Although (see below) the application of Article 50 to the UK is a novel and hugely important exercise, the Union's Institutions and Member States have taken it in their stride. There is, in this respect, perhaps something of a contrast between the political discord and absence of a clear alternative to EU membership in the UK, with the EU's objective to settle the legal and administrative issues necessary for the Union to function without the UK and then to move on. As the European Council at its Summit on 19-20 October demonstrates, this has now happened with the EU27 concentrating on their future agenda and with the crisis in Spain tending to overshadow Brexit.

On 15 December 2016, an informal meeting of 27 Heads of State or Government (together with the Presidents of the European Council and the Commission) was held to discuss the Article 50 process and *'to tackle the uncertainties arising from the prospect of UK withdrawal'*. As the supreme policy-making body in the EU, the European Council will remain *'permanently seized'* of the matter. Representatives of the European Council Presidency are present and participate, in a supporting role, alongside the Commission representatives, with the Union negotiator *'systematically reporting to the European Council, the Council and supporting bodies.'*

Against this background, special arrangements have been made in all EU Institutions (as well as in each Member State) to deal with the Brexit negotiations. As indicated above, the Commission has established a Task Force headed by a former French Minister and EU Commissioner, Michel Barnier. Barnier, as EU negotiator, operates under the authority of the Commission and in particular, its President. The Task Force now comprises around 40 officials drawn from the Commission's services covering for the moment substantive areas such as internal market and sectoral policies, budget, spending commitments and programmes, justice and home affairs, external relations and foreign and security policy, aviation, agriculture, the free movement of citizens and employment and fisheries, energy and climate change, international agreements and customs.

'Horizontal' sections in the Task Force deal with strategy, coordination and communication, relations with think-tanks, inter-institutional affairs and legal affairs. The Task Force obviously draws extensively on expertise available in the Commission's services. However, communications outside the Commission are the exclusive responsibility of the Task Force, acting under the authority of the Commission President and his team, in particular his Head of Cabinet. The Task Force includes a cross-section of nationalities with the exception of the UK, although UK Commission officials continue to work on Brexit-related issues in the services (as well as in the Secretariats of the Council and the Parliament).<sup>31</sup>

Within the Council of Ministers, an ad hoc Working Party was established on 22 May 2017. The Working Party assists the Council and COREPER in all matters related to UK withdrawal. It has a

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<sup>31</sup> The future of UK civil servants in the EU Institutions has not yet been settled, although it appears unlikely at this stage that a significant number will remain after March 2019.

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permanent chair and meets in an EU27 format.<sup>32</sup> The role of the Council and its preparatory bodies is to ensure that the negotiations are carried out in line with the European Council Guidelines and the Council negotiating directives, as well as to provide continuous guidance to the EU negotiator (Michel Barnier, acting on behalf of the Commission). The Working Party is assisted by a small Task Force in the Council Secretariat headed by Didier Seeuws.

The rotating Council Presidency, currently Estonia to be followed on 1 January by Bulgaria and on 1 July 2018 by Austria, does not have a formal role in the Brexit process. Each Presidency does however second an official to the Commission Task Force.

In the European Parliament, a Steering Group of MEPs has been established, headed by Guy Verhofstad, the former Belgian Prime Minister and leader of the Liberal (ALDE) Group in the Parliament. It would be wrong to under-estimate the role of the Parliament in the Brexit process. Article 50(2) provides that the withdrawal agreement (possibly including the framework for the future relationship and the transitional arrangement) can only be concluded by the Council after obtaining the consent of the European Parliament.

Together with the Member States in the Council therefore, the Parliament not only monitors progress in the negotiation, but also comments on the position papers submitted both by the Commission Task Force and by the UK. Michel Barnier has also made a point of working closely with the Parliament before and after each of the negotiating rounds.

Once the various organisational arrangements outlined above were in place, work began immediately on the preparation of the EU27's position in the implementation of Article 50, in particular the Guidelines to be adopted by the European Council and the negotiating directives (Mandate) to be adopted by the Council of the EU. Barnier and his Task Force (TF50) drawn from the Commission's services, prepared an exhaustive 'inventory' of issues which needed to be addressed in the withdrawal negotiations. This process started with detailed discussions in each of the Commission departments and was followed by similar discussions with each of the 27 Member States. The fact that 9 months elapsed between the UK's internal decision to withdraw (by treating the consultative referendum as politically binding) and the date of formal Notice, gave ample time for the EU to prepare its own position and to build a cohesive negotiating strategy.

As far as procedure is concerned, this is of course the first time that the EU has negotiated a withdrawal agreement under Article 50. This event is therefore quite literally unprecedented. However, it is perhaps not surprising that the EU have decided on an approach which closely resembles that followed in trade or cooperation negotiations with third countries generally. In broad terms this involves the Commission making proposals to the Council for the Mandate. Although such proposals are the result of intensive internal coordination between the Commission's services (including the Legal Service), they are also influenced by input from all Member States, as well as MEPs in the European Parliament and the Secretariats and Legal Services of the Council and the Parliament.<sup>33</sup>

There has been much discussion in the UK media about the 'solidarity' of the 27 EU Member

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<sup>32</sup> Note that Article 50(4) TEU provides that for the purposes of the withdrawal negotiations as set out in paragraphs 2 and 3 of Article 50 the UK 'shall not participate in the discussions of the European Council or Council or in decisions concerning it.'

<sup>33</sup> Note that the Committee on Constitutional Affairs of the European Parliament published a study on the General Institutional and Legal Considerations of Brexit and the European Union in January 2017

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States in the Brexit negotiations. On the day when the UK delivered its Article 50 letter to the President of the European Council, the latter (former Polish Prime Minister Donald Tusk) stated that “paradoxically there is something positive in Brexit. Brexit has made us, the community of 27, more determined and more united than before.”

Given the extended delays in actually launching the negotiations, delays emanating from the UK rather than the EU, and the fact that the EU 27 have unanimously agreed both Guidelines and Mandate it is perhaps unsurprising that there has so far been no ‘breaking of ranks’ on the EU side, with the exception of some competition on which Member State will inherit the various EU agencies which are currently hosted in the UK<sup>34</sup>. Certainly, all Member States and the Institutions have a common interest in ensuring that the financial, administrative and purely practical aspects of the ‘divorce’ are handled as expeditiously and efficiently as possible.

This by no means excludes disagreements between the 27 when it comes to negotiating the future bilateral relationship between the EU27 and the UK, nor the (related) transitional arrangement. Such disagreements are common in all the EU’s negotiations with third countries such as Korea, Canada and Japan. However, such disagreements will be addressed and resolved ‘inside the EU tent’, with the UK - like all other third countries<sup>35</sup> in negotiations with the EU - being forced to wait until the EU has agreed on a common negotiating position.

### *The EU approach to the ‘European Project’*

In analysing the collective EU approach to the negotiations it is also relevant to contrast the different perspectives of the remaining Member States to that of the UK in respect of the ‘European Project’. On this matter, there are many (especially amongst the older generation in the founding Member States), who take the view that the UK chose EFTA over the EEC in the 1950s and has never really changed, even if the present government has explicitly rejected joining EFTA as an alternative to EU membership.

Unlike the Paris Treaty which established the European Coal and Steel Community (ECSC) in 1951 with a finite duration of 50 years<sup>36</sup>, the original Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) were concluded for an indefinite period. No provision was made for withdrawal, suspension or expulsion before the Lisbon Treaty<sup>37</sup>, which entered into force in 2009. There is no precedent for a Member State leaving the Union, although three territories of Member States have withdrawn.<sup>38</sup>

The inclusion of a provision for withdrawal of a Member State, just over nearly 60 years after the launch of the ‘European Project’ reflects, *inter alia*, the enlargement of EU membership from 6 to 28 – increasingly diverse – Member States and the evolving ‘constitutional’ character of the EU Treaties.<sup>39</sup> It is improbable that any of the Member States envisaged, in 2009, which of them

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34 Including the European Medicines Agency and the European Banking Authority.

35 The position of a third country in the Brexit negotiations is explained further below.

36 The ECSC Treaty ceased to have effect in 2001, when the production of and trade in coal and steel were covered by the EC Treaty.

37 Comprising the Treaty on European Union and the Treaty on the functioning of the European Union.

38 Algeria in 1962, Greenland in 1985 and St. Barthelemy in 2012, the latter two taking the status under Oart Four of the TFEU of Overseas Territories (OTs).

39 Between 1973 and 2013, there were 7 enlargements of the EU and 5 inter-governmental conferences (IGCs) leading to Treaty changes. The negotiations for a Constitutional Convention in 2004 were unsuccessful, but provided the essential elements for the Lisbon Treaty in 2009.

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might be the first to invoke Article 50. It seems unlikely that any of the founding' Members<sup>40</sup> would have thought of doing so, despite rising Euroscepticism in France, the Netherlands, Italy and even Germany.

The United Kingdom (UK) on the other hand, had already held a referendum in 1975, only two years after joining the European Communities (EC)<sup>41</sup>. On this occasion, the British people voted by a majority of 2 to 1 to remain.

However, the 44 years of UK membership have been characterised by what, from an EU perspective at least, is seen as a lack of political commitment, reflected in six derogations (or 'opt-outs') from fundamental areas of EU law and policy such as monetary union and the euro, the Schengen area, significant parts of EU social law, civil and criminal justice and the common foreign and security policy (CFSP). It was therefore not perhaps surprising that the UK should be the first Member State to invoke Article 50. Brexit was, some may say, 'an accident waiting to happen'.

It is likely that the withdrawal of any Member State would have dealt a political blow to the process of European integration. Even the withdrawal of a small Member State would have legal, economic, social and - above all - political ramifications.<sup>42</sup>

That it should be the UK is particularly damaging to an EU vision of integration because:

- (a) As the 5<sup>th</sup> largest economy in the world and with a history of commitment to multilateral free trade<sup>43</sup>, the UK adds significantly to the EU's influence as the biggest 'player' in the global economy.
- (b) Despite numerous derogations from and limited participation in EU law and policies, the UK has made a substantial contribution notably in areas such as the common commercial policy, the Single Market<sup>44</sup>, security policy and, more generally, the development of EU law<sup>45</sup>.
- (c) The UK's global presence, notably as a result of its historic relations with Commonwealth countries, but also the United States (especially in the field of defence, security, aid and humanitarian assistance) has reinforced the EU's international 'personality' and presence<sup>46</sup>.
- (d) The political sensitivity and legal complexity involved in 'withdrawing and re-connecting' after 44 years membership imposes a burden on the EU at a time of

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40 France, Italy, Germany and the Benelux countries.

41 The European Communities became 'unified' as the European Community in the Maastricht Treaty in 1992 and the European Union, endowed with legal personality, was created by the Lisbon Treaty in 2009, although the term 'European Union' first appeared in the Maastricht Treaty.

42 Particularly so if the withdrawing State was in a politically sensitive area such as the Baltics or the Balkans.

43 Notably but not exclusively through the GATT and the WTO, but also the numerous bilateral agreements negotiated by the EU since UK membership in 1973.

44 Two British Commissioners (Lord Cockfield and Sir Leon Brittan) made a decisive contribution to the planning and implementation of the Single Market project between 1985 and 1996.

45 The judges and advocates general sent to the European Courts, as well as the cooperation between UK lawyers and courts, on the one hand and the European Courts on the other, have arguably been unequalled by any other Member State.

46 The UK is one of two EU States with a permanent seat on the UN Security Council - a particularly valuable asset for the EU following the establishment of the European External Action Service (EEAS) and the development of the Common Foreign, Security and Defence Policies under the Lisbon Treaty.

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unprecedented (even existential) threat from populism (including the attempted secession of Catalonia from Spain), slow recovery from the 2007 economic and financial crisis, instability and conflict in the Middle East, Turkey, Russia and the Far East (North Korea), uncertainty in the transatlantic alliance after the election of Trump and unprecedented migrations from Africa and Syria.

- (e) Notwithstanding the consistent qualified support (at best) by successive British Governments since 1973 for the European project and the political acrimony which this engendered with our European partners, there is not the slightest doubt that all 27 remaining Member States would far rather have the UK as a difficult partner inside the EU<sup>47</sup>, than as a ‘third country’ outside the process of European integration.

Given their different approaches to the EU, the 27 remaining EU Member States led by France and Germany have acted collectively in responding to the Brexit decision; a response given extra momentum by recent political developments in Europe - the election of the pro-EU President Macron in France and the re-election of Chancellor Merkel in Germany.

In fact, taken by surprise as the EU was by the 2016 referendum result, the four main Institutions<sup>48</sup> have reacted to the UK’s decision to withdraw by acting with seamless cohesion to:

- (a) Negotiate and agree both on Guidelines and negotiating directives (the mandate) as well as the necessary inter-institutional arrangements, based on well-tried mechanisms used in negotiations with other third countries<sup>49</sup> and
- (b) Agree on a series of political and economic priorities for the EU27 for the period up to and beyond 2020.

The EU’s reaction to the referendum result – expressed initially by the Presidents of the three main Institutions, Tusk, Juncker and Schultz - was predictable. It combined genuine regret, but equally firm determination to pursue the European Project with 27 Member States and, crucially for the purposes of this paper, to apply the provisions of EU law to the UK, notably Article 50 TEU. The EU’s ‘classical’ insistence on respect for the EU *acquis* in all phases of the withdrawal process is going to be a hallmark of these negotiations. It is a phenomenon the UK will become accustomed to as a third country, especially in the negotiations for the transition phase and definitive final agreement.

16 months after the referendum, Commission President Juncker has called Brexit a ‘blessing in disguise’ for the Union. Not all Member States would agree with him, but all now accept that UK withdrawal is politically if not legally irreversible and that the Union must move on ‘at 27’ (with others waiting in the wings to join under the accession process). Meanwhile, the failure of

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47 In a recent speech in Brussels. Herman van Rompuy – the former Belgian Prime Minister and the first President of the European Council said that, even at this late stage, Belgium still hoped that the UK would not withdraw and that the Article 50 process would somehow be stopped or reversed. For Belgium, as for several other Member States such as the Netherlands, Sweden and Denmark. He said however that the attitude in Paris and Berlin was different; for Germany and France (especially after the re-election of Merkel and the advent of Macron), “Brexit means Brexit” and the EU must now move forward as 27.

48 The European Council, the Council of Ministers, the Commission and the European Parliament

49 The importance of the term ‘third country’ in EU usage and its implications for UK-EU27 relations both after and even before withdrawal is discussed above.

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the UK 6 months after the referendum to define a clear alternative<sup>50</sup> to EU membership is deeply frustrating for the EU and weakening for the UK's negotiating position.

Juncker stated on 24 June 2016 that until the expiry of the two year period set out in Article 50 at the latest, the UK would remain a Member of the EU, with full rights and obligations, including those which applied - to EU citizens and companies - in the UK itself, as well as UK citizens and companies in the 27 Member States.

Although this formal legal situation continues to apply (at least for the EU), inevitably the role and influence of the UK has diminished from 24 June 2016 onwards and especially since the formal notice of withdrawal was sent to the EU on 29 March 2017. This is partly for obvious political reasons. It is difficult to take the lead in shaping law and policy in a 'club' which one is about to leave. In addition, because Brexit covers each and every EU policy area, it is difficult for the UK credibly to participate in ongoing discussions and decision-making when it will no longer be a Member State when the policies in question are adopted or implemented. This does not of course prevent the UK from continuing, at least at official level<sup>51</sup>, to participate in ongoing EU business.

Despite political statements by Prime Ministers Cameron and May that the outcome of the consultative referendum would be regarded as binding, the UK failed formally to invoke Article 50 for a period of 9 months after the referendum. The UK's formal letter of withdrawal under Article 50(2) was sent to the European Council only on 29 March 2017. By the time of Prime Minister May's speech in Florence on 22 September 2017 - 15 months after the referendum - the UK Government had still to form a clear idea of the future framework for its future relations with the EU27.

In contrast, the unanimous reaction of the EU's Institutions was not only strongly cohesive, but also based on a clear interpretation and application of Article 50 TEU. All 27 Member States and the three main Institutions (led by the European Council President Tusk and Commission President Juncker) immediately began - in a practical, empirical manner - to develop the EU's common position for the negotiations which would ensue once the UK had delivered its formal notification of withdrawal.

After June 24 2016, the EU quickly came to the view that, in political if not necessarily in legal terms, the UK's decision to leave the Union was politically irreversible. However, whilst internal preparations for Article 50 negotiations continued, the EU had no choice other than to 'watch and wait' in the face of protracted delays in the UK's approach to the Article 50 process. Now, Brexit is not only now accepted virtually as a *fait accompli*<sup>52</sup> by the other Member States but, with the exception of the "divorce" process, is not amongst the top political priorities of the EU.

For the sake of clarity, these priorities include:

- (a) Strengthening economic and monetary union and completing the euro area.
- (b) Moving to a full defence union.

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50 The Prime Minister's statement in Florence on 22 September that the UK seeks a 'new economic partnership [which] would be comprehensive and ambitious' lacks any precision.

51 There is no doubt that UK participation in ongoing EU business at a political level is hampered by the perceived lack of unity amongst Government Ministers in London. The absence of a clear roadmap for the UK's future relations with the EU (including a possible transitional period) has a spill-over effect on the influence which the UK can exert on current EU business.

52 Whether the Article 50 process can legally be halted or reversed is considered below.

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- (c) Completing the Schengen system.
  - (d) Completing the banking union.
  - (e) Enlarging the EU, especially in the Western Balkans.
  - (f) Completing the digital single market.<sup>53</sup>
  - (g) In external relations, addressing the challenges of mass migration as well as relations with Russia, Turkey, the Middle East, the United States and the negotiation, conclusion and implementation of free trade agreements with key trading partners such as Japan are at least as important for the EU27 as a “new settlement” with the UK.

The remarkable economic resurgence in the Eurozone in 2017 has also undoubtedly provided a boost to the EU27’s efforts to respond robustly to UK withdrawal. After the initial fears that Brexit could lead to other Member States taking the same approach especially in the context of difficult elections in France, the Netherlands and Austria, the 27 have quickly turned the page and moved on.

#### *The EU approach to transparency in the Brexit negotiations*

The ‘classical’ approach adopted by the EU to negotiations with third countries, whether bilateral (as with trade negotiations) or multilateral (as in the WTO or other international organisations) has been for its negotiating position, as set by the Council following a proposal from the Commission<sup>54</sup>, to be kept secret. Thus, in the past, the negotiating ‘mandate’ or directives adopted by the Council and updated during the negotiations have – until recently – not even been shared with the Parliament, let alone with “stakeholders” or other private parties such as NGOs. Certainly, mandates have never been shared with the EU’s negotiating partners.

Following criticisms of the lack of transparency generally in EU procedures (for example in the free trade area negotiations with Japan and Canada), the EU has now adopted a policy of total transparency. This new policy has been applied to the Article 50 negotiations. On 22 May 2017, the Council Secretariat circulated a note setting out the EU’s guiding principles for transparency in the Article 50 negotiations, as endorsed by Coreper (Article 50 format) on 17 May 2017. The rationale for this new approach was that “the upcoming negotiations with the UK are an unprecedented situation for the Union, not least from the strong public scrutiny and interest they will legitimately generate from citizens, public authorities and stakeholders across Member States as well as in partner countries.’ The European Council’s guidelines, discussed below, confirm this principle.

The principles adopted by the Council can be summarised as follows:

- (a) The Union negotiator (Michel Barnier and the Commission’s Task Force 50) *‘is invited to reach out to citizens, national parliaments and stakeholders, and to*

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<sup>53</sup> See further the State of the Union Address to the European Parliament by Commission President Juncker on 13 September 2017

<sup>54</sup> See Article 207(3) TFEU: *‘When agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations.’*

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*provide timely and directly accessible information to the public around negotiation rounds’.*

- (b) The European Parliament will be kept closely and regularly informed throughout the negotiations by the Union negotiator.
- (c) Member States with constitutional arrangements requiring them to transmit documents to their national parliaments will be able to do so according to applicable Union and national rules and practices and without prejudice to the application of Union rules on public access to documents.
- (d) Third country partners (in particular the EEA) and international organisations will be updated as appropriate by the Union negotiator on the progress of negotiations with the UK. The Council (Article 50 format<sup>55</sup>) will be duly informed in this regard;
- (e) Rules on transparency and public access will apply to all Council documents in the context of negotiations under Article 50.
- (f) The first and subsequent versions of European Council guidelines and Council negotiating directives will be made public immediately after their formal adoption by the European Council and/or the Council.
- (g) Negotiating documents of the Commission shared by the Union negotiator with EU Member States, European Council, Council, European Parliament and UK will be released to the public by the Union negotiator within the limits of EU law.
- (h) Member States will be consulted on negotiating documents to be sent to the UK; all UK documents received by the Union negotiator will be transmitted to the Council (Article 50) and its preparatory bodies (Article 50) via the General Secretariat of the Council.
- (i) Documents originating from Member States may be disclosed on a case-by-case basis, subject to prior agreement of the originating Member State and in accordance with applicable rules and exceptions under EU law. Other third-party documents may be disclosed on a case-by-case basis, subject to prior consultation of the author and in accordance with applicable rules and exceptions under EU law.

It is an interesting question whether such broad transparency principles would have been applied by the UK in the absence of this EU initiative. In any event, as a result of this policy, more than 40 position papers have now been made available by both sides covering all the issues being negotiated in the first phase of the Article 50 process

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55 Excluding the UK

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## ARTICLE 50 – THE LEGAL FRAMEWORK FOR THE NEGOTIATIONS: ITS PRACTICAL IMPLICATIONS

### *Risks for the UK in the Article 50 process*

The mandate, *acquis* and other concepts outlined above are very familiar to those negotiating on the EU side. They may be less familiar to those negotiating on behalf of the UK.

This may explain why on the EU side, the cohesion of the 27 has, thus far, been remarkable. Nonetheless, it may be that such unity is easier to achieve and maintain in phase 1 ('divorce') of the Article 50 withdrawal process than when the economic and other 'chapters' of the transitional arrangement and final agreement are at stake. Here, as in other trade and economic negotiations (perhaps especially on agriculture), divergent national interests are more difficult to reconcile. So if, prior to the first phase in the Article 50 process, it has been the UK which has been responsible for delay, this may not be the case for the later steps in the process, even if the EU shares an interest with the UK in reaching agreement on Phase 1 before the end of the 2 year period in March 2019.<sup>56</sup>

As explained earlier, Article 50 is also unique in that the withdrawing State is both a full Member of the EU and, in fact if not strictly in law, already a third country. The fact that the UK decided to withdraw at a time of crisis in the EU meant that the 27 were forced to act more quickly and with greater cohesion than otherwise would have been the case, with the new programme of activities<sup>57</sup> tending to take priority over the Article 50 negotiations, except for the need for a settlement under Phase 1. The fact that the UK has 'one foot in and one foot out' for the 2 years of the exit negotiations certainly weakens the UK's position as a Member State not only with its EU partners, but also internationally, being legally unable to negotiate new agreements with other third countries on its own behalf before April 2019.

Perhaps most challenging, in terms of providing the legal certainty which both States and stakeholders so urgently require, is the absence of any clear legal framework for EU27-UK relations after March 2019. The primary responsibility for defining the future relationship lies with the UK as the party seeking change. There is, it should be stressed, no legal requirement in Article 50 for any new bilateral arrangement to be negotiated. A withdrawing State, having settled its outstanding obligations prior to leaving and having incorporated these in an agreement with the EU27, could simply rely on multilateral frameworks (notably the WTO) for the future relationship.

Article 50 certainly permits such an approach (sometimes dubbed the 'cliff edge'). Indeed, if the Brussels negotiations fail, unless Article 50 is revocable and is revoked it seems inevitable that this would lead to the re-imposition of tariffs and non-tariff barriers (NTBs). This, in turn, would be likely to lead to resulting higher costs for economic operators, by the abolition of the current 'frontier-free' situation which the UK currently enjoys under Article 26(2) TFEU<sup>58</sup>.

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<sup>56</sup> To secure an 'orderly withdrawal' (as the European Council guidelines provide) and to prevent damaging losses to the EU budget.

<sup>57</sup> See the Leaders' Agenda adopted by the European Council on 19-20 October and the Bratislava Roadmap – One Year On.

<sup>58</sup> Of which, ironically, the principal architect was Prime Minister Thatcher's EU Vice President Lord Cockfield and which reads in part '*the internal market shall consist of an area without internal frontiers in which goods, services, persons and capital move freely*'.

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Whatever its perceived advantages, a cliff-edge approach would lead to the immediate absence of UK representatives in the ‘EU Club’, consisting not only of the principal Institutions, but also the hundreds of consultative bodies responsible for technical work on the regulation and supervision of trade in goods and services on a daily basis. The multilateral system of consultation and dispute settlement in the WTO (which, in any event, is not a rule-making body) is by no means the same as full participation in the daily management of the world’s largest economic area.

Both the UK and (especially) the EU apparently rule out a simple extension of the Article 50 process under Article 50(3).

The UK’s current refusal to contemplate an extension of time to negotiate a withdrawal deal that is satisfactory to the UK Parliament is probably attributable to the state of domestic politics.

For the EU27, however, the reasons seem objectively compelling. The end of 2018 is a period of institutional change, with the election of a new Parliament in May 2019 and the nomination and appointment of a new Commission between June and November 2019. Despite the regret still felt by most Member States at the UK’s departure, there now appears to be an acceptance that the future of the European Project will be without the UK and that, it would be in the Union’s interests if at least the UK’s withdrawal (if not the future, permanent bilateral arrangement) were settled as quickly as possible. It should also not be forgotten that, on the EU side, Treaty changes to take account of the UK’s withdrawal need to be settled and ratified, in accordance with Article 48 TEU, before 29 March 2019.

In addition, the pressing nature of the current EU27 agenda (reform of eurozone governance, managing migration flows, the digital economy including the fight against cybercrime, relations with Russia, Turkey and the United States, the conclusion of free trade area agreements with a number of third countries starting with Japan and the institutional changes for 2020-2025), means that Brexit is a hindrance or a drawback to progress.

It would certainly not be in the EU’s interests for the UK to remain in the Institutions (whether with MEPs in the Parliament, a Commissioner, a seat in the European Council and Council, as well as full participation in EU committees and agencies) beyond the end of March 2019.<sup>59</sup> And indeed, the Prime Minister stated clearly in her Florence speech that the UK will cease to be a member of the EU on 29 March 2019 and will no longer sit at the European Council table or in the Council of Ministers and we will no longer have MEPs.

Thus, a new legal bilateral ‘bridging’ agreement will almost certainly need to be negotiated between January and October 2018 if an immediate ‘cliff edge’ is to be avoided by default.<sup>60</sup> This is a tall order by any standards, especially if the substantive provisions of the transitional arrangement differ from today’s *acquis* (even if only in scope and not in legal substance) and given that new governance provisions would also need to be negotiated. Several Member States’ representatives in Brussels have said (privately) that the only possibility in the 9 months available in 2018 to devise, negotiate and agree on a transitional arrangement would be to take an existing ‘model’ such as the EEA Agreement. This would at least comprise much of the ‘Single Market’ (though not the customs union) *acquis* mentioned by the Prime Minister in Florence. Whichever content

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<sup>59</sup> It appears to be undecided as yet whether UK officials of the EU Institutions will be allowed to remain in post after March 2019 or whether they will be offered some kind of ‘severance package’.

<sup>60</sup> This paper takes no position as to whether a ‘cliff edge’ should, in fact, be avoided or sought to be avoided. There are some who consider it to be a feasible option.

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is chosen for a transitional agreement, the UK will in any event be excluded from the Institutions during this time following formal exit on 29 March 2019.

### *Time pressures under Article 50*

In reality, the whole Brexit process seems likely to comprise four phases: the first phase currently underway; a second phase on the ‘framework for the future relationship’; a third phase on possible transition arrangements and, finally, the definitive future bilateral agreement between the UK and the EU27. In the European Council of 19-20 October 2017, the second and third phases have been taken together.

Taking into account the delays which have already occurred and future political developments (some already foreseen and others not yet known, whether in the EU27 or in the UK), it is already clear, as foreshadowed above, that time is very short indeed for the completion even of the first two phases. In any event, as the negotiations stand at present, the Council has only adopted directives for the first phase. Following the European Council on 19-20 October, it was decided that:

*‘at its next session in December, the European Council will reassess the state of progress in the negotiations with a view to determining whether sufficient progress has been achieved on each of [three issues – the financial settlement, citizens’ rights and Ireland]. If so, it will adopt additional guidelines in relation to the framework for the future relationship and on possible transitional arrangements which are in the interest of the Union and comply with the conditions and core principles of the guidelines of 29 April 2017. Against this background, the European Council invites the Council (Article 50) together with the Union negotiator to start internal preparatory discussions.’*

The fact that the European Council has instructed the next stage to be prepared by the Council and the Union negotiator (Michel Barnier acting under the authority of the Commission) clearly demonstrates the cohesion of the process on the EU side.

There must now be a real question as to whether there is the political will (and practical possibility) in the EU27 (including the sometimes overlooked European Parliament) to devote the time necessary to mandate, negotiate, conclude and ratify (as part of the Article 50 agreement) a transitional agreement for a period as short as 2 years or, according to recent rumours in Brussels, only 20 months to the end of 2020 during which time the definitive framework would also occupy a significant amount of time and energy for the new Commission and Parliament to be elected and installed in 2019. Such a shortened transitional period may appeal to many both in London and Brussels, but it would greatly increase the pressure on the UK to accelerate negotiations for a definitive new relationship, if only to avoid a postponed ‘cliff edge’.

There is an assumption in the UK (apparent in the Prime Minister’s Florence speech) that there is a balance of interests between the UK and the 27 sovereign States and 460 million citizens of the EU. This is however not the case, or at least not in the eyes of the 27. Certainly, relations with the UK cannot be compared with (and are different from) those with EFTA countries such as Switzerland or Norway. Nonetheless, with the exception of a special agreement on security, the Prime Minister (and her predecessors) appear to see the UK’s relations with the EU primarily in terms of trade in goods and services. If this is the case, the political motivation of the 27 to find the imagination and flexibility for a bespoke new arrangement achieving virtually the same ends by different means as those which currently exist, may be limited.

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Certainly, one way of addressing the question of a transitional period given the time constraints built into the Article 50 process would be to extend the *acquis* in its entirety but (a necessary consequence of Brexit and the Treaties ceasing to apply) the UK being excluded from all the EU institutions. It is possible that the EU might, as part of a settlement of this kind, allow the UK observer status in some Council working groups (although it would, no doubt, have to be careful not to discriminate against the EFTA countries under the EEA).

Not only would a temporary resolution of this kind alleviate the current serious time constraints, it would also avoid the challenge of selecting (with some legal difficulty) specific parts of the *acquis* for inclusion in the transitional period (see also below). This, in turn, could ‘clear the decks’ for extended discussions on the definitive (final) agreement. A further consequences might be that it would greatly simplify the task of enacting the EU (Withdrawal) Bill. The legislation needed to continue the existing *status quo* albeit without continuing EU membership would be far simpler than the drafting difficulties posed by the current version of the Withdrawal Bill (for which see below).

## ARTICLE 50: LEGAL AND CONSTITUTIONAL ASPECTS

It is important to note that, in law, Article 50 requires the EU to ‘*negotiate and conclude an agreement*’ with a Member State that has given notice under Article 50(1). However, no time limit is laid down by Article 50 as to when the withdrawal agreement must be concluded. This is made clear by Article 50.3 which contemplates that the Treaties will (subject to a unanimous decision to extend time) cease to apply to the exiting Member State after 2 years from the giving of notice even if, by then, a withdrawal agreement has not been concluded.

So, there is the distinct prospect (see above) that if a withdrawal agreement (including the conclusion of a transitional agreement) cannot in practice be negotiated before the end of March 2019, the UK will be compelled to revert to WTO rules.

Having regard to the drafting of Article 50 that consequence could (even assuming it to be legally possible) only be avoided by the UK revoking its notice under Article 50.

The thorny issue of whether Article 50 may, in law, be revoked (whether unilaterally or only with the consent of the remaining Member States) has not been judicially determined. There are arguments both ways.<sup>61</sup>

Certainly, the text of Article 50 suggests that (whatever the political difficulties)<sup>62</sup> revocation may be possible. As a former French Director General of the Council Legal Service<sup>63</sup> has observed:

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61 See Gordon and Moffatt ‘*Brexit: The Immediate Legal Consequences*’ (2016, the Constitution Society) at pp. 17-18. The paper also contains a detailed legal analysis of the constituent elements of Article 50 at pp. 14-18.

62 The difficulties are at least two-fold. A revocation decision could be regarded as frustrating the will of the people as expressed in the 2016 referendum vote. Additionally, from the perspective of the EU it is hard not to see, at the very least, demands for financial recompense from the UK for the costs of the abortive preparations for a UK exit. However, if and to the extent that the UK Parliament was not enabled to have a ‘meaningful vote’ on a UK/EU withdrawal agreement prior to exit it is at least possible that demand would grow for revocation of Article 50 so as to enable Parliament to have an effective say.

63 Jean-Claude Piris writing in the Financial Times on 1 September 2016

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*‘But what would happen if the UK changed its mind after invoking Article 50? Some lawyers argue that invoking Article 50 triggers an irrevocable process. But this interpretation of the process as a one-way path does not appear to be legally correct. First, the decision to invoke Article 50 is a unilateral act that does not depend on what other member states think or do. The sole condition is that the interested state must act “in accordance with its own constitutional requirements”. Second, the Article 50 procedure provides for notification by the interested state only of its intention to leave the EU. Formal notification of that intention would be made to the European Council. In law, the word “intention” cannot be interpreted as a final and irreversible decision.’*

## **THE FUTURE OF UK/EU RELATIONS AFTER 29 MARCH 2019: A TRANSITIONAL PHASE?**

As far as the period after 29 March 2019 is concerned, the UK now advocates ‘a period of implementation’ (which pre-supposes agreement on at least the form and broad content of the future permanent bilateral arrangement), where ‘access to one another’s markets should continue on current terms and Britain should continue to take part in existing security measures’. The Prime Minister has said that ‘the framework for this strictly-limited period, which can be agreed under Article 50, would be the existing structure of EU rules and regulations.’<sup>64</sup> The length of the transitional period would be determined ‘simply by how long it will take to prepare and implement the new processes and new systems that will underpin the future partnership.’ She envisaged a period of ‘around 2 years’.

In the time available until October 2018 (the time generally agreed for the conclusion of the first three phases of the withdrawal process identified above), it is now inconceivable that both an Article 50 agreement and an agreement on the future bilateral relationship could be achieved, even if the UK had a clear idea of the form and (especially) the content of the new agreement, which is manifestly not the case.

A number of comments are necessary on this issue. **First**, at least as the Council Guidelines now stand (see above) any transitional arrangements must be in the interests of the Union.<sup>65</sup> It is not clear what these interests are as far as future relations with the UK are concerned, although the EU stance was confirmed by the European Council on 19-20 October. Perhaps the work being done by the Commission and the Council between now and the December European Council on the Mandate for negotiating this phase will clarify this issue.

It is certainly true that any UK departure without some form of transition to the definitive future relationship would cause legal and practical uncertainty for Member States, citizens and economic operators in the EU27. Traders in or near Continental ports where most trade with the UK is cleared are an obvious example of this. However, the economic harm and legal uncertainty may well be far greater in the UK, given the fact that 44% of UK exports are destined for the EU27 and that the economic resilience of a market with 27 States and 460 million consumers is likely to be

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<sup>64</sup> This leaves a number of questions unanswered (perhaps because they have not been asked). For example: does this mean the totality of EU law? Or the law of the customs union and internal market (however this is defined)? Is this left deliberately vague to be clarified during negotiations? Does the UK expect the EU to ‘make the running’ on the content of the transitional period?

<sup>65</sup> This was confirmed in the Conclusions of the European Council Summit on 19-20 October 2017

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greater than that of the UK.

**Secondly**, the Guidelines state that any transitional arrangements would involve the *'time-limited extension of the Union acquis'*<sup>66</sup> and the application of existing Union regulatory, budgetary, supervisory, judiciary and enforcement structures. The Council's negotiating directives/mandate amplify the European Council's Guidelines on this matter and provide that:

*'to the extent necessary and legally possible, matters<sup>67</sup> that should be subject to transitional arrangements (i.e. bridges towards the foreseeable framework for the future relationship) and which are in the interests of the Union, will be included in those future sets of negotiating directives in the light of progress made. Any such transitional arrangements must be clearly defined<sup>68</sup>, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply. This approach will allow an efficient allocation of the limited time that Article 50 TEU imposes for the conclusion of the Agreement by avoiding the need to address the same matter at different phases of the negotiations.'*

Whether an arrangement based on these principles - which would in effect subject the UK to EU rules and procedures whilst being excluded from any participation in their formation - would be politically acceptable to the UK is far from certain.

Against this background, there may be significant challenges in defining and then negotiating a 'bespoke' and unprecedented agreement. Whatever approach is chosen will require:

- (a) extensive inter-departmental coordination (as well as consultation with the devolved regions and dependent territories) in the UK, with a clear legal framework being backed by strong political leadership and, possibly, Parliamentary approval;
- (b) the acceptance by the EU27 and the three principal EU Institutions of the UK's vision for the new relationship;
- (c) the preparation of an EU mandate for the necessary negotiations, requiring a proposal from the Commission, adoption by the Council of Ministers (including approval by the European Council) and, in practice if not in law, the agreement of the European Parliament.

It is important to note that the more wide-ranging the proposed transitional arrangement (unless the approach chosen is for the extension of the *acquis* in its entirety) the more difficult and time-consuming will be the preparation of the EU mandate, notably in the Council where different Council working groups would need to be involved to the extent that the material scope of the arrangement went beyond 'trade'.<sup>69</sup>

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<sup>66</sup> It is not clear how much of the *acquis* would be extended.

<sup>67</sup> This seems to indicate a limited approach to the extension of the *acquis*.

<sup>68</sup> If it were the intention of the EU, even as a last resort, to extend the whole *acquis* for a limited period of time, this phrase would not have been used. It is possible of course that the EU's position may change as the 'cliff-edge' approaches, with legal uncertainty causing damage both in the EU and in the UK.

<sup>69</sup> Note that, even if the proposed transitional arrangement is limited to trade in goods and services, the latter would also involve experts from a wide range of sectors such as financial and related services, tourism, etc.

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At a time when Phase 1 of the Article 50 process is still not completed, the negotiation of a transitional arrangement between January and October 2018<sup>70</sup> would demand an almost unprecedented level of political will and technical acumen, even if the EU27 was not preoccupied with an ambitious forward-looking agenda.

In Florence, the Prime Minister referred (not for the first time) to a *'new, deep and special partnership with the EU'*, which would span *'a new economic relationship and a new relationship on security'*. None of these words are new – but the abiding difficulty faced by the EU27 in seeking to understand the aims of the UK in leaving the Union lies precisely in the continued use of terms that lack any precise legal meaning.

Even in Florence, 15 months after the referendum, the Prime Minister - having admitted that *'we start from an unprecedented position'* - was only able to reject what she termed a *'stark and unimaginative choice between two models: either something based on European Economic Area membership; or a traditional Free Trade Agreement, such as that the EU has just negotiated with Canada.'* She suggested that *'we can do much better'* than either of these models. However, the Prime Minister continued in rhetorical vein by saying *'let us be creative as well as practical in designing an ambitious economic partnership which respects the freedoms and principles of the EU, and the wishes of the British people.'*

As foreshadowed earlier, with this level of vagueness, it is not easy for the EU27 to begin the process of formulating a Mandate for negotiating a transitional arrangement taking into account the future framework for the bilateral relationship, with no clear final goal in sight.<sup>71</sup>

#### *Defining the content of the bilateral relationship after withdrawal*

It is not possible in this paper to engage in detail with the possible substance either of the transitional or definitive arrangements. However (unless extending the totality of the *acquis* is chosen) there is no obvious reason flowing from the Guidelines and directives why, subject to clear legal definition<sup>72</sup>, the *'existing structure of EU rules and regulations'*<sup>73</sup> could not be maintained, during a transitional period. However, the legal challenge will be to define with sufficient precision the areas of *acquis* which are to be maintained. For reasons of legal certainty for economic operators, this is vital for the period immediately after withdrawal on March 29, 2019.

It is simple enough for politicians to speak of *'remaining in the Single Market and Customs Union'*. It is less easy, especially in the case of the 'Single Market' to define this in legal terms.

As far as Treaty provisions are concerned, the key provisions on the customs union and Single Market are in Part Three of the TFEU, Title I-IV, covering the internal market, the free movement of goods (including the customs union and customs cooperation), agriculture and fisheries and the free movement of persons, services and capital.

Title V covers the area of freedom, justice and security, where the Prime Minister has also indicated her wish to *'take part in existing security measures'*. However, here the UK is covered by

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70 Assuming the transitional arrangement is to be ratified as part of the Withdrawal Agreement.

71 Although this has now been mandated by the European Council on 19-20 October 2017

72 The mandate states that any transition period would not only have to be in the interests of the Union but also 'clearly defined, limited in time and subject to effective enforcement mechanisms'. A *'time-limited prolongation of the acquis'* to quote the mandate.

73 A *'time-limited prolongation of the acquis'* to quote the mandate.

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Protocols 21 and 36 to the Lisbon Treaty which provide the legal basis for the UK's participation in (or opting-out of/opting back into) specific measures in these areas. On 20 November 2014, the UK indicated its wish to opt back in to 35 instruments (including the European Arrest Warrant) adopted under the former 'third pillar' of the Maastricht Treaty. A key issue, both in the transitional ('implementation') and definitive regimes is likely to be the extent to which the UK would seek to maintain its commitments as they currently stand in the area of freedom, security and justice, bearing in mind that the UK would be excluded from EU policy-formation and decision-making in these areas.

Equally important will be the definition of the areas covered by the 'Single Market' where, despite its exclusion from policy-formation and decision-making in the EU institutions, the UK seeks to be subject to the *acquis* for a limited period after withdrawal. Amongst the areas mentioned above, it may well be, for example, that the UK wishes to be excluded as soon as possible from the Common Fisheries Policy. Likewise, the UK may – for example as a result of domestic political pressure - wish to limit in some way the free movement of persons, perhaps to a greater extent than would have been possible under the arrangement negotiated by former Prime Minister Cameron.

There is then the issue as to the extent to which areas such as competition, state aids, taxation and the approximation of laws (Title VII) will continue to apply. The latter is a particularly important subject as far as internal market legislation is concerned. Article 114 TFEU provides the legal basis for most internal market legislation.

Amongst other things, this Article provides in paragraph 3 that the Commission, in its legislative proposals concerning health, safety, environmental protection and consumer protection, take as a base a high level of protection. It is not clear at this stage at least that the UK will wish to accept EU legislation into which it has had no input, which may in any event come into force after the end of the transitional period and which may, according to some, go beyond a narrow definition of '*internal market legislation*'. A clearer definition of the UK's objectives is, therefore, required.

Another sensitive area where the Prime Minister has already indicated that the UK may wish to follow its own policies is taxation – particularly direct tax but also indirect tax (VAT) legislation. For most Member States, tax is at the very heart of the 'Single Market' and, just as the UK leaves the EU, the question of taxation in the embryonic digital Single Market is a top priority.<sup>74</sup> There is clearly a question whether the UK will wish to be bound by EU tax policy (including fiscal state aids procedures) in the transitional period, when its 'veto' power in the Council will no longer exist and where it may, as the Prime Minister has indicated, wish to use tax rates and structures as an instrument of economic competition with the EU27.

There are many other areas where, following the increasingly close inter-relationship between EU policy areas post-Lisbon, the UK may seek to 'pick and choose' to be covered or not in the 'bridging' part of the Article 50 agreement. A much-discussed example is transport (Title VI of the TFEU) and in particular air transport.

The selection of the examples mentioned above is intended to show that the Prime Minister's claim that '*access to one another's markets should continue on current terms*', that '*Britain should take part in existing security measures*' and that the framework for this '*would be the existing structure of EU rules and regulations*' is, to say the least, optimistic.

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<sup>74</sup> Taxation of digital services is of course a top priority in the G20 and OECD, where – presumably - the UK will wish to pursue its own policies outside the EU framework from the earliest possible moment.

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First, the UK's negotiating position for the 'implementation period' may well be influenced by domestic political considerations (depending partly on the extent to which this is debated in Parliament as negotiations proceed), leading to the UK seeking to be bound by some parts of the Treaty and not others. In addition, however, there is the question not only of the applicable Treaty provisions, but of the secondary and tertiary<sup>75</sup> *acquis* as well as the relevant case law of the European courts.

Taking the 34 'chapters' of the *acquis* used with applicant States as a benchmark, there are many chapters which relate directly to one or other Treaty article or Title (e.g. free movement of goods). There are others however (e.g. financial services), where the EU may seek to impose limitations, even in the 'implementation period' on access to EU markets for UK banks, insurers<sup>76</sup> and investment services. Other similar (and sensitive) examples include public procurement, intellectual property law, company law, the free movement of workers, social and employment law, energy, consumer and health protection and food safety, veterinary and phytosanitary policy. Again, UK policy in these areas is unclear.

### *The external dimension*

For every internal area of policy mentioned above, there is an external dimension ("the external aspects of the internal market"). The UK will of course be excluded from participation as a Member State in the common commercial policy under Article 206-207 TFEU from 29 March 2019. Unless, as is provided by the first set of negotiating directives provided by the Council, the 'disentanglement' of the UK from the EU's agreements with third countries is achieved by March 2019 (which currently seems improbable), the trade relations both of the EU and the UK with third countries may well suffer from a lack of legal certainty in the transitional period and even beyond, to the extent that negotiations between the UK and its third country partners extend beyond the end of the transitional period.

In addition, the UK would be in the ambiguous situation of being inside the customs union and internal market, but nonetheless a 'third country' for international trade purposes.<sup>77</sup> The same ambiguity would apply (perhaps to the confusion of other third countries) in all other areas (e.g. transport or food safety) where the UK continued to be bound by the *acquis*, but where it is nonetheless free to develop its own international relations, including the conclusion of new bilateral agreements. The EU's perspective is that the UK would also be precluded from negotiating new bilateral agreements during the transitional period.

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75 i.e. the 'soft law' made in the hundreds of committees which administer the internal market on a daily basis and from which the UK will be excluded from 29 March 2019.

76 Particularly if, for example in the case of insurance, the UK and the EU27 do not agree on proposed reforms of Solvency II.

77 In the WTO in Geneva for example (as with the FAO, ICAO, WHO, OECD and other international organisations, the UK will – from 29 March 2019, take its own seat apart from the EU27 Delegation.

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## A FUTURE PARTNERSHIP?

### *The four options*

The political rhetoric so far used by UK Ministers to describe the future bilateral relationship masks the fact that in international trade relations there are in reality only four options to choose from. In ascending order of trade liberalisation these are:

- (a) the multilateral rules of the World Trade Organisation, based on the equal treatment rules in the most-favoured nation (GATT Article 1) and national treatment (GATT Article III) provisions;<sup>78</sup>
- (b) a free trade area, in conformity with GATT Article XXIV, where tariffs and non-tariff barriers (NTBs) are reduced or abolished;<sup>79</sup>
- (c) a customs union, where in addition to the removal of tariffs and NTBs between Members, a common external tariff and commercial policy are adopted. For the administration of these common external policies, customs union agreements often establish institutional arrangements;
- (d) a Single Market such as that which now exists (at least in law) in the EU, where – in accordance with Article 26(2) TFEU internal barriers to the free movement of goods, persons, services and capital are abolished completely.

There is no magic or bespoke formula which would achieve the degree of mutual liberalisation of trade (and presumably wide-ranging cooperation), which is achieved by these ‘classical’ trade agreements. The key (political) issue which the UK has to decide is to what extent it wishes to ‘de-liberalise’ economic relations with the EU27 by re-imposing border controls and ‘taking back control’.

### *The WTO option – back to 1972?*

In the absence of any agreement with the EU27 on some form of preferential agreement which would enter into force on 30 March 2019, the UK’s sole legal nexus with the EU27 will be that provided by the WTO Agreements, which entered into force on 1 January 1995. Article XI:1 of the WTO Agreement provides that the UK is an original Member of the WTO. The EU provided the WTO with a schedule of tariff concessions for the UK in 1974 and this has subsequently been updated. On services, under the General Agreement on Trade in Services (GATS), the UK submitted (together with the EU and its other Member States) a schedule of specific concessions in 1994. From a strictly legal point of view therefore (and despite the more negative views of

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<sup>78</sup> Note that, even if in statistical terms, most of world trade is conducted outside preferential trading arrangements such as the EU, NAFTA, EFTA or Mercosur (e.g. between the EU, the United States and Japan, most WTO Members are linked to other Members by preferential arrangements. In leaving the EU therefore, the UK would stand alone amongst the world leading trading nations as falling outside any preferential arrangements.

<sup>79</sup> Note that FTAs (such as the EEA Agreement) may also contain, in addition to rules removing tariff and non-tariff barriers, provisions on “flanking policies” such as health, environment and consumer protection, or cooperation in fields such as R&D.

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some commentators<sup>80</sup>), there is no reason why the UK cannot make a ‘seamless’ transition to ‘autonomous’ membership of the WTO.<sup>81</sup>

To pretend, however, that re-gaining ‘autonomous’ WTO membership after 44 years would in some way, ‘liberate’ the UK, turn it into a global leader on world trade and galvanise the economy through enhanced exports, is likely to be illusory.

A number of practical problems (with potentially serious legal implications) would face UK trade negotiators from March 2019 onwards in terms of the WTO. The most immediate of these would be the quantification (in terms of money or quotas) of the UK’s share of commitments currently assumed by the EU. There is nothing automatic about this exercise.<sup>82</sup> For example, the assessment of the UK’s share of tariff rate quotas currently maintained by the EU for imports from the United States, is a matter on which the United States would have a view, which may not coincide with any agreement reached between the EU27 and the UK on this matter. Any dispute on this and comparable issues (for example on other agricultural quotas maintained in respect of important UK trading partners such as Australia and New Zealand) would have to be settled under the WTO’s Dispute Settlement Understanding (DSU). Comparable problems arise for determining the UK’s share of the EU28’s agricultural subsidy commitments.<sup>83</sup>

In our view however, ‘withdrawal symptoms’ would be felt most acutely by the UK when it is excluded from the EU’s tightly-knit trade policy ‘club’. The EU’s common commercial policy has existed since the completion of the EC customs union in 1968. For nearly 50 years the EU has had exclusive competence on trade policy and spoken with a single voice in the WTO (formerly the GATT). Trade policy, as defined in Article 207 TFEU as covering not only trade in goods<sup>84</sup> but also in services, the commercial aspects of intellectual property and foreign direct investment, is the area where the EU carries the most weight in international economic relations.

From April 2019, the UK will no longer be a member of the EU ‘trade club’. In plenary meetings of the WTO in Geneva, the UK will sit on the opposite side of the room from the EU, next to the United States and Uruguay. On the positive side, the UK will be able to speak for itself in WTO meetings. However, in order to participate effectively in the WTO’s work (much of which is conducted informally between seasoned trade diplomats in Geneva), the UK will need to reinforce the UK Mission in Geneva.

As one of the world’s largest trading nations, the UK might expect to be included in the crucial informal meetings of the WTO, where key policy issues are discussed. On the other hand, it will be difficult for UK officials (and stakeholders) to accept exclusion from the EU’s trade policy

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80 Even the current WTO Director General Azevedo was reported (Guardian, 7 June 2016) as saying that the UK would have to ‘start from scratch’ post-Brexit, so far as trade discussions in the WTO are concerned.

81 The legal situation which will exist in the WTO after UK withdrawal is set out in a joint letter sent by the EU and UK Ambassadors to the WTO on 11 October 2017. In this letter, the UK and the EU confirm that the UK’s intention on leaving the EU is to ‘replicate as far as possible its obligations under the current commitments of the EU’.

82 In the letter referred to above, the UK and EU seek to re-assure WTO partners that they intend to ‘maintain existing levels of market access’ after withdrawal, with ‘objective methodology’ being applied to calculate the apportionment of agricultural support.

83 These are only examples of the type of ‘technical’ problems which could face the UK upon withdrawal from the EU. Experience shows that, especially on agriculture, “technical “ problems can quickly become “political”. Similar technical issues include WTO procedures for rectifying and modifying schedules of concessions, as well as the need for the UK to accede independently to the WTO Government Procurement Agreement 2014, to which at the moment only the EU is a party.

84 Including commercial defence measures such as anti-dumping, anti-subsidy and safeguard actions

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committee<sup>85</sup> when it meets, in Geneva or Brussels, to formulate the EU's position in WTO negotiations, not least because of the important influence which the UK has had in the last 44 years in shaping EU trade policy. In our view, it is this exclusion from the comprehensive network of consultative bodies which characterise EU law and policy-making which would be more damaging to the UK, in the medium to long-term, rather than the immediate effect of tariff and non-tariff barriers (NTBs).<sup>86</sup>

On leaving the EU and as repeatedly stressed in this paper, the UK will not only become a 'third country' for the EU27; it will also be in a minority of the WTO's 164 Members which are not a part of a preferential trading arrangement under GATT Article XXIV. It is true that China, India and (until it signs its FTA with the EU) Japan are the most important WTO Members which still trade on a most-favoured nation (MFN) basis. The UK will in 2019 join this exclusive club. It is of course the UK's intention to negotiate new FTAs with key trading partners, but this will take several years.

At least three fundamental questions arise in this context however. First, FTA negotiations with countries such as New Zealand, Australia, Japan, Canada and India will certainly not be a 'one-way street' and be limited to increasing UK exports to these countries<sup>87</sup>. The UK's new partners will certainly seek enhanced access to the UK's market, perhaps especially in agriculture. Secondly, to the extent that the UK's intention is to differentiate its trade policy from that of the EU (for example in relations with Japan or the United States), such 'new' agreements will take many years to negotiate and implement. If on the other hand, the UK intends largely to replicate the EU's FTAs, such as those with Canada, Japan and Mercosur, then Brexit is likely to represent an 'own goal' for the UK. Finally, if indeed the UK does seek different FTAs with other third countries (for example with the United States on issues such as financial and other services), then it may well discover that its access to the EU27 markets is made more difficult and costly, because of the costs for UK stakeholders in meeting two (or more) regulatory or supervisory standards.

### Negotiating divergence

The fact that, for the moment as the Prime Minister says, the UK and the EU27 are '*on the same page*' in regulatory terms (indeed as regards the application of the *acquis* as a whole<sup>88</sup>) does not mean that this situation would last once the UK has left the EU. At that stage, the EU will not assume – in the absence of Treaty commitments to the contrary (such as those which exist in the EEA Agreement for example) - that UK law and policy remains in line with the EU. Such identity or equivalence will need to be demonstrated on an ongoing basis, in order for the UK to secure market access in the EU.

Both in the transitional and definitive arrangements, the UK will be negotiating divergence from the current *acquis*. By definition, when the UK leaves the EU<sup>89</sup> there will be areas where EU law

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85 Formerly the Article 13 Committee

86 The short-term impact of NTBs on UK exports will depend largely on the speed with which the UK diverges in its standard-setting processes (for industrial and agricultural goods and services) from its major trading partners, especially the EU.

87 One factor often overlooked in the Brexit debate in the UK is the fact that there is nothing in EU membership which in any way limits the UK's capacity to expand exports of goods or services at any time, to any destination. On the other hand, in areas where UK farmers or manufacturers currently benefit from protection negotiated by the EU, this may well disappear and be difficult to replace, given the UK's lesser 'leverage' compared with the EU27.

88 With the exception of course of those (very important) areas where the UK has secured derogations or 'opt-outs'

89 And probably in the transitional period also, depending on what is negotiated in the short period available in 2018

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does not apply from the outset and other areas where, even if a particular area is covered by the Agreement, UK law gradually diverges from the *acquis* (and *vice versa*).

As far as any transitional period<sup>90</sup> is concerned, the Prime Minister (and other UK Ministers) have spoken of a '*framework of the existing structure of EU rules and regulations*'. This appears to be understood to mean, in essence at least, the '*rules and regulations*' of the internal market and the customs union. However, for the definitive future agreement, the Prime Minister has expressly ruled out 'membership' of the single market and customs union. If this approach is followed, there will in practice be a 'two-stage process of de-liberalisation'. Far from providing legal clarity and certainty for economic operators, such an approach would only complicate matters, including planning for trade and investment.

It is important here to underline that to speak of 'membership' of the single market and customs unions as if they were distinct 'clubs' or legal entities is erroneous. For a third country, as the UK will be, the only issues are:

- (a) on what conditions will the UK, its citizens and economic operators, enjoy access to EU markets and
- (b) in what areas and under what framework will the EU27 co-operate with the UK, as a third country.

Finally and ironically, the negotiation of a definitive new bilateral agreement to succeed any transitional arrangement made within (or even subsequent to) the Article 50 process, may at least be free of some of the legal and practical ambiguities mentioned above and which seem to be unavoidable in negotiating a transitional arrangement, where the UK is 'half in and half out' of the Union.

Further discussion of the definitive future arrangement is beyond the scope of this paper. The following comments may however be made:

- (a) in the absence of greater precision from the UK<sup>91</sup> on the form and, above all, the content of the future final agreement, it is difficult to see how a transitional agreement could be negotiated as a 'bridge';
- (b) despite the ostensible simplicity of the Prime Minister's request at Florence, merely extending EU customs union and internal market regimes to the UK as a third country is not free from legal uncertainties;
- (c) it is far from certain how internal politics in the UK will affect the UK's negotiating position (notably as regards content) for a transitional let alone a permanent regime;
- (d) given that, according to the EU's negotiating directives, any transitional arrangement must be in the EU's interests, it is not clear at this stage to what extent the kind of regime described above would be in the interests of all 27 Member States and
- (e) against this background, it is difficult to be optimistic as regards the likelihood of

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<sup>90</sup> The term 'implementation' used by the Prime Minister seems inappropriate

<sup>91</sup> It is accepted that at the European Council Summit on 19-20 October 2017, the EU has undertaken to 'scope' both the transitional and definitive arrangements. To that extent, preparing for the future is now a joint exercise.

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a transitional regime being in place by October 2018, if indeed it is to be a part of the Withdrawal Agreement, which would need to be ratified by all 29 Parliaments<sup>92</sup> and in force on 30 March 2019, thereby providing a measure of legal certainty to States and economic operators alike;

- (f) to the extent that it proves impossible between January and October 2018 to negotiate a transitional arrangement which can be included in the Withdrawal Arrangement, an alternative could be to settle the terms of such an arrangement outside the Withdrawal Agreement, thus avoiding the need for ratification by national parliaments. The fact that Article 50 does not mention the possibility of a transitional arrangement leaves unclear the formalities for the conclusion of such an arrangement, including the role of the European Parliament;
- (g) one possibility that has been (unofficially) canvassed – possibly as a ‘last resort’ to avoid a complete legal vacuum - is the extension of the totality of the *acquis* for a limited period (e.g. 2 years or perhaps only until the end of 2020: see above) by a decision of the European Council, whereby the UK would continue to be covered by the totality of the *acquis*, but with no rights of participation in the Institutions.

In an era of almost unprecedented legal uncertainty, one thing appears to be certain; this is that, the period between January and October 2018 will require political and legal flexibility and imagination if a legally watertight transitional arrangement is to be found. Political will on both sides will be an indispensable element in this process; it is not at all certain that this exists (although for different reasons) either amongst the 27 (and the European Parliament) or in the UK.

## EU WITHDRAWAL BILL AND THE BRUSSELS NEGOTIATIONS

The EU (Withdrawal) Bill (‘the Bill’) is central to the success of the Brussels negotiations and, perhaps also, to the success of any constitutionally acceptable way of exiting from the EU. It passed its second reading in the House of Commons on September 11. Given its crucial relevance to the negotiations in Brussels it has been given a three-line whip. Yet, as explained below, it is not even certain that it will pass into law, let alone constitute an effective piece of legislation.<sup>93</sup>

A detailed consideration of the Bill in its present form is beyond the remit of this Paper which focuses on the state of the Brussels negotiations. However, the significance of the Bill to the negotiations is at least five-fold.

**First**, the Bill is intended to serve as the ‘legal backbone’ of leaving the EU. It provides the sole legislative framework for exit. If the Bill were to fail there would be no legislation and, therefore, no mechanism for enabling the substance of EU law to remain on the statute book. The repeal of the European Communities Act (‘ECA’) would uncouple all former EU law from the statute book whereas it is clear that most of the content of what was EU law needs to be retained unless and until altered incrementally by new domestic law. Without a statutory mechanism for such

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<sup>92</sup> i.e. the 28 current Member States and with the consent of the European Parliament

<sup>93</sup> The Bill has several more Parliamentary stages both in the House of Commons and in the House of Lords. The next stage is the debate before a Committee of the whole House of Commons as a Bill of major constitutional importance. This will take place over 8 days starting on November 14 2017 over a 4 week period of 2 days each week.

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retention there would be a huge lacuna in our laws after the EU Treaties ceased to apply.

It is, therefore, entirely in keeping with this objective that the Bill, as envisaged, has been crafted so as to ensure that UK law functions as effectively after Brexit as before. That aim is sought to be achieved by replacing the structure of the ECA by a new juridical concept; that of '*retained EU law*'.

Three main classes of law will be retained in this way (see clauses 2-4 of the Bill). They comprise:

- (i) By clause 2, EU-derived domestic legislation (i.e. statutory instruments under the ECA giving effect to EU law).
- (ii) By clause 3, direct EU legislation (as for example, EU regulations and decisions).
- (iii) By clause 4, all other directly enforceable EU law (as for example directly effective rights).

However, the definitional content of *retained EU law* cannot simply be detached from what is being negotiated in Brussels. For example, any areas in which the jurisdiction of the CJEU was proposed to continue even for a transitional period would need to be woven into the fabric of the Bill. Currently, there is nothing in the Bill that obviously caters for exceptions of this kind brought about by a UK/EU 'withdrawal deal'. Moreover, and importantly, the conclusion of an interim agreement that may not form part of a withdrawal agreement under Article 50 (see above) is not referred to in the Bill at all.

**Secondly**, the current content of the Bill and its likely stormy passage through Parliament reflect strong political differences which will be played out in the forthcoming parliamentary debates. As currently drafted, the Bill restores full and absolute judicial and legislative sovereignty to the UK. If that were its final construct the Bill will itself determine the trading model of future UK-EU negotiations (the 'stages 2, 3 and 4' identified earlier in this Paper) because such a model is incompatible with a relationship with the EU founded on the single market or customs union membership where all countries are required to comply with a set of common rules, themselves subject to alteration by the EU institutions.

True it is that the Bill in its present draft closely aligns pre-existing EU law in content, where retained, to UK domestic law (albeit in a different way before and after the relevant exit day) but the UK Parliament and the UK courts rather than the EU institutions and the CJEU will be the sole source of law once the Bill is enacted.

This will have several material consequences including the loss of a number of fundamental principles that are axiomatic to the proper functioning of EU law between the different Member States. Most notable, amongst these consequences, is the intended removal of the doctrine of supremacy of EU law for post Brexit law (see clause 5(1)) and, with it, the concomitant overriding jurisdiction of the Court of Justice of the European Union ('CJEU') (see clause 6). This will inevitably result in the loss of EU remedies including valuable commercial remedies. Some of these, such as *Francovich* damages are expressly removed by the Bill (see schedule 1).

Moreover, former EU law converted into domestic law by the Bill will itself be subject to amendment; much of it by Ministers giving effect to so-called Henry VIII clauses which confer very wide and uncertain powers to amend retained EU law where considered 'appropriate'.

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The cluster of these extremely broad Henry VIII clauses are, in outline, these:

- (i) By clause 7(1) the power to make amending regulations to prevent, remedy or mitigate *'deficiencies'* in EU law where the Minister considers that retained EU law contains *'anything which has no practical application'* to the UK or *'is otherwise redundant or substantially redundant'*. There are (see clause 7(2)) only illustrations of what *'deficiencies'* might mean so that in the absence of statutory definition one Minister might (subject to the constraints of judicial review) reach a different conclusion to another thereby producing a raft of inconsistencies in amended primary legislation.
- (ii) By clause 7(5) the power to make amending regulations which may *'among other things'* provide for the functions of EU bodies to be exercised by a similar UK body or to be *'replaced, abolished or otherwise modified'*. Again, there is no definition of what is meant by *'among other things'* leaving it potentially open to Ministers (subject to public law constraint) to legislate as they wish.
- (iii) By clauses 7(4), 8(4) and 9(2) regulations may be made for *'any provision that could be made by an Act of Parliament.'* It is rare in the extreme for a Henry VIII clause to permit wholesale amendment of a statute (as opposed to specific parts of a statute).
- (iv) By schedule 8 any statutory instrument under the Bill may be amended by another statutory instrument made under any other power in existing or future legislation. This means that the already wide powers conferred under the Bill may themselves be augmented by any statutes at any time and whenever enacted to amend the body of retained EU law without even the constraints on the deployment of Henry VIII clauses in the Bill.
- (v) By clause 9(1) regulations may be made as the Minister *'considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day.'* Ostensibly the breadth of this provision might be read by Ministers as permitting use of the regulation-making power prior to any Parliamentary consideration of the withdrawal agreement. Indeed, such a wide power leaves it potentially at least in the gift of the Minister whether the withdrawal agreement (or the prospect of no agreement) would in terms of a meaningful vote be put before Parliament at all (even through the cursory negative and affirmative resolution procedures that apply to statutory instruments generally).
- (vi) By clause 17(1) regulations may be made so as to *'make such provision as the Minister considers appropriate in consequence of this Act.'* Clause 17(2) states that (subject to clause 17(3)) this power *'may (among other things) be exercised by modifying any provision made by or under an enactment.'*

**Thirdly**, the current version of the Bill is not obviously consistent with the terms of the EU's mandate for the negotiations (see earlier). This is so in at least three respects being that: (i) the Bill permits the UK to withdraw from the EU without any deal; (ii) EU citizens' rights are not protected by ultimate recourse to the CJEU or, indeed, by any guaranteed EU rights, and (iii) no deal may obviously be concluded with the EU that falls outside the model introduced by the Bill. The absence of an exception to the intended statutory regime so as to make possible an agreement

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between the UK and the EU that is capable of falling outside the general provisions of the Bill is especially significant because it threatens to operate at a structural level to prevent any form of EU law (for example that relating to citizens' rights) continuing in domestic laws passed after exit day and therefore to produce potential deadlock in the Brussels negotiations.

**Fourthly**, the Bill's final content will be highly relevant to the stance taken by the devolved administrations in Parliament. This aspect is not directly relevant to the negotiations but it should be borne in mind, as developed later, that Scotland, Wales and Northern Ireland often have very different priorities to those of the UK in the Brussels negotiations, yet there is no effective mechanism (domestic or otherwise) for their inclusion in the talks. Scotland, in particular, has threatened to vote against the Bill unless their concerns are addressed and both Scotland and Wales have tabled numerous proposed amendments.

**Fifthly**, there are, in its current drafting, significant constitutional concerns that are being raised about the Bill. These concerns - which include the effect of the Bill (if enacted in its current version) on the rule of law and the limited scrutiny by Parliament (and the devolved administrations) in the way that Brexit is implemented - are likely to have, to say the least, an indirect impact on the Brussels negotiations because they are likely to delay the progress of the Bill even if other more immediately relevant issues arising out of the negotiations in Brussels were to be resolved.

In its interim report on the Bill<sup>94</sup> the House of Lords Constitution Committee observes that the Bill *'raises a series of profound, wide-ranging and interlocking constitutional concerns'* embracing three broad constitutional themes, namely those relating to: (i) the relationship between Parliament and the executive; (ii) the rule of law and legal certainty and (iii) the stability of the UK's territorial constitution.

As to (i), the Committee is concerned that the procedures for parliamentary involvement and scrutiny of the statutory instruments that will derive from the Bill will be insufficient given their potential significance.

As to (ii) the Committee points to *'multiple uncertainties and ambiguities'* in the drafting (as for example in the uncertain scope of retained EU law and the fact that the term 'exit day' appears to be variable and one that is whatever the Minister wishes it to be).

As to (iii) the Committee addresses this only briefly but it is clearly concerned about the implications of the Bill for the territorial integrity of the UK given the growing significance of devolution as a constitutional force.

Given this background there must be every possibility that the progress of the Bill will be delayed and perhaps emasculated even if the Bill is not defeated in Parliament. The Leader of the House Andrea Leadsom has stated that as well as 300 proposed amendments by MPs, some 54 new clauses have been proposed. The key proposed amendments reflect the same concerns as those of the Constitution Committee of the House of Lords. A debate on the Bill scheduled for mid-October (albeit that no specific date for debate had been fixed) has been delayed to give the Government time for detailed consideration of the drafting concerns. The Bill will not now be debated until immediately after the autumn recess.

To the extent that the content of the Bill itself is directly relevant to a successful outcome to the Brussels negotiations, delay in enactment means delay in concluding the negotiations which,

<sup>94</sup> See European Union (Withdrawal) Bill interim report 3<sup>rd</sup> Report of Session 2017-19 published September 7 2017.

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having regard to the tight timetable imposed by Article 50 TEU (and the unlikelihood of any extension of time from the remaining 27 member states: see above) could leave the UK in an extremely challenging position.

Domestic politics are, therefore, distinctly relevant to an assessment of the relationship between the progress and likely outcome of the Brussels negotiations and the Bill. The current state of domestic politics is, in this respect, febrile. No attempt is made to analyse it here but some commentators are predicting that the Bill may fail, with the Labour Party supporting Conservative ‘rebels’. With Labour’s ‘six tests’ requiring delivery of the ‘*exact same benefits*’ as we currently have as members of the single market and customs union it may safely be forecast that the vote on the Bill in Parliament is likely to be extremely close.<sup>95</sup>

## THE NEGOTIATIONS AND THE DEVOLVED ADMINISTRATIONS

### *Overview*

Devolution, in the United Kingdom, has proceeded asymmetrically. As far as resolving Brexit is concerned the result is a mixture of priorities (outlined below) between the devolved administrations as to the desired outcome of the Brussels negotiations as well as major differences of view as between the devolved administrations and the UK government. Not only that. The mechanisms for ensuring their effective participation in such negotiations are weak.

None of the devolved governments possesses competence in external affairs and they cannot, therefore, as a matter of constitutional principle participate in negotiations on future UK/EU relationships. This lack of constitutional competence does not prevent the UK government from conferring substantial influence on those governments as to the outcome of the negotiations in Brussels. However, the absence of a clear legal foundation for their participation weakens their position considerably.

Nor, as the decision of the Supreme Court in *R (on the application of Miller and Another) v. Secretary of State for Exiting the European Union*<sup>96</sup> (*‘Miller’*) shows does constitutional convention necessarily assist the devolved governments. Two questions were engaged in *Miller*; the relevant one for present purposes was the legal status of the Sewel Convention (the Convention that the UK Parliament will ‘not normally’ legislate with regard to devolved matters without the consent of the Scottish, Welsh and Northern Irish legislatures).

In that case, each of the devolved administrations sought to invoke the Sewel convention in different ways. On this question,<sup>97</sup> however, the judgment of the Supreme Court was unanimous. Sewel had no legal status. Accordingly, as a matter of law, UK Ministers were not compelled to consult any of the devolved legislatures before triggering Article 50. Relations with the EU were a matter solely for the UK government.

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<sup>95</sup> The political uncertainties and the use that the EU negotiating side may seek to make of these in the timing and content of terms offered are illuminatingly described by Matthew Parris: see *MPs and the EU can together derail Brexit*, The Times October 28 2017.

<sup>96</sup> [2017] UKSC 5.

<sup>97</sup> The Court divided 8-3 on the question of whether Article 50 TEU (the trigger for Brexit) was required to be invoked under the authority of Parliament or simply by the exercise of prerogative power.

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There is no doubting the constitutional relevance of Sewel but, as the Supreme Court put it in *Miller*:

*'The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.'*<sup>98</sup>

In law, then, Sewel gives no right or expectation to the devolved legislatures that they have any relevant role in the current negotiations over Brexit. But, as implicitly recognised by the Supreme Court the constitutional reality may, at least in theory, be otherwise. Indeed, the government has made it clear in its Explanatory Notes to the EU (Withdrawal) Bill that it will seek legislative consent motions from Scotland, Wales and Northern Ireland before enacting the Bill.

Legally, the impotence of Sewel may be apparent but its constitutional significance remains to be tested. And it will face its greatest test during the progress of the Brexit negotiations in Brussels.

The negotiations process and its aftermath raise three broad questions as far as our current UK devolution arrangements are concerned. They are:

- (i) What are the current arrangements for involving the devolved administrations in the Brexit process in Brussels and are those arrangements satisfactory?
- (ii) In general terms what are the interests of the devolved administrations as far as the negotiations are concerned and to what extent is the resolution of those interests central to successfully concluding negotiations in Brussels?
- (iii) What is the likely domestic impact of failing to resolve the interests of the devolved administrations during the Brussels negotiations?

***Question (i): What are the current arrangements for involving the devolved administrations in the Brexit process and are those arrangements satisfactory?***

In her speech to the Conservative Party Conference in 2016, the Prime Minister stated that the government *'will consult and work with the devolved administrations for Wales, Scotland and Northern Ireland, because we want Brexit to work in the interests of the whole country.'* The pledge was, in substance, repeated in the opening paragraph of the Queen's Speech delivered on June 21 2017. Most recently, in a position paper published in advance of the third round of talks, the government has repeated its commitment to working with the devolved administrations *'as we progress negotiations with the EU'*.<sup>99</sup>

These aspirations are designed to be achieved through a special Joint Ministerial Committee ('JMC'). The initial creation of a JMC, under a reissued memorandum of understanding ('MOU') preceded the June 2016 referendum by several years and had a wider focus than Brexit. It was set up in 2013. Its general aim was to provide a *'central co-ordination'* of relations between the UK and devolved governments.

In October 2016 a new JMC was established for the specific purpose of addressing the Brexit

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<sup>98</sup> *Miller* at [151].

<sup>99</sup> See *Continuity in the availability of goods for the EU and the UK* published August 21 2017 at [14].

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negotiations. It was called the Joint Ministerial Committee (EU Negotiations) ('JMC (EN)'). Its remit was for the UK and devolved governments to work collaboratively to:

- discuss each government's requirements of the future relationship with the EU;
- seek to agree a UK approach to, and objectives for, Article 50 negotiations; and
- provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations; and
- discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.

Nonetheless, although JMC (EN)'s remit has ostensibly been tailored to meet the need for effective collaboration between the UK and devolved governments over the Brexit negotiations it suffers from two structural difficulties. They are interrelated.

**First**, there is no obvious incentive for the UK government to allow the devolved governments to exercise any veto over the terms of the Brexit agreement. To do so could only weaken the government's external negotiating position in Brussels. It would, therefore, have been surprising (short of any legal impediment) for any mechanism fostering collaboration between London, Belfast, Edinburgh and Cardiff to have enabled real influence to have been exerted by the devolved administrations.

**Secondly**, the JMC structure (from which JMC (EN) is derived) was not set up to cope with a politically complex and time-constrained process such as Brexit. In particular, the JMC machinery is not that of a decision-making body. It allows for information exchange but offers no political or constitutional guarantees. This is reflected in paragraph A3 of the 2013 MOU which states expressly at [A3.1] that '*... this agreement is a statement of intent, creating no legal obligations between the parties, and binding in honour only.*'

It is unsurprising, therefore, that, despite some pressure from the devolved governments to improve its effectiveness, JMC (EN) only met once between February and October 2017 (the last meeting, in respect of which a communique was issued in somewhat anodyne terms was on October 16 2017).

The current lack of effective participation is evidenced by the parliamentary question and answer in July 2017 shortly before the parliamentary recess. The question (raised by Jonathan Edwards MP on July 12) was '*To ask the Secretary of State for Exiting the European Union, when the Joint Ministerial Committee (EU Negotiations) will next meet.*'

Robin Walker MP (for the Minister) responded (it may be thought somewhat blandly) on July 21 as follows: '*The Government has been clear from the start that the devolved administrations should be fully engaged in our preparations to leave the EU. The Secretary of State has had a number of bilateral discussions with the Scottish and Welsh Governments as we have moved into the negotiations phase and we are committed to positive and productive engagement going forward. In the absence of an Executive, we have also engaged at an official level with the Northern Ireland Civil Service. Over the summer, we anticipate there will be regular and sustained bilateral discussions with officials from the devolved administrations, reporting back to Ministers at regular intervals*

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*to ensure sufficient progress is being made. There is also a place for multilateral meetings, and we will take that forward as and when it is appropriate.'*

The difficulties in ensuring effective participation by the devolved governments as the Brexit process moves forward are exemplified (and compounded) by the wider domestic issues that surface independently of Brexit.

An outline of just one issue currently affecting the UK government and the devolved administrations outside of Brexit illustrates the possibly insuperable difficulties in attempting to deploy the JMC machinery to solve what are becoming essentially entrenched political issues and divides.

Following the most recent (June) election in Northern Ireland, there remains no Executive and it is uncertain whether power sharing between Sinn Fein (pro remain) and the DUP (pro Brexit) will be possible in the short to medium term. The March election was followed by the UK election on June 8 and this resulted in a hung parliament. In order to secure a parliamentary majority for her government, the Prime Minister Theresa May arranged for her party to enter into a confidence and supply agreement with the DUP by which it committed the government to increased funding for identified items of Northern Ireland expenditure.

The legal status of this agreement was not beyond doubt. It was the subject of an unsuccessful challenge in the courts. Even though the legal challenge was recently defeated, the task of funding the devolved administrations has, to date, been consistent with the Statement of Funding Policy ('SFP') issued by the UK Treasury and the DUP agreement represents an ostensible departure from this policy.<sup>100</sup> By necessary implication the SFP makes clear (see for example [1.17] principle 6) that funding is intended to be made to each of the devolved administrations on a broadly equivalent basis. Both Scotland and Wales have formally invoked the JMC process in an attempt to secure increased funding following the DUP agreement.

It is very doubtful whether the JMC process will bring positive results. So far the UK government has indicated that it is not an appropriate vehicle for resolving political issues of this kind. If that stance is correct it is not easy to see how the considerably more contentious (and long-term) issues that divide (in different ways) the devolved governments and UK government over Brexit will be capable of being resolved by the current JMC (EN) procedures.

A recent select committee inquiry<sup>101</sup> has concluded as follows:

*'We note ... the concerns expressed by the Scottish and Welsh Ministers that the JMC (EN) is not fulfilling its terms of reference, and it is clear that at a basic level its meetings are not being treated with respect or organised efficiently. This needs to change: if the UK Government wishes the JMC (EN) to make a useful contribution, it must give it appropriate support, both in political and resource terms.'*

However, as implicitly foreshadowed earlier, the challenge appears to require more than a simple effort of will to improve the JMC (EM) process. Some of the potentially intractable issues that arise during the Brexit negotiations in Brussels will be relevant to the devolved administrations' priorities some of which are likely conflict with those of the UK government. That conflict in

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<sup>100</sup> HM Treasury *Statement of Funding Policy: funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly* 7th ed November 2015.

<sup>101</sup> European Union Committee *Brexit: Devolution* 4<sup>th</sup> Report of Session 2017-19 published July 19 2017 HL Paper 9. The extract is from [291].

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turn could have repercussions in terms of the UK's domestic constitution which may impact upon either the UK government's ability to push through a concluded Brexit deal and/or being able to keep the UK together as a unified constitution.

The next two sections address this potential *circulus inextricabilis*.

***Question (ii): In general terms what are the interests of the devolved administrations as far as the negotiations are concerned and to what extent is the resolution of those interests central to successfully concluding negotiations in Brussels?***

*Two general predictions*

At this stage in the negotiations, two general predictions may be made.

**First**, (unless the EU makes material concessions away from its original starting-point) the resolution of at least some of the interests of the devolved governments one way or the other will be necessary before negotiations over trade can even begin.

**Secondly**, in terms of Brexit the interests of the devolved administrations are not always the same and will, in any event, often be in conflict with those of the UK government. Even if a Brexit deal is ultimately agreed in principle by the UK government the difference of approach as between the devolved governments on the one hand and the UK government on the other are likely to prove intractable on fundamental constitutional issues.

Neither of these predictions augurs well for a Brexit outcome that will, on the international level, be acceptable to the devolved governments.

Moreover, these points are linked to the three other difficulties referred to here which compound the problems for a successful Brexit outcome, namely the challenges for the UK government in: (i) ensuring an effective participatory mechanism for the devolved governments to have any influence over the outcome of the Brussels negotiations; (ii) being in a position to give effect in domestic law to its concluded Brexit deal and (iii) keeping the UK constitution in more or less its present form (albeit with the inevitability over time of increased devolved powers).

*Problem (1): conflicting interests*

The interests of the three devolved governments over Brexit are discrete and often separate from those of the UK government. Nor is their position always identical as between the different administrations. Their principal respective positions are outlined (in highly simplified form) in the Tables below.<sup>102</sup>

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<sup>102</sup> These Tables do not encompass the significant constitutional concerns over what powers will be devolved following the conversion of EU law to domestic law. This topic is addressed separately below. It overlaps with the devolved governments' concerns over the conduct and outcome of the Brexit negotiations but is analytically separate from them as it goes to the ongoing constitutional relationship with the UK government once Brexit has been concluded. However, these concerns may themselves affect the UK government's capacity to ensure that the Brexit outcomes are endorsed by Parliament.

Table 1: Scotland Brexit priorities<sup>103</sup>

Priority	Observations
Membership of the single market and customs union. <sup>104</sup>	The UK government is currently opposed to staying in the single market and customs union although recognises the need for a transitional period of access. During any transitional period Mrs. May has confirmed that EU rights and obligations would continue. Nonetheless, Michel Barnier has said that transition can only be agreed once there is clarity on the key points of the withdrawal agreement and that, in any event, he will need a further mandate from the European Council before talks can be widened to embrace transition. It seems likely that either membership or any transitional period would require compliance by the UK with CJEU judgments. The EU is currently adamant that the CJEU must have the power of final determination. This is a red-line issue as far as the UK government is concerned because it has thus far not agreed to accept any overriding jurisdiction of the CJEU post Brexit. It is at least possible that a new disputes resolution mechanism may be the compromise that is ultimately reached.
Free movement within the EU	In theory free movement would end with Brexit subject to whatever transitional arrangements are negotiated. Again, if genuine EU free movement were agreed that would entail policing by the CJEU. Moreover, free movement is an essential component of membership of the single market.
Retained EU research funding	It is in the interests of both the UK and the devolved governments for as EU research funding to be retained as possible. But this will be subject to whatever transitional arrangements can be negotiated.
Continuing rights for EU citizens in Scotland	In her Florence speech the Prime Minister restated that the aim of negotiations was to preserve the rights of EU citizens living in the UK. But the issue is not resolved. One key question is how those rights are to be adjudicated on. It seems likely that the EU would insist on the continuing of CJEU jurisdiction (see above).

103 In Scotland, 62% of votes cast in the 2016 referendum were for remain making it the highest percentage of any of the nations in the UK (albeit with a relatively low turn-out of 67.2%).

104 See Scotland's Place in Europe (December 20 2016) at [95]-[96].

105 A recent House of Lords Committee inquiry (see House of Lords European Union Committee 4th Report of Session 2017-19 Brexit: Devolution published July 19 2017 HL Paper 9) has endorsed this view finding that continued Scottish membership of the single market as part of the EEA whilst the rest of the UK leaves the single market is 'politically impracticable, legally highly complex and economically potentially disruptive to the functioning of the UK single market' (see [201]). However, the Committee does recommend that in the event of the Brexit outcome not adequately meeting Scotland's special needs 'there is a strong political and economic case for making differentiated arrangements for Scotland' [205]. Those special needs encompass reliance on EU labour, the need for which is acute in certain areas such as health and social care [206] and for continued access to EU structural or research funds [207].

Special Brexit terms to be negotiated for Scotland in the event of a different UK solution	The UK government is opposed to any bespoke Brexit solution for Scotland. <sup>105</sup>
Commitment to addressing the Northern Ireland Border issue in Brexit talks	There is commitment to addressing this issue (see Northern Ireland priorities below).
Protection of key sectors: financial services, agriculture and fisheries, food and drink production and higher education	This is a common interest for both the UK government and the devolved governments. But the priority to be given to each sector is not necessarily the same.

Table 2: *Wales Brexit Priorities*<sup>106</sup>

Priority	Observations
Access to the single market	The current position of the UK government is not to see single market access given the EU requirement of free movement and the continuing requirement of CJEU jurisdiction.
Free movement to be linked to whether applicants have a job	The current position of the UK government is to oppose the EU principle of free movement (save for the continuing rights of EU citizens living here).
Job protection for Wales	This is not obviously part of the UK government's current agenda.
Ensuring Wales's participation in decision-making over Brexit negotiations	This is a totemic aspiration but in practice there are no effective mechanisms (see above).
Continued receipt of funding from the EU's common agricultural policy and structural funds	This will fall with Brexit subject to any transitional measures agreed.
Major revision of the UK's funding policy towards Wales	This is separate from the Brexit negotiations and is not linked to the outcome of negotiations. However, if left unresolved it could impede the implementation of a Brexit agreement.
Reformed relationship between the devolved administrations and the UK Government	This is separate from the Brexit negotiations and is not linked to the outcome of negotiations. However, if left unresolved it could impede the implementation of a Brexit agreement.

106 In Wales 52.5% of those voting in the 2016 referendum, voted to leave. In terms of votes cast, the turnout was 71.7% making it the highest of the devolved nations. The recent House of Lords committee enquiry (referred to above) explains that Wales could be '*profoundly*' affected by Brexit; being highly affected by membership of the single market with proportionately higher manufacturing than in other parts of the UK and with two-thirds of its exports going to the EU. Welsh farming is particularly at risk and Wales is a substantial net beneficiary of EU funds. Despite all this, Wales may have less leverage than either Scotland or Northern Ireland over the outcome of the Brexit negotiations both because it voted to leave and also because (unlike either Scotland or Northern Ireland) it does not pose similar constitutional difficulties to those posed by these nations (see House of Lords European Union Committee 4<sup>th</sup> Report of Session 2017-19 *Brexit: Devolution* published July 19 2017 HL Paper 9; [138]-[143]).

Table 3: Northern Ireland Brexit Priorities.<sup>107</sup>

Priority	Observations
Continuation of a 'soft' border ensured by the single market and customs union	In her Florence speech the Prime Minister stated that neither the UK government nor the EU would accept any physical infrastructure at the Irish border and were committed to protecting the Belfast Agreement and the Common Travel Area. However, no potential solutions are yet advanced.
Retaining as far as possible current trading with EU states	This forms the second part of the Brexit negotiations and the EU is currently refusing to negotiate a future trading relationship before its threshold issues have been resolved.
Retaining access to labour	This is an aspect of free movement and suffers from the same challenges as free movement more generally.
Securing energy supply	This is a common interest for both the UK government and the devolved governments. But the priority to be given to each sector is not necessarily the same.
Protection of agri-foods sector	This is a common interest for both the UK government and the devolved governments. But it has particular importance for Northern Ireland.
Maintaining EU funding for farming and infrastructure	This is a common interest for both the UK government and the devolved governments. But the priority to be given to this is unlikely to be the same for the UK government as it is for Northern Ireland,

*Problem (2): consequences of conflicting interests*

Four things are apparent from the above Tables.

**First**, there are important areas where the priorities of some, if not all, of the devolved governments currently differ materially from those of the UK government and where the consequences of the negotiations (most notably on single market membership or access and on the trade-off between free movement and the economic need for EU labour) will, in the absence of a radical

107 In Northern Ireland, the 2016 referendum produced a majority of votes cast for remain (55.8%) although on the lowest turnout of any other part of the UK. The main political parties were split along a political divide; the DUP argued for leave whereas its then power-sharing partner Sinn Fein was strongly remain. The 2017 election resulted in a hung parliament. Currently there is no power-sharing executive in Northern Ireland and the UK government is involving Northern Ireland in the Brexit talks via the republic's civil servants (see above). The nature of the Northern Irish border following Brexit is pivotal to the success of the Brussels negotiations and is one of the threshold separation issues that both the UK government and the EU have recognised must be resolved. The House of Lords select committee inquiry on the devolution impacts of Brexit referred to above has recognised that '*the specific circumstances in Northern Ireland give rise to unique issues that will need to be addressed during the Brexit negotiations*' (see House of Lords European Union Committee 4th Report of Session 2017-19 *Brexit: Devolution* published July 19 2017 HL Paper 9; [98]).

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change of stance by the UK government, be especially profound for the devolved administrations unless bespoke or differentiated solutions can be found.

**Secondly**, in at least some of the areas where the interests of the UK and devolved governments diverge, there are (on the current approach of the EU) formidable obstacles in the way of reaching a concluded settlement even at the first (separation) stage.

As explained earlier, the EU has insisted that the UK must make *sufficient progress* on (especially) three separation issues before talks can progress to trade (see above). These are: (i) the financial settlement; (ii) the Irish border and (iii) EU citizens' rights. Each of these involve potential issues of EU law and the resolution of the second and third, in particular, may impact heavily and adversely on some or all of the devolved governments if determined contrary to their interests.

The question of the Northern Ireland Border after Brexit (hard or soft) has obvious effects on the political and economic stability of the UK as a whole. Although there appears to be an in-principle consensus on the part of both the UK government and the EU as to the need for some form of 'soft' border it is far from clear that a viable solution will emerge from the way in which the UK government is approaching the issue. The *Northern Ireland and Ireland Position Paper* was published on August 16 2017. It appears to seek to mix trade with separation issues so as to include the customs union in discussions over the border.<sup>108</sup> However, this could well be vetoed by the republic of Ireland (itself a separate EU member with a right of veto) as it may be perceived as giving the UK government an economic bargaining chip that ought not, on the logic of the mandate, to be available to it.

As to citizens' rights, the current position of the EU is that the resolution of questions relating to EU citizenship necessarily entails adherence to the EU treaty rights of free movement for all EU citizens as well as the continuing jurisdiction of the CJEU to police those rights. The UK government is currently adamant that these are red-line issues and has repeatedly stated that it will not agree to the CJEU possessing overriding jurisdiction after Brexit day. Indeed, the current version of the EU (Withdrawal) Bill is premised on this being the case.

**Thirdly** therefore, and in any event, it seems distinctly possible that by the stage of trade negotiations some aspects of the economic model will already have been determined by the resolution of questions engaged at the first stage. For example, lack of adherence to free movement rights for EU citizens or continuing resistance to any continuing CJEU jurisdiction appear likely to operate to prevent membership of the single market or any similar EU focused trade model not only in form but also in substance. This is because even as members of the European Economic Area ('EEA') free movement principles would apply to the UK in exactly the same way as they do in EU member states.

It is at this point that the some of the devolved administrations would probably wish for differentiated solutions of some kind. However, this is problematic. For example, as far as access to the single market is concerned, not only is the UK government opposed to differentiated solutions so, too, are those countries in the EU with regional nationalisms such as Spain which would not wish by giving distinctive status to, say, Scotland to give any encouragement to domestic secessionist movements.<sup>109</sup> This is likely to rule out some scenarios that have been canvassed such as the

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<sup>108</sup> See Position Paper at for example [34], [44] and [46] et seq.

<sup>109</sup> This question now has added resonance given the recent declaration of independence by Catalonia.

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‘reverse Greenland’ scenario whereby Scotland retains EU or quasi- EU membership when the rest of the UK exits from the EU.

**Fourthly**, the success of the Brussels negotiations is hugely dependent upon the outcome being broadly acceptable to some, if not all, of the devolved nations. To the extent either that the devolved nations are unable to participate effectively in the Brexit negotiations and/or that an outcome is threatened that is fundamentally antithetical to their political or economic interests, consequences will flow on the domestic front. This is included as part of the next section. Importantly, however, the consequences of a Brexit solution being unacceptable to the devolved governments cannot necessarily be confined to domestic politics (significant though that may be for the territorial integrity of the UK after Brexit). Failure by the UK government to achieve general consensus across the UK to its proposed Brussels deal may adversely impact on that government’s ability to achieve a Brussels deal at all.

***Question (iii): What is the likely domestic impact of failing to resolve the interests of the devolved administrations during the Brussels negotiations?***

A potential constitutional crisis affecting the relationship between the UK government and the devolved governments may soon surface outside the scope of the Brussels negotiations as such though it is directly linked to them.

It concerns the terms of the EU (Withdrawal) Bill (see, also, earlier analysis). As explained above, there are several contentious drafting issues engaged in how to define the reach and scope of *retained EU law* within the meaning of the Bill (see, especially, clauses 2-6). For example, is *retained EU law* to be regarded as primary legislation and so immune from judicial review altogether or is it necessarily subject to judicial review and, if so, on what basis?

The problem arises, in part, because of the close linkage between the powers currently devolved to Scotland, Wales and Northern Ireland and substantive EU law. The Government has shared a list of 111 policy areas in Scotland and 64 such areas for Wales which are currently governed from Brussels but which intersect with devolved powers. They include farm support, fisheries, genetically modified crops, environmental regulations, fracking, rail franchising rules and co-operation against crime. Dividing these areas into devolved competences as distinct from national frameworks for the whole of the UK will be no easy task.

The current position is that, as a matter of legislative competence, none of the devolved legislatures may act incompatibly with EU law. Each of the devolution statutes prevents this in express terms.

However, clause 11 of the existing draft of the Bill changes this providing that, post-Brexit, the devolved legislatures will not be able to modify retained EU law or, therefore, to legislate contrary to retained EU law<sup>w</sup>.

As far as the devolved legislatures are concerned, this is a major constitutional change. On one analysis clause 11 is consistent with the statutory scheme in that the freeze-framing of EU law into domestic law as at the date of Brexit requires the creation of a new domestic construct preserving the substance of former EU law. This necessarily entails the substitution of an equivalent restriction on the legislative competence of the devolved legislatures to that prevailing before Brexit and which continues to prevent them from legislating contrary to what is, henceforth, ‘preserved’ (or ‘retained’) EU law.

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Nonetheless, the effect of clause 11 as drafted is that modifications to *retained EU law* will, post Brexit, be made throughout the UK by the UK government through the statutory mechanisms envisaged in the Bill (as opposed to EU law being modified by the EU institutions). The problem is that, if enacted, this leaves no ‘space’ for the devolved governments to legislate as to the content of retained EU law in their respective areas. It means that powers and constraints in respect of existing EU law are repatriated solely to Westminster and not to any of the devolved governments.

The position of the UK government (that position being the domestic simulacrum of its approach to encouraging participation of the devolved governments in the Brussels negotiations) is that it will liaise with the devolved administrations to ensure that retained EU law that is not proposed to be legislated for on a pan-UK framework basis is identified and devolved by Order in Council.

But, as with their vulnerability in respect of the Brussels negotiations, there is no legislative mechanism for ensuring the participation of the devolved administrations in changes to retained EU law beyond that contained in the Order in Council procedure. That procedure is, essentially, dependent on the exercise of discretion from Westminster (see, for example, the Bill at clauses 7-9 providing for the wide exercise of Henry VIII powers by ministers).

The concerns of the devolved governments over these aspects of the Bill were, on behalf of Scotland, trenchantly outlined by Michael Russell, the Scottish government minister responsible for Brexit-related matters following a meeting with the First Secretary of State Damien Green on August 9.

Mr. Russell said this:

*‘Today was a useful opportunity for an exchange of views between ourselves and the UK Government on Brexit and the repatriation of powers it will involve. But following today’s meeting we remain absolutely clear that, as things stand, we will not recommend to the Scottish Parliament that it gives its consent to the EU Withdrawal Bill. The bill as currently drafted is impractical and unworkable. It is a blatant power grab which would take existing competence over a wide range of devolved policy areas, including aspects of things like agriculture and fishing, away from Holyrood, giving them instead to Westminster and Whitehall.*

*That means that unless there are serious and significant changes to the proposed legislation, the strong likelihood is that the Scottish Parliament will vote against the repeal bill. To be clear, that would not block Brexit and we have never claimed to have a veto over EU withdrawal. But UK Ministers should still be in no doubt — to override a vote of the Scottish Parliament and impose the EU Withdrawal Bill on Scotland would be an extraordinary and unprecedented step to take.*

*What is now needed is a recognition from the UK Government that the bill as drafted cannot proceed. It should be changed to take account of the very serious concerns expressed by the Scottish and Welsh Governments. The current proposals are a direct threat to the devolution settlement which the people of Scotland overwhelmingly voted for in 1997. As we have made clear, we are not opposed in principle to UK-wide frameworks in*

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*certain areas — but this must be on the basis of agreement among equals, not imposed by Westminster.’*

Since then, on September 19, the Scottish and Welsh governments have jointly published 38 proposed amendments to the Bill designed to allay these concerns. Both governments have stated that they could not recommend giving consent to the Withdrawal Bill unless it is substantially changed. One interesting possibility is that Scotland and Wales could decide selectively to deny consent to deny legislative consent to those parts of the Bill that adversely impacted on their devolved powers. If a non-consent motion of this kind preceded a vote on the Bill by the House of Lords, there is at least a prospect that the House of Lords might then vote down those clauses which were objectionable to the devolved governments.

The amendments are designed to secure the following, namely to:

- ensure that devolved policy areas come back to the Scottish Parliament and the National Assembly of Wales on withdrawal from the EU;
- prevent UK ministers from unilaterally changing the Scotland Act and Government of Wales Act;
- require the agreement of the Scottish government on necessary changes to current EU law in devolved areas after Brexit;
- ensure that additional restrictions are not placed on devolved ministers compared with UK ministers.

The link between the objections of Scotland and Wales to the Bill and the outcome of the Brussels negotiations is this. At least to some extent, the content of the deal that is on offer after the Brexit negotiations have concluded could, in practice, condition how Scotland and Wales respond to the Bill as it goes through Parliament. True it may be that their principled constitutional objections to the Bill will remain however the proposed deal works out. But a trade model that meets the concerns of Scotland and Wales in Brussels may possibly serve to dilute opposition to the statutory structure of the Bill. Thus, the closer the final shape of the proposed deal is to requiring compliance with EU law (created and modified by the EU institutions) in order to preserve the trade model (as for example strong single market access) the less may be the need for objections to the Bill on the footing that Westminster may come to refashion the content of retained EU law as is presently contemplated.

As explained above, neither Wales nor Scotland possesses any kind of legal veto over the enactment of the Bill. Nonetheless, the constant refrain from the UK government has been that the will of the people as expressed in the 2016 referendum must be honoured. Yet, nothing in the referendum addressed the difficult challenges posed by devolution and where, in Scotland at least, the overwhelming majority of votes cast were for remain.

The distinguished legal commentator Professor Mark Elliott has put the potential constitutional fall-out from Brexit as far as devolution is concerned very well:<sup>110</sup>

*‘At the end of the day, the UK Government and Parliament (subject, of course, to the constraints of parliamentary arithmetic) can legally have their way on what happens to repatriated power, even if any “will of the people” justification for doing so would be*

<sup>110</sup> *Public Law for Everyone*, August 10 2017.

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*specious. But the UK Parliament's legal sovereignty does not render it a monopolist when it comes to determining the acceptable rules of interaction between the several governments and legislatures that wield democratic power within a British constitution that is unrecognisable from that which existed when the UK joined the EU over 40 years ago. And in whatever other senses (positive or negative) leaving the EU may involve a turning back of the clock, it will not afford the UK Government the luxury of a 1970s-style British constitution in which power was hoarded in London. The referendum result may stand for the (questionable) notion of "taking back control", but it leaves unanswered any detailed questions about where, post-Brexit, "control" over relevant matters should reside within the UK's contemporary multi-layered constitution.'*

## **THE CROWN DEPENDENCIES AND OVERSEAS TERRITORIES**

In 1972 when the UK Treaty of Accession was signed, special arrangements were made for the Crown Dependencies (Jersey, Guernsey<sup>111</sup> and the Isle of Man), the Overseas Territories<sup>112</sup> and Gibraltar.

The CDs were consulted by the UK during the accession negotiations on the relationship which they sought with the EEC. They decided that their main interest at the time was preserve market access for their agricultural and horticultural products. Protocol 3 to the UK Act of Accession therefore provides that the Islands are covered by the customs and free movement of goods provisions of EU law.<sup>113</sup> The CDs are part of the EU's customs union, although only the Isle of Man is affiliated to the WTO as a result of the extension of UK membership to the Island in 1997.<sup>114</sup>

Over the last 44 years, the economies of the Islands have developed so that financial services have become the mainstay of the Insular economies. Since around 2000, the Islands have been increasingly affected by the extension to them of EU direct tax rules, notably on tax transparency. All three Islands are currently being assessed by the EU's Code of Conduct Group for compliance with criteria on tax transparency, fair taxation and the minimum standards established under the OECD's BEPS<sup>115</sup> exercise.

The importance of EU markets for the Islands' financial products has meant that, although not directly affected by EU financial services legislation, the Islands have monitored developments closely, adapted their own regulations and supervisory requirements so that they are equivalent<sup>116</sup> to those in the EU and strengthened their informal relations with the EU Institutions and Member States.<sup>117</sup>

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111 The Islands of Alderney and Sark, each with a measure of independence within the Bailiwick of Guernsey

112 Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, the British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands and Bermuda (Annex II to the Lisbon Treaty)

113 The legal status of Jersey (and by implication Guernsey and the Isle of Man) is discussed by the CJEU in Rui Roque v. Lieutenant Governor of Jersey Case C-171/96

114 A detailed account of the CDs' evolving relations with the EU is contained in Sutton, Jersey's constitutional relationship with the EC, Jersey Law Review, 2005

115 Base erosion and profit shifting.

116 The EU Commission, assisted by ESMA, are currently assessing Insular legislation for equivalence under EU financial services directives (e.g. the Alternative Investment Fund Managers Directive).

117 The Channel Islands and, separately, the Isle of Man opened representative offices in Brussels in 2010.

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As far as the future is concerned, the CDs have taken the view that, to the extent possible, their current legal status in relations with the EU should be preserved after UK withdrawal in March 2019.<sup>118</sup>

As far as the OTs are concerned, from the outset (from 1 January when the UK became an EC Member State, a more structured relationship with the EU has existed under Part Four of the TFEU on the Association of Overseas Countries and Territories. The UK is one of four Member States with OTs, the others being Denmark, France and the Netherlands. The level of economic development of most OTs is below that of the EU average. For this reason, Article 198 TFEU provides that *'the purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole'*. To this end, the EU provides financial assistance and preferential trading arrangements for the OTs.

The level of economic development of three UK OTs (Bermuda, the Cayman Islands and the British Virgin Islands) is such that these territories do not benefit from EU financial assistance. For these territories, as for the CDs, financial services have become an increasingly important part of their economies. Access to EU markets for their financial products (especially insurance in the case of Bermuda and fund management in the case of the Cayman Islands and BVI) is now crucial for these Islands' continued prosperity. For this reason, on a sector by sector basis, the Islands have adapted their legislation so that they may be assessed as equivalent to EU legislation, thereby securing continued access to EU markets. For the moment, Bermuda alone has assessed as having insurance and reinsurance regulations and supervisory practices which are equivalent to those in force in the EU under the Solvency II regime.

The OTs (especially those with financial services sectors) have – like the CDs - been increasingly affected by EU direct tax measures. All have taken measures to cooperate with the EU and its Member States on the exchange of information on personal and corporate taxation. All are also currently being assessed by the EU Code of Conduct Group for compliance with criteria on tax transparency, fair taxation and the minimum standards established under the OECD's BEPS actions.

Unlike the CDs, the OTs have a more structured relationship with the EU. Thus, a special service in the Commission's Directorate General for Development is responsible for the EU's relations with OTs. Although in accordance with normal diplomatic practice, the Commission tends to deal with OTs through their Member States, direct contacts are also possible informally<sup>119</sup> and through the Overseas Countries and Territories Association (OCTA), based in Brussels.

In 2014, a new Overseas Association Decision (OAD) came into force, which made substantial changes to the previous Decision.<sup>120</sup> In essence, the new OAD introduced a new Chapter on sustainable development and broadened the areas of cooperation between the OTs and the EU to cover areas such as information technology, air safety, research and innovation, youth and education, employment, health and tourism. Special provision is also made for cooperation in

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118 See, further, House of Lords European Union Committee, 19<sup>th</sup> Report of Session 2016-2017, *Brexit: The Crown Dependencies*.

119 This was particularly the case for example with Bermuda. In the assessment process leading to the Commission's equivalence decision in insurance in 2015, Bermuda (mainly through the Bermuda Monetary Authority) maintained contacts with EIOPA, the Commission, the European Parliament and Member States.

120 Bermuda accepted coverage by this new OAD on 1 January 2014

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financial services and taxation, although in these sensitive areas, EU policy towards relevant OTs is conducted principally by the services specifically responsible for these areas.<sup>121</sup> As in the previous OAD, there are also specific chapters on trade and trade-related issues (e.g. environmental protection), as well as instruments for financial cooperation (e.g. aid).

As far as the future is concerned, the UK OTs<sup>122</sup> have not so far taken a public position. It should be pointed out however that, despite their common and historic links to the UK, OTs differ widely in their geographic location, economic structures and levels of development and political governance.<sup>123</sup> There are also significant historical, economic and political differences between Jersey, Guernsey and (especially) the Isle of Man, although their constitutional relationship with the EU is identical (in the sense that all three CDs are covered by Protocol 3 to the UK Act of Accession and all have the same degree of autonomy under UK constitutional law).

So far as ‘autonomy’ is concerned, in accordance both with international and UK constitutional law, the UK is formally responsible for the defence and international relations of the CDs and OTs. In practice however, especially in areas such as taxation and financial services, where Insular law and policy differs from that in the UK, the Islands are authorised to conclude international agreements on the basis of “entrustments” issued by the UK authorities and to conduct relations with bilateral<sup>124</sup> and multilateral<sup>125</sup> partners. On this basis, all CDs and OTs (especially Bermuda, the Cayman Islands and the BVI) have established working relations with the EU Institutions and Member States, as well as other third countries.

The legal status of Gibraltar under EU law is entirely different from that of the CDs and OTs. Article 355(3) TFEU provides that *‘the provisions of the Treaties shall apply to the European territories for whose external relations a Member States is responsible’*. However, Article 28 of the UK Act of Accession in effect excludes Gibraltar from the EU customs territory, from EU VAT and common agricultural policy (CAP) rules. Gibraltar is not part of the Schengen agreement on the free movement of persons, although Gibraltar citizens now have EU citizenship and, since 2004, are entitled to vote in elections to the European Parliament.<sup>126</sup>

As a result of this status, Gibraltar has benefitted from access to the EU Single Market for services. Most recently, this has been in the field of betting and gaming services, although Gibraltar is also - like the CDs and certain OTs - a major financial services centre, with full access to EU markets for its financial products. Unlike the CDs and OTs therefore<sup>127</sup>, Gibraltar has transposed a significant part of the EU acquis into Gibraltar law. Like the CDs and OTs, the Gibraltar Government maintains informal relations with the EU Institutions and Member States, although as a colony of the British Crown it is the UK authorities which are formally responsible for the defence and international relations of Gibraltar under international and UK constitutional law.

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121 In the Commission, these are the Directorates General for Financial Services (DG FISMA) and for Taxation and Customs (DG TAXUD).

122 Represented in the UK by the UK Overseas Territories Association (UKOTA)

123 For a comprehensive review of UK OTs law, see Hendry and Dickson, *British Overseas Territories Law*, 2011

124 For example in the field of taxation under tax information exchange agreements (TIEAs)

125 For example in the Global Forum on Transparency and Exchange of Information for Tax Purposes under the OECD

126 For a recent review by the CJEU of the status of Gibraltar under EU law, see *The Queen on the application of the Gibraltar Betting and Gaming Association Ltd. V. Commissioners for HM Revenue and Customs and HM Treasury* Case C-591/15

127 With the exception for the CDs of those areas of EU law, notably on customs and the free movement of goods covered by Protocol 3

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The European Council Guidelines for the Article 50 negotiations provide that on the date of withdrawal (currently 29 March 2019) *‘the Treaties will cease to apply to the United Kingdom, to those of its overseas countries and territories currently associated to the Union, and to territories for whose external relations the United Kingdom is responsible’*. The only UK territory mentioned by name is Gibraltar. Paragraph 24 of the guidelines provides that *‘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.’*

On 29 March 2019, the legal instruments which currently bind the UK’s CDs, OTs and Gibraltar to the EU will be severed. From 30 March 2019, all will be (whatever their precise appellation in UK constitutional law) dependent territories of a non-Member State of the EU. In the modern, post-colonial world, such entities are relatively rare. Hong Kong and Macau, formerly dependent territories respectively of the UK and Portugal are now Special Administrative Regions of the PRC. They are not comparable with the UK territories under discussion here.

In the early 1970s, the status of UK territories (in particular the CDs) was not settled until very late in the accession process. The economies of all (or at least the largest) CDs and OTs have developed exponentially since 1973 as has their dependence on international markets, including the EU. Even if the major Islands have gradually assumed more responsibility (in fact if not in law) for their international economic relations generally and with the EU in particular, the fact that the UK has been a Member State has certainly carried weight for the Islands, jointly and severally. This will not be the case (at least certainly not to the same extent) after UK withdrawal. The question for each jurisdiction therefore (and it is now an urgent question) is how to replace the existing relationship with the EU.

The first point to make is that the disappointment and even acrimony which has accompanied the UK’s decision to withdraw from the EU on the part of the EU Institutions and other Member States will certainly not assist the Islands in building a new relationship with the EU. The fact that the more prosperous Islands are perceived as creating difficulties in the tax field for some EU Member States (and are currently subject to “screening” by the EU’s Code of Conduct Group) is an additional handicap to overcome.

The UK recognises the challenge facing its dependencies. In the White Paper presented to Parliament in February 2017, the Government said:<sup>128</sup>

*‘As the UK leaves the EU, the unique relations that the Crown Dependencies of the Isle of Man and the Channel Islands and the Overseas Territories have with the EU will also change. Gibraltar will have particular interests, given that the EU Treaties apply to a large extent in Gibraltar, with some exceptions (for example, Gibraltar is not part of the customs union). We have ensured that their priorities are understood through a range of engagement including new for a dedicated to discussing the impact of EU exit: the Joint Ministerial Council on EU Negotiations, with representatives of the governments of the Overseas Territories, a new Joint Ministerial Council (Gibraltar EU Negotiations) with the Government of Gibraltar, and formal quarterly meetings with the Chief Ministers of the Crown Dependencies. We will continue to involve them fully in our work, respect their interests and engage with them as we enter negotiations, and strengthen the bonds between*

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128 At paragraphs 3.9 and 3.10 of The United Kingdom’s exit from and new partnership with the EU (Cm 9417)

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*us as we forge a new relationship with the EU and look outward to the world.'*

With nearly 20<sup>129</sup> dependent - but highly diverse territories under its responsibility, the challenge for the UK and the territories to find the optimum relationship for each of them with the EU in the course of the Brussels negotiations is obviously very great. It seems clear that a generic solution is out of the question, given their diversity. Equally, a case-by-case approach is probably inconceivable, both practically and politically.

The first task is for each jurisdiction to consider the ideal relationship which it would like to have with the EU, say over the next 20 years. This must then be discussed with the UK in one of the special frameworks established for this purpose. Normally, one would expect that, as the UK negotiates its own new and comprehensive framework for a long-term bilateral relationship with the EU27, it would include in these negotiations the wishes of each of its dependencies. There are a number of comments to be made on this scenario however.

First, as discussed earlier in this paper, the lapse of time in engaging in the essence of the Article 50 process means that, to avoid the 'cliff-edge', some form of transitional arrangement is now urgently required. The degree of urgency may not be identical for all dependencies however. Certainly for the poorest and most and most remote OTs, the replacement of EU aid by UK funding is of the highest priority. The case of Gibraltar, whose economy has become closely inter-woven with that of the EU over the last 44 years, is clearly crucial, if this vulnerable, small and remote (from the UK) jurisdiction is to be protected. For those jurisdictions where financial services provide the main pillar of their relations with the EU and where the current legal framework of their relations does not include this sector, different questions may arise.

One important issue to be considered by all jurisdictions concerned is the extent to which the political will exists, not only in the EU27 to envisage a new agreement which is mutually beneficial with UK dependencies, but also in the UK itself. Then, a different approach may be appropriate for those dependencies such as the CDs and Gibraltar which are "near neighbours" of the EU. It may be helpful to consider whether any of the existing relations between the EU and other comparable jurisdictions<sup>130</sup> could offer a more viable economic future than one which is tied to the UK.

A major difficulty at the moment is the fact that the UK still has not defined, with any legal precision, the content (or even the precise form) of the future agreement it seeks with the EU. Likewise, at least until December this year,<sup>131</sup> it may not be possible to identify the structure and content of a transitional arrangement. In these circumstances (where the prospect of no agreement after 29 March 2019 must at least be considered), it may be that certain jurisdictions which have already made use of their external autonomy in areas such as tax and financial services could obtain greater legal certainty by pressing for unilateral EU decisions on equivalence ahead of or in parallel with the UK's own negotiations.

The case of Gibraltar is not only urgent economically (since the territory stands to suffer more than any others when borders are reintroduced on 30 March 2019), but also sensitive politically, as the reference in the European Council guidelines shows.

As far as the possible transitional period is concerned, it is by no means clear at this stage if the

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<sup>129</sup> Depending on whether certain jurisdictions such as Sark and Alderney, for example, are treated separately.

<sup>130</sup> Liechtenstein, Andorra, San Marino, Iceland etc.

<sup>131</sup> When at least the Council and Commission will have produced a draft mandate for a possible transition period and final agreement.

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EU would be willing to include in those parts of the acquis which are to be included in such an arrangement, the current arrangements in place for the UK's dependencies. There is no legal reason why, for example, the unilateral equivalence decision for Bermuda on insurance should change. However, there is no legal reason why Protocol 3 or Part Four of the TFEU would automatically be renewed for a transitional period.

As far as the definitive future relationship is concerned, much depends on:

- (a) The legal model agreed upon by the EU27 and the UK (free trade area or customs union);<sup>132</sup> and
- (b) If, for any individual territory, it would not be appropriate simply to join the trade arrangement made by the UK for itself, the extent to which the UK would agree (and the EU accept) to negotiate a different arrangement for one or more dependencies, within the framework of the UK-EU27 agreement (e.g. such as the present Protocol 3 for the CDs).

As indicated above, if (b) is chosen, the success of any 'tailor-made' arrangement between the EU and one or more dependencies would depend on political will and mutual interest (on the part of the EU27). In this context, consideration should also be given to whether certain dependencies (jointly or severally) might be "entrusted" by the UK to negotiate on their own behalf with the EU. Once again however, the extent to which the political will would exist in the EU27 for such negotiations is doubtful. There is no precedent (other than the EU's agreements with Hong Kong and Macau) for the EU negotiating directly with the autonomous territory of a non-Member State.

Finally and in any event, given the fragility and vulnerability of the economies of all UK dependencies, there is clearly an urgent need for the responsible authorities in each dependency to:

- (a) Agree internally on the optimum legal framework for enhancing their economic viability and growth in relations with the EU over, say, the next 20 years.<sup>133</sup>
- (b) Discuss this in form and substance with the UK authorities, together with the extent to which the new framework would best be negotiated by the UK or under entrustment by the territory.
- (c) Consider the extent to which any new relationship with the EU would be better done on an individual basis or jointly with other with similar interests (e.g. the possibility that the Channel Islands, or indeed the three CDs might negotiate as a single entity).
- (d) Maintain and if possible even strengthen 'constructive engagement' with the EU Institutions and Member States in the run-up to and beyond UK withdrawal, not least to provide a 'platform' for building a new relationship in due course.

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<sup>132</sup> As indicated above in a 'bespoke' agreement which is neither 'fish nor fowl', there are only 4 legal mechanisms to liberalise trade, being the WTO, a free trade area, a customs union or a frontier-free internal market.

<sup>133</sup> This period is chosen arbitrarily, but in the light of experience it cannot be expected that the EU would agree to re-negotiate an agreement with the dependent territory of a non-Member State more frequently.

