



## BRIEFING PAPER

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# The UK's EU Withdrawal Agreement

By Library Subject Specialists

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Contributing Authors

Elena Ares, Lorna Booth, Louise Butcher, Sarah Coe, Graeme Cowie, John Curtis, Joanna Dawson, Tim Edmonds, Stefano Fella, Daniel Harari, Suzanna Hinson, Georgina Hutton, Neil Johnston, Ilze Jozepa, Matthew Keep, Steven Kennedy, Sylvia de Mars, Vaughne Miller, Claire Mills, Federico Mor, Gavin Phillipson, Sarah Priestley, Dominic Webb, Hannah Wilkins, John Woodhouse

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## Summary

On 13 November 2018 the EU decided that “decisive progress” had been made in the Brexit negotiations, and on 14 November the European Commission and UK Government published a draft withdrawal agreement, together with three protocols (on the border between Ireland and Northern Ireland, the UK’s Sovereign Base Areas in Cyprus, and Gibraltar) and nine annexes. The negotiated text of the Withdrawal Agreement, together with the Political Declaration on the framework for future EU-UK relations, was endorsed by EU leaders at a specially convened European Council meeting on 25 November 2018.

### Structure of the negotiated Withdrawal Agreement

Part 1 Common Provisions (p 6)  
Part 2 Citizens’ Rights (p 16)  
Part 3 Separation Provisions (p 69)  
Part 4 Transition (p 196)  
Part 5 Financial Provisions (p 210)  
Part 6 institutional and Final Provisions (p 268).

Protocol on Ireland/Northern Ireland (p 302) and Annexes to Ireland/N.I. protocol (p 331)

Protocol on Sovereign Base Areas of UK in Cyprus (p 476)

Protocol on Gibraltar (p 496)

Annex I on Social Security Coordination (p 505)

Annex II on Provisions of EU law referred to in Article 41(4) (animal health) (p 529)

Annex III on Time limits for situations or customs procedures referred to in Article 49(1) (p 531)

Annex IV on List of networks, information systems and databases referred to in Articles 50, 53, 99 and 100 (p 533)

Annex V on Euratom (p 547)

Annex VI on List of administrative cooperation procedures referred to in Article 98 (p 552)

Annex VII on List of Acts/Provisions referred to in Article 128(6) (p 555)

Annex VIII on Rules of Procedure of the Joint Committee and Specialised Committees (p 560)

Annex IX, Rules of Procedure for dispute settlement (p 569)

### Part one: Common Provisions

Part 1 of the Withdrawal Agreement contains so-called ‘Common Provisions’. They set out its territorial scope, key definitions, and how the Withdrawal Agreement (and particularly, its EU law content) is to be given effect in the UK. An important difference from the March draft Withdrawal Agreement is that Article 4 makes clear that the entire Withdrawal Agreement (rather than just Part Two on Citizens’ Rights) is intended to be directly effective in the UK where its provisions are clear, precise and unconditional.

### Part two: Citizens’ Rights

The citizens’ rights provisions were agreed by the UK and the EU in the March draft withdrawal agreement. There are no substantive changes or additions, except in provisions on the rights of nationals of Iceland, Liechtenstein, Norway and Switzerland.

Free movement will continue until the end of the transition (or implementation) period and EU and UK nationals will be able to move to the UK or Member States as is currently permitted by EU law. EU citizens living in their host state before the end of transition will have permanent residence rights under the withdrawal agreement, subject to certain requirements. The UK and the EU27 have discretion under the agreement to require EU or UK nationals to apply for a new residency status.

The UK has chosen to implement a scheme which requires EU citizens to apply for a new residency status known as settled or pre-settled status. It is still unclear whether each of the EU27 will exercise their discretion under the withdrawal agreement to require UK residents to apply for a new residency status.

The Government is expected to publish an Immigration White Paper in the coming weeks in preparation for next year's Immigration Bill. Much about the future relationship between the UK and EU in relation to immigration is yet unknown.

### **Part Three: Separation Provisions**

Part Three of the WA is intended to create an orderly exit from the EU. Ongoing processes and arrangements will be allowed to come to an end under current rules following the end of transition. It contains provisions on market access for goods, ongoing customs, VAT and excise matters, intellectual property, ongoing police and judicial cooperation in both criminal and civil/commercial matters, the protection of data obtained before the end of transition, ongoing public procurement procedures, Euratom issues, ongoing EU judicial/administrative processes, privileges and immunities, and a few provisions relating to the functioning of the EU institutions.

Some examples are summarised below.

#### **Goods Placed on the Market**

The December 2017 [Joint Report](#) included high-level agreement on goods placed on the market. Most of the draft legal text was shown as agreed in the [March 2018 draft](#). The final part, on the sharing of information on tests on goods (conformity assessment), was agreed in the June 2018 [joint statement](#).

#### **Ongoing Customs Procedures**

Early in 2018 the UK and EU had agreed on the broad principle here – that movements of goods which commence before the UK's withdrawal from the EU Customs Union should be allowed to complete their movement under the rules which were in place at the start of their movement (UK Government, [Technical note: other separation issues - phase 2](#), March 2018). The WA has an added requirement that the UK will reimburse the EU for the actual costs of facilitating access to the EU networks and databases.

#### **Ongoing VAT and Excise Duty Matters**

The current EU VAT arrangements will apply to goods dispatched or transported from the UK to an EU Member State, or vice versa, where the dispatch or transport started before the end of the transition period and ended afterwards. Unless the future relations agreement provides otherwise, goods exported from the UK to the EU and vice versa after the end of the transition will attract VAT and customs formalities. There is equivalent provision for EU excise arrangements for fuel, alcohol and tobacco products. After transition, exports of excisable products from the UK to the EU will be subject to customs formalities before they can be moved within the EU. To meet these requirements, the UK may have access to relevant network and information systems and databases.

### **Intellectual Property**

Intellectual property (IP) laws are harmonised to a large extent across Europe, and much of the UK legislative framework in this area is currently composed of directly effective EU Regulations and transposed EU Directives. Under the EU Withdrawal Act the existing body of directly applicable EU law will be converted into domestic law. However, because the UK would no longer be a Member State, this would affect the unitary character of EU IP rights, meaning that they would not be protected in UK law.

### **Ongoing Police and Judicial Cooperation in Criminal Matters**

The UK currently participates in approximately 40 EU measures that aim to support and enhance internal security and policing and judicial cooperation in criminal matters. Measures identified as being of particular significance include the European Arrest Warrant (EAW); access to databases, including the Second Generation Schengen Information System (SIS II), European Criminal Records Information Exchange System (ECRIS) and Passenger Name Records (PNR); and participation in agencies, in particular Europol and Eurojust.

### **Ongoing Judicial Cooperation in Civil and Commercial Matters**

The UK currently participates in certain measures designed to facilitate judicial cooperation in civil, family and commercial matters. These concern the choice of court to be used to determine disputes, the applicable law, and the automatic recognition and enforcement of legal decisions in different Member States.

### **Agriculture**

The Government's Agriculture Bill will take forward measures for new UK agricultural support schemes. The WA disapplies EU state aid rules that continue to apply to the UK more generally to enable the UK to operate agricultural support schemes during transition/extended transition periods. However, although CAP rules will not apply directly, the UK's 2020 scheme must be equivalent to the EU CAP and expenditure on UK schemes during the transition period are limited to CAP spend levels. The Ireland/NI Protocol includes similar measures which come into effect when the WA does.

Certain EU regulations on food and agriculture continue to apply to NI during the 'backstop' period (see below). Existing checks on animals and animal products moving from GB into NI will need to be scaled up. The Political Declaration states that provisions should be put in place to tackle sanitary and phytosanitary (animal and plant health) barriers to trade, that "build on and go beyond" WTO agreements.

### **Data Protection**

Under the EU's data protection framework, personal data can only be transferred to third countries (such as the UK when it leaves the EU) when an "adequate" level of protection is guaranteed. One option is for the European Commission to make an [adequacy decision](#). The WA covers data processed or obtained before the end of the transition period or on the basis of the Agreement. EU data protection law would apply in the UK in respect of the processing of personal data of subjects outside the UK where the data was processed under EU law before the end of transition period or the data was processed after the end of the transition period. These rules would not apply if the processing was covered by an adequacy decision. If an adequacy decision ceased to apply, the UK would have to ensure its data processing was "essentially equivalent" to EU law.

### **Immunities and privileges**

The WA generally provides for a continuation of existing privileges and immunities for activities that took place before the end of the transition period.

### **Euratom**

The UK will be responsible for nuclear safeguards and there are provisions on ownership of materials and equipment in relation to third countries and Euratom Member States. The UK will keep assets in the UK but would purchase from Euratom any equipment and other property related to the provision of safeguards in the UK as it implements its own safeguards regime. The UK will continue to fulfil obligations with third countries and will continue to be responsible for its nuclear waste, even if it is on another Member State's territory.

## **Part Four: Transition**

The transition period, also described as the 'implementation period' is meant to bridge the period between the date of the UK's exit from the EU and the entry into force of the new, yet to be negotiated, UK-EU partnership arrangements. The transition will run until the end of December 2020, with the possibility of extension for up to two years. A decision on extension must be taken by 1 July 2020. The UK will continue to apply EU law during the transition period, with a few exceptions, as if it were a Member State. But the UK will have no institutional representation and no role in decision-making. The EU institutions and other bodies, offices and agencies will continue to exercise their powers under EU law in relation to the UK. The CJEU will have jurisdiction in relation to the UK and to the interpretation and application of the Withdrawal Agreement.

## **Part Five: Financial Settlement**

After the first round of withdrawal negotiations, the UK and EU set out an agreed approach to the financial settlement in the December 2017 [Joint Report](#). The settlement sets out the financial commitments that will be covered, the methodology for calculating the UK's share and the payment schedule. The withdrawal agreement turns the approach set out in this Report into legal text and provides for further negotiations on UK contributions to the EU budget if there is an extension of the transition period. Any extension would not impact on the financial settlement, which would continue as agreed.

## **Part six: Institutional and Final provisions**

Part six sets out the institutional arrangements underpinning the Agreement, and how disputes about the WA are to be resolved. The key changes to Part Six of the March draft relate to disputes regarding the agreement itself, which the Commission had originally proposed should be resolved by the CJEU if it could not be resolved in the Joint Committee. The November draft instead proposes in Article 170 that any disputes not resolved in the Joint Committee are taken to an independent arbitral tribunal, which will issue a binding decision regarding the dispute. However, where the dispute requires the interpretation of concepts or provisions of EU law, under Article 174 the tribunal is obliged to refer those to the CJEU for a binding interpretation of those concepts or provisions which the tribunal must then apply.

## **Protocols**

### **The Protocol on Ireland/Northern Ireland**

The NI Protocol, including the 'backstop', is intended to be temporary and applies unless and until it is superseded by a future relations agreement, which the parties will try to achieve by 31 December 2020. The Protocol refers to equality rights, the Common Travel

Area and North-South cooperation. Under the 'backstop' the UK will form a customs union with the EU (except for trade in fisheries and aquaculture products, which should be the subject of a further agreement on fishing opportunities by 1 July 2020).

The UK will conform to specific EU legislation on customs, including with respect to third countries, and some harmonisation of law will continue on taxation, the environment, labour law, state aid, competition and public companies/monopolies, but with no obligation to keep up with new EU legislation and CJEU case law. To provide a 'level playing field' the UK commits to non-regression on EU environmental protection, labour and social standards, state aid and competition, and state-owned undertakings in respect of administration of tax.

The UK will be able to conclude trade agreements with third countries; however, the 'customs union' would substantially limit the UK's ability to have significantly different trade relationships with them, particularly in relation to goods. There would be greater scope for the UK to offer different terms on trade in services and areas such as procurement. In the UK in respect of NI, specific additional EU legislation applies on customs, certain VAT and excise provisions, and certain technical standards relating to goods. EU law on free movement of persons, services and capital, and contributions to the EU budget, will not apply. But there will be free movement for goods moving from NI to the rest of the UK and the EU. The EU and the UK will seek to facilitate trade between Britain and NI with a view to avoiding controls at NI ports and airports.

UK authorities are responsible for implementing and applying EU law applicable under the Protocol but also, where EU law continues to apply to the UK in respect of NI, the EU institutions and bodies will have the same powers as they have under the EU Treaties. EU bodies including the CJEU can apply and interpret Protocol provisions specific to Northern Ireland. EU law applicable to the UK in respect of NI can be amended or replaced. But new EU legislation not listed in the Protocol but in its scope would need to be adopted by the Joint Committee – failing which the EU can take appropriate remedial measures. The Protocol is subject to review and may be ended in whole or part by decision of the Joint Committee.

### **Protocols on Sovereign Base Areas in Cyprus and Gibraltar**

Gibraltar, other UK Overseas Territories and Crown Dependencies are covered by the territorial scope of the Withdrawal Agreement, including part four on the transition period. The extent of application to each of these territories reflects its relationship with the EU before Brexit.

The **Protocol on the Sovereign Base Areas in Cyprus** aims to protect the interests of Cypriots who live and work in the Sovereign Base Areas after Brexit and to ensure that EU law, in the areas stipulated in Protocol 3 to the Cyprus Act of Accession, continues to apply in the SBAs, with no loss of rights, especially for Cypriot civilians living and working in the SBA areas. This applies to policy areas such as taxation, goods, agriculture, fisheries and veterinary and phytosanitary rules. The arrangements aim to ensure that the laws applicable to Cypriots in the SBAs are the same as the laws of the Republic of Cyprus. The Protocol confers responsibility on Cyprus for the implementation and enforcement of EU law in relation to most of the areas covered, except for security and military affairs.

The **Protocol on Gibraltar** will apply to the end of the transition period, except for provisions on citizens' rights, which will continue beyond. The Protocol covers preparation

for the application of the Citizens' Rights part of the WA, allows EU law to be applied to Gibraltar Airport if the UK and Spain reach agreement on it; establishes cooperation between Spain and the UK on fiscal matters, environmental protection and fishing, and police and customs matters. Memoranda of Understanding between the UK and Spain facilitate working-level collaboration between competent authorities in Gibraltar and Spain, including through the use of joint committees, on citizens' rights, the environment, police and customs and tobacco.

## **Ratification of the texts in the EU and UK**

### **Parliamentary approval in the UK**

The UK Parliament will need to undertake two approval processes before the UK can ratify the withdrawal agreement. Both the *EU (Withdrawal) Act 2018* and the *Constitutional Reform and Governance Act 2010 (CRAG)* impose procedural hurdles on the capacity of the UK to ratify what has been negotiated. The *Withdrawal Act* also provides for a Parliamentary process in the event that a deal is rejected by the Commons, or if no negotiated agreement is ever put to it. The Government has [committed](#) to holding a vote on a resolution in both Houses of Parliament before the EP holds its vote, where each House will be asked to approve the withdrawal agreement. If approved, an EU (Withdrawal Agreement) Bill will be introduced to implement the withdrawal agreement in UK law. Further to the Library's paper, [The User's Guide to the Meaningful Vote](#), this paper provides an updated account of the domestic constitutional requirements for ratifying the withdrawal agreement. This includes a summary of the Procedure Committee's recommendations for how the 'Meaningful Vote' should be conducted in the Commons.

### **Second Referendum**

The possibility of a second referendum on the question of EU membership has been raised both within and outwith Parliament. The paper provides an overview of the practical steps that would need to be considered for any such referendum to take place, should Parliament decide that such a referendum ought to take place. Issues of importance, beyond the merits or otherwise of holding such a poll concern, among other things the timing of the referendum, the question or questions on the ballot paper, the legislation required to underpin the poll and arrangements for the regulation of the campaign, its participants, donations and expenditure.

### **EU approval**

If the EP approves the agreement by a simple majority, for it be 'concluded' (ratified) by the EU it must be passed by a super qualified majority of the European Council of the remaining 27 Member States (20 of the other EU27 representing 65% of the EU27 population).

### **Constitutional Implications**

Both the draft Withdrawal Agreement and the Political Declaration have potentially significant implications for the UK constitution. Some constitutional issues that are likely to arise in any bill to implement the withdrawal agreement include:

- the status of the European Convention on Human Rights in any future relationship;
- the role of Parliament in any decision to extend the transition period;

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- the role of Parliament in the conversion of the Political Declaration into a treaty on the future relationship;
- the constitutional status of the Withdrawal Agreement;
- the domestic legislation required to give effect to EU law during transition; and
- the role of the CJEU and domestic courts in interpreting and applying the Withdrawal Agreement during and beyond transition.

### Terminology and documentation

In this paper the negotiated [Withdrawal Agreement](#) endorsed by EU leaders on 25 November is abbreviated to **WA**, and the [Political Declaration](#) setting out the framework for the future relationship between the EU and the UK is abbreviated to **PD**. Earlier drafts of these documents are referenced as such (e.g. the March draft).

The Government published the following texts on the **Gov.uk website**:

- [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), 14 November 2018 (this includes Protocols on Ireland / Northern Ireland, the Sovereign Base Areas in Cyprus and Gibraltar)
- [Withdrawal Agreement explainer and Technical Explanatory note on Articles 6-8 on the Northern Ireland Protocol](#)
- [Explanatory slides](#) for the Withdrawal Agreement and Political Declaration on our future relationship with the EU
- [Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom](#), 25 November 2018
- [Explainer for the Political Declaration setting out the framework for the future relationship between the United Kingdom and the European Union](#), 25 November 2018
- [Four Memorandums of Understanding and a Concordat](#) between the UK and Spain on matters concerning Gibraltar

These texts are also available on the **EU's Taskforce 50** website

[Draft withdrawal agreement](#), 14 November 2018

[Outline of the political declaration setting out the framework for the future relationship](#), 14 November 2018

Factsheet and Q&A: [Brexit Negotiations: What is in the Withdrawal Agreement](#), 14 November 2014

### Commons Library Briefing Papers

All Brexit-related briefing papers are available on the Parliamentary website at [Brexit: research and analysis](#).

Other Library papers on the Withdrawal Agreement and Political Declaration are:

Commons Briefing Paper 8454, [The Political Declaration on the Framework for Future EU-UK Relations](#), 30 November 2018

Commons Briefing Paper 8451, [Brexit deal: Economic analyses](#), 4 December 2018

### Scottish Parliament Information Centre (SPICe)

[The UK's Departure from the European Union - An overview of the Withdrawal Agreement](#), Iain Mclver, Iain Thom, Angus Evans, Wendy Kenyon, Frazer McCallum, Francesca McGrath, 26 November 2018

[The UK's Departure from the European Union - An overview of the Political Declaration](#), Iain Mclver, Iain Thom, Angus Evans, Wendy Kenyon, Andrew Warden, Filippo Fontanelli, 28 November 2018

# 1. Background

## First drafts of withdrawal agreement

On 28 February 2018 the European Commission published a 119-page [draft withdrawal agreement](#) (WA). This put into legal language the conclusions of the negotiations in phase one as agreed in the December 2017 [Joint Report](#), but included other draft Articles on matters not covered by the Joint Report. The EU published an [amended draft text](#) on 15 March and another [draft](#) on 19 March which contained, primarily in the section on transition, areas of agreement between the EU and the UK. At this point around 75% of the WA had been agreed.

The EU wanted substantial progress on remaining areas of 'disagreement' by the June 2018 European Council. The parties released a [joint statement](#) on progress on 19 June, which was supplemented by commentary from the negotiating parties on areas still to be agreed. These included: the protection of data processed before the end of the transition (implementation) period, Geographical Indications, ongoing police and judicial cooperation in criminal matters, ongoing EU judicial and administrative procedures at the end of the transition period and possible new procedures concerning facts arising before the end of that period; consistent application and interpretation of the WA by the EU and the UK, and dispute settlement. Protocols on the Irish border and the Sovereign Base Areas in Cyprus still had not been agreed.

## The November agreements

On 14 November 2018 the EU negotiators announced provisional agreement on a draft legal text for the [whole withdrawal agreement](#) and a broad ['outline' text of the Political Declaration](#) on the framework for future relations. Theresa May [said](#) the Government had approved it and Michel Barnier [said](#) "decisive progress" had been achieved.<sup>1</sup> European Council President Donald Tusk called for a special European Council (Article 50) meeting on 25 November 2018, with a view to endorsing both the withdrawal agreement and the political declaration.

On 16 November the 27 other EU Member States (EU27) and the European Parliament (EP) started to examine the draft legal text, with a view to producing a final joint statement for presentation to special summit.

On 25 November the negotiated withdrawal agreement and a full version of the political declaration were endorsed by EU leaders and published on the EU and UK Government websites, with a few amendments to the 14 November texts.

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<sup>1</sup> See Parliamentary debate after Theresa May's statement [here](#). See also Commons Briefing Paper 8438, [Draft Withdrawal Agreement: 7 sites you should bookmark](#), 15 November 2018.

## 2. Part One: Common provisions

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

**Articles 1 - 8**, the Common Provisions, include definitions and references used in the withdrawal agreement which might need explanation or interpretation, such as who the contracting parties are, and, in this case, what is meant by the 'transition' or 'implementation' period, 'Union law' and 'Member States', as well as the notion of a 'day' (defined in Article 2 as a calendar day, unless specified otherwise in the remainder of the Agreement).

**Article 1** states that the UK's withdrawal is from both the EU and the European Atomic Energy Community (Euratom – initially it was not clear to some whether leaving the EU meant also leaving Euratom).

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

**Article 4** sets out how the WA has to be given effect in both the EU and the UK. Article 4.1 stresses that where provisions of the WA are clear, precise and unconditional, they must be made directly effective in the EU27 and the UK. In the draft WA, this requirement was limited to part 2 of the WA covering citizens' rights – but the final Article 4 makes it clear that it will apply to the entire agreement. Article 4.2 refers to the domestic primary legislation needed to ensure that any provisions of domestic legislation inconsistent with the WA. This confirms that if approved, the WA will need to be implemented through primary legislation that allows for both transitional arrangements and the enforcement of the rights as the *European Communities Act 1972* (ECA) does at the moment.

**Article 4(4)** confirms that references to EU law in the WA must be interpreted in line with the judgments of the Court of Justice of the EU (CJEU) given before the end of transition.<sup>2</sup> If Article 4(4) is given domestic legal effect, UK courts will be under a duty to interpret provisions of the WA referring to EU law in line with CJEU judgments given *after* exit day but *before* the end of the transition period. **Article 4(5)** requires that judgments of the CJEU handed down after the end of

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<sup>2</sup> Steve Peers, [Dispute settlement and the ECJ in the draft withdrawal agreement](#), 9 March 2018

transition should be given “due regard” by domestic courts when interpreting and applying the WA.

**Article 5** sets out a ‘good faith’ clause:

The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.

They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

This was included at UK insistence, on which Steve Peers<sup>3</sup> commented:

The UK government is particularly concerned about being bound by EU legislation adopted during the transition period without its involvement. The government’s approach in its proposed definitions clause is simpler and clearer. The UK also wants a “good faith” clause to deal with new EU legislation it disagrees with, but has not publicly proposed a text for this.<sup>4</sup>

**Article 7** explains that for the purposes of the WA, the term ‘Member States’ will be used to include the UK – except as applicable to members of EU institutions, bodies, offices and agencies, making clear that the UK will no longer hold ‘seats’ on the relevant EU institutions during the transition period.

Finally, **Article 8** makes clear that at the end of transition, the UK will lose access to relevant EU databases, networks and information systems, and must take measures to ensure that it will stop accessing those systems.

### Changes to Part 1 from March to November 2018

The most substantive change from the draft WA of March 2018 to the final agreement published on 14 November 2018 is that the final text acknowledges in **Article 4** that it is not only the Citizens’ Rights provisions that may be directly effective, but any part of the agreement that is clear, precise and unconditional. This makes little difference to the UK legislative process, which will have to legislate to make direct effect continue to be possible in the absence of the ECA 1972 regardless, but it may mean a significant increase in domestic case law on the WA.

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<sup>3</sup> Professor of EU and Human Rights Law at the University of Essex

<sup>4</sup> EU Law analysis, [EU27 and UK citizens’ acquired rights in the Brexit withdrawal agreement: detailed analysis and annotation](#), 13 March 2018

## 3. Part Two: Citizens' rights

The citizens' rights provisions were agreed by the UK and the EU in the March draft WA. There are no substantive changes or additions to these provisions in the November WA, except for **Article 33** in relation to the rights of nationals of the European Free Trade Association (EFTA) States: Iceland, Liechtenstein, Norway and Switzerland.

Citizens' Rights are found in **Part Two (Articles 9-39)** of the WA. Title 1 sets out the general provisions, Title 2 rights and obligations, Title 3 social security, and Title 4 other provisions.

### 3.1 Continuous residence

EU citizens living in the UK and UK nationals living in the EU before the end of the transition/ implementation period have the right to remain in the UK or their host state. The WA sets out the framework for continued legal residence for those residing in their host state prior to the end of the transition period. **Article 15** confirms that EU/UK nationals and their family members would acquire the rights of 'permanent residence' after accumulating five years' continuous lawful residence in accordance with EU law, or the period specified in Directive 2004/38/EC (the 'Citizens' Directive), before or after the end of the transition period. **Article 16** allows those who have not yet resided in their host state for five years to acquire permanent residence under **Article 15** when they meet the requirements.

The same rules will apply to each cohort, but host states have discretion under **Article 18** to require EU/UK nationals to apply for a new residence status. The purpose of creating a new residence status would be to verify the individual's rights under the withdrawal agreement.

The UK has implemented the continuous residence rights for EU citizens and their families through the introduction of the 'settled status' scheme. For an overview of the settled status scheme and eligibility requirements, see the GOV.UK page '[Settled and pre-settled status for EU citizens and their families](#)'. For further information on the scheme, see the Commons Library Insight '[The status of EU citizens in the UK after Brexit](#)' 18 October 2018.

Each of the EU27 will be required to adhere to the legal framework set out for continuous residence of those UK nationals and eligible family members who resided in their state before the end of the transition period. It is at each Member State's discretion to require UK nationals to register for a new residence status. However, **Article 18** requires host States to issue, at a minimum, a digital residence document.

### 3.2 Free movement for UK nationals after Brexit

The WA does not clarify whether UK nationals who are lawfully residing in a Member State at the time of Brexit will continue to benefit from onward movement. This would allow them to move between Member

States under EU law as opposed to the domestic immigration law of that State. EU free movement provisions are generally more generous and less onerous than domestic immigration regimes.

As the Library's March briefing paper explains, provisions prohibiting such UK nationals (except for frontier workers) from benefitting from onward movement were included in earlier European Commission drafts and subsequently removed from the March draft. These provisions are also not present in the November text. The Government's [Explainer](#) for the WA states:

As part of the future relationship with the EU, the UK will also seek to secure onward movement opportunities for UK nationals in the EU who are covered by the citizens' rights agreement. Some of these UK nationals have chosen to make their lives in the EU, and this should be respected in the opportunities available to them if they decide to change their Member State of residence.

### 3.3 Comprehensive sickness insurance

Those exercising their rights of free movement under the *Treaty on the Functioning of the European Union* (TFEU) as a student or economically inactive person must hold comprehensive sickness insurance in their host State. Access to the NHS in the UK does not fulfil this requirement. As in the March draft, **Article 18** of the WA permits the UK and EU27 States to require proof of comprehensive sickness insurance for economically inactive people and students when considering whether to issue residence documents after Brexit.

As noted in the Library's March briefing, the UK Government had stated previously that they would not impose this requirement on those applying under the settled status scheme. This was re-iterated after the November agreement by Minister of State for Immigration Caroline Nokes.<sup>5</sup> The information provided on GOV.UK for settled status applications also makes it clear that proof of past comprehensive sickness insurance will not be required under the UK scheme.<sup>6</sup>

### 3.4 Certain categories of beneficiaries of EU law

The WA suggests that those carers for minors who are unable to exercise movement rights without their non-EU national parents (so-called '*Chen*' children)<sup>7</sup> are covered, but third country national carers for minors who have not left their Member State of birth ('*Zambrano* children')<sup>8</sup> are not covered by the WA. In a response to the Home Affairs Select Committee, the Government said "Zambrano carers are not covered by the WA. Domestic policy proposals relating to *Zambrano*

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<sup>5</sup> [PQ 191401](#) [Immigrants: EU nationals] 19 November 2018

<sup>6</sup> See, e.g. [Settled and pre-settled status for EU citizens and their families](#).

<sup>7</sup> [Case C-200/02, Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department](#). Judgment 19 October 2004

<sup>8</sup> [Case C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi \(ONEm\)](#). Judgment 8 March 2011

carers will be set out in due course”.<sup>9</sup> The Home Office has also stated that “current rights to do not lead to a right of permanent residence under EU law, but further details will be provided in due course on the new status available to them”.<sup>10</sup> This suggests that *Zambrano* carers may be offered a less favourable form of residence than settled status.

So-called *Surinder Singh* families<sup>11</sup> are also not covered by the WA but the Home Office has confirmed that those lawfully resident in the UK prior to the end of the transition period will be able to apply for settled status.<sup>12</sup> The *Surinder Singh* route is open to spouses and families of British citizens returning from an EU Member State where they have exercised rights under EU free movement law.

### 3.5 Coordination of social security

**Articles 30-36** of the WA cover the coordination of social security. The provisions are substantively the same as in the March 2018 draft WA.<sup>13</sup>

The social security coordination rules – in [EC Regulation 883/2004](#) and associated legislation – do not harmonise social security systems across the EU but instead support freedom of movement by, for example, providing for equal treatment in access to benefits and healthcare with nationals of the host State, clarifying which Member State is responsible for paying benefits, allowing aggregation of insurance periods across countries, and enabling certain benefits (including state pensions) to be ‘exported.’ Administrative cooperation between States ensures the effective operation of the coordination rules, dispute resolution and secure data sharing.<sup>14</sup>

**Article 30** provides that social security coordination will continue to apply after the end of the transition period to individuals who come within the scope of the Withdrawal Agreement, and to others who are in a cross-border situation at the end of the transition period. The intention is to ensure that citizens who have moved between the UK and EU before the end of the transition period “are not disadvantaged in their access to pensions, benefits and other forms of social security, including healthcare cover”.<sup>15</sup> The WA also provides protections in other circumstances so that, for example, where a UK national has previously worked and paid social security contributions in a Member State, rights flowing from those contributions, such as benefits, pensions and reciprocal healthcare rights, are protected (see **Article 32**).

The social security coordination rules apply to EFTA countries as well as across the EU. **Article 33** extends the social security provision in the

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<sup>9</sup> Home Affairs Committee, [Home Office delivery of Brexit: immigration: Government’s response to the Committee’s Third Report of Session 2017-19](#), sixth special report of session 2017-19, 12.

<sup>10</sup> Home Office, [EU settlement scheme: statement of intent](#), 21 June 2018, 6.12

<sup>11</sup> [Case C-370/90](#), Judgment 7 July 1992

<sup>12</sup> [PQ 188868](#) [British nationals abroad: EU countries] 12 November 2018

<sup>13</sup> See Commons Library briefing 8269, [Brexit: the draft withdrawal agreement](#), 26 March 2018, section 3.2

<sup>14</sup> For further information on social security co-ordination see section 13 of Commons Library briefing CBP-7213, [Brexit: impact across policy areas](#), 26 August 2016

<sup>15</sup> HM Government [Withdrawal Agreement Explainer](#), 14 November 2018, para 37

WA to EFTA nationals, provided corresponding agreements are signed first between EFTA and the UK protecting EU nationals, and between EFTA and the EU protecting UK nationals. The intention is to protect the rights of EU citizens, UK nationals and EFTA country citizens in 'triangular' social security situations.<sup>16</sup>

**Article 34** outlines mechanisms under which administrative cooperation between the UK and the EU in relation to social security coordination can continue. The UK would have observer status at the Administrative Commission for the Coordination of Social Security Systems.<sup>17</sup> A representative from the UK may attend, "in an advisory capacity", meetings of the Administrative Commission and related technical bodies when matters concerning the UK are on the agenda. The UK will continue to take part in the Electronic Exchange of Social Security Information (EESSI)<sup>18</sup> and "bear the related costs".

Moreover, to ensure uniform treatment, the UK has also undertaken to incorporate changes to Regulation 883/2004 and its associated implementing Regulation 987/2009 into the Withdrawal Agreement, meaning the Government would have to apply any changes to those regulations adopted by the EU to persons covered by the Citizens' Rights part of the Agreement for the duration of their lifetime.

**Article 36(2)** provides for certain exemptions to this presumption that future changes to EU legislation in this area will always be incorporated into the Withdrawal Agreement. These are:

- changes to article 3 of Regulation 883/2004 (which lists the types of benefits covered by the coordination system); or
- any amendments to the extent to which cash benefits covered by the Regulation can be 'exported' from the UK to an EU country or vice versa.

For such amendments to Regulations 883/2004 and 987/2009, the UK-EU Joint Committee can decide (within six months of adoption of the amending legislation at EU-level) that the UK will not be required to implement the changes to the Regulation for citizens within scope of the Agreement. In assessing the effects of changes to the legislation, the Joint Committee must consider "in good faith" the scale of the changes, as well as their importance to the continued good functioning of social security coordination. The UK would not have the right to unilaterally refuse to apply new EU legislation varying the benefits covered by social security coordination, or the extent to which benefits

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<sup>16</sup> European Commission, [Brexit Negotiations: What is in the Withdrawal Agreement](#), 14 November 2018

<sup>17</sup> The Administrative Commission comprises a representative of each Member State and the Commission and deals with the administration of coordination, questions arising from interpretation of the rules, and collaboration between countries – see [Articles 71 and 72 of Regulation 883/2004](#).

<sup>18</sup> [Electronic Exchange of Social Security Information \(EESSI\)](#) underpins social security coordination by allowing national institutions to share information rapidly and securely, enabling faster calculation and payment of benefits. It is replacing previous paper-based processes.

can be exported; any such decision would have to be agreed by the Joint Committee.

In addition, this Article would only take effect after the transition period. During that period the UK will have to apply all new EU legislation as if it were still a Member State. If the end date of 31 December 2020 for the transition period is maintained, Article 36(2) will apply only to changes to Regulations 883/2004 and 987/2009 taking effect after that date.

The Member States and the EP are currently considering a significant amendment to various parts of Regulation 883/2004, including on access to unemployment benefits. It is not yet clear whether it will take effect before or after December 2020. While noting that the UK Government was “broadly supportive” of the proposed amendments, the European Scrutiny Committee decided in May 2018 to retain the proposal under scrutiny, given that the proposal remained under discussion and in view of the wider “uncertainties triggered by Brexit”. The Committee was however content to grant Ministers a scrutiny waiver to support a general approach on the remaining elements of the proposed Regulation.<sup>19</sup>

### 3.6 Jurisdiction of the Court of Justice of the European Union and oversight

**Article 158** authorises a UK court or tribunal to refer a case concerning Part II (citizens’ rights including social security) to the CJEU, when the case commences at first instance within eight years from the end of the transition period. Such a ruling by the CJEU will have the same legal effect in the UK as it would in the Member States, but the UK court will make the final individual judgment.<sup>20</sup> This period may be extended if the transition period is extended under **Article 132(1)**.

**Article 159** specifies that an independent monitoring body in the UK will conduct inquiries on alleged breaches of Part II by the UK administrative authorities. The body is also empowered to receive complaints from EU27 citizens and their families and to bring legal action on their behalf. The European Commission will have a reciprocal function in the EU27 States.

### 3.7 Immigration White Paper and Immigration Bill

The Government is expected to publish a much-anticipated White Paper on Immigration in the coming weeks. The White Paper should outline the future UK immigration system that will apply to EEA citizens who move to the UK to settle after Brexit and after the transition period. In a

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<sup>19</sup> See section 6 (pp33-39) the European Scrutiny Committee’s [29<sup>th</sup> Report of Session 2017-19](#), 23 May 2018, for more information on the proposal to amend Regulation 883/2004. For subsequent developments see [Coordination of social security systems: Council agrees general approach](#), press release, 21 June 2018; and [Employment MEPs want to ensure more flexibility and clarity for EU mobile workers](#), European Parliament press release, 20 November 2018.

<sup>20</sup> HM Government, [Explainer](#), 14 November 2018, pp 43-47

speech to the Confederation of British Industry on 19 November 2018, Mrs May said: "Instead of a system based on where a person is from, we will have one that is built around the talents and skills a person has to offer".<sup>21</sup>

### 3.8 Northern Ireland 'backstop' and citizens' rights

The Common Travel Area (CTA) between the UK and Ireland will continue after Brexit and under the 'backstop'. The CTA facilitates free movement of British citizens and Irish citizens between the UK, Ireland, the Channel Islands and the Isle of Man. As Professor Steve Peers notes, if the backstop were to come into force it would not extend free movement.<sup>22</sup>

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<sup>21</sup> [PM speech to CBI](#), 19 November 2018

<sup>22</sup> Professor Steve Peers, '[The Brexit Withdrawal Agreement: Overview and First Observations](#)', 22 November 2018

## 4. Part Three: Separation provisions

Part Three of the WA is intended to create an orderly exit from the EU. Ongoing processes and arrangements will be allowed to come to an end under current rules after the end of the transition/ implementation period.

### 4.1 Goods placed on the market

The December 2017 [Joint Report](#) included high-level agreement on goods placed on the market. Most of the draft legal text was shown as agreed in the [March 2018 draft](#). The final part, **Article 46**, relating to the sharing of information on tests on goods (conformity assessment), was agreed in the [June 2018 joint statement](#).

**Articles 40 – 46 with Annex II** cover the specific situation of goods that are in the UK / EU market at the end of the transition period.<sup>23</sup> They will generally be allowed to continue to move freely between the UK and the EU after the end of transition, with only limited additional requirements being placed on them – reducing possible costs and delays for these goods.

More precisely, it has been agreed that:

- Most goods that have been placed in the EU or UK markets before the end of transition may be made available in, and circulate between, both those markets until they reach their end users, and may be used (“put into service”) in either the EU or UK, even after transition ends.

The goods that this applies to include: “agricultural products, consumer products (such as toys, textiles, cosmetics), health products (pharmaceuticals, medical devices), and industrial products such as motor vehicles, marine equipment, machinery, lifts, electrical equipment, construction products, and chemicals”.<sup>24</sup>

- Live animals and animal products will, however, have to comply with the EU or the UK’s rules on imports from third countries – the laws that apply for animals are set out in Annex II.<sup>25</sup>

The European Commission says these checks are “necessary in view of the high sanitary risks associated with such products, and the need for

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<sup>23</sup> The key background documents on this specific area are: European Commission, [Position paper on Goods placed on the Market under Union law before the withdrawal date](#), July 2017; UK Government, [Continuity in the availability of goods for the EU and the UK - position paper](#), August 2017; UK Government, [Technical note: other separation issues - phase 2](#), March 2018

<sup>24</sup> European Commission, [Fact Sheet - Brexit Negotiations: What is in the Withdrawal Agreement](#), 14 November 2018

<sup>25</sup> Annex II of the draft Withdrawal Agreement lists ten relevant laws, relating to trade and movement of (broadly) cows/bulls and pigs; sheep and goats; horses; poultry and hatching eggs; fish and seafood; pets; cow/bull embryos; bull semen; pig semen; pets; and other animals / animal semen, ova and embryos.

effective veterinary controls when these products, as well as live animals, enter the Union market or the UK market";<sup>26</sup>

- Businesses would be responsible for proving, if necessary, that goods were on the market before the end of transition period, if they want to rely on the free circulation;
- Certain information would be shared between bodies in the UK and those in the EU - for example, information on goods presenting a serious risk and on previous tests on goods ('conformity assessment').

After transition ends, this would mean two parallel regimes running – with goods that were on the market before transition ended potentially subject to fewer checks than those put on the market afterwards.

### Box 1: Examples

The Commission gives examples of how this part of the WA would affect goods on the market at the end of transition:

A CE-marked X-ray machine, sold by an EU-27 manufacturer to a hospital in the UK but not yet shipped or physically delivered before the end of the transition period, can be shipped and delivered to the hospital after that date on the basis of its compliance with applicable requirements at the time it was placed on the market. Hence, no need for re-certification or affixing of new, UK-specific conformity markings or adapting the product to any new product requirement, including the indications to be affixed on the product or the information to be provided with it (product manual, instructions for use and the like).

Likewise, a car produced by a UK manufacturer based on a type-approval granted by the UK authorities and sold to an EU-27 distributor before the end of the transition period, can be shipped to the distributor, further sold to an end-customer, registered and entered into service in any Member State on the basis of its compliance with applicable requirements at the time it was placed on the market.<sup>27</sup>

As with various other separation issues, the Government takes the view that the future partnership will mean that this part of the WA will not be needed in practice:

... the arrangements the UK and the EU put in place as part of the future relationship for goods will determine whether any provisions put in place in the Withdrawal Agreement are required for goods that are already on the market.<sup>28</sup>

## 4.2 Medicines

During the transition period authorised medicines and medical products will be able to move freely. The WA makes provisions which relate to the management of medicines in the future:

<sup>26</sup> European Commission, [Fact Sheet - Brexit Negotiations: What is in the Withdrawal Agreement](#), 14 November 2018

<sup>27</sup> Ibid

<sup>28</sup> DExEU, [Legislating for the Withdrawal Agreement between the United Kingdom and the European Union](#), July 2018

- The UK must transfer documentation relating to ongoing assessments of new medical (and other) products led by UK authorities under EU regulations (**Article 44**);
- The UK must make available the marketing authorisation dossier of a medicinal product previously authorised by the UK (when requested by the end of the transition period for an application made to a Member State or the European Medicines Agency (EMA)) (**Article 45**);
- EU Member States must make available to the UK the marketing authorisation dossier of a medicinal product previously authorised by that body (when requested by the end of the transition period for an application made in the UK) (**Article 45**);
- Exchanges of information for conformity assessments, which would apply to medical devices, are covered by **Article 46**.

These provisions mean the UK authorities must “transfer files or documents related to certain ongoing product assessments to an EU Member State Authority. This applies to assessments of medicines and chemicals being carried out by the Medicines and Healthcare products Regulatory Agency (MHRA) [and others]”.<sup>29</sup> The Government Explainer states that the WA:

...provides for the transfer of information related to testing between relevant testing bodies in the UK and the EU. For example, if a manufacturer chooses to apply for a new certificate in the EU when they already have a certificate in the UK, the title provides for the transfer of information related to tests carried out before the end of the implementation period by the UK testing body to the EU testing body.

The WA makes specific provision (**Article 128 (6)**) that the UK shall not from exit day act as leading authority on behalf of the EU for risk assessments, examinations, approvals or authorisations in relation to a number of areas, including the regulation of medicines.

The WA was welcomed by the Association of the British Pharmaceutical Industry who said it would allow for the continued supply of medicines during the transition period “without delay or disruption”.<sup>30</sup>

The November 2017 [Brexit and medicines regulation](#) Library Briefing Paper provides an overview of current medicines regulation in the UK and the relationship with the EMA and regulatory agencies in EU Member States.

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<sup>29</sup> Government [Explainer](#), 14 November 2018

<sup>30</sup> ABPI, [Pharmaceutical industry responds to Brexit ‘draft agreement’](#), 15 November 2018

### 4.3 Ongoing customs procedures

Early in 2018 the UK and EU agreed on the broad principle here – that movements of goods which commence before the UK's withdrawal from the EU customs union should be allowed to complete their movement under the rules which were in place at the start of their movement.<sup>31</sup> The WA has an added requirement that the UK will reimburse the EU for the actual costs of facilitating access to the EU networks and databases.

In **Articles 47 – 50 with Annex III and part of Annex IV** ongoing customs procedures at the end of transition,<sup>32</sup> it has been agreed that:

Goods that are moving between the UK and EU customs territories will continue to be treated as though they are under EU law if that movement began before the end of transition – these goods will not have to re-start their customs journeys or be subject to additional procedures.<sup>33</sup>

Proof may be required for these goods to demonstrate their status and to show that the movement started before the end of the transition period.

Certain forms that were lodged before the end of the transition period would continue to be valid afterwards in the UK and the EU, and certain procedures that were started can be concluded. **Annex III** sets time limits on these.

The UK will continue to have access to certain EU networks and databases to allow it to fulfil its obligations – these are set out in **Annex IV**.

### 4.4 VAT and excise duty

**Articles 51-53** covering ongoing VAT and excise duty matters are unchanged from the March draft. The purpose of these provisions is summarised in the Government's [Explainer](#):

*Title III: Ongoing VAT and Excise Duty Matters (Articles 51-53)*

VAT and excise treatments for goods that are midway through an intra-EU customs movement that begins before the end of the implementation period and finishes afterwards will continue to be treated as though they are under EU law.

Goods moving from the UK to an EU Member State, and vice versa, which commenced their journey before the end of the implementation period, will continue to be treated under the rules on intra-EU movements of goods set out in the VAT Directive and the EU rules on intra-EU movements of excise goods.

The UK will continue to have access to a number of EU networks including information databases to allow the UK to share information on VAT and excise and to fulfil the obligations listed

<sup>31</sup> UK Government, [Technical note: other separation issues - phase 2](#), March 2018

<sup>32</sup> The key background documents on this specific area are: European Commission, [Position Paper on Customs related matters needed for an orderly withdrawal of the UK from the Union](#), September 2017; UK Government, [Technical note: other separation issues - phase 2](#), March 2018

<sup>33</sup> HM Government [Explainer for the withdrawal agreement](#), 14 November 2018

in the Withdrawal Agreement. These systems and timelines for access are listed in Annex IV.<sup>34</sup>

The provisions do not appear to have attracted any substantive commentary.

Taxation is largely a Member State competence.<sup>35</sup> The major exception to this generalisation is indirect tax: VAT – for which there is a substantive body of EU law establishing common rules across Member States – and, to a lesser extent, excise duties. It has long been recognised that the harmonisation of indirect taxes is an essential element to the achievement of an effective Single Market.<sup>36</sup> The main legislation for VAT is the EU Principal VAT Directive ([Directive 2006/112/EC](#)) and the main legislation for excise is the Excise Directive ([Directive 2008/118/EC](#)).<sup>37</sup>

Although it is anticipated that Brexit will see the UK having its own VAT and excise regime, no specific details have been published yet. Absent an agreement to the contrary, goods exported from the UK to the EU after the end of the transition would attract VAT on entering the EU as an import tax, necessitating customs formalities that are currently absent.<sup>38</sup> The reverse would also be true on goods exported from the EU to the UK.<sup>39</sup>

The Government's general position has been "the administration of the VAT and excise regimes following EU exit will remain largely as it currently is, in so far as this is desirable and practicable".<sup>40</sup>

The Government's March 2018 [Technical Note](#) on other separation issues noted the UK's agreement with the "broad principle ... that movements of goods which commence before the UK's withdrawal from the EU Customs Union should be allowed to complete their movement under the rules which were in place at the start of their movement", adding "the UK looks forward to discussing in more detail with the EU how this principle will be applied practically after the UK's withdrawal so that the requirements applying to traders and customs officials at the border are clear".<sup>41</sup> The Government's July [White Paper](#) on the future UK-EU relationship stated:

to ensure that new declarations and border checks between the UK and the EU do not need to be introduced for VAT and Excise purposes, the UK proposes the application of common cross-

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<sup>34</sup> Government Explainer, 14 November 2018, p15

<sup>35</sup> For details see, HM Treasury, [Taxation report: review of the balance of the competencies](#), November 2012

<sup>36</sup> On the historical development of the EU's VAT & excise regime see, *Fiscal Harmonisation*, Library Research Note 92/102, 23 November 1992.

<sup>37</sup> For details see, [Taxation \(Cross-border Trade\) Bill, Explanatory Notes](#), Bill 128-EN, November 2017 paras 30-32

<sup>38</sup> As part of the Single Market, cross-border business-to-business sales of goods within the EU are zero-rated, and VAT paid by the buyer as part of their regular VAT return. This provision allows for the absence of VAT controls intra-EU borders.

<sup>39</sup> For a discussion of the potential implications see, "VAT: Brexit's hidden border dilemma", *Financial Times*, 30 May 2018; [What leaving the EU's VAT area means for SMEs](#), UK Trade Forum, October 2018

<sup>40</sup> [Taxation \(Cross-border Trade\) Bill Impact Assessment](#), 20 November 2017, para 39; [PQ176059, 11 October 2018](#)

<sup>41</sup> DExEU, [Technical note: other separation issues - phase 2](#), 6 March 2018 p12

border processes and procedures for VAT and Excise, as well as some administrative cooperation and information exchange to underpin risk-based enforcement.<sup>42</sup>

In September 2018 the European Scrutiny Committee considered the European Commission's proposals for a major reform to the EU VAT system – the creation of a 'definitive' VAT system on cross-border sales within the EU. It noted that the Government:

... is yet to specify clearly what its actual plans are for a new arrangement with the EU on VAT after the end of the proposed transitional period. In its [White Paper on the future UK-EU relationship](#), it proposed to establish 'common procedures and processes' for VAT on UK-EU trade in goods to avoid the need for border controls, but without specifying what those might be.

We previously concluded<sup>43</sup> that such an arrangement was likely to require the continued application of significant parts of EU VAT law to the UK, and the Government has refused to categorically state that the latest proposals for reform of the VAT Directive will not apply to the UK (despite the fact they are unlikely to take effect until 2022 at the earliest).<sup>44</sup>

## 4.5 Intellectual property

Intellectual property (IP) laws are harmonised to a large extent across Europe, and much of the UK legislative framework in this area is currently composed of directly effective EU Regulations and transposed EU Directives. Under the *EU (Withdrawal) Act* the existing body of directly applicable EU law will be converted into domestic law. However, because the UK would no longer be a Member State, this would affect the unitary character of EU IP rights, meaning that they would not be protected in UK law.<sup>45</sup>

**Articles 54-61** of the WA seek to ensure that holders of existing intellectual property rights do not lose those rights in either the UK or the EU at the end of the transition period. The majority of these provisions were agreed in the March 2018 draft, with the exception of:

- Article 54(2)<sup>46</sup> - geographical indication guarantees (GIs);
- Article 55<sup>47</sup> - re-registration in the UK of existing EU rights;
- Article 60<sup>48</sup> - pending applications for supplementary protection certificates in the UK

**Article 54(1)** provides that any holder of an EU-originating intellectual property right in the UK granted or registered before the end of the transition period will be "without any re-examination" granted a

<sup>42</sup> HM Government, [The future relationship between the United Kingdom and the European Union](#), Cm 9593, July 2018 p18

<sup>43</sup> [VAT: EU proposals for reform and the implications of Brexit: Twenty-third report of Session 2017-19](#), HC 301-xxii, 3 April 2018 (see para 1.15)

<sup>44</sup> ["EU VAT Reform: implications of Brexit"](#), European Scrutiny Committee, *Third-seventh report of Session 2017-19*, HC 301-xxxvi, 11 September 2018 para 15.11

<sup>45</sup> EU IP rights are subject to a single process for the purposes of registration, recognition and protection

<sup>46</sup> Previously 50(2)

<sup>47</sup> Previously 51

<sup>48</sup> Previously 56

“comparable and enforceable” UK intellectual property right. This covers EU trade marks; registered Community designs; and Community plant varieties. **Article 54** further provides that these UK-based rights (sometimes referred to as ‘cloned’ rights) will operate under identical terms to their EU equivalents, including on issues such as duration of registration and commencement of trade mark status.

**Article 55** sets out the registration requirement for the new UK-based rights. It provides that registration will be carried out free of charge in the first instance, and that holders of rights under Article 54(1) will not be required to have a UK correspondence address for three years post transition.

**Article 56** provides that those in the UK with trademarks or design rights registered in international law via the Madrid<sup>49</sup> or Hague<sup>50</sup> systems, designating the EU as a relevant jurisdiction, will continue to be protected in the UK post transition.<sup>51</sup>

Likewise, **Articles 57 and 58** require an enforceable UK equivalent to unregistered Community design rights and IP rights in relation to databases which arise before the end of the transition period, for an equivalent duration.

**Article 59** sets out a mechanism for dealing with applications for EU trade marks, Community designs, or plant variety rights pending at the end of the transition period. It provides that the applicant will have a ‘right of priority’ to file an application with respect to identical goods and services in the UK for a period of nine months from the end of the transition period.

**Article 60** provides for pending applications for supplementary protection certificates for plant protection products and for medicinal products, and for the extension of the duration of such certificates. Where such applications are filed in the UK prior to the end of the transition period they will be dealt with under existing EU law obligations.

**Article 61** provides that IP rights that were exhausted in the EU and UK before the end of the transition period shall remain so.

**Article 97** is also relevant, in providing that those with standing in proceedings before the EU Intellectual Property Office before the end of the transition period will retain that standing where proceedings are ongoing after the end of the transition period.

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<sup>49</sup> A World Intellectual Property Organization (WIPO) [system](#) for the international registration of trade marks via a single application

<sup>50</sup> A WIPO [system](#) for the international registration of industrial designs via a single application

<sup>51</sup> These rights would currently be protected in the UK as a Member State, as a result of the designation of the EU as a relevant jurisdiction.

## 4.6 Geographical indications

**Article 54(2)** covers geographical indications (GIs), one of the last areas to be agreed in the negotiations.<sup>52</sup>

It guarantees that the existing EU-approved GIs for food and drink will be legally protected in the UK.

GIs provide registered products with legal protection from imitation or misuse of a name. Only products from specific regions (often with special associated characteristics) can be marketed using specific names; for example, 'champagne' has to come from the Champagne region in France to be called that, and 'feta' cannot be a name adopted for Danish crumbly cheese. There are more than 3,000 protected GIs in the EU, including 86 GIs from the UK.

Under Article 54(2) of the WA, these GIs will have at least the same level of protection in the UK as under the EU law. UK GIs, such as Welsh Lamb or Scotch Whiskey, will, without any changes continue to be protected by the existing EU regime.<sup>53</sup>

This protection will be in place until the future economic relationship is agreed, so the rights are guaranteed during the transition period and possibly beyond.

The UK will have to set up its own register in domestic legislation to recognise the existing EU GIs (Article 55). This is in line with the Government's intentions to have its own GI scheme after Brexit:

39. The UK will be establishing its own GI scheme after exit, consistent with the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). This new UK framework will go beyond the requirements of TRIPS, and will provide a clear and simple set of rules on GIs, and continuous protection for UK GIs in the UK. The scheme will be open to new applications, from both UK and non-UK applicants, from the day it enters into force.<sup>54</sup>

**Article 55** of the WA provides for an automatic registration of EU GIs.

The UK Government has recently [consulted](#) on proposals for the new UK GI schemes which will bring the EU GI regulations into UK law via the *EU (Withdrawal) Act 2018* from exit day to meet WTO obligations. There is only limited scope to diverge from the EU approach but the UK is consulting on a new logo and appeals process.<sup>55</sup> Commons Library Briefing [Brexit: Future UK Agriculture Policy](#) (chapter 8.4 Food Labelling) provides more background information on this topic.<sup>56</sup>

According to the Institute for Government the provisions of the WA on GIs will have important implications for UK's trade policy: "it prevents

<sup>52</sup> For more background information see Commons Library Briefing Paper 8339, [Brexit: Negotiations Update \(March-June 2018\)](#), 20 June 2018, para 1.2

<sup>53</sup> HM Government, [Explainer](#), 14 November 2018, para 68

<sup>54</sup> HM Government, [The future relationship between the United Kingdom and the European Union](#), Cm 9593, 12 July 2018, para 39

<sup>55</sup> Defra, [Consultation on establishing UK Geographical Indications \(GI\) Schemes after EU Exit](#), October 2018

<sup>56</sup> Commons Library Briefing 8218, [Brexit: Future UK Agriculture Policy](#), 11 September 2018, pp73-75

the UK from importing other countries' versions of protected products (such as Australian feta cheese) or manufacturing its own (such as English Champagne)."<sup>57</sup>

The UK Government recognises the importance of continued protection of GIs for UK producers:

The UK Government and the devolved administrations recognise the economic and cultural importance of GIs, which are also important to the strength of our global reputation for quality food. Producers of GI products value the schemes for the collective protection they bring from imitation and evocation and, in some cases, the premium it allows them to charge for products.<sup>58</sup>

The 86 recognised GIs from the UK, comprising 76 agricultural and food products, five wines and five spirit drinks, together make up a quarter of the value of UK food and drink exports.<sup>59</sup>

## 4.7 Ongoing police and judicial cooperation in criminal matters

The UK currently participates in approximately 40 EU measures that aim to support and enhance internal security and policing, and judicial cooperation in criminal matters. Measures identified as being of particular significance include the European Arrest Warrant (EAW); access to databases, including the Second Generation Schengen Information System (SIS II), European Criminal Records Information Exchange System (ECRIS) and Passenger Name Records (PNR); and participation in agencies, in particular Europol and Eurojust.<sup>60</sup>

**Articles 62-65** of the WA cover ongoing police and judicial cooperation in criminal matters. The main substantive provisions had not been agreed in the March 2018 draft agreement<sup>61</sup> and remained outstanding in the [joint statement](#) on the progress of negotiations in June 2018.

Under **Article 62(1)**, currently applicable EU law will continue to apply with respect to the following measures, where appropriate, if initiated by the relevant competent authority before the end of the transition period:

- Mutual legal assistance requests;
- European Arrest Warrants;
- Freezing orders;
- Financial penalties;

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<sup>57</sup> Institute for Government, [The November Draft Withdrawal Agreement](#), 19 November 2018

<sup>58</sup> Defra, [Consultation on establishing UK Geographical Indications \(GI\) Schemes after EU Exit](#), October 2018

<sup>59</sup> Defra, Guidance [Producing food products protected by a 'geographical indication' if there's no Brexit deal](#), 24 September 2018

<sup>60</sup> See Commons Library Briefings: [Brexit: implications for policing and criminal justice cooperation](#); [Brexit: implications for national security](#)

<sup>61</sup> Articles 58 & 59. Articles 60 & 61 were colour coded green. These are now Articles 64 & 65 and remain unchanged.

- Confiscation orders;
- Prisoner transfers;
- Criminal records;
- Requests for information about convictions. Article 62(1)(h) provides that replies to such requests cannot be transmitted after the end of the transition period via the European Criminal Information System (ECRIS);<sup>62</sup>
- European Supervision Orders;
- Requests for information about convictions for child sexual offences. As with requests for information about general criminal offences, replies to such requests cannot be transmitted after the end of the transition period by ECRIS;
- European Protection Orders;
- European Investigation Orders;
- Joint Investigation Teams

**Article 62** allows for a derogation from Article 8, which provides that the UK will lose access to all EU networks, information systems and databases at the end of the transition period. Under **Article 62(2)** the UK will continue to be able to access the Secure Information Exchange Network Application (SIENA) to the extent necessary for participation in joint investigation teams for up to one year after the end of the transition period. Provision is made for the UK to reimburse costs incurred, and for resolution of disputes as to the amount by the Joint Committee.

Provision is also made for the exchange of information via Eurojust in connection with ongoing procedures.

These are new provisions which were not included in the March 2018 draft WA. Other changes are largely technical.

One notable change to current arrangements is provided for by **Article 185** with respect to EAWs. Under this Article Member States may refuse to surrender own nationals to the UK during the transition period pursuant to a EAW, where it would be contrary to fundamental principles of national law to do so. The UK may subsequently declare a corresponding refusal to surrender its own nationals to the same Member State. This reflects the fact that several Member States have constitutional bars on the extradition of own nationals to non-EU countries. (This provision was not included in the first March 2018 draft, but was subsequently inserted and became Article 168 of the draft of 19 March).

**Article 63** provides for ongoing law enforcement cooperation proceedings, police cooperation and exchange of information as follows:

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<sup>62</sup> In accordance with Article 8, which provides that after the end of the transition period, the UK will lose access to "any network, any information system, any database established on the basis of Union law".

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

**Article 63(1)(e)** also allows for a derogation from Article 8 to enable the UK to access the ‘Communication Infrastructure’ associated with SIS II for the purpose of exchanging supplementary information for up to three months after the end of the transition period.

**Article 64** provides that competent authorities can request confirmation of receipt of a judicial decision or request, or of an arrest, where there is doubt as to whether this occurred before the end of the transition period. **Article 65** provides that measures concerning suspects’ rights will continue to apply with respect to EAW proceeding during the transition period. Both of these provisions were green in the March 2018 draft WA and are unchanged.

## 4.8 Ongoing judicial cooperation in civil and commercial matters

The UK currently participates in certain measures designed to facilitate judicial cooperation in civil, family and commercial matters. These concern the choice of court to be used to determine disputes, the applicable law, and the automatic recognition and enforcement of legal decisions in different Member States.

The Justice Sub-Committee of the House of Lords EU Committee summarised the practical effect of these measures as follows:

In the area of family law [these measures] provide certainty and protection to children and families in the often fractious and difficult environment of family disputes. ... [S]uch disputes can be made additionally complicated by a cross-border element. ...

In the civil field [the measures facilitate] the affairs of all those engaged in the myriad cross-border links enabled by the EU’s rules, from the tourist hit by a car in Warsaw, the consumer seeking redress for a defective product in Lisbon, to the employee seeking equal pay in London, and the tenant enforcing their rights in Nicosia. For businesses operating within the Single Market, from large multinational corporations to Small and Medium Enterprises, the [measures offer] all these people the reassurance

that when problems arise legal remedies are readily available and easily enforceable across borders.<sup>63</sup>

**Articles 66-69** cover ongoing judicial cooperation in civil and commercial matters. They provide that the current EU civil judicial cooperation rules will continue to apply during the transition period. All these provisions were agreed in the March 2018 draft, with the exception of Article 67,<sup>64</sup> on jurisdiction, recognition and enforcement of judicial decisions.

**Article 66** provides that the relevant EU law governing contracts and damages in non-contractual matters – known as the Rome I and II Regulations – will apply to all contracts concluded and events giving rise to damage that have taken place before the end of the transition period. The Rome Regulations standardise the rules by which the applicable law is determined. They aim to ensure that the courts in EU Member States apply the same law to the same international dispute, in order to reduce the risk of forum shopping (choosing the most favourable jurisdiction for a particular dispute, rather than the most appropriate):

- Rome I Regulation:<sup>65</sup> applies in relation to contractual disputes. It provides that, in the absence of party choice, the applicable law is the law of the place where the party performing the service characterising the contract has his or her habitual residence. It also applies with respect to the law of non-Member States.
- Rome II Regulation:<sup>66</sup> applies in relation to non-contractual obligations. It provides that the applicable law for the resolution of non-contractual disputes is determined on the basis of where the damage occurs, or is likely to occur, regardless of where the act giving rise to the damage occurs. As with Rome I, it applies equally to the law of non-Member States.

**Article 67** provides that in situations involving the UK, legal proceedings commenced before the end of the transitional period will be completed in accordance with relevant applicable EU law concerning jurisdiction and the mutual recognition of judicial decisions. This includes the following provisions of EU law:

- Brussels I Regulation (recast): applies in civil and commercial cases, typically with a cross-border or external element. It sets out reciprocal rules on:
  - Jurisdiction, that is, which court in which Member State should hear a particular civil/commercial dispute. The primary rule is that a defendant must be sued in courts of the State in which he or she is domiciled, although there are specific exceptions to this rule;

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<sup>63</sup> [Brexit: justice for families, individuals and businesses?](#), House of Lords European Union Committee, 17<sup>th</sup> Report of Session 2016-17, 20 March 2017

<sup>64</sup> Previously 63

<sup>65</sup> The Rome I Regulation on the law applicable to contractual obligations ((EC) 593/2008)

<sup>66</sup> Regulation (EC) No 864/ 2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

- Enforcement of judgments, so that court judgments delivered by one Member State court must be recognised and enforced in another Member State without additional processes or procedures
- Brussels IIa Regulation:<sup>67</sup> sets out a system for establishing jurisdiction in relation to divorce, legal separation and the annulment of marriage. It provides that an individual may take a matrimonial action in the courts of the Member State where one or both parties to the marriage are or were habitually resident or the Member State of the parties' common nationality or domicile. It also provides a framework for the automatic recognition of divorces concluded in other EU Member States, without the need for any special procedure, and deals with matters of parental responsibility, including custody, access, and guardianship.
- The EU Maintenance Regulation:<sup>68</sup> establishes similar rules on jurisdiction, recognition and enforcement of decisions in matters relating to maintenance obligations. It is designed to enable an individual to whom maintenance is owed easily to obtain in one Member State a decision that will be automatically enforceable in another without further formalities. It also establishes jurisdiction for the making of maintenance decisions and includes rules on the applicable law, that is, which Member State's law should be applied to a particular dispute.

Under **Articles 68 and 69**, EU law will also continue to apply to the following:

- recognition and enforcement of all legally binding decisions taken before the end of the transition period;
- to all requests made by relevant authorities before the end of the transition period as part of ongoing judicial cooperation procedures;
- requests for legal aid, and requests or orders for mediation received before the end of the transition period.

## 4.9 Data and information

### The EU data protection framework

The main elements of the EU's data protection framework<sup>69</sup> are:

- the [General Data Protection Regulation](#) (GDPR)<sup>70</sup> – this has applied since 25 May 2018;

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<sup>67</sup> [Council Regulation \(EC\) No 2201/2003 of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility](#), repealing Regulation (EC) No 1347/2000

<sup>68</sup> [Council Regulation \(EC\) No 4/2009 of 18 December on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations](#)

<sup>69</sup> See the European Commission [website](#) for further detail on the framework.

<sup>70</sup> Regulation 2016/679 EU

- the [Police and Criminal Justice Directive](#) (the 'Law Enforcement Directive' (LED))<sup>71</sup> - this has applied since 6 May 2018.

The GDPR applies to the general processing of citizens' personal data. The LED applies to the processing of personal data for law enforcement purposes. The [e-privacy Directive](#)<sup>72</sup> complements the general data protection framework and sets out specific privacy rights on electronic communications.

Under the EU's data protection framework, personal data can only be transferred to third countries when an 'adequate' level of protection is guaranteed. One option is for the European Commission to make an [adequacy decision](#). The Commission's [website](#) summarises what making an adequacy decision involves:

The European Commission has the power to determine, on the basis of article 45 of [Regulation \(EU\) 2016/679](#) whether a country outside the EU offers an adequate level of data protection, whether by its domestic legislation or of the international commitments it has entered into.

The adoption of an adequacy decision involves

- a proposal from the European Commission
- an opinion of the of the European Data Protection Board
- an approval from representatives of EU countries
- the adoption of the decision by the European Commissioners

At any time, the European Parliament and the Council may request the European Commission to maintain, amend or withdraw the adequacy decision on the grounds that its act exceeds the implementing powers provided for in the regulation.

The effect of such a decision is that personal data can flow from the EU (and Norway, Liechtenstein and Iceland) to that third country without any further safeguard being necessary. In other words, transfers to the country in question will be assimilated to intra-EU transmissions of data...

Other options data controllers can implement for their own data processing include:

- [Binding corporate rules](#)
- [Standard contractual clauses](#)

Further detail on transfers to third countries and international organisations is available from the European Commission [website](#).

### **Data protection in the UK**

The Government has stressed that it wants to maintain the unhindered flow of data between the UK and the EU after Brexit.<sup>73</sup> The [Data Protection Act 2018](#) brought the GDPR and the LED into UK law.

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<sup>71</sup> Directive 2016/680/EU

<sup>72</sup> Directive 2002/58/EC

<sup>73</sup> See, e.g. Matt Hancock (then Minister for Digital), [Oral evidence](#) to Select Committee on the EU Home Affairs Sub-Committee, 1 February 2017, p1; [PQ 163493](#) [answered 19 July 2018]

According to the Government, this will “ensure that the UK is prepared for the future after we have left the EU”.<sup>74</sup>

**Articles 70-73** of the WA cover data processed or obtained before the end of the transition period or on the basis of the Agreement. Under **Article 71(1)** EU data protection law<sup>75</sup> would apply in the UK in respect of the processing of personal data of data subjects outside the UK where:

- the data was processed under EU law before the end of transition period; or
- the data was processed after the end of the transition period under the Withdrawal Agreement.

The above rules would not apply if the processing was covered by an adequacy decision (**Article 71(2)**). If an adequacy decision ceased to apply, the UK would have to ensure its data processing was “essentially equivalent” to EU law (**Article 71(3)**).

**Article 73** states that the EU would not treat data obtained from the UK before the end of the transition period - or obtained after the end of the transition period on the basis of the Agreement - differently from data obtained from a Member State, on the sole ground of the UK having withdrawn from the EU.

## 4.10 Ongoing public procurement

**Articles 75-78** of the WA focus on public procurement procedures that have been started but are not yet finished at the end of the transition period.<sup>76</sup>

The UK and EU have agreed that the rules that currently apply to public procurement in EU Member States and the UK will continue to apply to:

- public procurement procedures launched before the end of the transition period and not yet finalised on the last day of it; and
- the award of contracts made under framework agreements (see box 2 below) where the procurement of the framework agreement was launched before the end of the transition period, until the framework ends.

This includes the EU rules for review and remedies for breaches of the procurement rules for these ongoing procurement procedures.

It is worth noting that these Articles will continue to be relevant for a number of years after transition ends for certain cases, particularly because framework agreements can be made for up to four years (and more in exceptional circumstances).

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<sup>74</sup> Department for Digital, Culture, Media and Sport, [Data Protection Bill Factsheet – Overview](#), September 2017, p1; [PO 187077](#) [answered 8 November 2018]; Library [Briefing Paper](#) (CBP 8214, 1 March 2018) gives background to the Act.

<sup>75</sup> i.e. the GDPR, the LED and the e-privacy Directive (**Article 70**).

<sup>76</sup> The key background documents on this area are: European Commission [Position paper on On-going Public Procurement Procedures](#), September 2017 & UK Government [Technical note: other separation issues - phase 2](#), March 2018.

**Box 2: Framework Agreements**

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

In addition, the UK and EU have agreed that the UK will be able to access the EU's online certification database (e-Certis) for up to nine months after the end of transition.

Much of this section was agreed early in the negotiations, and was shown as green in the March 2018 [joint text](#). The remaining text was agreed in time for the [June 2018 joint statement](#). The Library briefing [Brexit: public procurement](#) has information on this and other longer-term procurement issues linked to Brexit.

## 4.11 State aid

Administrative procedures around state aid<sup>77</sup> were still to be settled after the March 2018 draft WA. These concerned, among other things, the status of pending state aid assessments by the European Commission.<sup>78</sup> Currently, for example, UK authorities have to notify the Commission of their intention to provide support to specific sectors or businesses and the Commission decides when state aid is lawful.

Under the November WA state aid assessment will remain unchanged in the UK during the transition period. In its state aid assessments, the Commission will continue to apply existing case law and best practices and will treat the UK as if it were a Member State. The Commission will decide whether measures proposed by UK authorities involve state aid; whether they are lawful, or in case of doubt, initiate a formal investigation and declare the aid illegal.

The Commission will continue to be competent for ongoing procedures which were initiated before the end of the transition period. (**Article 92**).

When state aid is granted by UK authorities before the end of the transition period, the Commission will be able to initiate new procedures that relate to alleged illegal state aid for a period of four years after the end of the transition period and follow up on those procedures thereafter (**Article 93**).

<sup>77</sup> EU Member States sometimes intervene in their national economies by providing assistance to companies or industries using public resources. This can range from a government tax relief scheme for investors to a local authority giving a subsidy to a property developer. This type of assistance, when it has an effect on trade between Member States, is called 'state aid' and is generally prohibited under EU law.

<sup>78</sup> Competition and Markets Authority, speech by Michael Grenfell, Executive Director, [A view from the CMA: Brexit and beyond](#), 16 May 2018

The legality of EU state aid decisions in both ongoing and new cases covered by the Chapter 2, Administrative procedures, will be reviewed exclusively by the CJEU (**Article 95**).

During the transition period and thereafter, UK lawyers will maintain the same rights to represent their clients in UK state aid cases before EU institutions (**Article 94 (2)**). Also, UK experts or other representatives will be able to attend Commission expert meetings relevant to UK cases, although they will not have voting rights (**Article 128(5)**).

## UK Government's position

The Government had previously stated its intention to continue the application of the EU state aid rules during the transition period; the Commission would continue to assess and approve state aid measures designed by UK authorities during the transition.<sup>79</sup> In the meantime, the UK would shape its own, independent state aid regime.

The Competition and Markets Authority (CMA), which is set to become the UK's independent state aid authority, would take over the current EU role from the end of the transition period.

## 4.12 Euratom

### Background

The European Atomic Energy Community (Euratom) provides the basis for the regulation of civilian nuclear activity in the EU Member States. Euratom implements a system of safeguards to control the use of nuclear materials, controls the supply of fissile materials, and funds leading international research into nuclear fission and fusion.

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

An overview of Euratom is available in the Library briefing paper on [Euratom](#), 12 March 2018

### The Withdrawal Agreement

**Articles 79-83** relate to the UK's exit from Euratom. They cover nuclear safeguards and responsibility for nuclear material and equipment.

Some aspects of the Euratom relationship, such as research, are not mentioned in the WA, although they are referred to in the Political Declaration.<sup>80</sup>

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<sup>79</sup> Department for Business, Energy & Industrial Strategy, [Government response to the House of Lords EU Internal Market Sub-committee report on the impact of Brexit on UK competition and state aid](#), 29 March 2018, p2

<sup>80</sup> See Library Briefing Paper 8454, [The Political Declaration on the Framework for Future EU-UK Relations](#), 30 November 2018.

## Nuclear Safeguards

**Articles 80 and 81** relate to the UK's responsibility for nuclear safeguards (**Article 79** provides definitions). Nuclear safeguards are measures to verify that countries comply with international obligations not to use nuclear materials for nuclear weapons.

The UK's response to fulfilling its nuclear safeguarding responsibilities after leaving Euratom was to pass the *Nuclear Safeguards Act 2018*, which received Royal Assent on 26 June 2018. The Act creates powers for the provision of a domestic safeguard regime when the UK leaves Euratom. More information is available in the Library Briefing Paper on the [Nuclear Safeguards Act 2018](#).

## Responsibility for material and equipment

**Articles 82 – 85** refer to the responsibility and ownership of materials and equipment in relation to third countries and Euratom Member States.

In the 19 March draft WA, Article 79 (now with similar provisions to Article 83) was the only Article relating to Euratom which the UK had identified as "text proposed by the Union on which discussions are ongoing". Now included with minor wording changes, the Article specifies that special fissile material belonging to Euratom in the territory of the UK would cease to belong to Euratom and would instead be the property of whoever had the right to use the material. If the effective owner of the material is a Euratom Member State, the rights under the Euratom Treaty relating to the deposition, sale and transfer of materials would be preserved after the UK leaves Euratom.

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

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

## 4.13 Agriculture

### Overview

After Brexit the UK will leave the Common Agricultural Policy (CAP). The Government has introduced a Bill to allow development of a UK agricultural policy after 2020. Commons Briefing Paper, [The Agriculture Bill 2017-19](#), contains further details.<sup>81</sup> The Government has said that in 2019 the UK will continue direct payments to farmers under the CAP as

<sup>81</sup> Commons Briefing Paper 8405, [The Agriculture Bill 2017-19](#), October 2018

now in all major respects, with further simplification of the scheme in 2020, as allowed by the rules on the transition period.<sup>82</sup>

There is no mechanism for the CAP to apply to any non-EU Member State, but the WA sets out rules on future UK agricultural support after Brexit. These would apply during the transition/ extended transition from 2021 onwards/ backstop period as follows:

- **2020:** The WA exempts any UK support scheme from constraints on state aid without CAP direct payment rules applying, provided the scheme is equivalent to the CAP regulation.<sup>83</sup> [The Agriculture Bill proposes a simplified scheme in this period].
- **During extended transition:** The WA sets limits for UK farm support, including for rural development.
- **From entry into force of WA onwards** (whilst the relevant provisions under the Protocol on Ireland and NI remain in force): the Protocol sets limits on NI farm support (but not referencing rural development).

The Northern Ireland Protocol also includes sanitary and phytosanitary (SPS) rules in the list of EU regulations continuing to apply to NI under the backstop. Existing checks for agri-food product movements from GB to NI will need to be scaled up in consequence.

## Industry concerns

Farming representatives have for some time raised concerns about the continuation of free and frictionless trade in agri-food products.<sup>84</sup> They welcomed progress on the Withdrawal Agreement in broad terms. Four farmers' unions in England, Northern Ireland, Scotland and Wales issued a joint statement in support of the WA on 20 November 2018, stating that farmers want clarity on future trading relationships and calling for no tariffs or non-tariff barriers:

The default of trading with the EU under WTO rules alone is unacceptable and would decimate our industry.

The draft Brexit Withdrawal Agreement, while not perfect, will ensure that there are no hard barriers on the day we leave the European Union, and will allow trade in agricultural goods and UK food & drink to continue throughout the transition period largely as before. This opportunity needs to be taken.<sup>85</sup>

## Agricultural support schemes

**Article 137** disapplies CAP direct payment regulations to UK farm support payments for the claim year 2020. However, state aid rule exemptions will continue to apply to any such UK scheme provided it is equivalent to CAP regulations.<sup>86</sup>

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<sup>82</sup> Defra, Health and Harmony, [policy statement timeline](#), September 2018

<sup>83</sup> [Regulation \(EU\) No 1307/2013](#) establishing rules for direct payments to farmers under support schemes within the framework of CAP

<sup>84</sup> See for example NFU online, [NFU response to PM's Brexit Plan](#), 6 July 2018

<sup>85</sup> [Joint UK farming unions statement on Brexit](#), 20 November 2018

<sup>86</sup> [Regulation \(EU\) No 1307/2013](#) of 17 December 2013 establishing rules for direct payments to farmers under support schemes. Article 13 exempts farm subsidy

During an extended transition period, **Article 132(2)** provisions on agricultural support would apply to the UK. Under this Article, to qualify for exemption from state aid rules, any UK farm support would be tied to levels not higher than UK expenditure under CAP levels in 2019. Furthermore, a minimum proportion must be within 'green box' definitions (i.e. only minimally/not trade distorting) under Annex 2 to the WTO Agreement on Agriculture.<sup>87</sup> The Joint Committee will specify the levels of exempted support and compliance with WTO definitions. Similar measures for Northern Ireland specifically are included in the NI Protocol (Article 12 and Annex 9) to apply from when the WA comes into effect. Annex 4 of the Protocol sets out in some detail compliance mechanisms for these restrictions.

### Agri-food regulations in Northern Ireland

Imports of agri-food products to the EU from non-EU countries must meet certain sanitary and phytosanitary rules designed to protect human and animal health. These include physical border checks for animal products and live animals. These can only take place at certain specified Border Inspection Posts - for example the Port of Larne is the only approved port for importing livestock to NI. NI also currently conducts some checks on consignments coming in from the rest of the UK. This helps to protect the island of Ireland which is treated as a single epidemiological unit with an all-island approach to the control and surveillance of animal diseases.<sup>88</sup>

During the transition period/extended transition, the UK's continued compliance with SPS rules would entail a continuation of current check levels. However, under the NI Protocol there would be a need for additional levels of checks in movements from GB to NI. (**Protocol, Article 10 and Annex 5**).

The [European Commission's Q&A](#) notes that:

for agricultural products, already existing checks at ports and airports will need to continue, but will be increased in scale in order to protect the EU's Single Market, its consumers and animal health.<sup>89</sup>

Michel Barnier has [said](#) that livestock checks would increase from 10% currently to 100% of imports under the backstop, but that a later [EU/UK] animal-health agreement could reduce this proportion to 40%. Such an agreement could include, for example, allowing veterinary checks to take place in GB before despatch to NI.<sup>90</sup>

For information on the Protocol, see section 8 of this paper

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payments under this regulation from Articles 107, 108 and 109 of the Treaty on the Functioning of the European Union (state aid provisions)

<sup>87</sup> [World Trade Organisation Agreement on Agriculture](#)

<sup>88</sup> HM Government, [Northern Ireland and Ireland Position Paper](#), p19

<sup>89</sup> European Commission Press Notice, Fact sheet: [Q&A on Protocol on Ireland and Northern Ireland](#), 14 November 2018

<sup>90</sup> [Speech by Michel Barnier at the closing session of Eurochambre's European Parliament of Enterprises](#), 10 October 2018. Reuters report, [EU's Barnier plays down 'backstop' checks on Northern Irish trade](#), 21 October 2018

## 4.14 Specific arrangements relating to fishing opportunities

The arrangements regarding fisheries for the transition period set out in **Article 130** are identical to those in the March 2018 draft.

The EU's position in the negotiations was that that fisheries should form part of any transition agreement, with the UK being required to comply fully with the Commons Fisheries Policy (CFP) until the end of the transition period, and that the UK would be consulted rather than fully participate in negotiations.

This is reflected in the WA. The agreed 21-month transition period coincides with the end of the 2020 fishing quota year. During the transition period the UK will not be able to take part in quota negotiations, but its share of quota will not be reduced. The Government Explainer sets out that the UK will be allowed to take part in the 2020 negotiations to set its own fishing opportunities in 2021:

Specific arrangements are also made in relation to fishing opportunities, to enable a smooth transition to the new relationship between the UK and the EU. During the implementation period the UK's fisheries rules will be aligned with those of the EU and the UK's share of catch cannot be reduced. During the last year of the implementation period, the UK will be able to negotiate its own fishing opportunities for the following year.

The UK and the EU intend to conclude a new fisheries agreement in time to determine fishing opportunities for the first year after the Implementation Period, in preparation for which during the Implementation Period the UK can be invited to form part of the EU's delegation in international negotiations.<sup>91</sup>

## 4.15 Immunities and privileges

Privileges and immunities are standard provisions under international law and the privileges and immunities granted to the EU are similar to those of other international organisations in the UK.<sup>92</sup> [Protocol No 7](#) to the EU Treaties on the Privileges and Immunities of the European Union includes rules on individual rights of residence and taxation. This Protocol will not apply in the UK after Brexit, but the December 2017 Joint Report outlined at [para. 95](#) the EU and UK commitment to protect immunities and privileges throughout the transition period and beyond:

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

Immunity for official actions taken by UK and EU representatives before the end of the transition period will generally be preserved. The EU is

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<sup>91</sup> HMG, [Explainer](#), 14 November 2018

<sup>92</sup> See HMG [Explainer](#), 14 November 2018

given certain protections and exemptions from domestic law, such as the inviolability of premises and exemption from certain taxation.

**Articles 101 – 125** settle certain rights and obligations in respect of staff and members of the EU institutions, the ECB, EIB and European Schools, EU property, assets, benefits, pension rights, archives, official communications and documentation once the UK has left the EU.

Under **Article 106** MEPs and former MEPs retain rights to immunity from prosecution under Article 8 of the Protocol on Privileges and Immunities “in respect of opinions expressed or votes cast before the end of the transition period [...] irrespective of their nationality, in the performance of their duties”. Several Articles in this chapter continue EU rules granting EU officials, judges and politicians immunity from prosecution and tax obligations until the end of the transition period.

General commitments to staff include the following:

- the continuation of privileges and immunities for staff and officials working for the EU before the end of the transition period and after the end of the transition period in connection with activities of the EU (Articles 109 and 110);
- the UK will not be able to exclude staff of the European Central Bank or European Investment Bank, or expropriate assets or render them unrepatriable, due to exchange restrictions during the transition period;
- avoidance of double taxation (Article 108);
- the payment of EU unemployment benefit to all staff who contributed to the scheme;
- the transfer of pension rights (Articles 107 and 114);
- The [Convention defining the Statute of the European Schools](#) on 29 March 2019 will continue to apply to UK staff and family members until 31 August 2021 (Article 125). This is the end of the school year ongoing at the end of the transition period).

Under **Article 118**, the UK will also maintain European Investment Bank privileges and immunities (Protocol 5 on the EIB Statute and Protocol 7 on immunities and privileges of the EU) throughout the amortisation of the EIB's stock of operations at exit day.

## Professional secrecy and classified information

The December 2017 Joint Report committed the parties to “ensure compliance with obligations of professional secrecy; and that classified information and other documents obtained by both sides whilst the UK was a Member State retain the same level of protection as before withdrawal”.<sup>93</sup> **Articles 120 - 122** ensure that these obligations continue.

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<sup>93</sup> The UK Government published a position on [Privileges and Immunities](#) on 13 July 2017, and on [Confidentiality and Access to Documents](#) on 21 August 2017.



## 5. Part Four: Transition

### 5.1 Transition

Part Four of the WA sets out provisions for the transition period. This is meant to bridge the period between the date of the UK's exit from the EU and the entry into force of the new, yet to be negotiated, UK-EU partnership arrangements. The transition will run until the end of December 2020, with the possibility of extension for a further one or two years.

The Government's [Explainer](#) on the WA states that this will be of mutual benefit "giving an important bridge to our future relationship, and giving citizens and businesses in both the UK and the EU the time and confidence they need to plan for the UK's future relationship with the EU". The European Commission's [factsheet](#) on the WA explains that the continued application of EU law during the transition period "will give time to national administrations and businesses to prepare for the new relationship" and "also provide the EU and the UK with time to negotiate the future relationship".

Save for a few exceptions the entire EU *acquis* will continue to apply to the UK as if it were a Member State. As the European Commission factsheet explains:

This means that the UK will continue to participate in the EU Customs Union and the Single Market (with all four freedoms) and all Union policies. Any changes to the Union *acquis* will automatically apply to and in the UK. The direct effect and primacy of Union law will be preserved. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will apply, including the competence of the Court of Justice of the European Union.

However, during this period the UK will no longer be part of EU decision-making, and it will no longer be represented in the EU institutions, agencies and bodies.

### The negotiations

The transition provisions reflects principles set out in the December 2017 European Council [guidelines](#) which stated that the transition period would cover the whole of the EU *acquis*, while the UK "as a third country will no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union bodies, offices and agencies". The UK would also have to "continue to comply with EU trade policy, to apply EU customs tariff and collect EU customs duties, and to ensure all EU checks are being performed on the border vis-à-vis other third countries".

The text of Part Four is largely the same as Part Four of the March draft WA,<sup>94</sup> but the negotiated WA includes a new **Article 132** which

<sup>94</sup> For a discussion of the March draft text on transition, the UK position and proposed amendments in the negotiation leading up to it, see section 5 on 'Transition and Entry into Force' in Commons Library Briefing Paper 8269 [Brexit: the draft withdrawal agreement](#), 23 March 2018.

provides that the Joint Committee may take a single one-off decision on extending the transition period.

The possibility of extending the transition period meets the UK Government's previously expressed desire for greater flexibility over when the transition ends. The earlier negotiations leading up to the publication of the March draft also led to some movement from earlier proposals on the transition text put forward by the EU. Professor Steve Peers summarised the key changes in March as follows:

Overall, the UK has obtained some concessions during these talks: explicit powers to hold treaty talks with non-EU countries; the possibility to abstain on controversial EU foreign policy measures which it would have vetoed as a Member State; some greater consultation rights; an attempt to consider the UK still part of treaties with non-EU states for the time being; and protection against any grab of fisheries catches in UK waters. However, the UK government had to concede on issues which it had placed much stress on: taking fisheries catch issues out of the transition period and not extending all acquired rights to EU27 citizens who came to the UK during this period.<sup>95</sup>

## 5.2 Application of EU *acquis* during transition and exceptions

**Article 127** states that all EU law will apply to the EU, save for a few exceptions (**Article 127(10)**) during the transition period. The exceptions are Treaty Articles and subsequent acts providing for:

- The establishment of a European citizens' initiative (Article 11(4) TEU and first paragraph of Article 24 TFEU);
- The right of Member State nationals (as EU citizens) to vote and stand in EP and municipal elections in their Member State of residence, under the same conditions as nationals of that State (point (b) of Article 20 (20) and Article 22 TFEU);<sup>96</sup>
- Provisions relating to the UK opt-out from the euro (Protocol No. 15), UK adoption of the Schengen *acquis* (Protocol No.19), and the framework enabling the UK to opt in to Justice and Home Affairs measures adopted under the EU Area of Freedom, Security and Justice (AFSJ - Protocol No.21), unless already binding upon the UK before the WA enters into force.

The UK will not participate in any 'enhanced co-operation' authorised by the EU where the authorisation is granted after the WA comes into force, or where authorisation was granted prior to this but where acts had yet been adopted under the enhanced co-operation.

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<sup>95</sup> See Steve Peers, "[A Bridge to Nowhere? The Brexit transition period: analysis and annotation](#)", *EU Law Analysis* blog, 24 March 2018.

<sup>96</sup> As Steve Peers points out in his [analysis](#) of the WA, the UK (or its devolved legislatures) can, if it chooses, unilaterally continue to let EU27 citizens vote in local elections, and EU27 countries can choose to do the same for UK citizens.

### 5.3 Exceptions to UK being treated as a Member State in EU law

Under **Article 127(6)** references to Member States in EU law will be understood as including the UK apart from the following exceptions:

- The UK will not be considered as an EU Member State under Treaty provisions establishing permanent structured co-operation under the Common Security and Defence Policy (Article 42 (6) and Article 46 TEU and Protocol No.10). However, this does not preclude the possibility of the EU inviting the UK to take part in individual projects.
- The UK will not be included in EU acts where participation would grant the UK access to security-related sensitive information that only Member States, nationals or residents of Member States are “to have knowledge of” (the EU will notify the UK if applying this derogation).
- The UK will not be considered to be a Member State for the purposes of recruitment of officials and staff of EU institutions, bodies and agencies, or in references to Member States in EU staff regulations or conditions of employment.

### 5.4 Institutional Arrangements

**Article 128** provides that while EU law will continue to apply to the UK during the transition period, the UK will no longer be able to nominate, appoint or elect members of EU institutions, bodies and agencies. Nor will the UK be able to participate in the meetings or decision-making of the EU institutions, or in decision-making and governance of other EU bodies agencies.

In addition, the UK Parliament will not be considered as a national parliament of a Member State except for provisions in Article 1 and Article 2 of the Protocol on the Role of National Parliaments relating to the provision of information to national parliaments. The UK Parliament will therefore continue to receive European Commission consultation documents, the Commission annual legislative programme and other legislative planning documents, and (where they are in the public domain) draft legislative proposals. It is not yet clear how the UK Parliament will deal with or scrutinise these documents.

During the transition, EU Treaty provisions granting institutional rights to Member States enabling them to submit proposals, initiatives or requests to the EU institutions will no longer apply to the UK.

UK representatives or experts may “exceptionally” be invited to participate in meetings of committees under the EU’s comitology procedure to implement legislation, European Commission expert groups and other similar entities, and meetings of EU bodies, offices and agencies where the discussion concerns the UK and where this in interest of the EU and the effective implementation of the transition period. The UK representatives will have no voting rights in such meetings, and their presence will be limited to specific relevant agenda

items. The UK will, however, be consulted on draft EU acts which refer directly to specific Member State authorities, procedures or documents, with a view to ensuring the proper implementation and application of those acts by the UK.

The Bank of England will not be considered a central bank of a Member State during the transition period.

The UK will not act as a leading authority for EU-level or joint-Member State risk assessments, examinations, approvals or authorisations relating to plant variety rights and various medicinal and chemical products, labelling and placing certain substances on the market (the full list of items covered is listed in Annex VII to the WA).

### **Chemicals assessment**

The WA makes specific provision in **Article 128(6)** that the UK will not act as leading authority for risk assessments, examinations, approvals or authorisations in relation to a number of areas, including the regulation of chemicals (through EU Regulation 1907/2006 or REACH). The Health and Safety Executive (HSE) has published guidance on the transition period, noting that in relation to chemicals:

- Registrations, approvals, authorisations and classifications in place before March 2019 will continue to be valid during the implementation period in the same way that they are now
- REACH will continue to apply to the UK during the implementation period.
- The process for registering new chemicals under REACH during the implementation period will remain the same as it is now, which will require UK companies to register with the European Chemicals Agency (ECHA).
- During the implementation period, the UK will recognise all new registrations, approvals, authorisations and classifications granted by the EU.
- During the implementation period, we expect that HSE will not be able to act as a 'leading authority' to conduct certain assessments under the Plant Protection Products, Biocides and REACH regulations. We will work with affected businesses to minimise disruption and delay to their ongoing assessments.
- UK-based businesses will have the same rights during the implementation period as EU-based businesses to have their cases accepted and processed by 'leading authorities' based in other EU member states.
- HSE will continue to process product applications under the Biocidal Products Regulation for the UK market under the national authorisation route during the implementation period. Any applications will be considered against the current rules and standards.<sup>97</sup>

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<sup>97</sup> HSE, [Chemicals Regulation: Implementation Period Guidance](#) [accessed 22 November 2018]

## 5.5 EU Court jurisdiction

**Article 131** provides that the EU institutions and other bodies, offices and agencies will continue to exercise their powers under EU law in relation to the UK. In particular, the CJEU will have jurisdiction in relation to the UK, as provided for in the EU Treaties. CJEU jurisdiction will also apply in relation to interpretation and application of the Withdrawal Agreement.

## 5.6 Fisheries

The Common Fisheries Policy (CFP) will continue to apply to the UK during the transition period. The European Commission factsheet states that the UK “shall be bound by the decisions on fishing opportunities until the end of the transition period”. **Article 130** provides that during this period, the UK will be consulted “in respect of the fishing opportunities related to the United Kingdom, including in the context of the preparation of relevant international consultations and negotiations”. The UK will therefore be able to “provide comments” on the Commission’s Annual Communication on fishing opportunities, as well as on the scientific advice from relevant scientific bodies and proposals from the Commission for fishing opportunities for any period falling within the transition period. The EU may also “exceptionally” invite the UK to attend international consultations and negotiations. This, the Commission factsheet explains, will be “in view of preparing its future membership in relevant international fora”.

The Government’s WA [Explainer](#) says these arrangements will mean that during the last year of the transition period, “the UK will be able to negotiate its own fishing opportunities for the following year”. It also explains that the UK and EU intend to conclude a new fisheries agreement in time to determine fishing opportunities for the first year, in preparation for which during the transition period, the UK can be invited to form part of the EU’s delegation in international negotiations.

## 5.7 Justice and Home Affairs

Where the UK already participates in EU Justice and Home Affairs (JHA) co-operation having previously exercised its right to opt in to measures in this area, the Commission factsheet explains that “the UK will remain bound by EU acts applicable to it upon its withdrawal”.

**Article 127(5)** provides that the UK will continue to have a right to opt into JHA measures which amend, build upon or replace an existing measure that the UK has adopted in relation to the Schengen *acquis* or the AFSJ. But the UK will not have the right to opt into any new JHA measures adopted under the AFSJ. The EU may invite the UK to co-operate in relation to new measures adopted in this area.

Part Six of the WA covering **Final Provisions**, including entry into force of the Agreement, also provides that Member States may no longer surrender nationals to the UK under the European Arrest Warrant, if the

EU declares that the relevant Member State has raised a concern “related to fundamental principles of national law” at the time of notification of approval of the WA. The UK can reciprocate within a month of the declaration.

## 5.8 International Agreements and the EU’s external actions

**Article 129** covers specific arrangements relating to the EU’s external action and states that the UK will continue to be bound by obligations stemming from the EU’s international agreements during the transition period.

As the Commission factsheet explains, this means continued UK compliance with the EU’s trade policy and application of the Common Commercial Policy (CCP). The UK will therefore have to continue to apply the same level of market access (including any preferential tariff regime) towards third countries as if it were still an EU Member State. But this will not oblige the third countries concerned to reciprocate towards the UK (where the EU has trade deals with these countries involving reciprocal arrangements). A footnote to **Article 129(1)** states:

The Union will notify the other parties to these agreements that during the transition period, the United Kingdom is to be treated as a Member State for the purposes of these agreements.

This footnote was included in the March draft agreement but not in the initial draft published on 28 February.

The Government said in a [Technical Note](#) published on 8 February that the UK would seek continued application of EU international trade and other related agreements during the transition/ implementation period by agreement of all the parties concerned. The Government later [welcomed](#) the inclusion of this commitment in the March draft as “a positive and significant step towards securing continuity” in UK relationships with partner countries, providing “further certainty and confidence that there will be no disruption to existing trading relationships underpinned by EU trade agreements as we move into the Implementation Period”.

The wording in the footnote nevertheless remains a request to third parties on the part of the EU, and it is not guaranteed this will be agreed to. In [oral evidence](#) to the International Trade Select Committee on 11 July 2018, International Trade Secretary Liam Fox said the UK was still awaiting the EU’s formal notification to these countries and that, with regard to the rollover or negotiation of new agreements with them, these countries were waiting to see if there would be an implementation period first “where we can then come to a bespoke agreement once we have the implementation period in place”.<sup>98</sup>

In evidence to the International Trade Select Committee on 28 November, Trade Minister George Hollingbery said that not much had

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<sup>98</sup> See Commons Library Briefing Paper 8370 [UK adoption of EU external agreements after Brexit](#), 24 July 2018.

changed regarding rollover of trade agreements. None had yet been signed, but he was “extremely optimistic” that they could be rolled over in time for March 2019.

The Government had been negotiating on the basis of a transition period happening, but in recent months started to treat a ‘No Deal’ Brexit scenario as a very real possibility. Mr Hollingbery said it remained the Government’s intention to have all agreements in place on 29 March next year, but whether that was deliverable was “another matter”.

**Article 129** also provides that the UK will be excluded from the work of any bodies set up by EU international agreements, unless the UK participates in its own right, or where invited “exceptionally” to be part of EU delegations or meetings of such bodies. This would be where the presences of the UK “is necessary and in the interests of the Union, in particular for the effective implementation of those agreements”.

In addition, **Article 129** states that in accordance with the principle of “sincere co-operation”, the UK shall:

refrain, during the transition period, from any action or initiative which is likely to be prejudicial to the Union’s interests, in particular in the framework of any international organisation, agency, conference or forum of which the United Kingdom is a party in its own right.

But under Article 129 the UK will be permitted to:

negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union.

The Government’s [Explainer](#) states that this will “enable the UK to step out and take forward new trade deals with global partners”.

## 5.9 Common Foreign and Security Policy

If the EU and UK reach an agreement on their future relationship in the areas of the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) which becomes applicable during the transition period, **Article 127(2)** provides that Treaty provisions covering the CFSP and CSDP and acts adopted under these provisions will cease to apply to the UK from the date of application of the new agreement.

The CFSP will otherwise continue to apply to the UK during the transition period. The Commission factsheet explains that this means the UK will be required to implement EU sanctions in place or adopted during the transition period and to support agreed EU positions, including with regard to third countries and international organisations.

But **Article 129** indicates limits to the UK’s role in the CSDP and provides that the UK can abstain from certain actions; the UK may make a formal declaration to the EU High Representative for Foreign Affairs and Security Policy indicating that “for vital and stated reason of

national policy” it will not apply a CSDP decision. However, in “a spirit of mutual solidarity” the UK will refrain from any action likely to conflict with or impede EU action based on that decision, while the Member States will respect the UK position.

In addition, Article 129 states that during the transition period, the UK will not provide commanders of civilian operations, heads of mission, operation commanders or force commanders for missions or operations conducted under the CSDP, and will not provide the operational headquarters for such missions or operations or serve as a framework nation (the nation providing the core command, staffing and logistics) for EU battlegroups. The UK will not provide the head of any operational actions taken under CFSP Council Decisions. This means the operational headquarters of the EU operation fighting piracy, Atalanta, will be transferred from Northwood to Rota in Spain.

## 5.10 Duration of the transition period

In line with the March text **Article 126** of the WA states:

There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.

The EU had proposed this end date in January 2018 after the UK initially proposed a transition period of “around two years”. Under the December 2017 [guidelines](#), transitional arrangements had to be “in the interest of the Union, clearly defined and precisely limited in time”. The Council of the EU then adopted [supplementing negotiating directives](#) for the Brexit negotiations on 29 January 2018 proposing the end date of 31 December 2020. This date would avoid complications relating to the negotiation of ongoing UK contributions to the EU budget if the transition were to go beyond this date, since the EU’s seven-year Multiannual Financial Framework (MFF) budget cycle also concludes on 31 December 2020. The UK’s continuing contributions to the EU budget up to this point, in line with the agreed MFF for 2014 to 2020, had already been agreed in the December 2017 [joint report](#).<sup>99</sup>

The new **Article 132** in the WA indicated a more flexible approach to the transition end-date reflecting initial UK concerns. The UK Government [draft text](#) for discussion published on 21 February 2018 had suggested that it wanted a more open approach to setting the end date; that the definition of the duration “should 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”; and that while agreeing that “this points to a period of around two years”, the UK wishes “to discuss with the EU the assessment that supports its proposed end date”.

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<sup>99</sup> A European Commission [factsheet](#) on the first draft of the withdrawal agreement published on 28 February 2018 stated that the text took account of the UK’s request for a transition period of “around two years” and “makes it coincide with the end of the current MFF”. This reasoning was reiterated in the European Commission [factsheet](#) on the November Withdrawal Agreement.

The March draft nevertheless did not indicate any flexibility on the end-date, stating that it would end on 31 December. A proposed option to extend the transition was reportedly discussed at the October European Council, to give more time for talks to take place on the future partnership and reduce the likelihood of the disputed Northern Ireland backstop being enacted.<sup>100</sup>

## 5.11 Extension of the transition period

In the WA published on 14 November, Article 132 stated:

Notwithstanding Article 126, the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period up to [31 December 20XX].

This possibility can be used only once and must be decided by the Joint Committee before 1 July 2020.

The possible transition extension is also referred to in the Protocol on Ireland/Northern Ireland. **Article 3 of the Protocol** states that the UK may request an extension to the transition having had regard to progress in negotiating a new agreement which supersedes the Protocol. The Commission [factsheet](#) on the WA explains that a transition extension will provide the UK with the opportunity “to request additional time to make sure that a future agreement, including provisions for avoiding a hard border in Ireland, may be reached before the end of the transition period”.

Following the publication of the draft WA on 14 November, there was speculation that a decision on the extended transition end-date could be deferred until the transition period was in place (and could theoretically allow for the transition to be extended until 2099)<sup>101</sup>. However, the ‘20XX’ date was a placeholder with discussions ongoing as to the precise end-date should an extension be agreed.

An **amended version of Article 132** circulated on 22 November and was confirmed in the updated WA text published on 24 November:

Notwithstanding Article 126, the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to one or two years.

At the CBI conference on 19 November the Prime Minister [indicated](#) that she would prefer any transition extension to be over before the expected date of the next general election (June 2022).

The Commission [factsheet](#) on the WA makes clear that a one-off extension can only be made by mutual agreement of the UK and EU, and would cover all the terms of transition outlined for the initial period. All other transition terms previously agreed would remain applicable, meaning full application of EU law to the UK including CJEU oversight.

<sup>100</sup> European Council President Donald Tusk later [told](#) the EP that the extension of the transition period had been proposed by Theresa May at the October European Council meeting.

<sup>101</sup> In his response to her House of Commons statement on the agreement on 15 November, Jeremy Corbyn [asked](#) the Prime Minister if the text would permit extension of the transition “to be rolled on until 2099”.

While the UK would continue to be treated as a Member State regarding the applicability of EU law, **Article 132(2)** provides that in an extended transition period the UK would be considered as a third country for EU programmes and funding under the next budget plan ([Multiannual Financial Framework 2021 – 2027](#)). The UK could potentially participate in such programmes but would do so according to the EU's rules for third countries.<sup>102</sup>

The Government [Explainer](#) on the WA states that the UK will make decisions on participation in specific programmes in light of current negotiations within the EU on the next generation of EU programmes due to begin in 2021, the future relationship negotiations and UK priorities.

The UK will not be part of the CAP during the transition as direct CAP payments would have been disapplied in 2020 under Part Five, Financial Provisions of the WA, but there would be some constraints over the amount of direct support the UK could provide for agriculture (limited to the 2019 level of payments under the CAP). The Explainer states that the UK would not be part of the CAP during an extension and “the UK would be free to introduce a new agricultural policy providing the payments remain within certain limits”.

Given the expiry of the 2014-2020 MFF, the UK would no longer be contributing to the EU budget as if it were a Member State and the EU's [Own Resources](#) decision would no longer apply to the UK. But extending the transition would mean the UK would be required to make an ongoing contribution to the EU budget, with the amount payable to be determined by the Joint Committee. **Article 132(3)** states that the Joint Committee would agree both the amounts, taking into account the UK's status during the period and the schedule for making payments.

The wider financial settlement (see section 6 of this paper) set out in Part Five of the WA will not be affected by an extension of the transition period: the UK and EU will continue to settle their financial commitments to one another as agreed in the financial settlement.

## 5.12 Domestic Legislation required to implement the transition period

Implementation of the transition period and any possible extension of the transition will require legislation in the UK. This is because the transition period runs contrary to Parliament's intention, expressed in the *EU (Withdrawal) Act 2018*, that EU law will no longer have effect in domestic law after exit day. The forthcoming *EU (Withdrawal Agreement) Bill* will therefore need to amend the *EU (Withdrawal) Act 2018* to allow for EU law to have continuing effect. This will be done by delaying the provision of the *EU (Withdrawal) Act* that repeals the

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<sup>102</sup> Full participation in EU programmes as a third country typically involves very close alignment with EU priorities. For example, Switzerland became unable to participate fully in Horizon 2020 and Erasmus+ after it chose to restrict free movement following Croatia's accession to the EU.

*European Communities Act 1972* and removes the legal authority for EU law to have effect in the UK until the end of the transition period.

### 5.13 Final Provisions

Under **Article 182** the WA Protocols on Ireland/Northern Ireland, the Sovereign Base Areas in Cyprus and the various annexes form an integral part of the agreement.

**Article 183** provides that the WA will be drawn up in the EU's 24 official languages, each of which will be equally authentic, and that the WA will be deposited with the Secretary General of the Council (Jeppe Tranholm-Mikkelsen).

**Article 184** stipulates that the UK and EU will use their "best endeavours" to negotiate "expeditiously" agreements governing their future relationship as referred to in the Political Declaration and to conduct relevant approval and ratification procedures with a view to ensuring that the agreements apply "to the extent possible" by the end of the transition.

### 5.14 Entry into Force

**Article 185** states the WA will come into force on 30 March 2019. This follows on from the UK's planned exit date of 29 March. This is also dependent on the depositary of the agreement (the Secretary General of the Council) having received written confirmation that both the EU and the UK have completed their necessary internal procedures for approving the agreement. In the UK this will be the passing of the *EU (Withdrawal) Act*.

As described above, **Article 185** identifies another possible exception to the application of EU rules during the transition in the area of Justice and Home Affairs. It provides that the EU, when making its notification of approval of the WA, can declare that in the case of any Member State raising concerns "related to fundamental principles of national law" about surrendering its own nationals to the UK under the European Arrest Warrant during the transition, the judicial authorities of that Member State can refuse to do so. If this occurs, the UK can within a month of the EU's declaration, declare that it too will not surrender its nationals to that Member State. This reflects the fact that some Member States (including Germany) have constitutional provisions barring extradition of their citizens to non-Member States and others do this as a matter of national policy.<sup>103</sup>

Article 185 also provides that the following provisions will not apply until the end of the transition period (with a few exceptions):

- Provisions on citizens' rights in Part Two;<sup>104</sup>

<sup>103</sup> The House of Lords EU Select Committee Report, [Brexit: the proposed UK-EU security Treaty](#) in July 2018, identified Germany, the Czech Republic, France, Romania, Slovenia, and Slovakia as Member States that might invoke this Article during transition.

<sup>104</sup> The exceptions are: Article 19 enabling the UK in the case of resident EU27 citizens and Member States in the case of resident UK nationals to allow for voluntary

- The 'separation provisions' in Part Three;<sup>105</sup>
- Title I of Part 6, which sets out CJEU jurisdiction and UK participation in CJEU cases on Parts II and III following transition, so as to ensure 'consistent interpretation';
- Articles 169 -181 setting out dispute settlement procedures in the interpretation and application of the WA;
- The Protocols on Ireland/Northern Ireland<sup>106</sup> the Sovereign Base Areas in Cyprus;<sup>107</sup>
- The Protocol on Gibraltar will apply from the entry into force of the WA and will cease to apply at the end of the transition period, apart from Article 1 (on citizens' rights), which will apply from the entry into force of the WA. Article 1 confirms that the Governments of Spain and the UK will "closely cooperate" to ensure the citizens' rights guarantees in Part Two of the WA, in particular Articles 24 and 25 on frontier workers, will apply to such workers in Gibraltar and Spain.

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applications for residence status and; Article 30(1) which sets out an 'observer status' for the UK in the Administrative Commission.

<sup>105</sup> The exceptions are: Article 44 which requires the UK to send all documentation related to ongoing goods assessments procedures to a designated Member State by 30 March 2019 and Article 96(1) which states that technical examinations conducted by UK Examination Offices in co-operation with the Community Plant Variety Office which are ongoing on the day before the WA comes into force should be concluded as normal.

<sup>106</sup> The provisions of the Ireland/ Northern Ireland Protocol that will come into force from the entry of force of the WA rather than the end of the transition period are listed in the Appendix to this briefing.

<sup>107</sup> Article 11 of the Sovereign Base Areas Protocol will apply from the entry into force of the WA. This states that any measure adopted during the transition period under Article 6 of Protocol 3 of the Cyprus Accession Treaty, by which the Council can amend Protocol provisions, will not apply to the Base Areas.

## 6. Part Five: financial provisions

In the Financial Settlement (the settlement), the UK and EU have agreed on how they will settle their outstanding financial commitments to each other. The settlement sets out the financial commitments that will be covered, the methodology for calculating the UK's share and the payment schedule.

Many of the components of the settlement arise from the UK's participation in the EU budget; others are a result of broader aspects of the UK's EU membership, such as its involvement in the European Investment Bank (EIB). The settlement includes how the UK will contribute to and participate in the EU budget and its programmes during the transition period until 31 December 2020.

Following the first round of withdrawal negotiations, the UK and EU set out an agreed approach to the financial settlement in the December 2017 [Joint Report](#). The WA turns the approach set out in the Joint Report into legal text, and also, as noted, provides for the possibility of an extension of the transition period, which would require further negotiations on UK contributions to the EU budget during that time. Any extension would not impact on the financial settlement, which would continue as agreed.

### 6.1 What was agreed in the Joint Report?

#### Some underlying principles

The principles underlying the agreed methodology are that:<sup>108</sup>

- no EU Member State should pay more or receive less because of the UK's withdrawal from the EU;
- the UK should pay its share of the commitments taken during its membership; and
- the UK should neither pay more nor earlier than if it had remained a Member State. This implies in particular that the UK should pay based on the actual outcome of the budget.

The final point means that the UK will not be required to make any payments earlier than would have been the case if it had remained a Member State, unless agreed by both sides.

#### The components of the settlement

The Joint Report details the various components included in the settlement. The Library briefing [Brexit: the exit bill](#) goes into further detail, but in summary the UK will:

- contribute to and participate in the 2019 and 2020 EU budgets, as part of the transition period – this includes receiving funding from EU programmes that are part of the 2014 – 2020 budget plan;

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<sup>108</sup> These principles are laid out in the [Communication from the Commission to the Council on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union](#), 8 December 2017

- contribute towards the EU's outstanding budget commitments at 31 December 2020 (these are budget commitments that have been made, but not yet paid);
- contribute towards some of the EU's liabilities – obligations to pay for certain items following past activities – incurred before 31 December 2020. EU staff pensions are the main source of such liabilities;
- remain liable for the EU's contingent liabilities – costs that could arise in the future, but where the probability of each of them in isolation doing so is estimated at less than 50% – which relate mainly to financial guarantees given and to legal risks;
- receive back the €3.5 billion of capital it has paid into the EIB in 12 instalments from 2019 and the relatively small amount of capital it paid into the ECB on withdrawal;
- remain liable for EIB liabilities and will provide a guarantee to the EIB for its stock of outstanding loans which will decrease as EIB loans associated with it decrease;
- receive back its share of the net assets of the European Coal and Steel Community and the capital paid into the European Investment Fund;
- continue to participate in some EU overseas programmes, such as the European Development Fund until the current round ends.

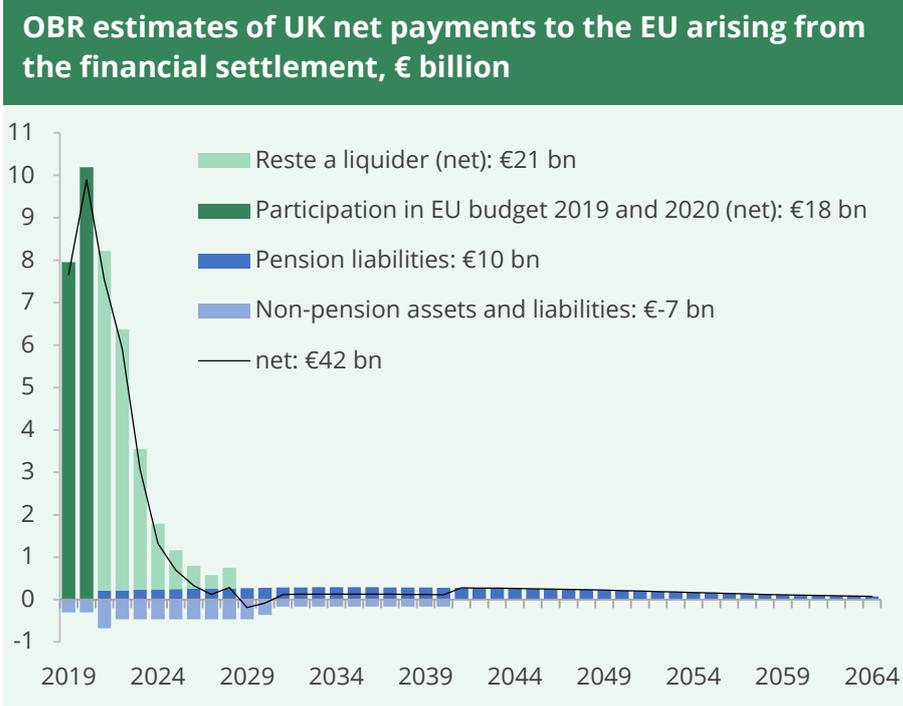
## 6.2 Potential cost

In the main, the financial settlement does not specify the financial amounts involved. Rather, it details the components of the settlement, the methodology for calculating the UK's share and the payment schedule.

No definitive value of the settlement can be calculated, as much of the cost will depend on future uncertain events. However, the Treasury and the Office for Budget Responsibility (OBR) have published estimates that broadly put the value at around £35 billion - £39 billion.

### **Office for Budget Responsibility's estimate**

The OBR's latest estimate – made in October 2018 – is that the cost will be around £39 billion (€42 billion). The cost is expected to be frontloaded, with most of the cost – around 75% – expected to come before 2022. The OBR expects that relatively small payments (of around €100 million for pension liabilities) will still be made in the 2060s, although it is possible that the UK and EU could agree on earlier payment for some of these.



### Treasury estimate

When the Joint Report was published, the Treasury estimated the settlement at around £35 billion–£39 billion.<sup>109</sup> The National Audit Office examined the reasonableness of the Treasury's estimate of the settlement's cost. The NAO found the estimate to be reasonable based on the parameters set by the Treasury, but that the actual value was uncertain because it would depend on future events.<sup>110</sup>

### There is uncertainty about the estimate

The final cost of the settlement to the UK is uncertain and will not be known until the final payment is made. The payments depend on a whole range of items including: the exchange rate when payments are made; the UK's economic performance relative to Member States; the amount of funding the UK receives from the EU during transition; and the impact of future events – such as mortality rates – on EU pension liabilities.

Some elements of the financial settlement are excluded from the estimates made by the OBR and Treasury. The EU's overseas spending via the European Development Fund is not included. Contributions to these are made by individual Member States and not through the EU budget, and the programmes are not included in the EU Treaties. The UK will continue to honour its commitments to the EDF, estimated at approximately £2.9 billion; the payments for which also contribute to its target of spending 0.7% of GNI on overseas aid.

Contingent liabilities are also not included in the estimates of the settlement. The Treasury believe it is highly unlikely that these liabilities

<sup>109</sup> [HC Deb 11 Dec 2017:c25](#)

<sup>110</sup> NAO, *Exiting the EU: The financial settlement*, [paras 11-22](#)

– which depend on uncertain events, such as countries defaulting on loans – will result in future payments.

## 6.3 The Withdrawal Agreement

Part Five of the WA turns the political agreement reached on the financial settlement into legal text.

### UK participation in Union annual budgets to 2020

During the transition period until 31 December 2020, the UK will continue to contribute to, and participate in, the EU Budget in 2019 and 2020. The UK will make contributions to the EU Budget as if it were still a Member and will continue to receive funding from EU programmes funded from the current budget plan ([Multiannual Financial Framework 2014-2020](#))

**Article 135** sets out that the UK's contribution to and participation in the 2019 and 2020 EU Budgets will be in accordance with the rules set out for the transition period. Article 135(2) says that any changes made to how the EU budget is spent or financed adopted after the date of withdrawal will not apply to the UK. This notably keeps the UK rebate in place in 2019 and 2020.

Contributions to the EU Budget are subject to corrections or adjustments after the year is over. Article 136 says that this process shall apply to the UK after 31 December 2020 for the financial years up to 2020 and sets out how this process would work. Article 136(3) allows for the UK to attend meetings of EU committees that could impact on resource corrections or adjustments. UK representatives can attend upon invitation, on a case-by-case basis, without voting rights. Article 136(3) also says that corrections or adjustments based on revisions to VAT or GNI – which can be significant<sup>111</sup> – will be time limited.

**Article 141** says that the UK shall receive a share of EU-levied fines decided before 31 December 2020 and collected by the EU. This excludes fines that have already been included as part of EU Budget revenue.

### UK participation in EU programmes in 2019 and 2020

**Article 137** sets out that the UK's participation in EU programmes will be in accordance with the rules set out for the transition period until 31 December 2020. The UK shall be able to participate in programmes – and receive funding from them – under the current 2014-2020 budget plan and previous budget plans. However, the UK will not be part of direct payments for farmers in 2020.

The UK shall only be eligible for programmes provided that the relevant instruments were established by the EU prior to the date that the WA comes into force (**Article 137(2)**).

**Article 138** lays out the EU laws the UK must adhere to while still receiving funding from EU programmes and sets out the UK's

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<sup>111</sup> For instance see the Library Insight [The UK's EU surcharge](#), November 2014

relationship with the programmes during the transition period. **Article 138(3)** says that the UK will be able to attend meetings of EU committees that assist the Commission on the implementation and management of EU programmes. UK representatives will attend upon invitation, on a case-by-case basis, without voting rights.

### Box 3: UK participation in EU programmes as a third country and replacing EU funding

#### Participating as a third country

After 31 December 2020, the UK will no longer receive funding from EU programmes as though it were a Member State. This will be the case even if the transition period is extended. This doesn't mean that the UK will be precluded from participating in future EU programmes, but if the UK wishes to participate then it would have to do so according to the EU's rules for third countries.

Some countries outside the EU (third countries) take part in programmes that are directly funded by the European Commission, such as Horizon 2020, and make a financial contribution for doing so. However, full participation in these programmes is generally dependent on close alignment with the EU (for example, Switzerland lost full access to both Horizon 2020 and Erasmus+ when it restricted free movement after Croatia joined the EU).

The [draft political declaration setting out the framework for the future EU-UK relationship](#), published in November 2018, says that the EU and UK will establish general principles, terms and conditions for the UK's participation in EU programmes. Any agreement will be subject to the conditions set out in the EU's rules for each of its programmes, including how the UK will make financial contributions. The EU is currently deciding on the new regulations for its programmes, so it is not yet possible to say what the exact conditions for UK participation as a 'third country' from 2021 onwards would be.

#### Replacing EU funding

The Government has said that it will create a UK Shared Prosperity Fund to replace the EU Structural Funds; it has promised to consult on the structure of this fund in 2018. The Government has also pledged to continue to commit the same cash total in funds (some €4bn per year) for farm support – currently provided under the Common Agricultural Policy (CAP) – across the UK until the end of this parliament, expected in 2022. It has pledged that “any changes made to agricultural funding would reflect the Government's aim of securing a better future for UK agriculture and for the environment”.<sup>112</sup>

## EU budget outstanding commitments (*reste à liquider*)

In their annual budgets the EU commit to some future spending without making payments to recipients at the time. The commitments will become payments in the future. The EU refer to outstanding commitments as *reste à liquider* (RAL).

The UK will contribute towards the financing of the RAL outstanding at 31 December 2020, less the amount of RAL due to the UK. The RAL will be adjusted to account for the actual amount implemented. An adjustment will be made for decommitments – commitments that are cancelled as they are not going to be converted into payments – and assigned revenues, which are largely revenues from non-EU countries to EU programmes.

**Article 140(1)** says that in addition to the EU's outstanding commitments on 31 December 2020, the UK will contribute to

<sup>112</sup> HL 10006 [Agriculture: Subsidies] 18 September 2018

commitments made in 2021 that were carried over<sup>113</sup> from the 2020 Budget. It also says that the outstanding commitments won't include those related to areas where the UK has an opt out, or those areas that are financed by specific revenues (assigned revenues).<sup>114</sup>

Articles **140(2)**, **140(3)** and **140(4)** set out how future payments for outstanding commitments shall be calculated and administered. **Article 140(5)** provides that the UK can make a lump sum payment to cover its outstanding commitments. After 31 December 2028, the UK can request that the EU make an estimate of what the UK has left to pay, and the UK can choose to pay this in advance.

## Liabilities

The UK will share the financing of the EU's liabilities incurred before 31 December 2020. Liabilities with corresponding assets will be excluded as will assets and liabilities related to the spending and financing of the EU Budget (**Article 142 (1)**).

Pensions and other benefits of EU employees are the most significant liabilities included in the settlement (**Article 142 (2)**). Like the UK civil service pension scheme, the EU's pension scheme is unfunded and operates on a 'pay-as-you-go basis', which sees costs being covered by the EU Budget as they arise.

**Article 142(3) to Article 142(6)** sets out how the outstanding liabilities will be calculated and administered. **Article 142(6)** allows for the UK to pay its outstanding liabilities relating to EU staff (pensions and Joint Sickness Insurance Scheme) early. The UK can request that the EU make an estimate of what the UK has left to pay, and the UK can choose to pay this in advance in a number of instalments.

## Contingent liabilities

Contingent liabilities are potential liabilities that may occur depending on the outcome of an uncertain event in the future. The UK will remain liable for its share of the EU's contingent liabilities as established at the date of withdrawal. Both the Treasury and European Commission deem that it is unlikely that each of these liabilities will result in a future cost.

Most of the EU's contingent liabilities relate to financial operations – for instance for financial guarantees given on loans and financial assistance programmes – and would only be called upon in the case of a borrower default. The EU's other contingent liabilities primarily relate to legal cases.

The UK will receive back its share of any unused guarantees related to these liabilities and subsequent recoveries following the triggering of the guarantees for such loans.

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<sup>113</sup> This is an exception to the principle of annuality in the EU Budget in so far as appropriations that could not be used in a given budget year may, under very strict conditions, be exceptionally carried over for use during the following year.

<sup>114</sup> For more on assigned revenues see European Parliament Research Service's, [Assigned Revenue in the EU Budget](#)

***Contingent liabilities for loans related to financial assistance and the EIB***

**Article 143** sets out how contingent liabilities relating to loans for financial assistance, financial operations managed by the EIB (such as the European Fund for Strategic Investment) and the European Fund for Sustainable Development will be calculated and administered. This includes how provisioning – recognising in the budget that a past event is more likely than not to mean a future liability – will work. Article 143 sets out that the UK will receive back its share of unused provisioning and any amounts recovered by the EU from those defaulting on loans.

***Liabilities arising from financial instruments of EU programmes***

**Article 144** sets out how liabilities arising from financial instruments of EU programmes shall be calculated and administered, including where the EU may be liable to make some payments to the UK for unused provisions or recoveries from defaulters.

***Contingent liabilities related to legal cases***

**Article 147** states that in each year the EU shall let the UK know of any payments arising from legal proceedings and the UK's share of any subsequent recoveries.

**European Investment Bank**

On withdrawal from the EU the UK will no longer be a member of the European Investment Bank (EIB). The UK's €3.5 billion of paid-in capital will be repaid to the UK in twelve annual instalments starting at the end of 2019.<sup>115</sup> **Article 150(4)** says that starting from 15 December 2019, the UK will receive eleven instalments of €300 million and a final instalment of €195.9 million. Should any liabilities be triggered, then the UK will still be liable for its share of the paid-in capital.

**Article 150** sets out that the UK shall remain liable for financial operations approved by the EIB before the WA enters into force and explains how this liability will be managed in the future. The UK shall provide a guarantee to the EIB equal to its current callable capital – an amount the UK currently agrees to provide if required. This guarantee will decrease as EIB loans associated with it decrease. Article 150(6) sets out how any triggered liabilities will be dealt with.

Once the WA enters into force, including during the transitional period, the UK will not be eligible for new funding from EIB reserved for Member States. Any projects approved by the EIB prior to the WA entering into force can proceed as approved (**Article 151**).

**European Central Bank**

At January 2015 the UK had €0.06 billion (€56 million) of paid-in capital in the ECB.<sup>116</sup> The paid-in capital will be returned to the Bank of England after the UK's withdrawal (Article 149).

<sup>115</sup> The first eleven payments will be €300 million and the final one will be €196 million.

<sup>116</sup> ECB, [Capital subscription](#)

## European Coal and Steel Community

**Article 145** states that the EU will make five payments to the UK for its share of the liquidated net assets of the European Coal and Steel Community on 31 December 2020. Five equal payments will be made on 30 June of each year starting on 30 June 2021.

## European Investment Fund

**Article 146** states that the EU will make payments to the UK for its share of the capital paid into the European Investment Fund (EIF) by the EU. The EIF is part of the EIB group and provides risk finance to benefit small and medium-sized enterprises (SME). Five equal payments will be made on 30 June of each year starting on 30 June 2021.

## European Development Fund

The European Development Fund (EDF) is the EU's main instrument for providing development aid overseas. The EDF is broken down over time into 'EDF funds'. The EDF is outside of the EU Budget and the UK contributes to the fund.

The UK will remain part of the EDF until the close of the 11<sup>th</sup> EDF fund. The 11<sup>th</sup> EDF is running between 2014 and 2020. The UK will honour its share of the total commitments made under this EDF and the payments related to its share of the outstanding commitments made under previous EDFs. **Article 152** sets this out in legal terms. The UK's commitment to the EDF is estimated at approximately £2.9 billion; the payments for which also contribute to its target of spending 0.7% of GNI on overseas aid (see box 4).

**Article 152(2)** says that the UK may participate, as observer, without voting rights, in the EDF Committee and the Investment Facility Committee.

The UK has a share of the EDF's Investment Facility. This funding will be returned to the UK as the investments end. Article 152(4) says that the UK will be reimbursed using the same method as for [financial instruments arising from EU programmes](#). Article 153 sets out that funding not committed or decommitted under the 10<sup>th</sup> EDF or previous EDFs shall not be reused.

### Box 4: Overseas aid spending through the EU

The UK has a legal obligation (under the [International Development \(Official Development Assistance Target\) Act 2015](#)) to spend 0.7% of its national income each year on international aid. In 2017, 6% of this total (£884 million) was spent via the EU, both as part of the UK's contribution to the EU budget and through contributions to the European Development Fund (EDF).

Because the UK will continue to contribute to the EU budget throughout the transition period, it will continue to be able to count some of this contribution as aid spending (the exact amount will depend on the amount the EU spends in aid).

If UK aid spending through the EU decreases after the UK leaves the EU, the legal obligation to spend 0.7% of national income on aid means that this spending would have to be reallocated to other aid spending.

## Facility for Refugees in Turkey and EU Trust funds

The UK will honour the commitments it has made on the [Facility for Refugees in Turkey](#) and the [EU Emergency Trust Funds](#). **Article 155** sets out that this commitment extends to any future EU Emergency Trust Fund created before the WA comes into force.

**Article 155(2)** allows the UK to participate, as a third country, in bodies related to the Facility for Refugees in Turkey.

## Defence related agencies

**Article 156** says that during the transition period the UK will continue to contribute to the funding of several defence-related agencies, including the European Defence Agency, and any CSDP operations. That funding will continue on the same basis as at present.<sup>117</sup>

**Article 157** says that beyond 31 December 2020 the UK will be required to pay (by June 2021) its share of the pension liabilities for personnel of the EDA and other defence-related agencies, assuming that it has not already done so by the end of the transition period.

## 6.4 Other key aspects of the settlement

### The UK's share of outstanding commitments and liabilities

Once the transition period ends, the UK will share the EU's outstanding commitments, liabilities and contingent liabilities according to its calculated share. **Article 139** says that the UK's share of these commitments should be based on the UK's percentage share of total contributions to the EU Budget over 2014 – 2020.

### The currency of payments

Except for the UK's participation in the EU budgets for 2019 and 2020, which will be under the current arrangements and paid in sterling, the settlement will be drawn up and paid in euro (Article 133). This means that the UK's actual contribution in pounds will be contingent on the future exchange rate.

### Payments after 2020

Article 148 proposes the practicalities for payments between the UK and EU after 2020, setting out, for instance, when payments will be made and the exchange rate that will be used. The majority of payments will have reference dates of 30 June and 31 October each year. In advance of the reference dates, the EU will inform the UK of the required payments, which will be made in four equal monthly instalments for payments with a reference date of 30 June or eight equal monthly instalments for payments with a reference date of 31 October.

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<sup>117</sup> CSDP operations are financed through the [Athena mechanism](#) ; while contributions to the EDA budget are made by Member States according to a GNI-based formula, whereby contributions are proportional to the share of each Member State's GNI within the total GNI aggregate of the participating states.

### **Auditors**

Article 134 says that the UK can appoint auditors to assure the implementation of the financial settlement. The EU will provide the auditors with information and assistance to help them complete their task.

### **Specialised Committee**

A specialised Committee on the financial provisions is established in Article 165(1(f)). The Committee, which will be in addition to the Joint Committee that governs the whole WA, will include representatives of the EU and the UK.

## **What if the Withdrawal Agreement is not approved?**

The Library briefing [What if there's no Brexit deal?](#) discusses what might happen with the financial settlement if there is no Withdrawal Agreement (WA) and the UK leaves the EU with no deal. The situation is uncertain, but in summary:

- if there is no WA the political agreement reached on the financial settlement – in the joint report – will not be legally binding;
- it is likely that politics and the appetite for an ongoing EU-UK relationship will largely dictate the extent to which the financial settlement is honoured. For example the UK Government has said that it would like to participate as a third country in some EU programmes, which appears difficult if the EU feels that the UK has outstanding financial commitments;
- a Lords Committee concluded, after receiving conflicting evidence, that under EU law if there is no WA Article 50 allows the UK to leave the EU without being liable for outstanding financial commitments, but the political and economic consequences of doing so “are likely to be profound”;<sup>118</sup>
- the Lords Committee also concluded that, if the UK didn't make payments, then EU Member States may seek to bring a case against the UK for the outstanding payments under public international law. The Institute for Government has suggested that the EU may seek redress through the International Court of Justice or the Permanent Court of Arbitration;<sup>119</sup>
- the Government's opinion is that the UK has some legal financial obligations to the EU and refusing to make payments could see the UK portrayed as an unreliable partner;<sup>120</sup>
- the financial settlement brings together a number of components and each may be considered separately in the event

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<sup>118</sup> House of Lords European Union Committee, [Brexit and the EU budget](#), 4 March 2017, HL Paper 125 2016-17

<sup>119</sup> Institute for Government, [The EU divorce bill](#)

<sup>120</sup> For instance see [Philip Hammond's evidence](#) to Treasury Committee on 5 November 2018 or The Attorney General in the House of Commons ([HC Deb. 3 December 2018:c570](#))

of no deal – for example, the UK will need to negotiate with the EIB regarding its liabilities and its paid-in capital.

## 7. Part Six: Institutional and Final Provisions

### 7.1 Administering the Agreement: the Joint Committee

**Articles 164-166** set out the institutional arrangements specific to the WA.

In line with UK proposals (as contained in a footnote in the amended transition text of 21 February 2018) and the March draft WA, the final version of the WA establishes a Joint Committee for the oversight of the WA in **Article 164**. The Joint Committee will meet annually. **Article 157(3)** describes its jurisdiction as covering interpretation, application and implementation concerns that either party may have concerning the WA.

The Joint Committee's role is to oversee the WA as a whole, and it can adopt binding decisions in light of this function, as well as agree to amend the WA where provision for such amendment is made. It also has the power to set up specialised committees to deal with specific parts of the WA as needed.

New to **Article 166(5)** in the negotiated agreement are the following two clauses:

(d) except in relation to Parts One, Four and Six, until the end of the fourth year following the end of the transition period, adopt decisions amending this Agreement, provided that such amendments are necessary to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed, and provided that such decisions may not amend the essential elements of this Agreement.

(e) adopt amendments to the rules of procedure set out in Annex VIII; and

These do not substantively add to the Joint Committee's functions, but rather specify its ability to 'oversee' the WA as a whole in more detail than was possible when the agreement (and particularly its Annexes) was incomplete.

**Article 165** provides for the creation of a core set of 'Specialised Committees', functioning under powers delegated by the Joint Committee. These Specialised Committees cover the following parts of the WA:

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

**Article 165(3)** makes clear that the Specialised Committees are to be composed of experts in the relevant areas covered. This contrasts with the Joint Committee, whose membership is described only as “comprising representatives of the Union and of the UK”, and who are not necessarily experts in any of the areas covered by the WA.

**Article 166** makes clear that the Joint Committee, and not the parties to the WA, will govern the WA once concluded. It can take decisions that are binding on both parties and issue recommendations to the parties. This is less controversial than it may sound, as the Joint Committee is composed of representatives of both parties, and per **Article 166(3)**, is intended to take all decisions “by mutual consent”.

### **Annex VIII: Rules of Procedure for the Joint Committee and Specialised Committees**

New to the final WA is **Annex VIII**, which sets out the rules of procedure for the Joint Committee (and its sub-committees) as agreed by the parties. They set out that Joint Committee meetings will be co-chaired by a member of the Commission and a UK minister or designated alternatives.

They establish a two-person Joint Committee ‘Secretariat’, which will in practice organise the relevant meetings of the Joint Committee and its sub-committees, distribute documentation, deal with correspondence from the parties, produce meeting agendas and draft minutes of meetings. Provisional agendas and summaries of meeting minutes *may* be made public if the parties so decide, but there is no obligation for them to be published. Indeed, Rule 10 specifies that unless otherwise decided, meetings of the Joint Committee will be confidential.

The Secretariat will also retain any ‘decisions’ or ‘recommendations’ made by the Joint Committee and file these. The working language of the Joint Committee will usually be English. Finally, the Secretariat will prepare a draft annual report (as required under **Article 164(6)** of the WA) on the functioning of the WA, which will be adopted and signed by the co-chairs of the Joint Committee.

**Rule 13** specifies that the specialised committees will operate under identical rules, albeit with different representatives co-chairing and attending meetings.

#### **Box 5: Changes to Institutional Provisions between March and November**

There are no fundamental changes between the March draft WA and the November WA regarding the establishment of and functioning of the Joint Committee that will oversee the agreement. Annex VIII contains significant new material on the rules of procedure for the Joint Committee and specialised committees, but does not hold any substantial surprises.

## **7.2 The role of the CJEU and domestic courts**

### **Citizens’ Rights**

**Articles 158 and 159** set out the monitoring and enforcement provisions for citizens' rights. First, **Article 158** specifies that UK courts can refer questions about the EU law referred to in Part Two of the WA for a period of eight years following the end of transition. Where such a reference is made, **Article 158(2)** stresses that the CJEU's interpretation of the relevant provision will be binding on the UK court that refers.

New to the final WA is **Article 158(3)**, which sets out that if the transition period is extended (as enabled by Article 132(1)), the eight-year period set out in **Article 158(1)** will commence from the 'extended' end date of the transition period.

**Article 159** states that UK compliance with Part Two of the WA will be monitored by an independent authority set up by the UK for that purpose. **Article 159(3)** maintains the possibility, introduced in the March draft WA, for this independent UK monitoring authority to be abolished (by agreement in the Joint Committee) at any point later than eight years following transition. It is unclear what consequences this will have for the enforcement of Part Two of the Agreement.

**Article 162** confirms that the Commission will be permitted to submit written observations, and with permission of a UK domestic court make oral observations, in any cases in the UK that concern the Withdrawal Agreement. In the March draft this referred only to UK cases regarding Part Two (Citizens' Rights), but it now applies to the entirety of the WA, reflecting the change in **Article 4** of the WA that suggests the entire Agreement can be directly effective where its provisions are clear, precise and unconditional (see Part One above.)

### References to the CJEU about the Withdrawal Agreement

Part Three (Separation Provisions) and Part Five (Financial Provisions) both cross-reference significant parts of the EU *acquis*. In the March draft, **Article 153** of the WA made clear that where there are any questions about the meaning (interpretation and application) of the law in question, these would fall within the jurisdiction of the CJEU, even after the transition – meaning that enforcement actions (Articles 258 - 260 TFEU) and preliminary references (Article 267 TFEU) in light of them will remain possible for the UK as well as the EU Member States. But the final WA, in **Article 160**, limits this CJEU jurisdiction to Part Five on the financial settlement post-transition, and specifically only to Article 136 and Article 138(1) or (2). The provisions in Part Four (particularly Article 87) granting the CJEU jurisdiction for four years over cases relating to EU law that factually occurred during the transition, will apply to Part Three instead.

Other provisions of Part Six set out a more general jurisdiction for the CJEU. The first example of this is **Article 161**, which permits the EU27 Member States to refer questions about the WA to the CJEU via the preliminary reference procedure. It contains an information obligation to let the UK know about the outcome of the domestic court proceedings that resulted in the reference being made.

The final WA contains significantly more detailed information about the process of referring such questions to the CJEU, but primarily stresses

that these referrals shall follow the same procedure as regular EU law referrals under Article 267 TFEU.

Regarding UK participation rights in proceedings before the CJEU, whether they stem from Article 158 (and therefore citizens' rights in Part Two) or Article 160 (therefore concerning Part Five of the WA), **Article 161(3)** confirms that the UK will be able to be a part of the proceedings in the same way as a Member State. Importantly, those who are qualified in the UK will also be able to "represent or assist" parties to such proceedings before the CJEU.

**Articles 160 and 161** are not time-limited. As Part Two of the WA is intended to last for the lifetime of the EU and UK nationals covered by its provisions, this means the CJEU will remain able to pronounce on the meaning of commitments contained in the WA (with the UK able to submit observations) if asked to do so by the EU27 for almost another century.

The system established here means that where the UK and the EU27 disagree about the meaning of the WA, this will be interpreted by the Joint Committee unless it relates to Part Five. But where matters regarding the WA arise in domestic case law in the EU27, domestic courts can refer questions about the WA to the CJEU. The CJEU and the Joint Committee thus have a 'shared' role in interpreting the WA, depending on where questions about it arise in the first instance. The WA does not provide explicit answers to what happens when the CJEU interpretation of the WA clashes with that of the Joint Committee, but **Article 164** suggests that the Joint Committee will be responsible for reconciling any such differences if they arise.

#### Box 6: Changes to the role of the CJEU and domestic courts provisions from March to November

**Article 162** contains one of two fundamental changes to these provisions. As **Article 4** now indicates that not only Part Two but the entirety of the WA will be directly effective where it meets the conditions of being clear, precise and unconditional, the Commission has been given participation rights in domestic UK cases concerning the WA as a whole (and not only regarding Part Two) in **Article 162**.

The other significant change is found in **Article 160**, which in March referred to Part Three of the WA, but now only refers to Part Five. The CJEU has an indeterminate jurisdiction over the financial settlement, while the separation provisions in Part Three are instead covered by **Article 87** of the Agreement, which gives the CJEU jurisdiction for a period of four years following the transition period on all cases involving facts that took place during the transition period.

## 7.3 Dispute Settlement

Title III of Part Six, **Articles 167 – 181**, covers the settlement of disputes between the UK and the EU with regard to the WA. Title III has been significantly expanded since the March draft WA, where the vast majority of provisions had not been agreed or did not exist.

The only two provisions retained as they were in March/June 2018 are **Articles 167 and 168**, which set out a general good faith 'cooperation' clause between the parties and also make clear that the arrangements

in Title III are exclusive – disputes between the parties cannot be resolved in other ways.

The brief provisions on dispute settlement previously contained in Article 162 of the draft WA now stretch across several Articles in the final WA. First, **Article 169** makes clear that the first step in any dispute resolution process (aside from the ability of the CJEU to enforce Part Five of the WA, per **Article 160**) will be to commence ‘consultations’ in the Joint Committee.

In a significant change from the original draft Article 162, which would have resulted in mandatory CJEU referrals for all disputes not resolved by the Joint committee,<sup>121</sup> **Article 170** now establishes that if no mutually agreed solution is found through consultations per Article 169 after three months, either party may request the establishment of an ‘arbitration panel’.<sup>122</sup> This is a significant achievement by the UK, who throughout the negotiations have been opposed to a direct CJEU role in the settlement of disputes between the parties to the WA.

**Article 171** sets out rules for the establishment of an arbitration panel. There will be a list of 25 possible arbitration panel members, with the EU and the UK proposing 10 members each and the final five members (who can act as chairperson of an arbitration panel) together. The requirements for panel members are independence, judicial qualifications and specialised knowledge of both EU and public international law. The panel cannot include anyone working for the EU, the Member State governments or the UK government.

An arbitration panel will be established within 15 days from it being requested by either party. It will be composed of five members, with two proposed by the UK and EU each and a chairperson chosen by consensus. If the chairperson cannot be chosen by the parties, the Secretary-General of the Permanent Court of Arbitration will select the chairperson from the list of five candidates by lot. Where the list of panellists is not ready by the time a panel is needed, and agreement on finding panellists where there is no list is not reached in a reasonable time, the Secretary-General of the Permanent Court of Arbitration is charged with appointing those panellists the parties cannot agree on.

**Article 173** specifies that ordinarily, the arbitration panel will issue a ruling within 12 months; where it cannot, it will notify the parties and explain why there is a delay. If a matter is declared urgent by either party, the panel itself will determine how urgent the question is - and if it agrees that it is urgent, it will “make every effort” to rule within six months.

**Article 74** is a key provision, and one which shows a compromise between the Commission’s original proposal and the UK objections to it regarding the CJEU’s rule in dispute settlement. This Article provides that where any dispute between the parties involves questions

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<sup>121</sup> See Commons Briefing Paper 8269, [Brexit: the draft withdrawal agreement](#) 26 March 2018, Section 6.

<sup>122</sup> Such a panel can also be established if mutually agreed by the parties within the first three months.

regarding the interpretation of concepts or provisions of EU law, the arbitration panel will refer questions regarding that interpretation to the CJEU, which will have binding jurisdiction to interpret the relevant provision. This is effectively how preliminary references work for domestic courts and appears to enable the CJEU's exclusive jurisdiction regarding the interpretation of EU law to be maintained without making it the ultimate arbiter on all disputes between the UK and the EU.

**Article 174(2)** makes clear that the parties can indicate where they believe such a reference would be appropriate and the arbitration panel (if it agrees with the parties) will make such a reference. The time limits applicable to arbitration do not apply where a reference to the CJEU has been made; the panel must await the CJEU's ruling and is required to give a ruling only after 60 days have passed following receipt of the CJEU's ruling.

**Article 175** begins a sequence of Articles that set out what will happen once an arbitration panel has ruled. It stipulates that the arbitration panel's rulings are binding, and that both parties "shall take any measures necessary" to comply with any ruling. **Article 176** makes clear that the parties will negotiate what they believe to be a "reasonable period of time" to comply with a panel ruling; where the parties cannot agree on this, the complainant (the party that started the arbitration proceedings) will request the panel to determine what a "reasonable period of time" for compliance will be. Any such agreed period can be extended if the parties mutually agree.

**Article 177** enables the complainant to ask the panel to review what measures the respondent (or losing party) has taken in response to the panel ruling if it is dissatisfied with them. Here too there is an obligation to refer questions about the interpretation of EU law to the CJEU.

Where a panel finds that the respondent did not comply with the panel ruling in a reasonable period of time under **Article 177, Article 178** sets out what "temporary remedies" exist for the complainant. The complainant can ask the panel to impose a "lump sum or a penalty payment" on a non-complying respondent; the panel will determine the seriousness of the breach of obligations and the duration of any non-compliance when setting such a sum or payment.

If the sum or payment is not paid, **Article 178(2)** makes clear that the complainant can suspend any part of the WA temporarily, except Part Two, or (if that is not an appropriate response) any other agreement between the UK and the EU. They must notify the respondent about their intended action; in response, the respondent can request further arbitration if they think these suspensions of obligations are disproportionate. **Article 178(5)** emphasises that any such suspensions of obligations are intended to be temporary and must be applied "only until any measure found to be inconsistent with" the WA has been withdrawn or amended, or until the EU and the UK "have agreed otherwise to settle the dispute".

**Article 179** establishes a system for monitoring the temporary nature of these suspensions: the respondent is asked to inform the complainant of any measures taken to reach compliance with the original panel ruling and can then request an end to the suspension of obligations (or penalty payment under **Article 177**, if ongoing). Again, matters regarding compliance with the panel ruling at this stage can be subject to further arbitration, with the panel permitted to issue an opinion on whether the respondent has complied with the original ruling. If it finds that the respondent has, the complainant becomes obliged to cancel the suspension of obligations or the demands for a penalty payment. Here too, if issues of interpretation of EU law arise, the arbitration panel must refer them to the CJEU.

**Articles 180 and 181** set out more details about the functioning of the arbitration panels, which will “make every effort” to take decisions by consensus; where this proves impossible, dissenting opinions shall not be published. The rulings themselves will be publicly available and will set out “findings of fact, the applicability of the relevant provisions of this Agreement, and the reasoning behind any findings and conclusions”. The need for the arbitration panellists to be independent is again emphasised, and they are granted immunity from legal proceedings in either party’s jurisdiction regarding their actions as arbitrators.

There has been a debate among academics about whether this ‘arbitral’ dispute resolution system satisfies the CJEU’s demands to remain the sole binding authority on the meaning of EU law. Tobias Lock has argued that the WA’s ‘arbitral’ tribunal may face similar issues to those surrounding EU accession to the European Convention on Human Rights (which would have violated the principle of the autonomy of EU law), because the WA requires the arbitral tribunal to decide if there are matters of EU law at play in any dispute before it. This, under the CJEU’s interpretation of its jurisdiction as set out in [Opinion 2/13](#), will involve it making binding interpretations of EU law.<sup>123</sup>

Others have suggested that for political reasons, the CJEU may back away from the Opinion 2/13 ruling and permit the WA’s dispute settlement ‘compromise’ to stay. The CJEU confirmed its stance - that a court or tribunal *deciding whether EU law is at stake* in a dispute is a *binding interpretation of EU law* - in [Achmea](#) in March 2018, so it is not clear how it would formulate an ‘exception’ for the WA dispute settlement system if a dispute about it were to reach the CJEU.<sup>124</sup> It is by no means clear that this will happen: Article 218(1) TFEU permits the CJEU to express opinions about the compatibility of international agreements with EU law, but it must be requested to do so by one of

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<sup>123</sup> *Verfassungsblog*, [On Thin Ice: the Role of the Court of Justice under the Withdrawal Agreement](#), Tobias Lock, 15 November 2018

<sup>124</sup> Lock *ibid*; one possible view is that the arbitral tribunal established under Part Six of the WA functions similarly to the EEA dispute resolution system, where a Joint Committee can refer a matter of EU law to the CJEU, and as it is not a judicial institution, such a referral does not result in ‘binding interpretations’ of EU law. For discussion, see [this Twitter thread](#).

the EU institutions or the Member States, and to date none of them have suggested they are going to ask for such an opinion.

### **Annex IX: Rules of Procedure on Dispute Settlement**

**Article 172** alludes to Annex IX, which sets out dispute settlement rules of procedure. The Annex itself contains substantial further details on rules of communication between parties and arbitration panels; the appointment and replacement processes of panellists; payment of panellists; and the general operation of the actual panels, including how hearings are to be set up and structured. Part B of the Annex establishes a Code of Conduct for panellists and sets out the steps they must follow to prove their independence (e.g. disclose any associations or interests that may impact on their impartiality, and how they intend to carry out their arbitral duties with both diligence and independence).

#### **Box 7: Changes to dispute settlement between March and November**

There are significant changes to the text of the WA in Title III of Part 6. The dispute resolution process envisaged now only has two steps:

1. 'consultation' in the Joint Committee; and where this fails,
2. 'arbitration' by an arbitration panel, which will issue binding rulings on both parties and refer any questions regarding the interpretation of EU law over the course of the arbitral proceedings to the CJEU.

The arbitration panel can rule on:

the original dispute, *compliance* with the original panel decision, appropriate levels of financial temporary remedies in the case of *non-compliance*; the proportionate nature of suspension of obligations in response to *non-compliance* with the panel decision and/or any temporary remedies, and can rule again on *compliance* with the original panel decision that necessitates an end to the suspension of obligations.

The CJEU has no jurisdiction over dispute settlement regarding the WA (excepting Part Five, as discussed above) beyond having the exclusive jurisdiction to interpret EU law concepts and provisions. The relationship between the arbitration panels and the CJEU will therefore operate on a similar basis to relationships between domestic courts and the CJEU, via a preliminary reference procedure.

## **7.4 Disputes about EU law**

Part Six of the WA covers dispute settlement between the UK and the EU regarding *the content of the WA*, meaning the overarching framework for the transition (and in Part Two and the Protocols, beyond transition). But where disputes arise between the parties over the EU law that the WA obliges the UK to comply with, these disputes will not be settled via procedures set out in Part Six. Other parts of the WA make clear that these types of disputes involve continued jurisdiction of the CJEU for the duration of the transition (and, in limited circumstances, beyond). They are summarised by Tobias Lock as follows:

- 1) It goes (almost) without saying that the ECJ's jurisdiction will continue as it is now during the transition period (Article 131 WA).

But even after transition, the ECJ and its case law will continue to play an important role in the UK. First, its case law up until the end of the transition period will remain binding on the UK; post-transition case law will have to be given due regard (Article 4 WA).

2) The ECJ will continue to have jurisdiction over cases pending before it when the transition period ends (Article 86 WA) and over new enforcement actions brought within four years after the end of transition provided the UK's violation occurred before then (article 87 WA). [...]

4) The ECJ will retain jurisdiction over large parts of the Protocol on Northern Ireland (the 'backstop' contained in the Protocol on Ireland/Northern Ireland). According to Article 14 (4) of the Protocol, the ECJ will have jurisdiction (including for preliminary rulings) over the interpretation of EU customs legislation; the rules of the single market in goods as far as they apply under the backstop; VAT and excise rules; agriculture and environment; the single electricity market; and state aid (Articles 8 -12 of the Protocol).<sup>125</sup>

Lock observes that legally, these provisions are uncontroversial, but notes that they may prove politically sensitive in the UK, given that this does appear to extend the jurisdiction of the CJEU for a period of at least two years (until 2021) or 8 years (in the case of Part 2, as discussed above), and perhaps indefinitely (in the case of the 'backstop' activating, as discussed below).

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<sup>125</sup> *Verfassungsblog*, [On Thin Ice: the Role of the Court of Justice under the Withdrawal Agreement](#), Tobias Lock, 15 November 2018

## 8. Protocol on Ireland/Northern Ireland

### 8.1 Background

The future status of Northern Ireland has proved to be the most difficult and controversial element of the withdrawal negotiations. There are two principle reasons why solving the issue of the border between Northern Ireland and Ireland has been so complicated.

Firstly, there is the legacy of the 'Troubles' in Northern Ireland and the role of the Good Friday Agreement (GFA) that brought them to an end. The GFA ensured that the security border that had existed between Ireland and Northern Ireland could be dismantled and it built cross-border institutions, removing many of the distinctions between Ireland and Northern Ireland. It allowed people on both sides of the border to live and work in the different territories, and for there to be shared services in areas like health and education. The challenge now facing the UK is how it can leave the EU without unpicking this delicate network of inter-dependent relationships between the North and South.

Secondly, there is the issue of 'sequencing'. There has been disagreement between the UK and the EU over how to interpret Article 50 TEU, which allows a Member State to leave the EU. Does Article 50 just provide for settling the 'legacy' issues of the UK's membership of the EU, as the EU has argued, or does it allow for at least parts of the future relationship to be agreed, as the UK has suggested? The Irish Protocol suggests a compromise between these two positions; it provides, [according to the European Commission](#) "a bridge to the future relationship".

### The Good Friday Agreement

The [Belfast or Good Friday Agreement 1998](#) brought an end to decades of violence and provided political solutions and institutions to bring together the different communities in Northern Ireland.

The Belfast Agreement comprises two agreements: a Multi-Party Agreement involving most of the political parties in Northern Ireland (the DUP did not support the Agreement) and the British-Irish Agreement, a treaty between the governments of the UK and Ireland. This British-Irish Agreement means that the UK Government has obligations under international law to another sovereign state in respect of Northern Ireland.

The Agreement was subject to referendums in Ireland and Northern Ireland and received strong backing in both.<sup>126</sup>

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<sup>126</sup> In Northern Ireland the electorate was asked if it supported the Agreement and the result was 71% 'Yes'. In Ireland voters were asked to endorse changes to the Irish Constitution which implemented the British-Irish Agreement and also amended Articles 1 and 2 of the Irish Constitution which had asserted that the whole island of Ireland was Irish territory and subject to the jurisdiction of the Irish Parliament and Government. The referendum saw 94% of voters approve the changes.

The Good Friday Agreement confirmed that a devolved system of government would be established in Northern Ireland and that the people of Northern Ireland would determine whether to remain part of the United Kingdom - the principle of consent. It also provided a guaranteed human rights framework and bodies for UK-Irish and north-south relations. It included a right for the people of Northern Ireland to choose to hold Irish or British citizenship, or both.

## How Brexit might affect the Good Friday Agreement

The preamble to the GFA between the UK and Ireland includes a statement about the status of both countries within the EU:

Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union.

The preamble to a treaty is not binding. However, common EU membership was an important part of the context within which Republicans found their way to participate in political institutions within the UK. It also put the British-Irish relationship, in Irish eyes, on a more equal footing.

There has been a significant focus on what the Agreement may or may not say that is of relevance to Brexit, and whether it 'prevents' any particular outcome or future relationship. There is nothing in the GFA which can be definitively said to do this. But the GFA did call for the removal of security installations in Northern Ireland.

The definition of the "people of Northern Ireland" in the WA is the definition found in Annex 2 of the British-Irish Treaty (to which the GFA is annexed).

The GFA also outlined the areas for North-South cooperation between Ireland and Northern Ireland.

Beyond the text of the GFA, there are the principles and methods that the peace process has used, which some believe are threatened by Brexit. These methods were to create flexible and fungible identities, where people in Northern Ireland could choose to identify as British or Irish or both, and to change these identities in different contexts. The GFA also blurred the jurisdictions of Ireland and the UK, creating island-wide institutions.

Brexit has given rise to a significant focus on Northern Ireland, the border and relations between Ireland and the UK. For many, Brexit has sharpened things the peace process tried to blur. Others believe concerns over the status of Northern Ireland are being over-played in order to keep the UK in a closer relationship with the EU post-Brexit.

Both the EU and the UK Government have repeatedly confirmed they want to ensure that the violence of the past does not return to Northern Ireland, and that they want to prevent the creation of any form of hard border between Ireland and Northern Ireland.

## The Brexit negotiations

The current frictionless and infrastructure-free border between Northern Ireland and Ireland largely relies on the UK's membership of the EU's Single Market and customs union. The Prime Minister announced in her Lancaster House speech in January 2017 that the UK must leave both relationships to deliver on the Brexit she believed 'leave' supporters voted for in referendum. Since then, the EU and the UK have sought in the negotiations on the WA to reconcile three objectives for the future UK-EU relationship that are seemingly irreconcilable:

- avoiding a hard border in Ireland;
- allowing the UK to diverge from EU regulations and have an independent trade policy;
- avoiding regulatory and customs divergence between Northern Ireland and the rest of the UK – i.e. no border in the Irish Sea.

Most trade experts believe it is only possible to achieve two out of the three objectives. The EU has said there are two main forms of future relationship that they can agree to and that meet their tests for the border:

- A Norway-style agreement **plus** the customs union;
- **OR** a relationship based on a Free Trade Agreement (FTA) **plus a 'backstop'** that would keep Northern Ireland more closely aligned to the EU. The EU offered an ambitious FTA - one without tariffs or tariff rate quotas - but this did not solve the issues of regulatory and customs checks.

The UK Government released a [position paper on the Irish border](#) in August 2017, which committed to:

[r]ecognise the crucial importance of avoiding a return to a hard border for the peace process in Northern Ireland. This must mean aiming to avoid any physical border infrastructure in either the United Kingdom or Ireland, for any purpose (including customs or agri-food checks).

Commitments to prevent a hard border were given legal status when Lord Patten's amendment to the [European Union \(Withdrawal\) Act 2018](#) was passed. It states:

- (2) Nothing in section 8, 9 or 23(1) or (6) of this Act authorises regulations which—
- (a) diminish any form of North-South cooperation provided for by the Belfast Agreement (as defined by section 98 of the Northern Ireland Act 1998), or
- (b) create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature physical infrastructure, including border posts, or checks and controls, that did not exist before exit day and are not in accordance with an agreement between the United Kingdom and the EU.

In December 2017, in order to meet the EU's demands that 'sufficient progress' be made on the withdrawal agreement before talks on the political declaration on the future relationship could start, the UK signed

up to commitments in the [Joint Report](#). This is the agreement which gave birth to the backstop.

Instead of proposing one solution, it set out three scenarios (paragraph 49 of the Report). The first, and the UK Government's favoured option, was for the Irish border issue to be settled as part of the overall UK - EU future relationship. The second was that the UK would propose specific solutions to solve the Irish border issue. The third was that where there was no agreed solution, the Joint Report committed the UK to:

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

The WA Protocol provides for all three scenarios.

The Government's July 2018 'Chequers' [White Paper](#) proposed that the border issues could be solved by staying closely aligned to EU goods regulations - preventing the need for regulatory checks. Customs checks would be avoided through a Facilitated Customs Arrangement (FCA). The EU largely rejected these proposals.

Also in July the European Research Group (ERG) of Conservative MPs proposed an amendment to the *Taxation (Cross-border Trade) Act 2018* (the so-called 'Customs Bill') which would prevent Northern Ireland from being in a different customs territory to Great Britain. The Government accepted the amendment and it now forms part of the Act. This section (55(1)) reads:

It shall be unlawful for Her Majesty's Government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain.

In June 2018 the Government published a [technical note on a Temporary Customs Arrangement](#) (TCA) that proposed a temporary, UK-wide 'bare bones' customs union, which would see goods moving between the UK and the EU, tariff-free, and without checks. This would bridge any potential gap between the end of the transition period and the entry into force of a future relationship agreement with EU.

The EU eventually agreed to add a similar UK-wide customs arrangement to the backstop, and these proposals are contained in the Protocol on Ireland/Northern Ireland in the November 2018 WA.

## Reaction to the backstop

The Government and the Protocol on Ireland/Northern Ireland emphasise that the backstop should not have to be used, and that if it does, only for a short period of time before a future relationship treaty is agreed.

The DUP are strongly opposed to the backstop as set out in the Protocol, saying they will not vote in support of the WA in the House of Commons, despite their 'confidence and supply' agreement with the

Government. The DUP Deputy Leader, Nigel Dodds, says the WA is “worse than no deal”.<sup>127</sup>

Sinn Féin, the SDLP, Alliance and the Green Party, who all opposed Brexit, have given qualified support for the WA, saying it is better than no deal.<sup>128</sup> Michelle O’Neil, leader of Sinn Féin in Northern Ireland, said “what is on the table currently in the form of the withdrawal agreement is the least worst outcome, it is by no means a brilliant outcome”.<sup>129</sup>

Ulster Unionist Party leader Robin Swann said his party “cannot and will not” support the WA.<sup>130</sup>

The Northern Ireland business community have largely been supportive of the WA and the backstop arrangements, saying they are much preferable to a ‘no deal’ scenario.<sup>131</sup>

## 8.2 The text of the Protocol

### Preamble, entering and exiting the Protocol

#### Preamble

Preambles do not contain the same binding commitments as the main body of legal texts, but they are important in interpreting the provisions contained within it.<sup>132</sup>

A significant amount of the Preamble was already in the March draft WA. There are also several new commitments and references, which mostly fall within two categories:

- Those emphasising that the UK and EU hope to complete a future relationship agreement before the end of the transition period, that backstop should not have to be used, and if it is, it should be temporary. For example:
  - “RECALLING the Union’s and the United Kingdom’s intention to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing”; and
  - “RECALLING that the Withdrawal Agreement, which is based on Article 50 TEU, does not aim at establishing a permanent future relationship between the Union and the United Kingdom”.

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<sup>127</sup> *BBC News*, 25 November 2018, [Brexit: DUP's Nigel Dodds says Brexit deal 'worse than no deal'](#), 25 November 2018

<sup>128</sup> *The Times*, [North's pro-Remain parties throw weight behind May's Brexit deal](#), 27 November 2018.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Belfast Telegraph*, [Northern Ireland unionism stands united in opposition to Brexit withdrawal agreement says DUP's Dodds](#), 18 November 2018.

<sup>131</sup> *BBC News*, [NI firms 'cannot cope with no-deal Brexit'](#), 26 November 2018.

<sup>132</sup> The Attorney General’s legal advice note on the Protocol says it “may have some freestanding legal significance”. Attorney General’s Office, [‘Legal effect of the Protocol on Ireland/Northern Ireland’](#), 13 November 2018.

- Those emphasising continuity in terms of the movement of goods between Great Britain and Northern Ireland and from Ireland to Northern Ireland, and vice-versa. For example:
  - “DETERMINED that the application of this Protocol should impact as little as possible on the everyday lives of communities both in Ireland and Northern Ireland”; and
  - “NOTING that nothing in the Protocol prevents the United Kingdom from ensuring unfettered access for goods moving from Northern Ireland to the rest of the United Kingdom’s internal market.”

A few areas mentioned in the Preamble are not mentioned elsewhere in the text of the Protocol:

- The EU’s PEACE and INTERREG funding programmes;  
The so called ‘mapping exercise’ undertaken by the UK and EU negotiators (see Section 1.6 on North-South co-operation for more detail).

### **Northern Ireland EU funding programmes**

The Preamble recalls the UK and EU’s commitment to:

The North South PEACE and INTERREG funding programmes under the current multi-annual financial framework and to the maintaining of the current funding proportions for the future programme.

The European Commission’s [factsheet on the Protocol](#), gives more detail on the next steps for the future funding programme:

The EU and the UK are committed to the PEACE and INTERREG funding programmes under the current multi-annual financial framework and to maintaining the current funding proportions for the future programme. The Commission has already proposed the continuation of PEACE and INTERREG for Northern Ireland and the border regions of Ireland beyond 2020 under a single programme PEACE PLUS. It will now be for Member States, with the consent of the European Parliament, to decide on this.<sup>133</sup>

The Centre for Cross Border Studies, based in Northern Ireland, welcomed the commitment to the funding programmes, but raised concerns over “the failure to offer explicit support for cross-border cooperation”.<sup>134</sup>

The Government have not as yet given any further detail on the scope of the future PEACE PLUS programme.

### **The “People of Northern Ireland”**

The Preamble refers to “the people of Northern Ireland” in relation to citizenship and states that the definition is based on Annex 2 of the British-Irish Agreement (see above). This Annex sets out that the “People of Northern Ireland” includes:

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<sup>133</sup> European Commission - [Fact Sheet, Protocol on Ireland and Northern Ireland](#), 14 November 2018

<sup>134</sup> Centre for Cross Border Studies: [Statement on the draft Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom](#), 23 November 2018.

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

De Mars et al believe this definition will result in inconsistencies in the way people living in Northern Ireland are treated:

It appears from the definition that such individuals would not have to reside in Northern Ireland to be one of 'the people of Northern Ireland' – they only have to be born on the territory under the conditions above. As well as affording benefits to some groups and not others within Northern Ireland (e.g. EU or non-EU nationals in NI without permanent residency), this definition will allow those born NI who have since moved away from the country to reassert their Irish (and EU) or UK rights into the future.<sup>135</sup>

### **Entering the backstop: in what circumstances does the Protocol come into force?**

The Protocol sets out how and in what circumstance, the backstop scenario will operate.

**Article 185** of the WA provides that the Protocol "shall apply as from the end of the transition period" (i.e. until 31 December 2020). The Protocol is an integral part of the WA and will therefore enter into force automatically; there is no active process that 'triggers' the Protocol.

However, some sections of the Protocol will come into force along with the main body of the WA on exit day (30 March 2019) and not, like the rest of the Protocol, after the end of the transition period. These sections are mainly measures on planning for the backstop to ensure it can operate from day one, should it come into full operation. A full list of these provisions is available in the **Appendix** to this paper.

The only course of action that can prevent the Protocol coming fully into force before the end of the transition period is the EU and UK concluding a future relationship agreement/agreements that prevents a hard border between Ireland and Northern Ireland.

As already noted, under **Article 132** of the WA the UK can, before 1 July 2020, request a one-off extension to the transition period which will be considered by the EU-UK Joint Committee.

The backstop will see the whole of the UK in a customs union with the EU, covering all goods except for fish. The UK as a whole will be subject to 'level playing field' restrictions, principally the EU's rules on state aid and competition law, with commitments to not downgrade domestic policies in areas such as labour, social and environmental standards. In addition, Northern Ireland but not the rest of the UK will be subject to EU regulations in areas such as VAT, agriculture, the environment, electricity markets and the EU's Customs Code.

<sup>135</sup> [Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement](#), A 'Constitutional Conundrums: Northern Ireland, the EU and Human Rights' Project Report, by Sylvia de Mars (Newcastle University), Aoife O'Donoghue (Durham University), Colin Murray (Newcastle University), Ben Warwick (University of Birmingham).

## Exiting the backstop

Articles 1, 2 and 20 of the Protocol set out the two main mechanisms by which the UK can exit the backstop.

The first is by concluding an agreement on the future relationship. Paragraph 4 of Article 1 emphasises that the backstop, if enabled, is supposed to be temporary. It also references Article 2(1), which commits the EU and the UK to try and conclude a future relationship agreement before the end of the transition period. However, if this is not possible, and the Protocol comes into force, then Paragraph 4 of Article 1 makes clear that the provisions of the Protocol **shall apply “unless and until they are superseded, in whole or in part, by a subsequent agreement”** (our emphasis).

**Article 2(1)** of the Protocol reiterates the commitment made in Article 184 of the WA that both sides “shall use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes this Protocol in whole or in part”.

Many commentators question the practicality of the UK and EU concluding a future relations agreement by this time.

**Article 2(2)** states that “any subsequent agreement between the Union and the United Kingdom shall indicate the parts of this Protocol which it supersedes”. These two references to “in whole or part” recognise that a future relationship agreement may not completely remove the need for parts of the Protocol to come into force. There could be a scenario, therefore, where some elements of the Protocol would continue alongside a future relationship agreement.

## Review mechanism

The second mechanism for exiting the backstop is a review mechanism, set out in Article 20, where either party can call for the end to the backstop. The Joint Committee, the body which will consider such a request, is made up of representatives of both the EU and the UK (for the review process the Protocol states the representatives will be “at ministerial level”). The decision must be made by mutual consent, which means the UK would not be able to withdraw from the backstop without the consent of the EU. The way in which one party considers the request of the other to end the backstop can be ruled on by the arbitration panel, but they cannot overturn that decision, (see end of section for more detail).

### ARTICLE 20

#### Review

If at any time after the end of the transition period the Union or the United Kingdom considers that this Protocol is, in whole or in part, no longer necessary to achieve the objectives set out in Article 1(3) and should cease to apply, in whole or in part, it may notify the other party, setting out its reasons.

Within 6 months of such a notification, the Joint Committee shall meet at ministerial level to consider the notification, having regard to all of the objectives specified in Article 1. The Joint Committee

may seek an opinion from institutions created by the 1998 Agreement.

Reference to institutions created by the Good Friday Agreement could include the North-South Ministerial Council, the British-Irish Council or the British–Irish Intergovernmental Conference, but is mostly like a reference to the Northern Ireland Assembly and Executive.<sup>136</sup>

In the December Joint Report, the devolved institutions were given a role to consent to any new regulatory barriers between Great Britain and Northern Ireland. No such power exists in the Protocol; instead of consenting, they are to be consulted on whether the UK should exit the Protocol.

At present, there is no functioning Northern Ireland Executive due to major disagreements between the two parties that lead the Executive - the DUP and Sinn Féin. If by the time the Protocol came into operation there was a functioning Executive, it is not clear that it or the Assembly would speak with one voice and come to a joint decision. Even if they did, it is not clear how much weight the UK or the EU might give to such a decision.

The 'tests' the Joint Committee would be judging for ending the Protocol are set out in paragraph 3 of Article 1:

#### **ARTICLE 1**

##### **Objectives and relationship to subsequent agreement**

This Protocol is without prejudice to the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.

This Protocol respects the essential State functions and territorial integrity of the United Kingdom.

This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, **maintain the necessary conditions for continued North-South cooperation, avoid a hard border and protect the 1998 Agreement in all its dimensions** (our emphasis).

Essentially, the UK can exit the backstop if a future relationship agreement meets these tests and the EU agrees that it does. The most challenging test is avoiding a hard border between Ireland and Northern Ireland.

Trade experts tend to agree that the only known existing option that would guarantee this is for the UK to remain in the Single Market and for the UK to be in the or a customs union with the EU. This option ('Norway plus') has been ruled out repeatedly by the Government and it is not clear if Parliament would support it.

#### **Specific solutions**

But under paragraph 49 of the Joint Report and the Article 20 review process, the UK could still try and come up with other solutions that

<sup>136</sup> A Civic Forum was also created by the GFA, to be "a consultative mechanism on social economic and cultural issues", but the body hasn't met since 2002.

would ensure checks are not needed at the border. These could be based on the Government's Chequers [White Paper](#) proposals, although these were rejected by the EU at the time.

There has been a recent focus on technological solutions to border checks and whether they would be considered by the EU. These would be relevant not only to reviewing exiting the Protocol, but also to removing any reference to the backstop in the Withdrawal Agreement.<sup>137</sup> Some of these solutions might be based on the 'Maximum Facilitation' or 'Max Fac' option the Government put forward in its [Position Paper on Ireland Northern Ireland](#) in August 2017.

The Prime Minister's spokesman confirmed that such discussions had taken place at Cabinet level:

There was discussion in Cabinet about the fact the withdrawal agreement recognises and keeps open the potential for alternative arrangements to avoid a hard border on the island of Ireland.

"Both the text of the Northern Ireland protocol itself and the outline political declarations note 'the Union's and the United Kingdom's intention to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland'."

He added: "One possible alternative arrangement could involve technological solutions."

Asked if the necessary technology had been invented yet, the spokesman said: "I think in terms of what technological solutions could be, they're all things that are being looked at/have been looked at."<sup>138</sup>

The Northern Ireland Affairs Select Committee concluded in March 2018 in a report on the Ireland/NI border that:

We have had no visibility of any technical solutions, anywhere in the world, beyond the aspirational, that would remove the need for physical infrastructure at the border.<sup>139</sup>

Jill Rutter of the Institute for Government, produced [a blog](#) looking at the options for exiting the backstop. These are, in summary:

- The 'Chequers' proposal
- 'Max fac'/technological solutions
- Leaving Northern Ireland 'behind' (e.g. as per the original backstop in the March Draft withdrawal agreement)
- Norway + Customs Union
- The 'Nuclear Option'- i.e. withdrawing from the whole Withdrawal Agreement Treaty (see section on the Vienna Conventions)

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<sup>137</sup> *The Guardian*, [May defends under-fire Brexit plan: 'a deal is within our grasp](#), 22 November 2018

<sup>138</sup> *Politics Home*, [Theresa May resurrects 'Max Fac' customs plan in bid to avoid hard Irish border](#), 20 November 2018.

<sup>139</sup> Northern Irish Affairs Committee, [The land border between Northern Ireland and Ireland](#), 13 March 2018, HC 329, 2017-19, Page 54 para 8

Concerns have been raised about the review mechanism in Article 20 and whether the EU would look at options such as technological solutions in good faith, and not dismiss them out of hand. The Exiting the EU Select Committee took evidence on the WA in November 2018. One of the witnesses, Dr Holger Hestermeyer, an academic at King's College London specialising in international dispute resolution, was asked about Article 20 and he argued that the EU would abide by "good faith" commitments:

That is the provision you would turn to if you said, "We now have a technological means to do this". Article 20 has a joint review so, yes, there is no unilateral decision, but it also stipulates a goal. It says, "The Union or the United Kingdom considers that this protocol is, in whole or in part, no longer necessary to achieve the objectives set out in article 1(3)". There has been some discussion among experts. I tend to believe there is a good faith obligation to look at this honestly so that, if you have clear evidence that we now have the tools, I would argue that the European Union would be in breach of its good faith obligation if it said, "Do you know what? We will not even to look at it". Of course, you will have a lot of borderline situations where you would defer to the judgment of the parties, so you would have to have clear evidence.<sup>140</sup>

The Political Declaration on future relations also makes a reference to the role technology might play in solving the border issue:

Such facilitative arrangements and technologies will also be considered in developing any alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing.

The [UK Government Explainer](#) states that disputes on exiting the backstop could be escalated to the Arbitration Panel (Articles 170 to 181) if the Joint Committee could not reach agreement<sup>141</sup>. However, the [Government's legal position](#) on the Withdrawal Agreement, published after the Explainer, states that the Panel would not be examining the evidence presented by a party, but whether that evidence was considered by the other party in 'good faith'; and further:

In the absence of such a clear basis, a panel would be unlikely to find that a party had acted unlawfully in reaching its view under Article 20 about whether the Protocol continued to be necessary.<sup>142</sup>

The Attorney General's legal opinion expands upon this view stating that it would be unlikely the EU would act in a manner that would be considered bad faith:

It is possible that if the EU peremptorily refused to entertain any alternative proposal for safeguarding them put forward by the UK, clearly demonstrating bad faith and a breach of the duty to use best endeavours, it could be challenged. But such conduct on the part of the EU, would be highly unlikely; all they would have

<sup>140</sup> Exiting the EU Committee, [Oral evidence: The progress of the UK's negotiations on EU withdrawal](#), HC 372, 21 November 2018, Q3275.

<sup>141</sup> Paragraph 171.

<sup>142</sup> HM Government, 'EU Exit: Legal position on the Withdrawal Agreement', [CM 9747](#), December 2018, p 32.

to do to show good faith would be to consider the UK's proposals, even if they ultimately rejected them.<sup>143</sup>

The Attorney General's conclusion of the review process is that there are no legal remedies for a unilateral exit from the backstop, only political ones:

[the review process] **does not provide for a mechanism that is likely to exit the UK wide customs union without a subsequent agreement. This remains the case even if parties are still negotiating many years later, and even if the parties believe that talks have clearly broken down and there is no prospect of a future relationship agreement. The resolution of such a stalemate would have to be political. (His emphasis).**<sup>144</sup>

### **International Law: the Vienna Convention on the Law of Treaties**

The review mechanism in the Irish Protocol has brought renewed attention to how international law governs entering into and exiting from treaties. The main body of international law on treaties is contained in the 1969 [Vienna Convention on the Law of Treaties](#).

The Convention sets out conditions (Articles 46-53 and 64) which render a treaty invalid (so that it no longer binds the parties to it). These include treaties concluded under duress or in error, for example. The Convention also provides (Articles 42-45 and 54-64) for the termination and suspension of the operation of treaties in certain circumstances. Under the established principle in international law of '*pacta sunt servanda*' ('treaties should be observed'), agreements are binding on the parties to them and must be carried out in good faith. This does not mean that treaties cannot be terminated, but the grounds for doing so are limited. They include:

- Termination by treaty provision or consent: a treaty may be terminated or suspended in accordance with a specific provision in that treaty. Even if there is no such provision, it can be terminated if all the parties agree.
- Intended or implied right to unilateral termination: despite the principle of *pacta sunt servanda*, a state can unilaterally terminate a treaty either if it can be shown that the parties intended to allow termination, or if the right to terminate can be implied by the nature of the treaty.
- Where the purposes and object of the treaty have been fulfilled or it is clear from its provisions that it is limited in time and the required period has ended.
- Material breach by the other state: where one state violates an important provision and the other state (for bilateral treaties) 'retaliates' by regarding the whole agreement as ended.
- Supervening impossibility of performance: where the agreement cannot be carried out because of the 'permanent disappearance

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<sup>143</sup> Attorney General's Office, '[Legal effect of the Protocol on Ireland/Northern Ireland](#)', 13 November 2018.

<sup>144</sup> *Ibid.*

or destruction of an object indispensable for the execution of the treaty’.

- Fundamental change of circumstances: the doctrine of *rebus sic stantibus* provides that where there has been a fundamental change of circumstances since an agreement was concluded, a party to that agreement may unilaterally withdraw from or terminate it. This is narrowly interpreted: the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; the change must have been unforeseen by the parties; and the effect of the change must be to transform radically the extent of obligations still to be performed under the treaty.

In evidence to the Exiting the EU Select Committee, Professor Dehousse, former judge at the CJEU, was asked about the Protocol’s ‘exit clauses’ and international law:

First, there is an exit from this exit, but when you read the provisions of the Vienna Convention you will need to take in many elements of the field. I cannot answer you precisely because I need to know the context in the future. There will be other things surrounding. What will be the agreements in the states and the parties implicated in those? If you read the basic provisions of international law, you will know there are always ways to exit. The question now is in which circumstances and with which conditions, et cetera. It is a complex matter. I do not believe one can answer you yes or no now, most unfortunately, as with most of the problems in this negotiation, by the way.<sup>145</sup>

Sir William Cash MP wrote [an article](#) in the *Daily Telegraph*, arguing the Agreement was “invalid” under international law. Sir William argued that the Vienna Convention states “manifest violations” of constitutional requirements under domestic law make treaties invalid (this refers to Article 46 of the Convention), and that Withdrawal Agreement contravenes the *Withdrawal Act 2018*. International law experts [Professor Holger Hestermeyer](#) and [Dr Lorand Bartels](#) believe this reading is incorrect.

The Attorney General referenced international law in his legal opinion, Mr Cox believes it does not prevent the Protocol enduring indefinitely:

**Despite statements in the Protocol that it is not intended to be permanent, and the clear intention of the parties that it should be replaced by alternative, permanent arrangements, in international law the Protocol would endure indefinitely until a superseding arrangement took its place, in whole or in part. (His emphasis).**<sup>146</sup>

The Attorney General also says it is unclear whether Article 50 provides an adequate legal basis in EU law for providing for a future relationship, and that the longer the backstop operated, the more pressure would come to bear on what would then be an open-ended customs union with the EU:

<sup>145</sup> Exiting the EU Committee, [Oral evidence: The progress of the UK’s negotiations on EU withdrawal](#), HC 372, 21 November 2018, Q3274

<sup>146</sup> Attorney General’s Office, [Legal effect of the Protocol on Ireland/Northern Ireland](#), 13 November 2018.

There may be, therefore, some doubt as to whether the proposed Protocol is consistent with EU law, and that uncertainty will increase the longer it subsists.<sup>147</sup>

### Extension to the transition period

**Article 3** references the possibility of the UK extending the transition period, as set out in Article 132 of the main Agreement.

## 8.3 Individual Rights and the Common Travel Area

### Rights of individuals

**Article 4** safeguards individual rights in Northern Ireland. It is based on the language of the Joint Report and upholds the principle that there will be no “diminution of rights” in the region, *as a result of Brexit*. This conditionality is important; it is not, as De Mars et al argue, a ‘catch-all’ commitment to individual rights:

It indicates – in line with the general approach of the Protocol, certainly in relation to rights – that the agreement is concerned with EU competences and what is currently EU law, and not with underwriting broader commitments or standards for post-Brexit Northern Ireland.<sup>148</sup>

The question of whether Brexit will lead to a diminution of rights is explored in more detail in Library Briefing Paper 8183, [Brexit: 'sufficient progress' to move to phase 2](#).<sup>149</sup>

**Article 4** differs little from the March draft WA, except that Annex 1, which was to contain specific EU regulations that will continue to apply to Northern Ireland, is now completed.

Annex 1 lists six EU Directives that underpin equality law in the UK. They include the Race Equality Directive and the Employment Equality Directive.

Legal academic and barrister Ciaran White, in an analysis of these provisions, explains that Northern Ireland employment law is:

[a] devolved issue and its statute book has always been largely distinct and separate from that applicable in GB. This always had the potential to allow for NI-specific protections of EU-derived labour law rights post-Brexit.<sup>150</sup>

The Government [Explainer](#) states why these provisions are in the Protocol:

Guarantees of equality and rights, which recognise the unique circumstances of Northern Ireland, are a fundamental part of the Belfast (Good Friday) Agreement. The UK Government has acknowledged that EU law, particularly on protection from

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<sup>147</sup> *Ibid.*

<sup>148</sup> [Briefing on: The Protocol on Ireland/Northern Ireland](#), Sylvia de Mars, Colin Murray, Aoife O'Donoghue, Ben Warwick ('de Mars et al'), 14 November 2018

<sup>149</sup> *Ibid.*, pages 39-40

<sup>150</sup> C. White, '[Northern Ireland Workers' Rights and the Draft Withdrawal Agreement: The Quasi-constitutional Entrenchment of EU-derived Labour Law Rights](#)', U.K. Constitutional Law Association Blog, 19th Nov. 2018

discrimination, has formed part of the framework for delivering those guarantees.

Ciaran White says there is “something novel” in the inclusion of the EU law enactments listed in Annex 1:

Their inclusion in the Protocol in this way, means that they cannot be diminished or diluted as long as the Protocol is in force. Presumably, this guarantee would manifest itself in a specific domestic statutory limitation on the legislative powers of the Westminster Parliament and of the Northern Ireland Assembly. In this way, any legislative attempts to reduce these rights would be outside the competence of those legislative bodies.<sup>151</sup>

The limitations on the UK Parliament could be put in the proposed *EU (Withdrawal Agreement) Bill* and those on the Northern Ireland Assembly in the [Northern Ireland Act 1998](#).

Mr White observes that there are no time limits for the operation of these six Directives, so they would apply in Northern Ireland law “in perpetuity”. While this may be the case if the Protocol is enacted, these provisions would have no force if the UK moved from the transition period to a future relationship that prevented the need for a backstop. If the UK and the EU remain bound by the commitments in the Joint Report, then any future relationship agreement should contain similar commitments.

The Annex containing the EU equality Directives is not ‘dynamic’, in that new EU labour law rights that are created post-transition will not be added to the Annex. Ciaran White calls this an “odd omission”, as it will allow divergence between labour standards in Northern Ireland and the EU “even in relation to the making, sale and supply of goods”. However, **Article 15(4)** on Common Provisions states that “where this Protocol makes reference to a Union act, the reference to that act shall be read as referring to it as amended or replaced”. Therefore, if those six acts are amended or replaced, the Annex will have to be updated, along with any corresponding domestic legislation in Northern Ireland and the UK.

De Mars et al say this ‘stand-still’ arrangement “would only serve to widen the gap between the North and the South of the island of Ireland”.

The second implication is that the UK will be tied to affording equality rights in Northern Ireland that it is not obligated to provide to (many of) those in Great Britain. The content of this non-diminution guarantee becomes all the more significant in light of the levelling down that has taken place in respect of Irish citizens in Northern Ireland. Many of them – like UK citizens in Northern Ireland – will rely on the extent of the non-diminution guarantee rather than the full EU rights that were suggested in the December Joint Report.<sup>152</sup>

The academics point to the effects of these different rights regimes in Ireland and Northern Ireland:

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<sup>151</sup> Ibid

<sup>152</sup> De Mars et al, 14 November 2018

There will now be a hard border for rights protections where the people of Northern Ireland leave many EU based protections behind when they cross from the South of the border to the North.

This will be of especial significance for border communities (in particular those who assert Irish citizenship) who will find themselves with different employment, equality and civil rights depending on which side of the border they happen to be at a particular point in time. This is disruptive to an idea of all-island living and the position of Northern Ireland as a hybrid space of governance.

The European Commission factsheet on the Protocol highlights the rights that Irish citizens in Northern Ireland will continue to enjoy:

**Will Irish citizens in Northern Ireland continue to enjoy their rights as EU citizens?**

Northern Ireland will no longer be part of the EU, but a great number of people born and raised there will continue to be EU citizens. They will continue to enjoy their rights as Union citizens under the Treaties. Under the Treaty (on the functioning of the European Union) they will in particular continue to enjoy the following rights:

- non-discrimination on the basis of nationality
- move and reside freely within the EU
- consular protection (help from the embassy or consulate of any other EU country to EU citizens in distress in a country outside the EU where they have no embassy or consulate of their own country)
- petition the European Parliament and complain to the European ombudsman
- contact and receive a response from any EU institution in one of the EU's official languages
- access European Parliament, European Commission and Council documents under certain conditions
- access to the EU Civil Service

The Good Friday Agreement's guarantee that the people of Northern Ireland can choose to have Irish or British citizenship, or both, will also still apply.

The UK Government Explainer on the WA gives more detail on how the "dedicated mechanisms" mentioned in Article 4(1) to ensure the "no diminution of rights" pledge, will operate:

It is intended that this mechanism will draw on the existing human rights and equality bodies established under the Belfast (Good Friday) Agreement - namely the Northern Ireland Human Rights Commission (NIHRC), the Equality Commission for Northern Ireland (ECNI) and, on issues with an island of Ireland dimension, the Joint Committee - to provide independent oversight of the 'no diminution' commitment. The UK will confer upon NIHRC and ECNI new powers to monitor, supervise, advise and report on and enforce the commitment, as well as provide adequate resources to ensure that they are able to perform their enhanced roles effectively. The UK Government will continue to

engage with both Commissions on issues relating to the dedicated mechanism.

## Common Travel Area

**Article 5** is unchanged from the March draft WA. It states that the UK and Ireland can continue to operate the Common Travel Area (CTA), but must also ensure that Ireland still meets its obligations under EU law.

The CTA is a series of bi-lateral agreements and arrangements between Ireland and the UK which allow for passport and visa-free travel for British and Irish citizens between the two countries. It also allows for open-ended residence for immigration purposes and provides for access to certain social security schemes for British and Irish citizens resident in each other's countries.

These arrangements are not set out in full in a single document. Some elements, for example data-sharing for social security systems, currently rely on elements of EU law.

De Mars et al published a report on the future of the CTA post-Brexit for the Northern Ireland Human Rights Commission. They draw attention to the things the CTA does not cover:

The CTA, for example, does not directly cover the movement of capital, the cross-border provision of services, moving across the internal CTA borders purely for work purposes, or transporting goods across borders. Nor does the CTA secure access to medical care or education for citizens of one member of the CTA who has travelled to another on the same terms as 'home' citizens. The CTA imposes no obligation upon members to extend a full range of civil and political rights to each other's nationals. The CTA, moreover, does not mandate any form of police and security cooperation nor does it afford any particular rights in education and health.<sup>153</sup>

**Article 5** states that the UK shall ensure the CTA and the associated rights and privileges can continue to apply "without affecting the obligations of Ireland under Union law". Professor Dagmar Schiek of Queens University Belfast explains the effect of this clause:

Ireland would be barred from giving UK citizens special rights in Ireland which EU citizens do not enjoy. However, there would be little to hinder Ireland to give UK citizens the same rights as EU citizens enjoy.<sup>154</sup>

Professor Schiek also notes that the Article obliges the UK to ensure that the CTA is operated in such a way that it does not conflict with free movement rights of EU citizens and their family members, and states:

The provision also implies that the CTA needs to be reregulated between Ireland and the UK, elevating it from a set of customs and practices to an international law agreement proper.<sup>155</sup>

<sup>153</sup> [Discussion Paper on the Common Travel Area](#), Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, for the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission. Page 8

<sup>154</sup> [The island of Ireland and the UK's withdrawal from the EU – a legal political critique of the draft withdrawal agreement](#). Professor Dagmar Schiek, Queen's University Belfast, March 2018, Page 5

<sup>155</sup> Ibid

In their report De Mars et al also call for the CTA to be made into an international treaty and say the 'gold standard' outcome would be:

The UK and Irish governments should agree a Common Travel Area treaty encompassing common immigration rules, travel rights, residency rights and related rights to education, social security, work, health, and security and justice.<sup>156</sup>

The CTA does not cover frontier workers - EU citizens who live in one EU state but work in another. The WA (Articles 24 and 26) guarantees that those who already have that status will see their rights continue, but individuals working across the Irish border who commence their employment after exit day will not be considered frontier workers.<sup>157</sup>

For more detail on frontier workers in Northern Ireland, see Library Briefing Paper 8397, '[What if there's no Brexit deal?](#)' (pp 93-94).

## 8.4 The 'backstop': trade, Single Market provisions and the level playing field

### Single customs territory, movement of goods

#### Overview

**Article 6** and its associated **Annexes (2 to 5)** form the core of the 'backstop' solution to prevent a hard border on the island of Ireland.

Unlike the March draft WA, which placed Northern Ireland in a 'common regulatory area' with the EU, putting Northern Ireland in the EU's customs territory and erecting a customs barrier between NI and Great Britain, the November Protocol provides for a 'single customs territory' including the UK and the EU.

The single customs territory is formed between the customs territory of the UK and the customs territory of the EU and covers all goods except for fish and aquaculture products. This trading model is based in part on the [Temporary Customs Arrangement](#) the Government proposed in July 2018, which called for a UK-wide temporary customs union with the EU.

The single customs territory ensures that the Government complies with the European Research Group amendment to the [Taxation \(Cross-border trade\) Bill](#) (now Act) that prevents Northern Ireland from being in a separate customs territory to the rest of the UK (see Section 55(1) of the Act). Northern Ireland *will* be treated differently from the rest of the UK in some respects. It will be subject to the EU's customs legislation (the Union Customs Code) but the rest of the UK will not. Northern Ireland must also conform with some areas of EU law relating to the Single Market. These are contained in **Annex 5**.

There are also 'level playing field' provisions. These are set out in **Annex 4** and cover taxation, environmental protection, labour standards, state aid and competition (see section on level playing field provisions).

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<sup>156</sup> [Discussion Paper on the Common Travel Area](#), de Mars et al, page 8

<sup>157</sup> See section 3.2 of this paper.

## Comment

The arrangements in **Article 6** have been described as a “swimming pool Brexit”, with Northern Ireland being more closely tied to the EU (and therefore in the deep end) with the rest of UK less closely integrated (in the shallow end).<sup>158</sup>

As noted above, **Article 6(2)** provides that Northern Ireland will have to adhere to the EU's Union Customs Code and certain EU regulations. The Government's Explainer sets out the reasons behind this:

The Protocol includes a commitment by the UK to apply, in Northern Ireland, EU legislation on industrial, environmental and agricultural goods. This commitment on applying harmonised regulation is limited to those rules that are necessary to achieve the objectives of the Protocol as set out in Article 1(3).

The application of the Union Customs Code in Northern Ireland is necessary since the UCC covers all formalities before a good can be released for free circulation in the EU. These include all of the overarching requirements for regulatory compliance. Once a good has completed such formalities it can be considered a ‘Union good’ and in free circulation.<sup>159</sup>

While the Explainer argues that Annex 5 includes only those rules “strictly necessary to avoid a hard border and protect North-South cooperation”, this is still a significant volume of legislation; the Annex runs to nearly 70 pages. A leader in the *Economist* said that the deal “would keep open the Irish border, but create a deeper regulatory divide between Northern Ireland and mainland Britain”.<sup>160</sup>

However, that regulatory divide will depend on the degree to which Great Britain decides to diverge from the regulations covering Northern Ireland. The Prime Minister sought to assure the DUP, who are opposed to Northern Ireland being in a separate regulatory regime to the rest of the UK, that such divergence can be kept to a minimum during the backstop:

During the temporary period of the backstop it wouldn't make any real sense for Great Britain, for the UK government, to say that Great Britain should diverge from regulations which we might then be entering back into in the future relationship. So there is I hope some reassurance there,” she told reporters on visit to Belfast on Tuesday.

But I'm looking at what reassurance I can give that actually wouldn't see that extra regulatory divergence that everybody is concerned about. We have that regulatory divergence today. We're one UK but there's an acceptance of the particular position of Northern Ireland in the regulations as they're applied today.<sup>161</sup>

Some commentators have pointed to economic advantages that Northern Ireland will enjoy as result of having full access to the internal

<sup>158</sup> See, for example, [Will Theresa May sink or swim in her customs union swimming pool?](#) *ITV News* (Peston's Politics), 13 November 2018; [Brexit deal done – now for the hard part](#), John Springford, Centre for European Reform, 15 November 2018

<sup>159</sup> Government Explainer, paras 190-94

<sup>160</sup> *The Economist*, Into the endgame [leader], 17 November 2018

<sup>161</sup> *Financial Times*, [May looks to reassure DUP on Brexit during N Ireland visit](#), 27 November 2018

markets of both the UK and the EU, as well as the fact that Northern Ireland has been allowed to 'cherry pick' free movement of goods, without accepting the other four freedoms - something the EU has ruled out for the UK as a whole.<sup>162</sup>

The Attorney General, for example, in his legal advice explained the WA:

affords NI full access to the single market for goods, and the Customs Union, without the corresponding obligations of membership, thus splitting the "four freedoms". It is arguable that this poses a dangerous precedent for other member states at risk of seeking to exit.<sup>163</sup>

And, "it might be said that the benefits to NI of access to the EU market will far outweigh any contributions to the EU system".<sup>164</sup>

### Is this a Customs Union?

The operation of customs unions is set out under the WTO's [General Agreement on Tariffs and Trade](#) (GATT) Article XXIV. In a customs union partners commit to:

- remove all duties on products originating in each other's territory; and
- have a common external tariff, i.e. apply the same tariff to goods coming in from outside the customs union.

There can also be a common collection of customs duties, but this varies by customs union.

Customs unions under GATT XXIV cover goods but not services. Customs unions are supposed to cover "substantially all trade".

A formal customs union may still require border checks, including for tax (especially for VAT or other sales tax purposes), technical standards, and transport (e.g. cabotage).<sup>165</sup> Joint Single Market membership means that at present Ireland and the UK do not need to undertake these checks on goods moving across the Northern Irish border.

Customs Territories are mentioned in [GATT Article XXIV \(8\)](#), which stipulates: "A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories".

### The EU's customs union

The EU's customs union goes further than GATT requires, as all members are also part of the EU's Common Commercial Policy (CCP), which covers the full range of trade policy instruments, including

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<sup>162</sup> See, for example, Professor Karl Whelan, University College Dublin, '[The EU's backstop is a great opportunity for Northern Ireland](#)', 14 June 2018; AND Peter Foster: '[The backstop can benefit Northern Ireland, but only if DUP plays ball](#)', *Daily Telegraph*, 9 October 2018.

<sup>163</sup> Attorney General's Office, '[Legal effect of the Protocol on Ireland/Northern Ireland](#)', 13 November 2018.

<sup>164</sup> *Ibid.*

<sup>165</sup> [A Customs Union with the EU?](#) UK Trade Policy Observatory, University of Sussex, 19 April 2018

services. Trade policy that comes under the CCP is an EU competence, meaning Member States have delegated these powers to the EU.

Under the EU's customs union no customs checks, including those on the rules of origin, are required on goods circulating between Member States, as the correct policies and checks will have been made on goods coming from outside the EU.

### **Turkish-EU customs union**

Turkey has a customs union with the EU, but this customs union covers only industrial goods, so checks on agricultural goods are still required. The cabotage and tax checks mentioned above are also still required. This is why there are checks (and often long waits) for goods crossing the Bulgaria-Turkey border.

Furthermore, because Turkey is not part of the CCP, it does not automatically achieve access to new countries' markets when the EU signs FTAs with them, whereas these countries do get access to Turkey's market. Turkey also agrees to 'level playing field' restrictions, which means it aligns its national legislation with a number of essential internal market rules, notably on industrial standards.

The text of the [EU-Turkey Customs Union Agreement](#) states:

The customs territory of the Customs Union shall comprise:

- the customs territory of the Community as defined in Article 3 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,
- the customs territory of Turkey

### **The Single Customs territory**

**Article 6** of the Protocol defines the 'Single Customs Territory':

Until the future relationship becomes applicable, a single customs territory between the Union and the United Kingdom shall be established ("the single customs territory"). Accordingly, Northern Ireland is in the same customs territory as Great Britain.

The single customs territory shall comprise:

- (a) the customs territory of the Union defined in Article 4 of Regulation (EU) No 952/2013; and
- (b) the customs territory of the United Kingdom.

The text of Article 6 is almost identical to that of the EU-Turkey Customs Union Agreement, except that it omits the phrase 'Customs Union'.

**Article 15** of the Protocol states:

For the purposes of the first subparagraph of Article 6(1), the term "customs territory" shall have the same meaning as in Article XXIV of the General Agreement on Tariffs and Trade 1994.

As noted above, Article XXIV of GATT defines a Customs Union as "the substitution of a single customs territory for two or more customs territories". Therefore, the omission of the phrase 'Customs Union' in the Protocol seems to have no practical effect and is a political choice.

**Annex 2** of the Protocol sets out exactly how the Single Customs Territory between the UK and the EU will work. Essentially it:

- Eliminates customs duties on imports and exports between the EU and the UK [Annex 2, Article 2(1)];
- Mandates that the UK will “align the tariffs and rules applicable in its customs territory” with that of the EU’s Common Customs Tariff [Annex 2, Article 3(1)];
- States that the UK cannot set a lower tariff than one set out in the EU’s Common Customs Tariff [Annex 2, Article 3(2)].<sup>166</sup>

Therefore, the Single Customs Territory meets the two requirements of a customs union set out above - it eliminates tariffs/duties between the UK and the EU, and in almost all cases the EU and UK will apply a common external tariff to all goods. This view has been confirmed by the [Government’s legal position paper](#), which states further:

The provisions in Article 6(1) and Annex 2 establishing the single customs territory do not directly apply provisions of Union law to the UK, but create new concepts that are to be interpreted in accordance with normal principles of international law.<sup>167</sup>

### **Can the UK sign new free trade agreements under the Protocol?**

The Single Customs Territory goes further than the GATT requirements and is much closer to the UK’s current customs union with the EU:

- While the UK won't be IN the EU's Common Commercial Policy, it will have to HARMONISE with it [Annex 2, Article 4(1)]; and
- the UK will also be part of the EU’s trade defence measures and Generalised System of Preferences (GSP) [Article 4(3)].

This combination of requirements would substantially limit the UK’s ability to have significantly different trade relationships with third countries. On goods, any FTAs the UK might wish to sign would be substantially aligned to the way these third countries already trade with the EU. This might lead to third countries questioning the utility of negotiating trade agreements with the UK, as the UK would not be able to lower any of its tariffs.

There would be greater scope for the UK to offer different terms on trade in services and areas such as procurement. But this would also require flexibility regarding immigration for the nationals of those third countries the UK was negotiating with – trade in services is intimately bound up with the movement of people (Mode 4 under GATS). Many observers also believe third countries will want to wait and see the final UK-EU trade deal before they sign up to a trade agreement with the UK.

Supporters of Brexit have been critical of these arrangements and argue that they will prevent the UK from concluding trade deals with other

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<sup>166</sup> The Government’s legal position paper gives an example of when the UK may need to charge higher tariffs: “it may in such circumstances charge higher tariffs pending the conclusion of a third country agreement that allows for alignment with the EU’s preferential rates”. HM Government, ‘EU Exit: Legal position on the Withdrawal Agreement’, [CM 9747](#), December 2018, p 34.

<sup>167</sup> HM Government, ‘EU Exit: Legal position on the Withdrawal Agreement’, [CM 9747](#), December 2018, p 34.

countries. In his *Daily Telegraph* column, Boris Johnson said: "We are giving up the hope of new free-trade deals".<sup>168</sup> In a question to the Prime Minister on 22 November 2018, Mr. Johnson said:

[the Withdrawal Agreement] gives the EU a continuing veto over the unilateral power of the entire United Kingdom to do free trade deals or to take back control of our laws.<sup>169</sup>

Sam Lowe, of the Centre for European Reform, argues that while the customs union would constrain the UK's ability to have an independent trade policy, "this need not prevent the UK from operating an effective trade policy". He also said that the UK could "create opportunities in sectors and industries consistent with the UK's comparative advantage". But he warns this would require "a retreat from the obsession with FTAs, and a more holistic approach to trade policy".<sup>170</sup>

### **Would the UK be party to new EU FTAs during the backstop?**

As the UK must align its tariffs with the EU's Common Customs Tariff and must also harmonise with the EU's Common Commercial Policy, it seems clear that if the EU were to enter into new FTAs with third countries during the backstop, then these third countries would gain access to UK markets under the new terms, but the UK would not get automatic reciprocal access to that third country's market.

This is the situation Turkey finds itself in. The third country is 'encouraged' to sign its own agreement with Turkey, but often has little incentive when it already has access to Turkish markets through its FTA with the EU.

If the backstop is used only as a temporary bridge to a future relationship agreement, as the Government argues, this feature will not have much impact, because the EU is unlikely to conclude many new FTAs in this time.

The EU and Turkey have looked into updating their customs relationship. In [a study](#) the EU describes the problem with this relationship:

In this context of an increasing number of ambitious and comprehensive FTAs, certain deficiencies in the design of the CU have become evident. In particular, Turkey has become concerned about its obligation to essentially follow the EU's commercial policy with third countries, without legal means to convince the EU's FTA partners to conclude FTAs also with it, in parallel. This also limits Turkey's ability to negotiate and obtain access to the markets of certain EU FTA partners.<sup>171</sup>

The report said the EU would explore procedures to include Turkey more closely in its FTA negotiations and to "ensure harmonised entry

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<sup>168</sup> *Daily Telegraph*, Boris Johnson, "The EU will turn us into captives if we sign up to this appalling sell out" 19 November 2018

<sup>169</sup> [HC Deb 22 November 2018 c1107](#)

<sup>170</sup> Centre for European Reform, S. Lowe, '[An effective UK trade policy and a Customs Union are compatible](#)', 29 November 2018

<sup>171</sup> European Commission, [Recommendation for a Council Decision authorising the opening of negotiations with Turkey on an Agreement on the extension of the scope of the bilateral preferential trade relationship and on the modernisation of the Customs Union](#), 2 December 2016, Page 6

into force/implementation of the EU's and Turkey trade agreements", but did not come up with specific solutions for doing so.<sup>172</sup> Discussions between the EU and Turkey on refreshing their customs arrangements foundered as their general relationship has become more strained in recent years.

Sam Lowe believes fears that the UK could find itself in the same situation as Turkey are "overstated" because "the UK is not comparable to Turkey – it is a larger, more developed and better regulated economy, and access to its market is more prized"; also, in the future relationship, the EU and UK "could seek to implement their trade agreements at the same time".<sup>173</sup>

## **How 'frictionless' will trade be between GB and the EU?**

### **Customs checks**

**Article 6(1)** states that the detailed rules on trade in goods between the two parts of the customs territory must be adopted by the Joint Committee before 1 July 2020. If not, the provisions of Annex 3 apply.

The [Government Explainer](#) elaborates on some of the decisions the Joint Committee will have to make, which include "the nature of documentary evidence to prove entitlement to benefit from these arrangements; and administrative cooperation".

The most significant element of the new regime in goods set out in Annex 3 is that it introduces a 'movement certificate' that will be required for all goods moving between the EU and the UK.

White & Case, an international law firm, published advice to companies on the WA and specifically on the movement certificate:

That Annex introduces a "A.UK. Movement Certificate" to demonstrate that the EU's tariffs and commercial policy measures have been applied by the exporting part of the single customs territory before the goods are shipped to the other part of the single customs territory. In other words, UK exporters wishing to export to the EU27 would have to request this Certificate from the UK authorities to demonstrate that their goods (or goods produced in the UK but incorporating materials imported from third countries) have been subject to the EU's tariffs and commercial policy measures, and vice versa.<sup>174</sup>

The [British Chambers of Commerce](#), also provide advice on the movement on goods during the backstop which mentions the movement certificate:

Customs duties would be prohibited on any goods in free circulation (originating in the EU/UK or not) as well as products produced from inputs from outside EU/UK which were not in free circulation, provided all appropriate formalities have been completed. If the goods do not meet the conditions, third-party tariffs (WTO rates) would apply. UK and EU tariffs would be fully

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<sup>172</sup> Ibid Page 23

<sup>173</sup> Centre for European Reform, S. Lowe, [An effective UK trade policy and a Customs Union are compatible](#), 29 November 2018

<sup>174</sup> White & Case, [Brexit - Trade in goods under the draft Withdrawal Agreement endorsed on 25 November 2018 by the UK and the EU](#), F. Vermeeren, J. MacLennan & R. Eglin, 28 November 2018

aligned. No rules of origin would apply, but traders would need to demonstrate that goods are in free circulation and all conditions have been met. A new movement certificate, A.UK, will be used for this purpose.

There are questions that the text of Annex 3 does not answer:

- Can the certificate be submitted electronically?
- Does it need to be inspected/checked at the border?
- Will it be required for goods moving from Great Britain into Northern Ireland?

Some answers may lie in how goods move across the Turkish-EU border, as a movement certificate is required here, an 'A.TR' certificate rather than 'A.UK' certificate. It seems that the UK regime is modelled on this arrangement. Turkish goods are still inspected at the border, in part because its customs union is only for industrial goods and does not cover other categories, such as agricultural goods.

The UK-EU customs union in the backstop only excludes fish and aquaculture products, but this means some checks would be required to ensure the correct tariffs were applied and that these products were being declared properly.

The Attorney General's legal advice states that "goods passing from GB to NI will be subject to a declaration process".<sup>175</sup> Mr Cox does not give any further details on what these processes may be, however, this might be a reference to the requirement for movement certificates.

Movement certificates would not be required for "goods bought by travellers" moving from the UK and EU and vice versa (Annex 3, Article 12), or for postal consignments (Annex 3, Article 13).

### **Regulatory checks**

UK goods moving into the EU would still be subject to regulatory checks such as Sanitary and Phytosanitary (SPS) checks, as the Commission guide to the Withdrawal Agreement makes clear:

By way of exception, the movement of live animals and animal products between the Union market and the UK's market will, as from the end of the transition period, be subject to the applicable rules of the Parties on imports and sanitary controls at the border, regardless of whether they were placed on the market before the end of the transition period.

This is necessary in view of the high sanitary risks associated with such products, and the need for effective veterinary controls when these products, as well as live animals, enter the Union market or the UK market.

The UK is hoping to negotiate a Veterinary Agreement with the EU to prevent such checks (see section on Article 7).

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<sup>175</sup> Attorney General's Office, '[Legal effect of the Protocol on Ireland/Northern Ireland](#)', 13 November 2018.

## What does the Protocol not cover?

The relationship between the EU and the UK provided for in the Protocol is much narrower and shallower than in the transition period (see section 5 of this paper on transition). The Protocol aims to ensure the free flow of goods across the Northern Ireland/Ireland border, obviating the need for customs and regulatory checks, and allowing UK goods to enter the EU without customs checks. It does not cover, among other things:

- Trade in services
- Movement of people/workers
- Movement of capital
- Licences for road hauliers carrying goods
- Government procurement
- Membership of EU agencies and programmes
- Regulatory checks on goods leaving the UK (not including goods moving from Northern Ireland to Ireland and to the rest of the EU)
- Payments to the EU budget.
- Agreements on security and police co-operation

Moving from the transition period to the Protocol would require firms and individuals that trade with the EU to deal with a significant adjustment to their trading arrangements.

The Government Explainer states that separation provisions set out in Articles 40-125 of the WA allow for “the application of the EU legal order in the UK [to be brought] to an orderly conclusion”. They also acknowledge:

This may require new substantive arrangements to be agreed and put in place between the UK and the EU to ensure a smooth and orderly transition from the implementation period to the future relationship.

Without these ‘bridging’ agreements in place, the UK would see a significant curtailment of access to the EU’s Internal Market for trade other than goods until it could conclude an agreement on the future relationship. Businesses and individuals would have to go through another type of transition period to implement the Protocol, and then adjust again when the future relationship came into force. This uncertainty could be a reason why extending the transition period may present an easier option for the UK compared to entering the Protocol. But extending the transition period would require EU agreement.

The EU could agree to ‘provisional application’ of the trade elements of the future relationship, where it has exclusive competence. But such an outcome is unlikely as it would require these elements to be finalised in sufficient detail. It would also be a significant concession by the EU, as it would remove a large part of its bargaining power while it was still concluding negotiations with the UK.

### **Would the UK pay into the EU budget during the backstop?**

There is no provision in the Protocol for the UK to pay into the EU budget. Considering its narrow application, and as it is largely a customs union with some Single Market access for Northern Ireland, this makes sense. The Prime Minister, answering questions in the Commons on the WA, said

In the implementation period, there would be an expectation of a financial obligation; there would not be a financial obligation were we in the backstop.<sup>176</sup>

However, if “substantive agreements” were put in place to give the UK greater access to the Single Market, these may require the UK to make some sort of financial contribution. The exact details would need to be negotiated between the UK and the EU. Negotiations between the EU and third countries are governed by [Article 218 TFEU](#) and depending on the scope of the agreements, they may require the consent of the European Parliament.

### **Fisheries**

The backstop arrangements for Ireland/Northern Ireland include a reference to fisheries and trade. The UK will no longer be part of the CFP after the end of the transition period. However, **Article 6** of the Irish Protocol sets out that the free movement of fishery and aquaculture products would not be included in any backstop customs arrangements for the whole of the UK “unless an agreement on access to waters and fishing opportunities is applicable between the Union and the United Kingdom”.

The Government summarises the agreement as follows:

The rules governing the single customs territory do not automatically apply in respect of fishery and aquaculture products. These products would be included when a UK-EU Fisheries Agreement has been reached that includes arrangements on access to waters and fishing opportunities. Nothing in this Protocol prescribes the content of that fisheries agreement, and the UK as a whole will not be part of the Common Fisheries Policy.<sup>177</sup>

The EU summarised the fisheries arrangements in relation to the Single Customs Territory:

#### **Will fisheries be included in the “Single Customs Territory”?**

Arrangements on fisheries will be negotiated as part of the overall future partnership. The EU and the UK will use their best endeavours to agree on a fisheries and aquaculture agreement by 1 July 2020. An essential condition for this single customs territory to cover fisheries and aquaculture products will be to agree between the Union and the UK on access to waters and fishing opportunities. We have shared objectives to ensure fishing at sustainable levels and promote resource conservation'.<sup>178</sup>

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<sup>176</sup> HC Deb, ‘Leaving the EU’, 26 November 2018, Volume 650, [Column 56](#).

<sup>177</sup> HM Government, [Explainer](#), 14 November 2018

<sup>178</sup> EU Commission, [Fact Sheet: Protocol on Ireland and Northern Ireland](#), 14 November 2018

## Level playing field provisions

### Taxation

Part one of **Annex 4 (Article 1)** to the Protocol addresses level playing-field measures on taxation and establishes the following obligations:

- The UK and the EU commit themselves to implementing the principles of good governance in the area of taxation, including global standards on transparency and exchange of information, fair taxation and [OECD standards](#) against Base Erosion and Profit Shifting (BEPS).
- The UK will continue to apply its domestic law which transposes EU Directives on the exchange of information on taxation ([Directive 2011/16](#)), anti-tax avoidance rules ([Directive 2016/1164](#)), and country-by-country-reporting by credit institutions and investment firms ([Directive 2013/36](#)).
- The UK reaffirms its commitment to curb harmful tax measures as defined in the [EU Code of Conduct for business taxation](#).

The Commission's factsheet on the Protocol underlines that "the implementation of this commitment will be addressed by the Joint Committee".<sup>179</sup>

### Environmental protection

**Part Two of Annex 4 (Articles 2 and 3)** relates to environmental protection.

Under **Article 2(1)** the UK and the EU commit to non-regression in the level of common standards of environmental protection applicable at the end of the transition period in a range of environmental areas including: air quality, industrial emissions, nature and biodiversity, the protection and preservation of the aquatic environment and the marine environment, waste management and climate change.

**Article 2(2)** requires that the EU and UK respect the following four environmental principles in their respective environmental legislation:<sup>180</sup>

- the precautionary principle;
- the principle that preventive action should be taken;
- the principle that environmental damage should as a priority be rectified at source;
- the "polluter pays" principle.

Section 16 of the [EU \(Withdrawal\) Act 2018](#) requires that the four principles listed in the Protocol, alongside several other environmental principles, be included in a draft *Environment Bill*. This has not yet been published so the detail (and territorial extent) is not yet known, although it is required by the EU(W) Act only to apply to England and to

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<sup>179</sup> European Commission, [Protocol on Ireland and Northern Ireland](#), 14 November 2018. For more details on the EU's approach see, European Commission, [Harmful tax competition](#).

<sup>180</sup> All four principles are explained in a POST Note: [EU Environmental Principles](#), 28 November 2018.

reserved matters across the rest of the UK.<sup>181</sup> See Library Briefing Paper 8132, [Brexit and the environment](#) for a discussion of environmental principles, governance and the forthcoming environment Bill.

**Article 2(3)** provides that the Joint Committee shall adopt decisions laying out minimum commitments for the reduction of national emissions of “certain atmospheric pollutants” and the maximum sulphur content of marine fuels used in certain specified areas, and best available techniques (BATs) in relation to industrial emissions. This provision will apply from the date the WA enters into force (WA Article 185), but the decisions shall apply only from the end of the transition period (Protocol Annex 4, Article 2(3)).

**Article 2(4), (5) and (6)** respectively commit the EU and the UK to meeting their respective international climate change agreements, including the Paris Agreement. They require the UK to implement a system of carbon pricing of “at least the same effectiveness and scope” as that provided by the EU ETS Directive,<sup>182</sup> and commit the EU and the UK to implementing the multilateral environmental agreements to which they are party.

As the provisions of **Annex 4, Article 2** apply to the whole UK, it is not clear how Northern Ireland would be impacted where any specific environmental targets, standards or schemes overlap with the EU law that will continue to apply to Northern Ireland under Annexes 5 and 7 of the Protocol (e.g. in respect of electricity generators in Northern Ireland that would remain subject to the EU ETS Directive under Annex 7 to the extent necessary for the continued operation of the Single Electricity Market). It is also unclear whether such operators would also be required to take part in the (separate) UK-wide system of carbon pricing implemented under Annex 4, Article 2(5) or require an exemption from such a system. This situation may be clarified as detailed proposals for commitments in the Protocol are developed.

The WA arbitration clauses (Articles 170 to 181) do not apply to the environmental protection provisions of the Protocol. Instead, **Article 3 of Annex 4** sets out monitoring and enforcement provisions. This requires the UK to “ensure effective enforcement” of the environmental protection provisions establishing a level playing field. The European Commission and the Court of Justice will continue to undertake enforcement roles for the EU.

**Article 3(2)** requires the UK to establish an “independent and adequately resourced body or bodies” to carry out monitoring, reporting, oversight and enforcement of the environmental provisions. The body or bodies will have powers to:

[...] conduct inquiries on its own initiative concerning alleged breaches by public bodies and authorities of the United Kingdom,

<sup>181</sup> Defra consultation hub, [Environmental Principles and Governance after EU Exit](#) [accessed 21 November 2018]. Note also that the UK *Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* includes the same four environmental principles as the Protocol. This Bill has been referred to the Supreme Court which is yet to rule on whether the Bill is within the competence of the Scottish Parliament.

<sup>182</sup> Directive 2003/87/EC

and to receive complaints for the purposes of conducting such inquiries. It shall have all powers necessary to carry out its functions, including the power to request information. The independent body shall have the right to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure, with a view to seeking an adequate remedy.<sup>183</sup>

The inclusion of public bodies and authorities within the scope of the body's enforcement powers create a wider reach than those prescribed by the *EU (Withdrawal) Act 2018* for the watchdog body that will be set up by the forthcoming *Environment Bill*. Although the draft Bill is not yet published, it is required to establish a body with powers to take proportionate enforcement action against a Minister of the Crown only. Whether the Protocol body would be UK-wide or whether each country within the UK would set up its own independent body is not yet known.

### Labour and Social Standards

**Annex 4 (Articles 4 to 6)** relates to labour and social protection standards for the whole of the UK. Labour standards are also covered in **Article 4** of the Protocol, specifically certain equality rights in Northern Ireland (see Section 8.3 for more information).

Under **Article 4(1) of Annex 4** the UK and EU commit to non-regression in the level of common standards of labour and social protection applicable at the end of the transition period in a range of labour and social areas, including: fundamental rights at work, occupational health and safety, fair working conditions, fair employment standards, information and consultation rights and restructuring.

The labour and social standards from which regression is not permitted are those that are common between the UK and EU *at the end of transition*. This means that while the UK will need to keep pace with EU labour and social standards during the transition period, it would not have to after the end of the transition.

Ciaran White writes:

This appears to 'ring-fence', in NI law, a wide range of EU-derived labour law rights. It would include things like the Working Time Regulations, to pick an obvious example. And if the Protocol continues without any further Agreement superseding it, it would mean that those rights would continue in perpetuity, albeit in the state in which they existed at the date of transition.<sup>184</sup>

[NB. While Mr White refers to ringfencing 'in NI law', this point applies equally to UK law].

**Article 6(1) of the Protocol** does, however, provide that the Joint Committee can modify Annex 4 to lay down higher standards.

Annex 4 does not contain a list of specific EU laws. The scope of rights covered by **Article 4(1) of Annex 4** does, however, appear to be comprehensive. Commons Briefing Paper 7732, [Brexit: employment law](#), 10 November 2016, lists a number of EU-derived employment

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<sup>183</sup> Protocol on Ireland/Northern Ireland, Annex 4, Article 3(2)

<sup>184</sup> Ibid.

rights.<sup>185</sup> Most, if not all, of these rights would appear to be captured by **Article 4(1)**.

Under **Article 5(2) of Annex 4** the UK and EU “reaffirm their commitments” to effectively implement the [ILO Conventions](#) and the Council of Europe [European Social Charter](#) that are ratified by the UK and EU Member States respectively. The UK has ratified 87 ILO Conventions, including all eight of the Fundamental Conventions and three out of the four priority Governance Conventions.<sup>186</sup> These references to ILO Conventions may, however, be of limited significance. Marley Morris, a senior research fellow at the Institute for Public Policy Research (IPPR), writes:

Indeed, unlike some countries, the UK’s legal system does not take ILO conventions particularly seriously. Moreover, the UK has denounced a number of up-to-date ILO conventions, including the Labour Clauses (Public Contracts) convention in 1982 and the Protection of Wages convention in 1983.<sup>187</sup>

**Article 4(2)** and **Article 5(4) of Annex 4** state that **Articles 170 to 181** of the Withdrawal Agreement (the provisions on arbitration) do not apply in respect of disputes arising under them. Only the mechanisms for dispute resolution for these provisions is the Joint Committee under **Article 169** of the Agreement.

**Article 6 of Annex 4** requires the UK to ensure enforcement of **Article 4 of the Annex**, through the maintenance of an effective system of labour inspections and the availability of administrative and judicial proceedings that can address violations and provide effective remedies.

The Government [Explainer](#) states:

In terms of enforcement, the European Commission will ensure that the EU is upholding these commitments; and in the UK they will be enforced domestically. Disputes about these non-regression commitments will not be subject to the Withdrawal Agreement arbitration mechanism.

The mechanism for arbitration under **Articles 170 to 181** of the Withdrawal Agreement is not disapplied with respect to **Article 6 of Annex 4**. This means that disputes concerning the *enforcement mechanisms* for rights under **Article 4(1) of Annex 4** could be subject to arbitration.

It is not clear, however, that this would be an effective way of securing labour and social rights. Marley Morris and Tom Kibasi, the director of the IPPR, write:

Finally, the governance arrangements are much weaker than the status quo: the non-regression clauses are enforced primarily at the domestic level. Formal arbitration proceedings can apply with respect to enforcement, but these are state-to-state procedures that tend to be ineffective in fully protecting rights (WA Prot Anx 4 Art 2 & Art 4) (see also Morris 2018). A non-regression clause of

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<sup>185</sup> pp. 10 to 12.

<sup>186</sup> International Labour Organisation, [Ratifications for the United Kingdom](#), [last accessed 5 Dec 2018].

<sup>187</sup> M. Morris, [A level playing field for workers: The future of employment rights post-Brexit](#), IPPR, October 2018, p. 18.

this type is therefore not sufficient to maintain current protections in full.<sup>188</sup>

### State Aid

See Section 1.5, which combines the provisions contained in **Annex 4 Part Four** with those in **Article 12**.

### Competition

**Annex 4, Part 5**, Competition, commits both parties to continuing to take action against anti-competitive business practices such as cartel agreements (**Article 17**), the abuse of a dominant position (**Article 18**), and mergers and takeovers which threaten to substantially reduce competition (**Article 19**).

Under **Article 23**, the EU and UK also commit to continued cooperation in matters of policy and enforcement between their respective competition authorities. The authorities are the Competition and Markets Authority (CMA) in the UK and the European Commission (EC) in the EU.

There is a global consensus that the three practices described in Articles 17 to 19 are anti-competitive and harmful. In a [speech](#) about competition after Brexit, Michael Grenfell, Executive Director of Enforcement at the CMA, explained that the fundamental principles of competition law are the same around the world:

Certainly, there are advantages in businesses being subject to competition laws that do not differ too radically from each other, particularly in the case of businesses that operate multi-nationally. But that is in any way the case – in most respects, competition law imposes the same requirements on businesses across the globe. Whether under the UK or the EU regime, the US or the Australian, the Russian or the South African, it's unlawful for businesses to collude on price, for example, or to engage in bid-rigging when tendering for contracts.<sup>189</sup>

The Commission [fact sheet on the Protocol](#) says more on the enforcement of competition laws:

The EU and the UK commit to ensuring that their respective competition laws effectively enforce these agreed rules. More concretely, the UK commits to ensure that administrative and judicial proceedings are available in order to permit the effective and timely action against violations of competition rules, and provide for effective remedies. In case of disputes about whether the UK complies with these commitments, dispute settlement through arbitration is available.

### State owned undertakings

**Part 6 of Annex 4** relates to state-owned undertakings (for example the Post Office), undertakings granted special rights and privileges (for example, Royal Mail), and monopolies (for example, many regional water companies).<sup>190</sup>

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<sup>188</sup> M. Morris and T. Kibasi, [The Brexit Withdrawal Agreement: A First Analysis](#), IPPR, November 2018, p. 5.

<sup>189</sup> Michael Grenfell (CMA), [A view from the CMA: Brexit and beyond](#), 16 May 2018

<sup>190</sup> Library briefing [Public ownership of industries and services](#) gives background on such bodies and their regulation in the UK.

Part 6 has one article – **Article 25**: Neutral Regulation. It states that the UK and EU will “make best use of relevant international standards” including, among others, “the OECD Guidelines on Corporate Governance of State-Owned Undertakings”. The OECD Guidelines are an international standard intended to help governments “avoid the pitfalls of both passive ownership and excessive state intervention”.<sup>191</sup> As examples, two of the Guidelines are:

- Rationales for state ownership  
The state exercises the ownership of [state-owned enterprises] in the interest of the general public. It should carefully evaluate and disclose the objectives that justify state ownership and subject these to a recurrent review.
- State-owned enterprises in the marketplace  
Consistent with the rationale for state ownership, the legal and regulatory framework for [state-owned enterprises] should ensure a level playing field and fair competition in the marketplace when [state-owned enterprises] undertake economic activities.<sup>192</sup>

The Article also states that UK and EU regulators should be independent of the bodies they regulate and act impartially. The UK and EU should ensure that laws and regulations are enforced in a consistent and non-discriminatory manner. These appear reasonably uncontroversial ideas.<sup>193</sup>

## 8.5 The UK internal market and technical regulations

### Protection of the UK internal market

**Article 7** contains provisions on the UK internal market – i.e. trade between Northern Ireland and the rest of the UK.

The Government had already made a commitment that Northern Ireland businesses should continue to enjoy unfettered access to the rest of the UK market. This commitment was included in the Joint Report in December 2017<sup>194</sup> and is reflected in **Article 7(1)**:

Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom's internal market.

**Article 7(2)** requires the UK and EU to use their “best endeavours” to facilitate trade between Great Britain and Northern Ireland. This will be kept under review by the Joint Committee, the aim being to avoid controls at ports and airports in Northern Ireland. There will be no tariffs, quotas or rules of origin checks on trade between Great Britain and Northern Ireland. There will be some regulatory checks on British

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<sup>191</sup> From foreword to OECD, [OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition](#), Nov 2015.

<sup>192</sup> OECD, [OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition](#), Nov 2015.

<sup>193</sup> On regulation, they are consistent with government commitments in BIS, [Principles for Economic Regulation](#), April 2011, for example.

<sup>194</sup> HM Government, [Explainer](#) para 197.

goods exported to Northern Ireland, as these are not subject to the same single market rules as Northern Ireland goods. These checks are necessary to allow frictionless trade across the Irish border.

The European Commission's Q&A on the Irish Protocol explains how these checks will work:

**What checks will need to take place on goods entering Northern Ireland from the rest of the UK?**

In order to ensure that Northern Irish businesses can place products on the EU's Single Market without restriction – and given the island of Ireland's status as a single epidemiological area – there would be a need for checks on goods travelling from the rest of the UK to Northern Ireland. There would be a need for some compliance checks with EU standards, consistent with risk, to protect consumers, economic traders and businesses in the Single Market.

The EU and the UK have agreed to carry out these checks in the least intrusive way possible. The scale and frequency of the checks could be further reduced through future agreements between the EU and the UK.

- For industrial goods, checks are based on risk assessment, and can mostly take place in the market or at traders' premises by the relevant authorities. Such checks will always be carried out by UK authorities.
- As for agricultural products, already existing checks at ports and airports will need to continue, but will be increased in scale in order to protect the EU's Single Market, its consumers and animal health.<sup>195</sup>

In an article in the *Belfast Telegraph*, the Prime Minister said that these checks would be minimised:

... the Government will keep regulations consistent across the whole of the UK in order to minimise any checks or controls and ensure no divergence between Northern Ireland and Great Britain.<sup>196</sup>

The Prime Minister reiterated this point at PMQs on 21 November 2018:

If we were in the situation where the backstop had to be in place for a matter of months, for example, it would be right for the United Kingdom to give the commitment that we would not be looking to diverge from regulations during that period<sup>197</sup>

De Mars et al commented on the trade provisions of the backstop:

The consequence of the backstop activating is that Northern Ireland will be subject to different rules than the remainder of the UK is obliged to follow. Article 7(1) declares that the UK will act to ensure that this will not introduce any barriers for goods moving from Northern Ireland to Great Britain. The reverse, however, cannot be promised outright—it is only Northern Ireland that is fully aligning to the relevant Single Market rules. However, recognizing that Northern Ireland has an 'integral place' in the UK internal market, the parties have agreed that they will use their

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<sup>195</sup> [European Commission Q&A](#), 14 November 2018)

<sup>196</sup> *Belfast Telegraph*, [Theresa May: 'The draft Brexit deal keeps us safe, protects jobs, businesses and also preserves the Union'](#), 20 November 2018

<sup>197</sup> [HC Deb 21 November 2018 c 864](#)

best endeavours to ensure that trade from Great Britain to Northern Ireland is facilitated in every possible way. This includes a commitment to avoid, as much as possible, any border checks on goods. The Commission's FAQ on the Withdrawal Agreement makes clear that there will be only minimal new checks introduced in the Irish Sea; agricultural products are already checked at ports under the current rules, and industrial goods can by and large be checked within Great Britain, rather than at the ports. This suggests that risk-based spot checks at the Irish Sea are the only change to current movement of goods in the UK internal market.<sup>198</sup>

The number of checks required on goods moving from Great Britain to Northern Ireland will depend, both during the backstop and in the future relationship, on the degree of regulatory convergence between the two territories.

Karen Bradley, Secretary of State for Northern Ireland, was asked about regulatory checks for agricultural goods moving between GB and Northern Ireland by the Northern Ireland Affairs Select Committee:

**Q329 Chair:** The withdrawal agreement contained reference to avoiding checks at the land border, but including certain checks, particularly SPS checks, over the Irish Sea. Can you say to what extent checks will be increased under the withdrawal agreement beyond those that currently exist?

**Karen Bradley:** In terms of animal health, the draft text sets out proposals for checks for animals, which, in the absence of an EU-UK veterinary agreement, would go up from 10% live animal checks, as there is today, to 100%. Clearly, we are working to a UK-EU veterinary agreement and would expect the checks to be broadly as they are today. In a deal situation where we are working towards a future relationship, in the unlikely event we end up in the backstop for a short period of time— and we all want to avoid being in the backstop—one would also expect that we would have been able to sign a veterinary agreement, which would mean that live animal checks were broadly as they are today.

**Q330 Chair:** Can you say what going up from 10% to 100% means in practice? Does that mean every single animal that crosses the Irish Sea would need to be checked in some way and, if so, what does the checking involve?

**Karen Bradley:** In the absence of an EU-UK veterinary agreement, that would mean 100% live animal checks, as it would mean 100% live animal checks going from GB to any other part of the European Union. GB to France would involve 100% live animal checks, likewise GB to the Netherlands, Denmark, et cetera, and vice versa: 100% live animal checks coming the other way. We do expect to sign an EU-UK veterinary agreement much in line with the situation we have today, and we would therefore expect live animal checks to be broadly in line with what they are today.<sup>199</sup>

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<sup>198</sup> Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, [Briefing on: The Protocol on Ireland/Northern Ireland](#), 16 November 2018

<sup>199</sup> Northern Ireland Affairs Committee [Oral evidence: Work of the Secretary of State for Northern Ireland](#), 2017-19, HC 498 Wednesday 21 November 2018

A Veterinary Agreement modelled on the EU-Swiss Agreement would require the UK to apply all the relevant EU *acquis* and to continue to update it as it changed. The Agreement covers:

- the control of certain animal diseases and their notification;
- trade between Switzerland and the EU in living animals, their sperm, egg cells and embryos and animal products (milk and dairy products, meat and meat products);
- the import of these animals and products from third countries;
- animal breeding.<sup>200</sup>

According to the [Swiss Government's website](#), the Swiss acknowledge that when the EU is considering new legislation on animal health and food safety, it can seek to represent its position "by participating in working groups and in the standing committee", but notes:

Its scope for influence is, however, limited since Switzerland does not have voting rights. Good bilateral contact is therefore vital for ensuring that Switzerland's concerns and interests are taken on board.<sup>201</sup>

## Technical regulations

This article relates to regulatory processes for placing goods on the market. Certification checks and approvals are usually referred to as '[conformity assessments](#)'.

**Article 8** deals with the consequences of the end of the EU's mutual recognition of UK goods standards arising from the UK leaving the Single Market. Article 8 puts in place measures to ensure Northern Ireland goods can still circulate freely without checks on the Island of Ireland. In the Protocol, Northern Ireland will apply regulations that i) remove the need for checks at the border, and ii) ensure a level playing field.

The [Government's Explainer](#) states that Northern Ireland goods will also be free to circulate on the UK market:

No EU approval process will be required to place Northern Ireland goods onto the UK market, and both EU and UK approvals will be recognised for goods to be sold throughout the UK. This means that Northern Ireland businesses placing goods on the market in both the EU and the rest of the UK will not have to go through two separate approvals processes. [...]

For Northern Ireland businesses, these provisions mean that they will only need to seek approvals or certifications once, and will be free to sell goods both in the EU and in the rest of the UK based on that single approval or certification.<sup>202</sup>

For circulation beyond the UK, **Paragraph 3(1) of Article 8** excludes most conformity assessments from UK authorities for Northern Ireland goods from being recognised by EU Member States. Therefore, goods

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<sup>200</sup> Swiss Federal Government, [Veterinary Agreement between Switzerland and the EU](#)

<sup>201</sup> Ibid

<sup>202</sup> HM Government, [Explainer](#), paras 201, 203

manufacturers would be required to have authorised representatives or responsible persons in another Member State to provide a certificate.

There are two exceptions.

- Certificates produced by UK bodies for Northern Ireland goods will be recognised by the EU where they are veterinary certificates and official labels for plant reproductive material (Paragraph 3(3)).
- Under paragraph 3(2) the EU will also recognise certain authorisations by UK authorities for processes that require on-site inspections – at slaughterhouses, for example.

The European Commission's [Fact Sheet](#) on the Protocol emphasises:

Where existing EU law provides for the possibility for an authority/body in another Member State to issue product approvals/certificates, this option should be used by Northern Irish businesses if they want to export to the EU27 Member States.

The EU's 'notices to stakeholders' on what would occur in the event of 'no deal' included advice to companies on [EU rules in the field of industrial products](#). It states:

Authorised representatives or responsible persons established in the United Kingdom will not, as from the withdrawal date, be recognised as authorised representatives or responsible persons for the purposes of the applicable Union product legislation. Therefore, manufacturers are advised to take the necessary steps to ensure that, as from the withdrawal date, their designated authorised representatives or responsible persons are established in the EU-27.

[...] In some product areas, Union legislation requires the intervention of a qualified third party, known as Notified Body, in the conformity assessment procedure. Union product legislation requires Notified Bodies to be established in a Member State and be designated by a Member State notifying authority for performing the conformity assessment tasks set out in the relevant act of Union product legislation.

**Paragraph 3(5) of Article 8** also prevents the UK from bringing to the arbitration process disputes on how other Member States' authorities have assessed or certificated Northern Ireland goods. It is not clear if the individual companies could still seek legal redress through the courts of other Member States.

Paragraph 3(4) includes provisions for Northern Ireland goods to be labelled differently from those from the rest of the UK:

Products from Northern Ireland can continue to be labelled or marketed as UK products throughout the rest of the United Kingdom. Where EU law on goods is concerned, Northern Irish products shall be indicated as "UK(NI)". A relevant example would be regarding ear tags for live animals.<sup>203</sup>

This measure will ensure Northern Ireland goods can continue to circulate freely on the island of Ireland and throughout the rest of the EU, without any additional checks.

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<sup>203</sup> [European Commission Q&A](#), 14 November 2018)

## 8.6 Tax, agriculture, environment

### VAT and excise

VAT is payable on the goods that businesses bring to the UK, although the accounting treatment differs depending on whether the goods come from an EU Member State or a non-EU country. Consequently, EU VAT law distinguishes between ‘acquisitions’ – the supply of goods between businesses from one Member State to another - and ‘imports’ – the supply of goods from outside the EU.<sup>204</sup> Businesses are entitled to use ‘postponed accounting’ for VAT on acquisitions, but not on imports, as the Chartered Institute of Taxation (CIOT) explains:

Postponed accounting for import VAT allows businesses to offset import VAT via their quarterly VAT returns for imports from the EU. (NB. Imports from EU are technically called acquisitions while we remain EU members.) For imports from outside the EU a business has to either pay VAT at the point of import or via a deferment account, and then claim it back up to three months later in the VAT return. Such accounting is enabled currently through acquisition VAT for purchases of goods from the EU – which will go after Brexit as we leave the Single Market - and through the reverse charge for services.<sup>205</sup>

Several stakeholders, including the British Retail Consortium (BRC), have raised concerns that one consequence of Brexit would be that a large number of businesses would face serious cash flow difficulties if they were required to account for VAT on all imports from EU Member States at the point of import.<sup>206</sup> In the Autumn Budget in November 2017 the Government acknowledged the importance of postponed accounting for businesses, and stated that it would “take this into account when considering potential changes following EU exit and will look at options to mitigate any cash flow impacts”.<sup>207</sup>

The purpose of Article 9 is summarised in the Government’s Explainer on the WA:

Article 9 provides that certain EU VAT and excise rules will apply in Northern Ireland with respect to the movement of cross-border trade in goods.

However, Northern Ireland will remain part of the UK’s VAT area, with HMRC continuing to be responsible for the operation and collection of VAT, and Parliament for the setting of VAT rates, across the UK in line with the Northern Ireland Act 1998. Specifically, the UK will ensure that no registered business is required to pay VAT upfront when moving goods between Great Britain and Northern Ireland, and that accounting for VAT can

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<sup>204</sup> HMRC, [VAT: imports, acquisitions and purchases from abroad](#), April 2016

<sup>205</sup> CIOT press notice, [Institute highlights possible relief from Brexit burden for importers](#), 28 November 2017. For more details of the ‘reverse charge’ for services see, HMRC, [VAT Notice 741A: place of supply of services](#), 1 November 2017.

<sup>206</sup> BRC, [A fair Brexit for consumers: the Customs Roadmap](#), Winter 2017 p9. See also BRC, [We need a post-Brexit VAT plan, and quickly: BRC blog](#), 11 January 2018.

<sup>207</sup> [Autumn Budget 2017](#), HC 587, November 2017 para 3.62. See also, HMT, [Overview of tax legislation & rates](#), November 2017 para 2.44

continue to be done through postponed accounting and UK VAT returns.<sup>208</sup>

The provision does not appear to have attracted substantive commentary.

## Agriculture and environment

Under the heading 'agriculture and environment', **Article 10** sets out that the provisions of EU law listed in **Annex 5** of the Protocol shall apply in respect of Northern Ireland.

**Annex 5** lists a broad range of EU legislation, including in relation to general trade, motor vehicles, gas appliances and pressure vessels, measuring instruments, electrical and radio equipment, medicinal products and medical devices, chemicals (including REACH), pesticides, biocides, waste, environment, energy efficiency, food, GMOs, live animal transport and slaughter, animal disease control, plant health, veterinary checks, marketing of fisheries and aquaculture products, pet travel, trade in wild animals and plants, and fur products.

The Government Explainer states that these are only the rules that are strictly necessary to avoid a hard border and protect North-South cooperation:

Northern Ireland will also apply a limited amount of EU law which includes relevant regulatory requirements for the movement of goods. The list of which regulations are included within the scope of this commitment is set out in Annex 5.

Only rules that are strictly necessary to avoid a hard border and protect North-South cooperation have been included in Annex 5. They constitute a small fraction of the single market rules that currently apply to the UK, representing a significant increase in the areas over which the UK Parliament or devolved institutions in Northern Ireland will be free to legislate.<sup>209</sup>

More specifically in relation to animals, fisheries and agriculture, the Government Explainer also notes that "the majority of animal welfare regulations and wider Single Market regulations, such as the Common Agricultural Policy and Common Fisheries Policy, are excluded from the Annex".<sup>210</sup> For clarity, EU Regulations relating to the marketing of fish products which fall under the CFP are covered by the Annex.<sup>211</sup>

Under this Annex, Northern Ireland will continue to adhere to EU SPS rules on imports of animals/animal products from non-EU countries that are in place to protect health and limit the spread of diseases. The Government's Explainer notes that this means "products of animal origin or live animals moving between Northern Ireland and Ireland will not have to undergo SPS checks and controls".<sup>212</sup>

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<sup>208</sup> HMG Explainer on WA p47. See also "Will Northern Ireland remain part of the UK's VAT area?" in EC, [Protocol on Ireland and Northern Ireland – Fact Sheet](#), 14 November 2018

<sup>209</sup> HMG Explainer, paras 192-193

<sup>210</sup> HMG Explainer, para 194

<sup>211</sup> See Annex 5, heading 46: Fisheries and aquaculture

<sup>212</sup> HMG Explainer, para 194

Northern Ireland is part of the 'single epidemiological unit' of the island of Ireland, geographically separate from Great Britain, so animals/animal products moving from GB into Northern Ireland are already subject to some SPS checks.<sup>213</sup> However, these checks will need to be scaled up, reflecting the fact that a different regulatory regime would apply in Northern Ireland than in the rest of the UK.<sup>214</sup> (See Karen Bradley's oral evidence to the Northern Ireland Affairs Committee).

The DUP finds such checks unacceptable. DUP Leader Arlene Foster said in October 2018 that current checks such as those on animal health are there "for a very good reason, and are obviously something that will continue", but:

new added burdens between Northern Ireland and Great Britain are something that will make us less competitive and will cause difficulties for our economic well-being and that's something we cannot countenance, never mind the constitutional position as well.<sup>215</sup>

The Annex also sets out that the main pieces of EU medicines legislation relating to medicinal products, medical devices, substances of human origin and clinical trials will continue to apply in Northern Ireland.<sup>216</sup> However, there are some restrictions on this. For example, medicinal products require marketing authorisations to be sold under EU legislation. The Annex states that a medicinal product granted a marketing authorisation in Northern Ireland (presumably via the UK's MHRA) would not be considered an authorised product for sale in the EU.<sup>217</sup>

## Single electricity market

**Article 11** of the Protocol relates to the Single Electricity Market. The island of Ireland operates a Single Electricity Market (SEM) which allows free trade of power across the island. A new Integrated Single Electricity Market (I-SEM), designed closely around the rules of the EU's Internal Energy Market, was launched in 2018. There have been concerns that regulatory divergence between the UK and EU electricity markets could be problematic for the continued functioning of the I-SEM. Further information is available in Library briefing paper 8394 on [Brexit: Energy and Climate Change](#); Ireland is covered in Section 4.

**Article 11** states that EU law governing wholesale electricity markets listed in Annex 7 will continue to apply. These regulations are necessary for the continued operation of the SEM.

The legislation set out in **Annex 7** applies in relation to generation, transportation and wholesale and cross-border trading of electricity, but not retail markets or consumer protection. The legislation includes the

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<sup>213</sup> Department for Agriculture, Environment and Rural Affairs, NI, online guidance on [Importing animals and animal products](#) [accessed 20 November 2018]

<sup>214</sup> European Commission, [Fact Sheet on Irish Protocol](#), 14 November 2018

<sup>215</sup> *BBC News*, [DUP won't accept Brexit Irish Sea checks](#), 2 October 2018

<sup>216</sup> See Annex 5, heading 20: medicinal products, heading 21: medical devices and heading 22: substances of human origin

<sup>217</sup> For more information see [Health and Social Care Committee Special Advisers' comment on the EU-UK Draft Agreement](#)

rules for the internal electricity market, the Directive that established the Agency for the Cooperation of Energy Regulators (ACER, which combined with the European Network Transmission Systems Operators, determines the rules of the market), the industrial emission Directive on pollution prevention and control, and the Directive establishing the EU emissions trading scheme.

As mentioned above in relation to Part 2 of Annex 4 (environmental protection), it is not clear how any overlap of the above regimes with the level playing field provisions of Annex 4 (which apply to the whole of the UK) would be addressed, for example, in respect of relevant operators in Northern Ireland that would remain subject to the EU ETS Directive under this Annex. Whether such operators would also be required to take part in the (separate) UK-wide system of carbon pricing under Annex 4, Article 2(5) or require an exemption from such a system, is not clearly set out in the Annexes. This situation may be clarified as detailed proposals for commitments in the Protocol are developed.

## 8.7 State Aid

Articles covering state aid are a part of the commitments to a 'level playing field' for trade between the UK and the EU and are particularly strong. In order to prevent undue distortion of competition and trade, EU state aid law will continue to apply to Northern Ireland and the rest of the UK if the backstop is activated. A Commission factsheet summarises the UK's commitment on state aid as "dynamic alignment":

The United Kingdom has committed to apply EU state aid rules, in a way that is dynamically aligned to the development of those rules in the EU.<sup>218</sup>

The Protocol contains differences in the enforcement of EU state aid law specific to Northern Ireland.

**Article 12** refers to state aid in Northern Ireland. When state aid granted by UK authorities will affect trade flows between Northern Ireland and the EU, the Commission will retain authority to directly enforce EU state aid law.

EU state aid law will also apply to UK aid measures affecting trade between (the rest of) the UK and the EU (**Articles 7-15 of Annex 4**); but here, state aid regulations will be directly enforced by an operationally independent UK authority (**Article 9 of Annex 4**). This authority will fulfil the same role as the Commission under EU state aid law and will be "free from political or other external influences".

The EU state aid provisions applicable under the Protocol are listed in **Annex 8** and cover effectively the whole body of EU state aid regulations.

### State aid for agriculture

**Article 12** specifies that the provisions of EU state aid law listed in Annex 8 to the Protocol will apply to "measures supporting the

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<sup>218</sup> European Commission, [Fact Sheet Irish Protocol](#), 14 November 2018

production of and trade in agricultural products” in Northern Ireland, where these measures affect trade between NI and the EU. The state aid laws listed in that Annex aim to prevent undue distortions of trade and competition. However, Article 12 states that the rules will not apply:

With respect to measures taken by the United Kingdom authorities supporting the production of and trade in agricultural products in Northern Ireland up to a determined maximum overall annual level of support, and provided that a determined minimum percentage of that exempted support complies with the provisions of Annex 2 to the WTO Agreement on Agriculture.<sup>219</sup>

The maximum exempted overall annual level of support and the minimum percentage shall be set by the Joint Committee according to procedures described in **Annex 9**.

**Article 7 of Annex 4** covers the application of state aid law in the whole of the UK customs territory, includes a similar exemption for agricultural support schemes and refers to setting the levels of support by the Joint Committee.

The Protocol includes enforcement measures. **Article 12** gives powers to the European Commission to continue to enforce state aid affecting trade between NI and the EU, as today. **Annex 4, Article 7** applies to the whole UK customs territory – the new UK independent authority will have the same enforcement functions as the EU Commission, working closely with the Commission.

**Annex 4** sets out detailed arrangements for setting the level of exemptions. Article 8 specifies that the Joint Committee must set the initial exempted levels with reference to “the design of the United Kingdom’s future agricultural support scheme as well as by the annual average of the total amount of expenditure in the UK customs territory” under the 2014-20 CAP. The minimum percentage required to comply with WTO Annex 2 rules is to be informed by the UK support scheme, as well as by how much of the EU CAP expenditure complied with Annex 2 in the period concerned. These levels are to be adjusted in line with any changes in the EU budget for CAP after 2020.

### **Independent state aid authority**

As mentioned above, under **Article 9 of Annex 4**, the UK will establish an independent state aid authority. Its powers with respect to application and enforcement of state aid law will be equivalent to those of the EC and its decisions in the UK will have the same legal effect as Commission decisions in the EU. The UK Government has said that after leaving the EU the Competition and Markets Authority (CMA) will become the UKs independent state aid regulator.<sup>220</sup>

**Article 12(3)** provides that the Commission and the independent authority will establish and review the administrative arrangements

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<sup>219</sup> WTO Agreement on Agriculture Annex 2. This covers agricultural and rural support expenditure and excludes direct payments. Annex 2 payments are ‘green box’ as they may not distort trade or be only minimally trade distorting. See WTO guide, [Domestic support in Agriculture: The Boxes](#).

<sup>220</sup> HMG, [CMA's role after Brexit](#), 30 October 2018

necessary to the proper implementation of state aid regulations as agreed in the Protocol.

The independent authority and the Commission will extensively cooperate to ensure “consistent surveillance” as set out in **Article 10, Annex 4**. The arrangements involve, for example, exchanges of information on a case-by-case basis. Before taking any formal decision on state aid, the independent authority will consult the Commission and “shall take utmost account of that opinion” (Article 10, Annex 4).

**Article 15 of Annex 4** deals with the coordination of powers between the independent authority and the Commission. The powers of the independent authority are “without prejudice to the European Commission’s powers” under **Article 14(4)** as regards state aid in Northern Ireland referred to in Article 12. [see also section on implementation, application, supervision and enforcement (Article 14)].

### Courts and tribunals

**Article 11 of Annex 4** specifies the competences of UK courts and tribunals with respect to state aid. UK courts will review and enforce compliance with state aid law by UK authorities and supervise the independent authority. At the same time, the Commission will have legal standing before UK courts and the right to intervene in state aid cases.

The CJEU will maintain its jurisdiction, particularly over the interpretation of EU state aid law and state aid decisions of the European Commission (Article 14(4)). According to *Global Competition Review*, UK courts do not often refer questions regarding the interpretation of EU state aid rules to the CJEU, as they generally consider themselves capable of resolving state aid issues directly. This is due to the available volume of national and EU case law and direct legislation.<sup>221</sup>

### Consultations on disagreement

**Articles 13-14 of Annex 4** cover consultation procedures within the Joint Committee in case of disagreement between the UK and the EU regarding the state aid provisions in the Protocol. If no solution can be found to a dispute, the EU will be able to take interim measures. Unresolved conflicts may be submitted to arbitration in accordance with Article 170 of the Withdrawal Agreement.

### Commentary

The Institute for Government highlights the powers the UK has given to the Commission in the field of state aid under the Irish Protocol, and the provision for the Commission to bring cases to UK courts, which is an unusual feature in international agreements:

The UK has conceded a strong role for the Commission and the ECJ in Northern Ireland and given the Commission wide-ranging rights to ask for information and intervene in the way UK enforcement bodies are acting. Most notably in the area of state

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<sup>221</sup> Global Competition Review, an antitrust and competition law news service, [Global Competition Review on State aid](#), September 2018

aid, the Commission can bring legal cases to UK courts – which is not usually a feature of international agreements.<sup>222</sup>

## 8.8 North-South co-operation

The text on North-South co-operation is largely unchanged from the March draft WA. **Article 13** sets out that the Protocol should be implemented to ensure North-South co-operation continues and lists 13 areas where this co-operation should occur:

environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport.

All these areas, apart from sport, telecommunications and broadcasting, are suggested areas of co-operation for the North-South Ministerial Committee in the Good Friday Agreement.<sup>223</sup>

As part of the withdrawal negotiations, officials from the EU and the UK conducted a 'mapping exercise' to identify what areas of North-South cooperation relied on the application of EU law. It was scoped to look at just six areas: environment, health, agriculture, transport, education and tourism, not the full 13 listed in the Protocol.<sup>224</sup> Reports suggest it found 142 cross-border activities that would be affected by changes to EU law.<sup>225</sup>

The December 2017 [Joint Report](#) (paragraph 47) referred to the mapping exercise, saying it:

[s]hows that North-South cooperation relies to a significant extent on a common European Union legal and policy framework. Therefore, the United Kingdom's departure from the European Union gives rise to substantial challenges to the maintenance and development of North-South cooperation.

The mapping exercise is also referenced in the Preamble to the Protocol but it has never been published. European Commission and UK officials argued that the sensitivity of the negotiations on the Irish border meant it could not be put in the public domain. The EU Ombudsman, Emily O'Reilly, has called on the Commission to publish the document now that the negotiations have concluded, saying there is "no obvious reason for the [mapping] table not to be published".<sup>226</sup>

**Article 13** makes clear that the UK and Ireland can, within the constraints of EU law, continue to build upon the North-South cooperation that is provided for in the Good Friday Agreement.

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<sup>222</sup> Institute for Government, [The Northern Ireland and Ireland Protocol](#), 19 November 2018

<sup>223</sup> See the Annex to Strand Two of the Multi-Party agreement of the [Belfast Agreement](#). Urban and rural development; social security & welfare; and aquaculture and marine matters are mentioned in this Annex as possible areas of co-operation but are not mentioned in the Protocol.

<sup>224</sup> *The Guardian*, [Hard Brexit would hit 142 Irish cross-border agreements](#), 27 November 2017

<sup>225</sup> *Ibid*

<sup>226</sup> *RTE*, [EU Ombudsman calls for publication of key Brexit report on Northern Ireland](#), 19 November 2018.

The Article also provides roles for the Joint Committee. It will monitor the “necessary conditions for North-South cooperation” and can recommend specific measures to the EU and UK on maintaining these. However, beyond making recommendations to the EU and UK, the Joint Committee is not endowed with any specific powers to enforce them.

## 8.9 Supervision, enforcement and common provisions

**Article 14** sets out how the Protocol will be enforced, including the role of the CJEU in enforcing and interpreting EU laws that will operate in Northern Ireland and, in the case of the level-playing field and the customs code, UK-wide.

### Supervision and control measures

UK authorities are responsible for implementing and applying the provisions of EU law applicable to Northern Ireland by the Protocol.

**Article 14(2)** grants EU officials a power to monitor how the UK authorities are implementing EU regulations that will apply during the backstop. The Government will be obliged to comply with requests from EU representatives for information, and to facilitate their presence if they request that also. It also grants the EU a power to instruct UK authorities to carry out “control measures in individual cases for duly stated reasons”. While the text does not define what ‘control measures’ are or refer to any regulations that might define them, the context implies they refer to enforcement checks to the areas of law that EU representatives play a role in, including customs controls, VAT (presumably measures to combat fraud), state aid, agricultural and environmental regulations. The Government’s legal position paper gives an example of what these measures may target: a “contaminated consignment identified through risk management and intelligence”.<sup>227</sup>

The practical arrangements for how all the aspects of **Article 14(2)** will operate will be determined by the Joint Committee on a proposal of the Specialised Committee.<sup>228</sup>

The powers required to put these arrangements into effect will probably require domestic legislation. The most likely vehicle would be the EU (Withdrawal Agreement) Bill. However, as the precise details are to be determined by the Committees, these powers may be provided by delegated legislation (e.g. powers granted to Ministers to make statutory instruments). Much of the statutory basis for the Protocol may take the form of delegated legislation, as most of the Protocol’s provisions may never come into effect. If the Protocol does come into force, this will not be until at least January 2021, which could make Parliamentary scrutiny of the Protocol’s legislative framework more difficult.

<sup>227</sup> HM Government, ‘EU Exit: Legal position on the Withdrawal Agreement’, [CM 9747](#), December 2018, p 38.

<sup>228</sup> This provision (**Article 14(3)**) comes into force from exit day, so the rules will be decided before the Protocol comes into operation (if it does).

The EU may also have a view as to how the Protocol is legislated for and may want to be reassured that it cannot be 'unpicked' or easily altered at a future date.

### **Single Market regulations**

**Article 14(4) and (5)** set out the role of the EU institutions and bodies in overseeing the Northern Ireland-specific Single Market regulations. EU institutions will exercise their oversight with respect to the Union Customs Code and other regulations on customs and trade, certification and assessment of goods placed on the market, VAT and excise on goods, rules for agricultural goods, including SPS, agricultural production and marketing, as well as environmental standards. EU institutions will also have powers regarding the working of the single electricity market on the island of Ireland.

EU state aid rules under the backstop will be applied UK-wide. For Northern Ireland the competences of the Commission and the CJEU in this area of law will apply. For the rest of the UK, the UK will establish an independent authority to oversee its application, and the Commission will retain the ability to be kept informed and to intervene.

However, as the functions of the independent UK state aid authority in the UK will be equivalent to those of the Commission in Northern Ireland (Article 9, Annex 4), it follows that the main focus of the Commission will be state aid in Northern Ireland. **Article 15 of Annex 4** points to the complexity of the coordination needed between both authorities in case a state aid measure, such as a tax relief or grant scheme, is available to businesses in Northern Ireland as well as in GB.

The powers of the Commission and other EU institutions with respect to EU legislation covered by Article 14(4) and (5) will be similar to their current competences under EU law in relation to the UK and natural and legal persons residing or established in the territory of the UK. Their acts will have an effect in the UK as if it was an EU Member State.

The CJEU will have jurisdiction in these areas of law, as within the EU. In particular, UK courts will be able to refer cases to the CJEU asking it to interpret EU law. The main purpose of this is to ensure that EU law with respect to Northern Ireland is interpreted the same way as in the EU.

### **Common provisions**

#### **Definition of the Customs territory**

**Article 15(1)** is an example of the how the status of Northern Ireland is 'blurred' in the Protocol. The paragraph sets out how Northern Ireland relates to the customs territory of the EU:

Any reference in the applicable provisions of the Withdrawal Agreement and of this Protocol, as well as in the provisions of Union law made applicable to and in the United Kingdom in respect of Northern Ireland by this Protocol, to the territory defined in Article 4 of Regulation (EU) No 952/2013 shall be read as including the part of the territory of the United Kingdom to which Regulation (EU) No 952/2013 applies by virtue of Article 6(2) of this Protocol.

Article 4 of Regulation (EU) No 952/2013, is the part of the EU's customs code that defines its customs territory – it lists all the current Member States.

**Article 6(2)** of the Protocol applies to EU customs legislation (including the Customs Code) to the “United Kingdom in respect of Northern Ireland”, or more simply, Northern Ireland only.

Putting these two provisions together means, in effect, that Northern Ireland will be treated in many respects *as if it were* part of the customs territory of the EU. It is not technically part of the EU's customs territory, as it “applies by virtue of” **Article 6(2)** of the Protocol.

**Article 6(1)**, as previously mentioned, states that

Until the future relationship becomes applicable, a single customs territory between the Union and the United Kingdom shall be established (“the single customs territory”). **Accordingly, Northern Ireland is in the same customs territory as Great Britain.**

The single customs territory shall comprise:

- (a) the customs territory of the Union defined in Article 4 of Regulation (EU) No 952/2013; and
- (b) the customs territory of the United Kingdom.

**Article 6(1)** could be read as saying Northern Ireland is part of the UK customs territory by virtue of being in the EU customs territory, that together forms a single customs territory. However, it could also be read that as Northern Ireland is an integral part of the United Kingdom, and by virtue of that status Northern Ireland is part of the customs territory of the UK.

The Attorney General, Geoffrey Cox, is of the former opinion, and in his legal advice to the Cabinet on the Protocol states “NI remains in the EU's Customs Union”, and

GB is in a separate customs union with the EU creating a single customs territory between the EU and the UK, meaning NI and GB are not in separate customs territories.<sup>229</sup>

Some commentators have applied the term ‘Schrödinger customs territory’, i.e. it has more than one state, that corresponds to different readings, or outcomes.

This legal duality should allow Northern Ireland privileges that won't be applied to Great Britain. If the Protocol is in force, for the purposes of trade with the EU-27 and for existing (or new) EU free trade agreements, Northern Ireland will be treated as if part of the EU. This is because the definition of EU customs legislation applicable to Northern Ireland includes “international agreements containing customs provisions, insofar as they are applicable in the Union”.<sup>230</sup>

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<sup>229</sup> Attorney General's Office, '[Legal effect of the Protocol on Ireland/Northern Ireland](#)', 13 November 2018.

<sup>230</sup> [Regulation \(EU\) 952/2013](#), Article 5(2)(d).

### Updating EU acts

**Article 14(4)** ensures that where the Protocol makes a reference to an EU law, it will continue to apply if it is amended or replaced - making this a 'dynamic' rather than 'a stand-still' arrangement.

**Article 14(5)** also makes provision for new EU acts that "fall within the scope of this Protocol, but neither amends nor replaces a Union act listed in the Annexes to this Protocol". The process will be:

- The EU will inform the Joint Committee that a new act has been adopted;
- The EU or UK can request that the JC hold "an exchange of views" on the implications of the new act within six weeks of the request;
- As "soon as reasonably practical" the JC shall either:
  - Adopt a decision to add the new act to the Protocol; **or**
  - Where agreement cannot be reached "examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect".
- If the JC has not taken a decision "within a reasonable time", the EU will be entitled, after giving notice, to "take appropriate remedial measures".

While there is no definition of how soon "within a reasonable time" may be judged by the EU, these remedial measures cannot take effect "at the earliest 6 months" after the EU has informed the UK, as per the first step, and any such measures cannot take place "earlier than the act is implemented" in the EU.

There is no definition of the scale of these remedial measures, beyond what is considered "appropriate".

If the Protocol only comes into force for a limited period of time before a future relationship agreement replaces it, then there should be limited scope for these measures ever to be enacted.

Should the EU and the UK disagree on the processes set out in **Article 14(5)**, they can make use of the arbitration process.

**Article 14(6)** regulates how the UK can access the EU's data, networks, databases and information systems under the Protocol. It sets out that such access will be by exception – i.e. it will only be allowed if "strictly necessary to enable the United Kingdom to comply with its obligations under this Protocol".

## 8.10 Governance

### Specialised Committee

The Specialised Committee under **Article 16** governing the implementation of the Protocol is one of six specialised committees established by the WA. Their remits are set out in Article 165 (see Part

Six on Institutional Provisions). They sit below the Joint Committee, but the UK or the EU can refer matters directly to the Joint Committee.

The Specialised Committee comes into being from exit day, in preparation for the Protocol.

Beyond general powers of “facilitating the implementation and application of the Protocol”, discussing matters and making recommendations to the Joint Committee, there are two specific roles the Specialised Committee will oversee. The first was already provided for in the March WA – to:

- examine proposals concerning the implementation and application of this Protocol from the North-South Ministerial Council and North-South Implementation bodies set up under the 1998 Agreement;

The second is a new role, which will be part of the ‘dedicated mechanism’ referred to in Article 4 on individual rights:

- consider any matter of relevance to Article 4 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland;

**Article 16** does not, however, give the Specialised Committee any specific enabling powers to enforce any solutions. It will rely on escalating matters to the Joint Committee for action to be taken.

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

### Joint consultative working group

The Joint Consultative Working Group in **Article 17** is a new addition to the WA. It creates a third tier of governance under the two tiers that were already provided for: the Specialised Committee, which the Working Group will report to, and the Joint Committee.

The Working Group’s main function will be as a forum for sharing information and mutual consultation. The Working Group comes into being on exit day, but the provision that it meet “at least once a month” does not come into force until the Protocol is enacted.

As the Specialised Committee and the Joint Committee must only meet “at least once a year” (Articles 164 and 165), the Working Group’s monthly schedule suggests it will be the main forum for discussing the functioning of the Protocol. However, the Working Group can make no binding decisions on matters before it; these will have to be escalated to the other Committees.

**Annex VIII (of the main Agreement)** establishes the rules of procedure for the Specialised Committees. They can choose to make public their agendas and a summary of the minutes. Both the EU and the UK can choose whether to publish the decisions and

recommendations of the Committees. The type of work the Working Group will undertake suggests it will be staffed by civil servants rather than Ministers.

Parliamentary scrutiny of the Working Group and Specialised Committee will depend in part on which Government Department will lead the work of these institutions.

The Northern Ireland Executive and Assembly may, through the North-South Ministerial Council, refer matters to the Specialised Committee, but there is no requirement in the Protocol for these institutions to be kept informed of their work.

## Safeguards

**Article 18** deals with ‘safeguards’. These are measures which may be taken unilaterally by either the UK or EU if the application of the Protocol leads to “serious economic, societal, or environmental difficulties liable to persist”. There are strict conditions on the use of such measures and the other party is permitted to take proportionate rebalancing steps. The Government’s Explainer says “[t]hese provisions are common in international obligations and are rarely used”.<sup>231</sup>

There was a broadly similar Article in the draft WA. The text of Article 18 is very similar to Articles 112-114 of the EEA Agreement. This framework does not, however:

- establish more specifically how ‘difficulties’ or ‘diversion’ are to be measured, or thresholds of significance; or
- establish the types of measures that may and may not be taken.

Joint Committee involvement will therefore be crucial to navigating this and making progress, although it is unlikely that safeguarding measures will have to be used.

## Protection of financial interests

**Article 19** requires the EU and UK to counter fraud and any other illegal activities which affect their financial interests. There was a similar Article in the draft WA but this was limited to the protection of the financial interests of the EU and Northern Ireland only.

The UK Government Explainer makes clear that any disputes after transition will be referred to the arbitration panel:

In the case of any disputes concerning either the obligation to use best endeavours to agree a future relationship that supersedes the Protocol, or the obligation to review whether the Protocol remains necessary in the light of its objectives, the dispute resolution process agreed as part of the Withdrawal Agreement will apply. This means that after the implementation period, dispute would be resolved by an independent arbitration panel.

## Review

For comment on **Article 20**, see section 8(2) on ‘exiting the backstop’.

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<sup>231</sup> HM Government [Explainer](#), para 223

## 9. Protocols on UK Sovereign Base Areas in Cyprus and Gibraltar

### 9.1 Protocol relating to Sovereign Base Areas in Cyprus



Source: SBA Administration [website](#), map showing 'Green Line', SBAs and retained sites (in red)

Cyprus was ceded to the British Empire by the Ottoman Empire in 1878, originally as a protectorate, in return for British support for the Ottoman Empire against Russian encroachments. It was redefined as a military occupied area in 1914 and as a Crown Colony from 1925. When Cyprus became independent in 1960 the UK retained the two main military bases of Akrotiri (the 'Western Sovereign Base Area') and Dhekelia (the 'Eastern Sovereign Base Area') and surrounding land as Sovereign Bases and Overseas Territories of the UK. They were recognised as such by Cyprus, Greece and Turkey in the [Treaty of Guarantee](#).

The island of Cyprus has been divided since 1974 by a United Nations buffer zone, which forms the ceasefire line known as the 'Green Line' (see area marked green on map above). The UK Government and all other countries except Turkey recognise only the Government of the Republic of Cyprus (mostly referred to as 'Cyprus' in this paper), which administers the southern two-thirds of the island, but not the Turkish Republic of Northern Cyprus ('Northern Cyprus' in this paper).

The Buffer Zone - also called 'the Green Line' - extends approximately 180 km across the island. In some parts of old Nicosia it is only a few meters wide, while in other areas it is a few kilometres wide. Its northern and southern limits are the lines where the belligerents stood following the ceasefire of 16 August 1974, as recorded by UNFICYP.

In the eastern part of the island, the Buffer Zone is interrupted by the British Sovereign Base Area of Dhekelia, where the UN does not operate.<sup>232</sup>

The UK agreed to use the bases only for military purposes and not to install customs posts around them. This meant that although day to day mechanisms for administration were agreed directly between the UK Ministry of Defence and the Government of Cyprus, the arrangements needed to be formalised and amended in international law when first the UK and then Cyprus joined the EU (Cyprus joined in 2004).

The two UK bases together cover 98 square miles (about 3% of the area of the island). The UK Government does not own most of the land. About 60% is privately owned, with some 20% owned or leased by the MOD and the remaining 20% Crown land held by the Administration.<sup>233</sup> The original 1960 boundaries largely excluded towns and villages, but as a result of events in 1974 and other developments over the years, around 10,000 Cypriots now live in the SBAs,<sup>234</sup> most of whom work at the bases or provide goods and services to them.

In addition to the Sovereign Bases, the *Treaty of Guarantee* also provided for the UK's continued use of certain facilities in Cyprus known as 'Retained Sites', and for the use of specified training areas in Cyprus.

### **Current arrangements for UK bases in Cyprus**

The current legal base for the economic administration of the UK's Sovereign Base Areas (SBAs) in Cyprus is [Protocol 3](#) attached to Cyprus's 2003 Treaty of Accession to the EU. The current mechanism, contained in Article 6 of the 2003 Protocol, assumes that both the UK and Cyprus are members of the EU and that the Council of the EU has the power to amend the detailed provisions.

The 2003 Protocol does not contain a set of 'objectives' as such, but its Preamble notes that "one of the main objects to be achieved is the protection of the interests of those resident or working in the Sovereign Base Areas, and considering in this context that the said persons should have, to the extent possible, the same treatment as those resident or working in the Republic of Cyprus". It also notes the UK's "commitment"

... not to create customs posts or other frontier barriers between the Sovereign Base Areas and the Republic of Cyprus and the arrangements made pursuant to the [Treaty of Establishment](#) whereby the authorities of the Republic of Cyprus administer a wide range of public services in the Sovereign Base Areas, including in the fields of agriculture, customs and taxation.

The whole of Cyprus is in the EU but in the northern part of the island, EU legislation is suspended in line with [Protocol 10 to the 2003 Act of Accession](#). The 'Green Line' separating the two parts of the island is not an external border of the EU. [Council Regulation \(EC\) No 866/2004](#) of 29 April 2004 (the 'Green Line Regulation') sets out a regime under

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<sup>232</sup> [UN Peacekeeping Force in Cyprus](#) (UNFICYP)

<sup>233</sup> Sovereign Base Areas Administration, [background](#)

<sup>234</sup> According to the MOD there are approximately 7,000 Cypriot residents, around 3,000 UK service personnel and around 3,500 dependants of service personnel.

Article 2 of Protocol 10 to the Cyprus Act of Accession in which, although the EU *acquis* are suspended in Northern Cyprus, there are rules governing border checks and the movement of people, animals and goods from Northern Cyprus into Cyprus. The Regulation establishes in Article 11 a review and monitoring mechanism involving an annual report from the Commission to the Council on the implementation of the Regulation.



Source: [Wikimedia Commons](#)

Since April 2003 several crossing points have opened up between the north and south (most recently on 12 November), including two in the SBAs at Pergamos and Strovilia.

The Eastern SBA, Dhekelia, borders both the Republic of Cyprus and Northern Cyprus and crosses the UN buffer zone. There are two land boundary crossing points between the SBA and Northern Cyprus.<sup>235</sup> The SBAs have a maritime boundary with the Republic of Cyprus, Lebanon and Egypt.

### Earlier draft WA guarantees

The Brexit negotiators aimed to preserve the unique situation of the SBAs in Cyprus as guaranteed in the 1960 *Treaty of Establishment* and *Treaty of Guarantee* at the end of the transition period.

In October 2017 the UK and Cyprus began bilateral negotiations to resolve the issues posed by Brexit, but the December 2017 EU-UK Joint Report did not refer to Cyprus. The Commission's March 2018 draft WA included an incomplete draft protocol on the SBAs, the aim of which was to "ensure the proper implementation of the applicable Union law in relation to the Sovereign Base Areas in Cyprus following the withdrawal of the United Kingdom from the Union".

There has been general agreement between all the parties that the status of the UK bases should not be materially altered by Brexit. The

<sup>235</sup> See SBA Customs and Immigration, [SBA Administration](#).

main issues were the detailed mechanisms for guaranteeing this, for which a placeholder was left in the March draft WA to “ensure the proper implementation of the applicable Union law in relation to the Sovereign Base Areas in Cyprus” after Brexit. There were no public updates or statements about the negotiations on this protocol from either negotiating party before the 19 June 2018 Joint Statement, in which the EU and UK committed to establishing appropriate arrangements for the SBAs “in particular with the aim to protect the interests of Cypriots who live and work in the SBAs following the UK’s withdrawal from the Union, in full respect of the rights and obligations under the Treaty of Establishment”.

## The Protocol

The [Protocol](#) on the SBAs largely enables the continuity, from the end of the transition period, of existing agreements in and around the SBAs. The implementation and application of Protocol provisions based on EU law will be interpreted according to relevant CJEU case law (**Article 1**).

There are provisions concerning EU data protection laws and UK access in certain circumstances relevant to the SBAs to a network, information system or database established under EU law (**Article 1.5**).

Cyprus and the UK will cooperate in ensuring the implementation of the Protocol and Cyprus will be responsible for implementing and enforcing EU law in the SBAs, including EU law on turnover taxes, excise duties and other forms of indirect taxation, and the collection of duties and taxes payable by people living in the SBAs (**Article 3**).

The SBAs will remain in the EU customs territory after Brexit and EU law on customs and the Common Commercial Policy will apply to and in the SBAs (**Article 2**). Cyprus will be responsible for implementation and enforcement of EU law in relation to goods destined for or originating in the SBAs that enter or leave through a seaport or airport in Cyprus, including customs formalities, controls and the collection of import duties (**Article 2**). There are exceptions to this in **Article 2.6** for military goods and the personal goods of UK military personnel, for example, the checking of which will be done by the SBA authorities. Incoming British Forces Post Office parcels will be checked by the Cyprus authorities, while outgoing parcels from UK personnel will be checked by the SBAs. The UK and Cyprus authorities will cooperate to tackle tax evasion and smuggling (**Article 2.6**).

There are detailed arrangements for checks required by EU law of goods and persons crossing the external borders of the SBAs (the sea boundaries and the airports and seaports of the SBAs, but not their land and sea boundaries with Cyprus (**Article 7**)) and for goods coming from Northern Cyprus, including veterinary, phytosanitary and food safety checks (**Articles 2.8 and 6**).

Arrangements are made regarding the relief and exemptions from duties and taxes that UK Armed Forces and associated personnel can maintain after Brexit (e.g. goods or services imported for use by UK military or civilian staff or for supplying their canteens, **Article 4**).

Any duties that may be collected by the SBAs will be remitted to the Cyprus authorities (**Article 4**).

The UK and Cyprus Governments will ensure the continued protection of the social security rights of people resident or employed in the SBAs (**Article 5**).

EU law on agriculture and fisheries, veterinary and phytosanitary rules will apply to and in the SBAs, and Cyprus will be responsible for their implementation and enforcement (**Article 6**). This largely continues current practice.

The UK checks on persons crossing the external borders of the SBAs at authorised 'crossing points' will include travel documents to establish identity or a visa if required (**Article 7**). There will be conditions for third country and certain UK nationals (e.g. possession of valid travel document, engagement with a defence-related activity, not posing a security threat to Cyprus). The UK and Cyprus authorities will continue to cooperate in dealing fairly and justly with would-be asylum seekers and illegal immigrants who enter Cyprus via an SBA (**Article 7.4**). They will also cooperate in countering fraud and other illegal activities affecting the EU's finances (**Article 8**).

**Article 7** defines where the external boundaries and crossing points lie on the Green Line between the Republic of Cyprus, the SBAs and Northern Cyprus and who will be responsible for surveillance. There will be no checks on persons at the land and sea boundaries between the SBAs and Cyprus (**Article 7.5**). The UK will conduct out-of-hours external border surveillance at SBA borders and crossing points in "constant close cooperation" with the Cyprus authorities.

The Green Line Regulation provides for the operation of the Line, including special provision for the boundary between the Dhekelia SBA and Northern Cyprus (**Article 7.6**). The Regulation will only be amendable by the Joint Committee on a recommendation by a Specialist Committee which will oversee the application of the Protocol.

**Article 9** sets out a mechanism for ensuring the implementation and application of the Protocol. A Specialised Committee under Article 165 of the WA will discuss any difficulties in implementation raised by the UK and make recommendations to the Joint Committee set up under Article 164 of the WA. **Article 10** sets out what the Joint Committee will do: on a recommendation from the Specialised Committee, amend any references to EU law in the Protocol; take decisions to replace EU law if necessary, and make amending provisions on crossing points.

Although during the transition period EU law will be applicable in the UK, Article 6 of Protocol 3 to the Cyprus Accession Treaty, by which the Council can amend Protocol provisions, will not apply to the SBAs (**Article 11**). **Article 12** provides that the CJEU will have jurisdiction in respect of EU law applicable to the SBAs.

The UK will be responsible for implementing and enforcing the Protocol in the SBAs, particularly in respect of UK authorities, MOD property and

coercive enforcement power, and will enact the relevant domestic legislation to this effect (**Article 13**).

Cyprus will be responsible for implementing and enforcing the Protocol in the SBAs with regard to Article 2.10 (prohibition of quantitative restrictions between Member States), Article 3 (taxation) and Article 6 (agriculture, fisheries and veterinary and phytosanitary rules).

### Reaction in Cyprus

In a statement on the WA and Cyprus protocol, Cypriot President Nicos Anastasiades expressed his “complete satisfaction with the final result”, which he said ensured the “uninterrupted continuation of the implementation of the European acquis in the Sovereign Base Areas, in the specific areas provided for in Protocol 3 of the Act of Accession of Cyprus to the EU”.<sup>236</sup> He continued:

I am absolutely convinced that the arrangements that have been agreed in principle in the new protocol fully safeguards the legal rights and interests of both Cypriot and EU citizens living and working in the Sovereign Base Areas and the Republic of Cyprus itself, with continuation of the acquis in the British Bases, which from the outset was the primary objective of the government.

## 9.2 Protocol on Gibraltar

### Background

#### Map of Gibraltar and surrounding areas



Source: [Googlemaps](https://www.google.com/maps). Map data ©Google, Inst. Geogr. Nacional United Kingdom

Gibraltar is a largely self-governing Overseas Territory of the UK which joined the EU in 1973 as an external European territory of the UK. The UK is responsible for Gibraltar's external relations and EU law is

<sup>236</sup> *Cyprus Mail online*, [EU rights of Cypriots on British bases secured under Brexit deal](https://www.cyprusmail.com.cy/news/2018/11/15/eu-rights-of-cypriots-on-british-bases-secured-under-brexit-deal/), 15 November 2018

applicable to Gibraltar to the extent provided in the 1972 Act of Accession by virtue of [Article 355\(3\) TFEU](#) on the territorial scope of the Treaties.

Brexit will mean the border between Gibraltar and Spain, like that between the Ireland and Northern Ireland, will become a border between the EU and a non-EU territory. There are major differences, however, between the Gibraltar and Northern Ireland situations. Gibraltar is not in the EU customs union, so goods imported and exported are already subject to a tariff. The freedoms of the Single Market generally apply at the Spain-Gibraltar border, but exemptions are in place for certain goods and Spain is entitled to (and does) carry out customs checks on goods and checks on people crossing the Gibraltar-Spain border.

In the EU referendum 96% of Gibraltarians voted to stay in the EU (with a turnout of 84%). Their main concerns about leaving the EU have included fears of an escalation in disruptive action from Spain, the protection of citizens' rights and the risk of damage to the economy (which is largely based on services, including banking, insurance and online gambling). Another priority during the negotiations was that the transition period should apply to Gibraltar.

Background information on Gibraltar's status within the EU, the outcome of the 2016 referendum and the Brexit negotiations with reference to Gibraltar is provided in Commons Briefing Paper 7963 [Brexit and Gibraltar](#), May 2017 and Briefing Paper 8278, [Brexit: Gibraltar update](#), 5 April 2018.

## Brexit negotiations

The forum for UK-Gibraltar Brexit discussions has been the [Joint Ministerial Council \(Gibraltar EU Negotiations\)](#) at which the Gibraltar Chief Minister, Fabian Picardo, and/or Deputy Chief Minister, Joseph Garcia, have represented the Gibraltar Government. The most recent UK-Gibraltar meeting was on 15 November 2018 (see [press release](#)).

The Brexit negotiations aimed to address the concerns of the UK, Spain and Gibraltar by establishing withdrawal terms that would not negatively impact the lives of Gibraltarians and the Gibraltar economy and would also "adequately address" the territory of the municipalities that make up the *Mancomunidad de Municipios del Campo de Gibraltar* in Spain (see map above).

The Government insisted throughout the negotiations that Gibraltar's constitutional status post-Brexit would remain secure, and the Spanish Government confirmed that sovereignty (including the joint operation of the Gibraltar airport) was not part of the negotiations. Spain said it wanted a "reasonable" outcome regarding Gibraltar, its priorities including the protection of the rights of Spanish citizens working in Gibraltar and co-management of Gibraltar's airport. In September 2018 *El País* reported on Spain's key demands:

**Smuggling.** Gibraltar is the biggest entry point for illegal tobacco products into Spain. Last year authorities seized more than

600,000 packs of cigarettes, a 158% rise from 2016, according to official data. Madrid wants the price of tobacco, which is much lower in Gibraltar, to be raised in order to make illegal trafficking less attractive.

**Taxes.** There are 55,000 registered businesses in a territory of just over 30,000 residents. Madrid wants stricter tax residence criteria to prevent businesses that operate in Spain from registering in Gibraltar for tax-avoidance purposes.

**Workers.** The Spanish executive wants more stable conditions for the 10,000 to 12,000 workers who cross from Campo de Gibraltar into the overseas territory each day.<sup>237</sup>

Fabian Picardo was optimistic in a [statement](#) to the Gibraltar Parliament on 18 October: agreement had almost been reached on a protocol; doubts about the inclusion of Gibraltar in the transition period had been removed; any discussion of sovereignty was off limits; and agreement had been reached on the substance of four Memorandums of Understanding (MoUs)<sup>238</sup> on citizens' rights, the environment, police and customs cooperation and tobacco. The negotiators were also "seeking to try to agree a tax treaty to settle the perennial misunderstanding by some in Spain of our internationally accepted tax system".

The Chief Minister clarified some of the sticking points and "irritants" in [evidence](#) to the House of Lords EU Committee on 23 October. Taxation was proving particularly difficult and under Spanish law could not be the subject of an MoU; a separate bilateral agreement would be needed on taxation and the protection of financial interests.

On 22 October, in her [statement](#) on the October European Council summit, Theresa May also acknowledged that after discussions with Spain "and in close co-operation with the Government of Gibraltar" a protocol and a set of underlying memorandums on Gibraltar had been developed, "heralding a new era in our relations".

## Territorial scope of WA includes Gibraltar

**Article 3(b)** of the WA confirms that any reference to the term "United Kingdom" should be understood as referring to Gibraltar to the extent that EU law applied to it before Brexit (the same formulation is used for the Channel Islands, the Isle of Man, the Cyprus SBAs and other UK Overseas Territories).

## Bilateral cooperation

The Protocol sets out areas where there would be bilateral cooperation that will be underpinned by future arrangements between Spain, the UK and Gibraltar and set out in the MoUs, with a separate agreement on taxation. It creates three Spanish-UK committees that will address issues of concern. There is no mention of Gibraltar representatives on

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<sup>237</sup> *El País (in English)*, [Spain hopeful of closing Gibraltar Brexit deal with UK by October](#), 21 September 2018

<sup>238</sup> MoUs are not treaties but political commitments, and although they are concluded between states they are not legally binding in international law. Sometimes they are described as "diplomatic assurances". Anthony Aust, 'Modern Treaty Law and Practice', Third Edition, Cambridge University Press, 2014, p. 29

the committees, but the UK Government has included them in its delegation in the past and is thought likely to continue to do so. The UK Government [press release](#) after a meeting between Theresa May and Fabian Picardo on 15 November supported this assumption, stating: "The leaders agreed that these arrangements reflected the determination of all parties to move forward in a spirit of dialogue and cooperation".

The Protocol and MoUs will apply until the end of the transition period, at which point it is envisaged that bilateral future relations agreements will enter into force. The citizens' rights provisions will continue.

## Citizens' rights

Some 10,000-12,000 Spaniards work in Gibraltar as cross-border workers and a much smaller number of Gibraltarians cross into Spain.

**Article 1** of the Protocol confirms that the governments of Spain and the UK will "closely cooperate" to ensure the citizens' rights guarantees in Part Two of the WA; Articles 24 and 25 on frontier workers, in particular, will apply to such workers in Gibraltar and Spain. The relevant authorities in both countries will exchange data on the situation and establish a coordinating committee for "regular discussion" and "to monitor matters relating to employment and labour conditions", to ensure Spanish frontier workers are not discriminated against in their salaries, working conditions and social rights compared to local workers. This committee will report to the specialised committee established under Article 165 of the WA (**Article 1.3**).

## Gibraltar Airport

The Spanish Government claims the Gibraltar Airport was built on land not ceded to Britain in 1713, a claim that has been one strand of the wider sovereignty dispute. In December 1987 the Spanish and UK Governments signed an agreement to allow the joint civil use of the airport and envisaged the building of a new terminal in neighbouring La Línea in Spain. But the Government of Gibraltar rejected the agreement and it was never implemented. Since then, Spain has vetoed or obstructed the inclusion of Gibraltar in EU aviation deregulation such as the Single European Sky programme, which has prevented direct links from Gibraltar to the rest of the EU (except the UK). **Article 2** maintains the current situation, providing that EU law which does not apply to Gibraltar Airport on exit day will only become applicable if the Joint Committee decides it should. The UK and Spain will notify the Joint Committee that they have "reached a satisfactory agreement on the use of the Gibraltar Airport".

## Taxation

Gibraltar sets its own tax policy and has a favourable tax regime for businesses. Local and foreign businesses do not pay income tax unless their operations are in Gibraltar itself. There is no capital gains tax, wealth tax, sales tax or Value Added Tax.<sup>239</sup> Spain complains that

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<sup>239</sup> See Gibraltar Government, [Income Tax Office](#).

Gibraltar is a “de facto tax haven”<sup>240</sup> and wants to reduce unfair competition from the Rock.<sup>241</sup> Under **Article 3** Spain and the UK shall cooperate to “achieve full transparency in tax matters and in respect of the protection of the financial interests of all the parties concerned”. They will cooperate administratively to tackle fraud, smuggling, money laundering and the tax residence issues.

Gibraltar must comply with international standards (G20 and OECD) on good fiscal governance, transparency, information exchange, harmful tax practices and economic substance criteria (**Article 3.2**).

The UK shall extend to Gibraltar its ratification of two international conventions on the elimination of the illicit trade in tobacco and ensure that EU law on tobacco products is in force in Gibraltar by 30 June 2020 (**Article 3.3**). The UK will also ensure that for alcohol and petrol, there is a tax system that aims to prevent fraudulent activities in Gibraltar.

## Environmental matters

Spain is concerned about pollutants being discharged in Algeciras Bay from a refinery, heavy industries, thermal power plant and shipping bunkering. It attributes much dumping of pollutants to Gibraltar.

**Article 4** establishes a coordinating committee to discuss environmental issues such as waste management, air quality, scientific research and fishing. The EU will be invited to participate in these meetings and the committee will report regularly to the Specialised Committee.

## Police and customs

**Article 5** establishes a coordination committee to discuss and monitor cooperation in police and customs matters, to which the EU will be invited. The committee will report regularly to the Specialised Committee.

## The tasks of the Specialised Committee

**Article 6** sets out the tasks of the Specialised Committee, which will be to:

- facilitate the implementation and application of the Protocol;
- discuss any difficulties in relation to the Protocol raised by the EU or the UK;
- examine the coordination committee reports;
- make recommendations to the Joint Committee on the functioning of the Protocol.

## Spain objects

Just days before the special European Council summit to endorse the negotiated WA and Political Declaration, issues outstanding included fisheries (complaints from France, Denmark and the Netherlands) and Gibraltar (complaint from Spain). In order to avoid unravelling or re-

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<sup>240</sup> *El País in English*, [Gibraltar after Brexit](#), 24 September 2018

<sup>241</sup> *El País in English*, [Spain will veto Brexit deal despite bilateral agreement on Gibraltar](#), 22 November 2018

opening the WA and PD, these concerns were addressed in statements in a separate Annex appended to the minutes of the European Council meeting on 25 November. They are not legally binding but underline the national interests of Member States, so will carry some political weight in future negotiations on the EU-UK relationship.

### Spanish complaint

The Spanish Government objected to **Article 184 of the draft WA**, which says that the EU and the UK will negotiate a future relationship as outlined in the political declaration but does not specify that Spain will negotiate with the UK independently about Gibraltar. Foreign Minister Josep Borrell wanted Article 184 to be clear that it meant the negotiations between the UK and the EU would not apply to Gibraltar. After talking to Theresa May on 21 November Spanish Prime Minister Pedro Sánchez [tweeted](#) that their “positions remain far away. My Government will always defend the interests of Spain. If there are no changes, we will veto Brexit”.<sup>242</sup> The Spanish EU minister Marco Aguiriano said the same day that Spain could “stop the clock” on the negotiations and force the UK and EU27 leaders “to come back in December unless it gets its way in the next 48 hours”.<sup>243</sup> Mr Sánchez had threatened to boycott the special summit on 25 November to approve the WA, but he later withdrew his threat, amid suggestions that the UK Prime Minister had caved in to Spanish demands.

### EU response

On 24 November Donald Tusk and Jean-Claude Juncker [responded](#) to President Sánchez, confirming their “shared interpretation” of Article 184 and the territorial scope of the future relationship between the EU and UK. He acknowledged the sensitivities of the matter, underlined the EU’s solidarity with Spain and sought to reassure the Spanish Government:

The sole purpose of Article 184 is to create best endeavours' obligations for the Union and the United Kingdom to negotiate agreements governing their future relationship. It imposes no obligation or presumption, on the basis of this provision, for such agreements to have the same territorial scope as the one provided for in Article 3 of the Withdrawal Agreement. As regards the territorial scope of future agreements between the European Union and the United Kingdom, it is clear that after the United Kingdom leaves the Union, Gibraltar will not be included in the territorial scope of the agreements to be concluded between the Union and the United Kingdom... However, this does not preclude the possibility to have separate agreements between the Union and the United Kingdom in respect of Gibraltar. Without prejudice to the competences of the Union and in full respect of the territorial integrity of its Member States as recognised by

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<sup>242</sup> Spain cannot “veto Brexit” because when the Member States vote on the agreement it will be by a strong qualified majority (20 of the EU27). But the EU wanted to maintain consensus among the EU27, so Spain’s threats were taken seriously. See also *PoliticoPro*, ‘Can Spain ‘veto Brexit?’ 23 November 2018. It is likely that a future agreement on the UK’s relations with the EU will need to be agreed by all EU27 States, so Spain could wield a veto later on.

<sup>243</sup> *The Guardian*, [Spain accuses UK of treachery over Gibraltar Brexit deal](#), 22 November 2018

Article 4(2) of the Treaty on European Union,<sup>244</sup> those separate agreements will require a prior agreement of the Kingdom of Spain.

## Statements attached to European Council minutes

In an [Annex](#) to the WA and PD two statements entered in the minutes of the November summit seek to clarify Article 184 and Spain's concerns:

### **Interpretative declaration of the European Council (Art.50) and of the European Commission on Article 184 of the Withdrawal Agreement**

The sole purpose of Article 184 of the Withdrawal Agreement is to create best endeavours' obligations for the Union and the United Kingdom to negotiate agreements governing their future relationship. It imposes no obligations regarding the territorial scope of such agreements. Therefore, there is no obligation or presumption, on the basis of this provision, for such agreements to have the same territorial scope as the one provided for in Article 3 of the Withdrawal Agreement.

The European Council and the European Commission take note of the declaration by the United Kingdom, that the United Kingdom shares this interpretation.

The second declaration makes clear that the territorial scope of the WA – which includes Gibraltar - will not necessarily be the same as that of any future agreements between the EU and the UK:

### **Declaration of the European Council (Art.50) and of the European Commission on the territorial scope of the future agreements**

After the United Kingdom leaves the Union, Gibraltar will not be included in the territorial scope of the agreements to be concluded between the Union and the United Kingdom. However, this does not preclude the possibility to have separate agreements between the Union and the United Kingdom in respect of Gibraltar. Without prejudice to the competences of the Union and in full respect of the territorial integrity of its Member States as guaranteed by Article 4(2) of the Treaty on European Union, those separate agreements will require a prior agreement of the Kingdom of Spain.

## **The UK response**

In letters to the Commission and Council Presidents on 25 November the UK Permanent Representative to the EU, Sir Tim Barrow, sought to reassure Gibraltar of the Government's solidarity with it:

... the Government of the United Kingdom recalls that it has no doubt about the sovereignty of the United Kingdom over Gibraltar, including Gibraltar Territorial Waters. Additionally the United Kingdom stands by its assurances to Gibraltar never to enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another State against their

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<sup>244</sup> "Article 4(2) of Treaty on European Union states the following: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

freely and democratically expressed wishes. Furthermore, the United Kingdom has given an assurance that it will not enter into a process of sovereignty negotiations with which Gibraltar is not content.

... the Government ... further restates that it will negotiate the future agreements implementing the Joint Political Declaration on behalf of all territories for whose external relations the United Kingdom is responsible, including Gibraltar, to ensure an appropriate and beneficial future relationship with the European Union, taking into account their existing relationships with the European Union.<sup>245</sup>

### **Gibraltar's response**

Fabian Picardo said in a statement on 14 November he was "satisfied" that the parts of the WA "which relate to Gibraltar work for Gibraltar", but he was waiting for the MoUs to be published to properly study and analyse their effects.<sup>246</sup> In a [statement](#) on 22 November, Mr Picardo commented on the Spanish demand regarding Article 184:

Firstly, during the course of this week, the Spanish Government has publicly expressed its misgivings with how Gibraltar has been treated in relation to one aspect of the Withdrawal Agreement. This concerns Article 184 of the Agreement which Spain interprets as compromising the role it wishes to play in determining how the UK's future partnership with the EU will apply to Gibraltar.

Let it be clear that this has nothing to do with what we have been negotiating which is the terms of our differentiated involvement in the Withdrawal Agreement for Gibraltar and our inclusion in the Transition Period and not the terms of the future relationship with the EU, that is not what we are dealing with at this point.

...

Secondly, the MoUs and the Tax Treaty we have been negotiating underpin the operation of the Gibraltar Protocol that forms an integral part of the Withdrawal Agreement.

They are therefore the product of requirements contained in the Withdrawal Agreement.

That Agreement is an EU Treaty which is a formally binding treaty under international law entered into by sovereign States. Gibraltar is constitutionally not, and constitutionally cannot be, a party to such an Agreement.

This said, it is important that the Protocol and the MoUs are understood in the light of Recital 2 of the Protocol which states that the Protocol is to be implemented in accordance with the respective constitutional orders of the United Kingdom and Spain.

This recognises that the rights and obligations set out in the Protocol and the MoUs are enjoyed and performed by the Gibraltar Government in accordance with the terms of our Constitution.

All the commitments entered into, whether under the Protocol or the MoUs concerning Gibraltar, have been negotiated by Gibraltar AND the United Kingdom together. They are commitments

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<sup>245</sup> Tim Barrow, [letter](#) to Jeppe Tranholm-Mikkelsen, Secretary General of Council of EU; [letter](#) to Martin Selmayr, Secretary General of European Commission, 25 November 2018

<sup>246</sup> [Gibraltar Government press release](#) 695/2018, 15 November 2018

entered into only as a result of the consent of the Cabinet of Her Majesty's Government of Gibraltar having been expressly given.

The Government is the guardian of the Constitution as much as this Legislature or the Judiciary may be. We would not have countenanced agreeing to anything which might have resulted in our Constitutional Order somehow being compromised.

He also pointed to Gibraltar's close geographical proximity to Spain ("Our geographic gateway to Europe is Spain") and emphasised the importance of continuing engagement and cooperation with the Spanish Government:

No one should think that we read any part of the Withdrawal Agreement in any way that would persuade us to avoid that genuine, human and political reality. Nobody needs a veto to bring us to the table.

In a TV address on 24 November Mr Picardo dismissed the Spanish Government's claims and compared Mr Sanchez to General Franco.

On 29 November 2018 the governments of the UK and Spain, together with the government of Gibraltar, [concluded four Memorandums of Understanding on Gibraltar, covering citizens' rights, cooperation on environmental matters, cooperation in police and customs matters tobacco and other products](#). The three governments also agreed to conclude a tax agreement covering tax transparency and cooperation. A [Concordat](#) between the UK and Gibraltar governments states that the Memorandums and the Protocol on Gibraltar will be implemented in accordance with the Constitution of Gibraltar.

The UK Government said:

With the Protocol on Gibraltar, the Memoranda form a package of agreements between the UK, Spain and Gibraltar that reflect the commitment of each to future cooperation. [...]

The Memoranda reflect our shared desire to work together in a spirit of trust and solidarity, and support the shared prosperity and security of Gibraltar and the neighbouring area.

### 9.3 The Isle of Man and the Channel Islands

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

As noted above, under **Article 3(c)** of the WA the Isle of Man and the Channel Islands are within the territorial scope of the agreement "to the extent that Union law was applicable to them before the date of entry into force of this Agreement". This means that during the transition period the status quo will be maintained in most areas, including the movement of goods.

The House of Lords EU Committee published a report in March 2017, [Brexit – The Crown Dependencies](#), which was debated on 23 January 2018. [Replying to the debate](#), Baroness Goldie said the Crown Dependencies had identified six priority areas likely to be affected by Brexit: justice, security and migration, agriculture and fisheries, customs, financial services, transport and the digital single market. She assured the Committee that the Government was committed to remaining engaged with the Crown dependencies on these areas and was “fully committed to getting the best possible deal in negotiations on Brexit [...] for all British jurisdictions, including the Crown dependencies”.

The Isle of Man [Government website](#) looked at possible Brexit effects:

No change in the relationship between the Isle of Man and the United Kingdom is anticipated as a result of its withdrawal from the European Union. The members of the Common Travel Area, which allows free travel within the British Isles, have committed to retaining the Area in its current form; and it is anticipated that the Customs and Excise Agreement between the Isle of Man and the UK will continue, although potentially modified in some way.

Guernsey’s Chief Minister, Gavin St Pier, said in a [statement](#) on 15 November that he welcomed confirmation that the UK would be “seeking specific arrangements for Guernsey and the Crown Dependencies, taking account of our existing relationship and arrangements with the EU”. Jersey’s Minister for External Relations, Senator Ian Gorst, made a similar statement and also outlined Jersey’s Brexit objectives: to continue the fundamentals of Jersey’s existing relationship with the UK; to continue, as far as possible, the benefits of our relationship with the EU, and to ensure that Jersey has the right agreements and international relationships in place to benefit from global opportunities arising from Brexit”.<sup>247</sup>

On 30 November the Government signed new arrangements with each of the Crown Dependencies to maintain and reaffirm close customs relationships. The aim is to ensure that when the UK leaves the EU customs union goods moving between the UK and the Crown Dependencies (and vice versa) will continue to not attract customs duty. The UK and the Crown Dependencies will maintain a common external tariff.

## Overseas countries and territories

The UK’s overseas countries and territories are listed in Annex II to the TFEU.<sup>248</sup> Under **Article 3(e)** They are included within the scope of the WA to the extent that it relates to the special arrangements for them in the EU.

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<sup>247</sup> Government of Jersey, [External Relations Minister welcomes PM's statement](#), 15 November 2018

<sup>248</sup> Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, Saint Helena, Ascension and Tristan da Cunha, South Georgia and the South Sandwich Islands, Turks and Caicos Islands.

## 10. What now in the UK and EU?

### 10.1 Overview of Parliamentary approval in the UK

For the Withdrawal Agreement to take effect in UK law, it will need to be implemented through the proposed *European Union (Withdrawal Agreement) Bill (WA Bill)*, which will be the subject of a forthcoming Library Briefing Paper. This section highlights some, but by no means all, constitutionally significant matters arising from commitments the Government has made in the WA and PD texts.

The UK Parliament will need to undertake two approval processes before the UK can ratify the WA. Both the *EU (Withdrawal) Act 2018* and the *Constitutional Reform and Governance Act 2010 (CRAG)* impose procedural hurdles on the capacity of the UK to ratify what has been negotiated. The *EU (Withdrawal) Act* also provides for a Parliamentary process in the event that a deal is rejected by the Commons, or if no negotiated agreement is ever put to it.

The Library's October 2018 paper [A User's Guide to the Meaningful Vote](#) covers in detail Parliament's role in approving the WA.<sup>249</sup> It also addresses Parliament's formal role in the event that it rejects a deal or no deal is reached.

#### Preconditions for ratification

Two statutes give Parliament a role in the ratification of the WA. The *CRAG Act* applies to treaties generally. The *EU (Withdrawal) Act 2018* applies specifically to the Withdrawal Agreement.

#### **European Union (Withdrawal) Act 2018 (the 'Withdrawal Act')**

[Section 13](#) of the *European Union (Withdrawal) Act 2018* provides a role for MPs in the approval of a withdrawal agreement. It outlines an "affirmative approval" process in two steps.

Unless:

- the Commons approves a resolution approving both the negotiated withdrawal agreement **and** the framework for the future relationship; and
- Parliament passes the *European Union (Withdrawal Agreement) Bill* to implement the WA in domestic law,

the UK legally cannot ratify the Withdrawal Agreement.

The first of these two requirements has come to be known as 'the meaningful vote'.

#### **Constitutional Reform and Governance (CRAG) Act 2010**

Parliament has a right to object to the UK being bound by most international treaties under [part 2](#) of the *Constitutional Reform and Governance Act 2010*. If either House objects to ratification within 21

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<sup>249</sup> Commons Library Briefing Paper 8424, [A User's Guide to the Meaningful Vote](#), 25 October 2018

sitting days of the Government laying a copy of a signed treaty before Parliament, the Government must explain why it nevertheless intends to ratify. The Commons could then theoretically use repeated resolutions to block ratification indefinitely.

However, there is no guarantee under the *CRAG Act* that either House will debate or vote on any given treaty. It is a 'negative approval' process: if Parliament does nothing, a Government can proceed to ratification.<sup>250</sup>

Neither House has ever debated or voted on, let alone passed, a motion that a treaty should not be ratified under the provisions of this Act.

The procedure under the *CRAG Act* is supplemented rather than replaced by the requirements of the *Withdrawal Act* with regard to the Withdrawal Agreement.<sup>251</sup>

### **Box 8: Two statutory provisions affecting ratification of a Withdrawal Agreement**

#### **Section 13(1) European Union (Withdrawal) Act 2018**

The withdrawal agreement may be ratified only if—

(a) a Minister of the Crown has laid before each House of Parliament—

- (i) a statement that political agreement has been reached,
- (ii) a copy of the negotiated withdrawal agreement, and
- (iii) a copy of the framework for the future relationship,

(b) the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown,

(c) a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and—

- (i) the House of Lords has debated the motion, or
- (ii) the House of Lords has not concluded a debate on the motion before the end of the period of five Lords sitting days beginning with the first Lords sitting day after the day on which the House of Commons passes the resolution mentioned in paragraph (b), and

(d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

#### **Section 20 Constitutional Reform and Governance Act 2010**

(1) Subject to what follows, a treaty is not to be ratified unless—

- (a) a Minister of the Crown has laid before Parliament a copy of the treaty,
- (b) the treaty has been published in a way that a Minister of the Crown thinks appropriate, and
- (c) period A has expired without either House having resolved, within period A, that the treaty should not be ratified.

(2) Period A is the period of 21 sitting days beginning with the first sitting day after the date on which the requirement in subsection (1)(a) is met.

(3) Subsections (4) to (6) apply if the House of Commons resolved as mentioned in subsection (1)(c) (whether or not the House of Lords also did so).

(4) The treaty may be ratified if—

<sup>250</sup> For more information on the CRAG process, see Commons Library Briefing Paper, [Parliament's role in ratifying treaties](#), 17/5855, 17 February 2018.

<sup>251</sup> Section 13(14) of the *Withdrawal Act* provides that: "This section does not affect the operation of Part 2 of the Constitutional Reform and Governance Act 2010 (ratification of treaties) in relation to the withdrawal agreement".

- (a) a Minister of the Crown has laid before Parliament a statement indicating that the Minister is of the opinion that the treaty should nevertheless be ratified and explaining why, and
- (b) period B has expired without the House of Commons having resolved, within period B, that the treaty should not be ratified.
- (5) Period B is the period of 21 sitting days beginning with the first sitting day after the date on which the requirement in subsection (4)(a) is met.
- (6) A statement may be laid under subsection (4)(a) in relation to the treaty on more than one occasion.
- (7) Subsection (8) applies if—
- (a) the House of Lords resolved as mentioned in subsection (1)(c), but
- (b) the House of Commons did not.
- (8) The treaty may be ratified if a Minister of the Crown has laid before Parliament a statement indicating that the Minister is of the opinion that the treaty should nevertheless be ratified and explaining why.
- (9) “Sitting day” means a day on which both Houses of Parliament sit.

## 10.2 The ‘meaningful vote’

There are three key stages to the ‘meaningful vote’ process:

- the laying of documents before Parliament;
- the approval motion to be moved by a Minister; and
- the decision on the approval motion (and any amendments that may have been tabled in relation to it).

### Laying of documents

[Section 13\(1\)\(a\)](#) of the [Withdrawal Act](#) provides the starting point for the process of Parliamentary approval for a ‘deal’. It requires a Minister of the Crown to lay three documents before Parliament:

- a statement that political agreement has been reached;
- a copy of the negotiated withdrawal agreement; and
- a copy of the framework for the future relationship.

The Government [made the statement and laid the documents](#) on 26 November 2018. These are not necessarily the only documents the Government will make available to Parliament; but they are the only ones the Government legally must lay. On several occasions, the Government indicated that it would publish an economic impact analysis of the deal negotiated with the EU.<sup>252</sup> On 28 November 2018 the Government [laid four documents](#) “to support understanding and assessment of the agreement we have reached with the EU”. These included [EU Exit. Long-term economic analysis](#).

Similarly, following an Opposition Day debate on the Attorney General’s legal advice on any deal, on 13 November 2018 the Chancellor to the Duchy of Lancaster (David Lidington) said the Government would publish a “detailed legal analysis” of the deal:

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<sup>252</sup> E.g see Steve Baker, then Parliamentary Under Secretary of State for Exiting the EU, [HC Deb 30 January 2018 c679](#)

if and when... a withdrawal agreement comes forward for debate in Parliament, right hon. and hon. Members should have access not only to an economic and political analysis of what we are being asked to approve or disapprove, but to detailed legal analysis of the meaning and the implications of the agreement.<sup>253</sup>

The Government also said the Attorney General would make himself available to answer MPs' questions from the dispatch box on Monday 3 December.<sup>254</sup> Neither of these commitments is the same as committing to publish Law Officers' 'legal advice' on the WA. For instance, Government legal 'advice' may highlight areas where a particular point is unclear or contestable. In that advice a Law Officer may give an assessment as to the legal risks of adopting a particular position or the interpretation of a legal document. It may also disclose the kinds of legal question on which the Government has sought advice.

A legal 'opinion', 'position statement' or 'analysis, by contrast, would set out the Government's official stance on what the legal implications of the WA are. It may not disclose all matters asked about or considered when the Law Officer formulated his advice to the Government.

The Government has refused to publish its legal 'advice' as such. Chancellor Philip Hammond, for example, insisted on the BBC Today Programme on 28 November that:

...there's a very important principle here that the government must be able to commission impartial legal advice that tells it absolutely like it is...

It would be impossible for Government to function if we create a precedent that the legal advice that the Government receives has to be made public.<sup>255</sup>

In an Urgent Question before the House on 29 November 2018, Keir Starmer (Shadow Secretary of State for Exiting the EU) insisted that the Government's commitment fell short of what would be necessary to honour the resolution previously adopted by the House on disclosure of legal advice. He said:

It was perfectly clear to Ministers, including the Solicitor General who spoke at the end of the debate, that the House was not asking for a position paper or a summary of the Attorney General's advice. That was the offer made from the Dispatch Box during the debate, and it was roundly rejected, as the Solicitor General knows full well. The binding motion that was passed was for nothing less than for the full and final legal advice provided by the Attorney General. It is therefore wholly unacceptable, and frankly shows contempt for this House, for Ministers, including the Prime Minister at the Dispatch Box yesterday, now to pretend that the House was asking only for partial or qualified legal advice. If the Government are not willing to comply with the order of the House, why did they and the Solicitor General not vote against the motion?<sup>256</sup>

## Motions to be moved for debate

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<sup>253</sup> [HC Deb 13 November 2018 Vol 649 c199](#)

<sup>254</sup> [Exiting the European Union: publications](#), HCWS1118, 28 November 2018

<sup>255</sup> BBC Today programme, 28 November 2018

<sup>256</sup> [HC Deb 29 November 2018](#) c411

Both Houses of Parliament will have the opportunity to debate the WA and the text of the Political Declaration on the future relationship. Ministers of the Crown must move 'a motion' in each House.

- The Commons motion(s) must "approve" the WA and PD;
- The Lords motion(s) must "take note" of the two texts.<sup>257</sup>

The Government will move a single motion in the Commons which, if adopted without amendment as a resolution, would – clearly – approve both the WA and the PD for the purposes of the 2018 Act. The motion to be moved will say:

That this House approves for the purposes of section 13(1)(b) of the European Union (Withdrawal) Act 2018, the negotiated withdrawal agreement laid before the House on Monday 26 November 2018 with the title 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' and the framework for the future relationship laid before the House on Monday 26 November 2018 with the title 'Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom'

## Procedure to be adopted for the debate

There are two key aspects to the debate on the Commons motion. The first concerns the timing of the debate and the second concerns the order of proceedings and how amendments will be handled.

Both of these matters will, if the House approves it, be dealt with under the Business of the House Motion tabled by the Government. It proposes to disapply [Standing Order No. 16](#), which governs the default approach to proceedings under an Act, and would provide a bespoke arrangement for the debate and votes. The Government's proposed Business motion (with a few minor exceptions on the timetable) adopts [the approach recommended by the Procedure Committee](#) both on questions of time allocated for debate and the treatment of amendments.<sup>258</sup>

Five days of debate would be provided and amendments would be dealt with in the normal way (i.e. voted on before any vote on the motion as a whole). Up to six amendments could be put to a vote if selected by the Speaker, and the order in which they are put would be a matter for him.

### Box 9: Key recommendations of the Procedure Committee

The Procedure Committee's [November 2018 report](#) into approval motions under section 13(1)(b) recommended that:

- the Government should publish its proposals for the Business Motion at least 5 sitting days before the start of the debate on the motion to approve the deal;

<sup>257</sup> The Lords motion does not have to be approved. The Government need only move the motion and allow at least five Lords sitting days for it to be debated.

<sup>258</sup> Procedure Committee, [Motions under section 13\(1\) of the European Union \(Withdrawal\) Act 2018](#), HC1664, 16 November 2018

- the Commons should take at least one full day of debate on the Business Motion itself and any amendments to it;
- the debate on the Business Motion should take place at least 2 sitting days before the debate on the deal is anticipated to begin;<sup>259</sup>
- the debate on the substantive motion should last at least 5 days (concurring with the like recommendation from the Exiting the EU Committee);<sup>260</sup> and
- the House should allow decisions on multiple amendments and those decisions should be taken before any final decision taken on the motion as a whole (whether or not as amended).<sup>261</sup>

The Government had initially raised concerns in a [Memorandum](#) of 10 October 2018 to the Procedure Committee about legal uncertainty if an amended motion were approved. It argued that there was a risk that amendments could cast doubt on whether the motion did in fact discharge the requirements of section 13(1)(b).

The Government had initially indicated a preference for procedural adaptations to be made so as to guarantee that the Commons first had the opportunity to vote on the original Government motion in unamended form. The expectation would have been that amendments would only be considered if the House voted not to adopt the original motion at the outset.

However, such a departure from the normal practice of the House does not now appear to be in contemplation. The Business of the House motion tabled by the Government has adopted an approach that aligns far more closely with that recommended by the Procedure Committee.

#### Box 10: The Business of the House Motion

[The Government's Business of the House motion](#) provides for (among other things):

- Five days of debate on the section 13(1)(b) motion:
  - Tuesday 4 December (8 hours of debate, less any time taken on the Business Motion itself)
  - Wednesday 5 December (8 hours of debate)
  - Thursday 6 December (8 hours of debate)
  - Monday 10 December (8 hours of debate)
  - Tuesday 11 December (debate until moment of interruption at 7pm)
- Up to six amendments to be selected by the Speaker for a vote
- Amendments to original motion to be voted on **first** before the final motion (whether or not amended) is put to a vote

## Outcomes of the section 13 motion and division

There are three possible outcomes once the Commons has had its 'meaningful vote':

<sup>259</sup> Procedure Committee, [Motions under section 13\(1\) of the European Union \(Withdrawal\) Act 2018](#), HC1664, 16 November 2018, para 56

<sup>260</sup> Exiting the EU Committee, [Parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship](#), HC1240, 28 June 2018, para 41; and Procedure Committee, [Motions under section 13\(1\) of the European Union \(Withdrawal\) Act 2018](#), HC1664, 16 November 2018, para 56

<sup>261</sup> Procedure Committee, [Motions under section 13\(1\) of the European Union \(Withdrawal\) Act 2018](#), HC1664, 16 November 2018, para 53

- the Commons unconditionally agrees the motion to approve the negotiated WA and the PD;
- the Commons approves an amended motion in different terms from those in the motion originally moved by a Minister of the Crown; or
- the Commons rejects the motion to approve the agreements.

In the first scenario the Government would then be expected to bring forward the *European Union (Withdrawal Agreement) Bill* (on which see below).

In the second scenario the Government must take a view on whether the resolution adopted was compatible with discharging the requirements of s.13(1)(b) of the *Withdrawal Act*. The Procedure Committee has pointed to the fact that not all amendments would raise the same legal risk in this regard.<sup>262</sup>

In the third scenario the Government would not be expected to bring forward a Bill and would have to make a statement within 21 days (on which see 'No Deal Scenarios' below).

### Could there be more than one attempt to pass the 'meaningful vote'?

There is nothing in the statute that explicitly prohibits more than one attempt on the part of a Minister of the Crown to secure the Commons' approval for a section 13(1)(b) motion.

The current edition of Erskine May provides that:

A motion or an amendment which is the same, in substance, as a question which has been decided during a session may not be brought forward again during that same session.<sup>263</sup>

But it goes on to say:

Whether the second motion is substantially the same as the first is finally a matter for the judgment of the Chair.<sup>264</sup>

It also notes that:

On rare occasions where the House has been offered a series of alternative proposals for its consideration, an order was made specifically directing the Chair to put the questions on later motions notwithstanding any decision of the House on earlier motions.<sup>265</sup>

Sir David Natzler, the Clerk to the House, also indicated (in evidence to the Exiting the EU Committee) that it should be possible to enable a further vote if needed.<sup>266</sup> It is therefore likely that arrangements could be made to enable a 'second attempt' to pass a motion under section

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<sup>262</sup> Procedure Committee, [Motions under section 13\(1\) of the European Union \(Withdrawal\) Act 2018](#), HC1664, 16 November 2018, paras 25-28.

<sup>263</sup> Erskine May, *Parliamentary Practice*, 24<sup>th</sup> edition, 2011, p. 397

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*

<sup>266</sup> [Oral evidence](#): The progress of the UK's negotiations on EU withdrawal, HC 372

13(1)(b) of the *Withdrawal Act* if the Commons decided not to pass the requisite motion the first time around.

### 10.3 The *EU (Withdrawal Agreement) Bill*

The [European Union \(Withdrawal\) Act](#) requires primary legislation to implement a withdrawal agreement. However, some of the provisions of the WA require domestic legislation for implementation in any case.

The White Paper, [Legislating for the Withdrawal Agreement between the United Kingdom and the European Union](#), acknowledges the need for primary legislation to deliver domestically, among other things, the anticipated transition period and the provisions on citizens' rights thereafter.<sup>267</sup> The *Withdrawal Act* does not accommodate this possibility and would need to be amended.

Michel Barnier, [giving evidence to the Exiting the EU Committee](#) on 3 September 2018, also said that the WA needed to contain "an operational backstop in legal terms", suggesting that primary legislation may be required in respect of arrangements agreed to in respect of Northern Ireland.<sup>268</sup>

There are, however, two further constitutional reasons why the UK Government requires this Bill.

#### Constitutional requirement for a Bill

Firstly, Government Ministers cannot exercise their delegated powers under [section 9](#) of the *Withdrawal Act* to:

make such provision 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

unless Parliament has first enacted:

a statute ... approving the final terms of withdrawal of the United Kingdom from the EU.

#### No ratification without primary legislation

Secondly, [section 13\(1\)\(d\)](#) of the *Withdrawal Act* provides that the WA cannot in any case be ratified unless:

an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

#### How is the Bill different from the motions?

There are three key differences between the 'motion' stage of the approval process and the 'Bill' stage:

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<sup>267</sup> [Legislating for the Withdrawal Agreement between the United Kingdom and the European Union](#), Cm 9674, 24 July 2018, Chapters 2 and 3

<sup>268</sup> [Oral evidence to the Committee for Exiting the European Union](#), HC372, 3 September 2018, Q2537

- the Bill is principally concerned with domestic implementation, rather than just the principle of whether the deal should be approved;<sup>269</sup>
- the Bill gets line-by-line scrutiny and requires the consent of the House of Lords, which cannot be overridden under the *Parliament Act 1911* because exit day is less than a year away;<sup>270</sup> and
- there is no specific statutory duty for the Government to set out how it proposes to proceed if the Bill does not pass, unlike rejection at the motion phase.

## 10.4 Parliament's role in a 'no deal' scenario

If the Commons is taken not to have approved the WA and the PD, the Government then has **21 calendar days** in which to set out in a statement on how it:

proposes to proceed in relation to negotiations for the United Kingdom's withdrawal from the EU under Article 50(2) of the Treaty on European Union.<sup>271</sup>

The content of such a statement is a matter for the Government itself, but might plausibly include proposals connected to:

- the negotiated texts themselves;
- the negotiating timetable; and/or
- the Government's domestic contingency plans in the absence of a ratified withdrawal agreement.

Once the Government has made a statement, a Minister of the Crown then has **7 sitting days** within which to move "a motion in neutral terms" to the effect that the Commons has considered the matter of the Government statement.

This motion legally need not pass and it has no direct legal effects even if it does. A political 'rejection' of the Government's proposed next steps, for instance, could not by itself have the effect of cancelling or postponing the Article 50 process.<sup>272</sup>

The legal position would remain that the UK leaves the EU on 29 March 2019 with or without a ratified withdrawal agreement. Under Article 50(3) a later date for exit may only be set by either:

- the date the WA comes into force; or
- unanimous agreement by the EU27 and the UK to extend the negotiations.

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<sup>269</sup> However, rejection of the Bill would also prevent the ratification of the WA in the same way as the failure to pass the necessary approval motion.

<sup>270</sup> [s. 2 Parliament Act 1911](#) gives the House of Lords a 'power of delay' over a Public Bill of one year from the point it first completes its Commons Second Reading.

<sup>271</sup> s. 13(4) *EU (Withdrawal) Act 2018*

<sup>272</sup> Neither too could any amendment to a motion moved under section 13(1)(b) of the *Withdrawal Act*, or any provision in or amendment to the forthcoming *EU (Withdrawal Agreement) Bill*, on its own, postpone the Article 50 process.

## 10.5 A second UK referendum?

### Summary

The Government has repeatedly ruled out holding a second referendum on Brexit.

If a second referendum were to be held, an Act of Parliament would be required to make provisions for it to be held.

How quickly a second referendum could be held would partly depend on statutory requirements, but it would also be highly influenced by political considerations. Therefore, accurately estimating how quickly a referendum would be held is not possible.

An Act would include provisions for the question to be asked in the referendum and the eligibility to vote. The Act would also usually contain the detailed conduct rules to allow counting officers to administer the poll in their areas or would delegate the power to a Minister to make the detailed conduct rules at a later date.

The Electoral Commission is required to assess any proposed question contained in a referendum Bill. The Commission assesses the intelligibility of the question and publishes its views. The final decision on the question to be included on any referendum ballot paper remains with Parliament.

The Electoral Commission is also responsible for registering campaigners wanting to spend over a certain amount of money and appointing lead campaign groups for each possible outcome of the referendum.

The Government has repeatedly ruled out holding a second Brexit referendum. For example, in July 2018, a Downing Street spokesman said, "The British public have voted to leave the EU. There is not going to be a second referendum in any circumstances".<sup>273</sup> The Prime Minister reiterated this stance during a summit in Oslo in October 2018, saying "There will be no second referendum on Brexit".<sup>274</sup>

### Referendum legislation

The general regulatory framework for national or regional referendums is set out in the *Political Parties, Elections and Referendums Act 2000* (PPERA), as amended. This regulates general aspects such as financial regulation of the campaign, designation of lead campaigns and the statutory responsibilities of the Electoral Commission. However, a national referendum still requires separate legislation to allow for the specific poll to be held.

A Bill must be passed by Parliament and would need to include important provisions such as the franchise to be used, the question to be asked in the referendum and the date of the poll.

Detailed legislation to allow for the conduct of the poll is also required. For the 2016 referendum the conduct rules were set out in a detailed statutory instrument made under powers granted in the enabling Act. This Order was made four months before the referendum.<sup>275</sup> For the

<sup>273</sup> *Financial Times*, Theresa May rules out second Brexit referendum, 16 July 2018

<sup>274</sup> *Independent*, [Brexit, Theresa May rules out holding another referendum despite mass Final Say protest](#), 20 October 2018,

<sup>275</sup> *European Union Referendum (Conduct) Regulations 2016*

2011 referendum on the voting system to be used for UK Parliamentary elections, the detailed rules were contained in a schedule to the main Act, passed three months before the poll.<sup>276</sup>

## How quickly could a Bill be passed?

The Standing Orders of the House of Commons do not prescribe the timings of parliamentary stages of a bill and the length of time for a bill to pass through both Houses of Parliament and gain Royal Assent varies considerably.

How quickly a Government Bill proceeds through Parliament will partly depend on the length and complexity of the Bill, how many amendments are tabled, and whether the Bill has broad cross-party support or whether it is controversial.

The timings could also be affected if the Bill seeks to change the regulatory framework for referendums. There have been several reports and recommendations on improving the regulation of referendums recently. These include the report of the Independent Commission on Referendums,<sup>277</sup> and reports from the Information Commissioner on personal data and campaigning.<sup>278</sup> Trying to incorporate regulatory modifications in the Bill could make the Bill more complex and add to the time taken to scrutinise it.

Bills can be programmed in the House of Commons; the Government can control the timetable of proceedings on Bills, but this requires a programme motion to be passed by the House.

There are no equivalent programming provisions in the House of Lords and a controversial Bill could take considerably longer there. For example, the *Parliamentary Voting System and Constituencies Act 2011* had seventeen sessions in committee, three sessions on report in the Lords and four sessions of 'ping pong' between the Houses before being passed.

The UCL Constitution Unit issued a report in October 2018 which assessed the possible timescale between a decision to hold a second referendum on Brexit and polling day.<sup>279</sup> The report concluded that if the political will existed within Parliament, then a Bill could be passed in about 11 weeks. The report also noted that there could be dangers for a Bill being rushed through Parliament:

If the referendum result is to be seen as legitimate, and to command widespread public acceptance, it could be damaging for an impression to be created that the bill had been rushed through too quickly.<sup>280</sup>

## Question testing

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<sup>276</sup> [Parliamentary Voting System and Constituencies Act 2011](#)

<sup>277</sup> [Report of the Independent Commission on Referendums](#), July 2018

<sup>278</sup> ICO, [Democracy disrupted? Personal information and political influence](#), July 2018 and [Investigation into the use of data analytics in political campaigns](#), November 2018

<sup>279</sup> UCL Constitution Unit, [The Mechanics of a Further Referendum on Brexit](#), October 2018

<sup>280</sup> *Ibid*, p12

The Electoral Commission has a statutory duty, under provisions in PPERA, to assess any question to be put in a referendum. The way the Commission assesses a question is not set out in legislation and it can consider the wording "in such a manner as they may determine".<sup>281</sup>

The Commission tests intelligibility by using focus groups and similar techniques to ensure the electorate understands the question. Its guidance states:

A referendum question should present the options clearly, simply and neutrally. So, it should:

- be easy to understand
- be to the point
- be unambiguous
- avoid encouraging voters to consider one response more favourably than another
- avoid misleading voters.<sup>282</sup>

During the passage of the *European Union Referendum Act 2015*, (the Act that enabled the 2016 referendum to take place), the question was altered on the recommendation of the Electoral Commission.

The question that had originally been included in the Bill was tested with members of the public and the Electoral Commission also sought views from other individuals and groups to make sure the question was "clear, unambiguous and to the point".<sup>283</sup> The Commission's research showed that "some campaigners and members of the public felt the wording is not balanced and there was a perception of bias".

The Electoral Commission's recommended question was inserted to the Bill at report stage in the Commons by a Government amendment and the amendment was agreed without division.<sup>284</sup>

There have been suggestions that a second Brexit referendum question might be a multi-option or two-stage question rather than a binary 'yes'/'no' question. The UCL report highlights that there is currently no consensus about what a second Brexit referendum question might be. The report also points out that question testing usually takes about 12 weeks and that truncating the assessment of whatever question might be included in a Bill runs similar risks to rushing through referendum legislation:

In the current polarised political environment over Brexit it is of utmost importance that the result of any referendum should be perceived as legitimate. Integral to this is public confidence in the neutrality and intelligibility of the question. Curtailing or abandoning the normal process could jeopardise this, and risk accusations that the question was misleading or biased. Furthermore...there is a possibility that the referendum question could take a form not previously used in the UK – with the likeliest innovation being a three-option question. This would necessitate

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<sup>281</sup> Section 104 of the *Political Parties, Elections and Referendums Act 20*, as amended

<sup>282</sup> Electoral Commission, [Referendum question assessment guidelines](#), November 2009

<sup>283</sup> Electoral Commission press release, [Electoral Commission recommends change to EU Referendum question](#), 1 September 2015

<sup>284</sup> [HC Deb 7 September 2015 c171](#)

particularly careful testing. Therefore, it is likely that something similar to the usual process, albeit perhaps on a somewhat condensed timetable, will be necessary.<sup>285</sup>

The final decision on the contents of a Bill, including the question to be asked in the referendum, remains with Parliament.

## Statutory pre-referendum period

There is a minimum campaign period for referendums held under the framework set out in PPERA. This must be 10 weeks and comprises three stages. The first four weeks is the four-week period for registered campaigners to apply to be the lead campaign groups. The next two weeks are the period in which the Commission assesses applications to be lead campaign groups for each possible outcome and designates those groups. In the final four weeks the designated lead campaigns can utilise the benefits of designation – which include a grant of up to £600,000 and higher spending limits than other registered campaigners.

Changes to the statutory period could be made by the legislation allowing for a referendum but any changes would be open to debate and amendment during the passage of a referendum Bill.

On designation of lead campaign groups, the UCL Constitution Unit report commented:

If there is more than one suitable applicant to be lead campaigner for one outcome, it would be difficult for the Electoral Commission to designate in less than two weeks. This choice is unavoidably controversial, and subject to potential judicial review. It must be made in a demonstrably fair and rigorous manner.<sup>286</sup>

This pre-referendum period cannot start until all other aspects of the referendum are known and the detailed conduct rules for a referendum have been put in place.

## 10.6 Approval in the EU

### Council of EU27

The special meeting of the European Council bringing together EU27 leaders on 25 November 2018 issued a [statement](#) endorsing the WA. On this basis it said:

the European Council invites the Commission, the European Parliament and the Council to take the necessary steps to ensure that the agreement can enter into force on 30 March 2019, so as to provide for an orderly withdrawal.

The procedure for EU approval of the WA is set out in Article 50 TEU. This states that following notification by a Member State of its intention to withdraw from the EU, the EU “shall negotiate and conclude an agreement with that State, setting out the arrangements for its

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<sup>285</sup> UCL Constitution Unit, *The Mechanics of a Further Referendum on Brexit*, October 2018, p12-3

<sup>286</sup> *Ibid*, p13

withdrawal, taking account of the framework for its future relationship with the Union”.

Once agreement is reached, it “shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament”.

For decisions related to the negotiation and the conclusion of the agreement, the withdrawing Member State “shall not participate in the discussions of the European Council or Council or in decisions concerning it”.

The Council vote of approval will require a “super-qualified majority”, defined as at least 72% of the members of the Council representing Member States comprising at least 65% of the population of the EU27.<sup>287</sup> This means at least 20 Member States must approve the WA.

## European Parliament

The EP has not been involved in the negotiating process itself, but has adopted resolutions on the negotiations, prepared by the Brexit Steering Group. Under the Article 50 procedure, the EP must give its consent to the WA before it can be “concluded on behalf of the Union” by the Council, so its views have been important to the negotiators on both sides.

The EP vote will need to endorse the WA by a simple majority and UK MEPs will be able to participate in the vote.

The EP has set aside time in its plenary session of 11-14 March 2019 to debate and vote on the WA. However, this could also take place in the plenary session of 25-28 March if the WA has not been approved in the UK in time for the earlier March plenary.

Before the plenary the WA will be scrutinised by the EP’s Committee on Constitutional Affairs ([AFCO](#)), which has responsibility for drafting a report and motion on the WA on the basis of which the EP will vote or not for consent.

The EP Steering Group on Brexit is separate from AFCO. It is co-ordinated by former Belgian Prime Minister, Guy Verhofstadt, and includes representatives of the leading political groups in the EP as well as the AFCO chair. The Steering Group has had weekly meetings with Michel Barnier on the progress of the negotiations.

Mr Verhofstadt welcomed the “positive progress” made on the WA in a statement on 14 November:

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<sup>287</sup> This is a higher threshold than the normal Council qualified majority voting (QMV) threshold of at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States. Article 50 states that for the purposes of decisions under it a qualified majority will be defined in accordance with Article 238(3)(b) TFEU which states that “when the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72% of the members of the Council representing Member States comprising at least 65% of the population of these States”.

It is encouraging to see that we are moving towards a fair deal that should ensure an orderly withdrawal, including a backstop guaranteeing that there will be no hardening of the Northern Irish/Irish border and that the Good Friday Agreement will be safeguarded. This deal is a milestone towards a credible and sustainable future relationship between the EU and the UK

It is now up to elected Parliamentarians on both sides of the Channel to do their work and scrutinise the proposed deal, including the political declaration and the framework for future relationship. Throughout the Article 50 negotiations, we have fought for a people – first Brexit, and we are committed to forensically monitor closely the implementation of the citizen's rights parts of the agreement. The European Parliament will have the final say, along with the UK Parliament, on the deal.

The November WA was also welcomed by EP President Antonio Tajani, who [said](#) he was “optimistic that it will pave the way towards a close future EU-UK relationship”. He referred to the EP’s role in approving the Agreement and said it would “continue to scrutinise developments, ensuring that our red lines are delivered upon”.

The EP [resolution](#) on the Brexit negotiations adopted in April 2017 stated that a priority in the WA should be respect for the rights of EU27 citizens in the UK and UK citizens in the EU27. The WA should also be in conformity with the EU Treaties and the EU’s Charter of Fundamental Rights. Other EP priorities are:

- the UK should settle its financial commitments to the EU;
- the Northern Ireland peace process is protected and a hard border on the island of Ireland is avoided;
- the integrity of the Single Market, including its four freedoms is protected;
- there should be no trade-off between the economic relationship and security co-operation.

The EP is not expected to refuse consent to the WA, although it is possible it could seek clarification on aspects of it or refer it to the CJEU.

The Council must authorise the signature of the WA before sending it to the EP for its consent. The vote of approval in the Council will take place once the EP has given its consent.

Ratification in the Member States is not required for the WA, although it will most likely be required for agreement(s) on the future relationship.<sup>288</sup>

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<sup>288</sup> Approval or ratification by Member State according to their own constitutional provisions will be necessary for the future relationship agreement if, as is likely, it covers areas that go beyond the exclusive competences of the EU. Where competence is shared between the EU and its Member States, international agreements are concluded both by the EU and by the EU Member States. These are known as [mixed agreements](#), to which EU Member States must give their consent.

# 11. Constitutional implications of the texts in the UK

## 11.1 Extension of the transition period

Article 126 of the WA states:

There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.

The *Withdrawal Agreement Bill (WA Bill)* will need to legislate to implement this provision in domestic law. This is because the transition period runs contrary to Parliament's intention expressed in the *EU (Withdrawal) Act 2018*, that EU law will no longer have effect in domestic law after "exit day".

As a matter of international law, Article 132 allowing the extension of the transition period for up to two years beyond December 2020 will also need to be reflected in the provisions of the *WA Bill*.

### Parliament's role

The exercise of this power in the WA to extend transition is of considerable political and constitutional significance. It would mean the UK would have to follow EU law (including CJEU judgments) and make significant further payments to the EU several years after it had formally ceased to be a Member State.

Unless the *WA Bill* directly addresses the issue, there may be some uncertainty as to the domestic constitutional requirements that must be satisfied if the UK's representatives on the Joint Committee are to seek, or agree to, a proposal to extend the transition period. Depending on how the *WA Bill* addresses transition, a UK Government may even risk frustrating the will of Parliament if it sought, through the Joint Committee, to extend transition without Parliament's consent.<sup>289</sup>

In that context, Parliament may wish to consider what its role ought to be in authorising, approving or implementing any request or decision to extend the transition period. The Government's position on what Parliament's role should be will only become clear when it publishes the *WA Bill*, but there are (at least) three distinct ways in which Parliament could be granted a formal role in that process. These are set out below.

### Reflecting a change of transition expiry in domestic law

One possible role for Parliament would imitate closely the *EU (Withdrawal) Act's* domestic arrangements for an extension of Article 50 TEU. Under [section 20\(4\)](#) of that Act, if:

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<sup>289</sup> That making a notification of intent to withdraw under Article 50 would frustrate the intentions of Parliament in relation to the *ECA* was why the Supreme Court, in *ex parte Miller*, concluded that specific primary legislation was needed. A similar argument might be made about a request or decision to extend the transition period beyond any period provided for in domestic legislation.

- the UK and EU27 unanimously agree to extend the two-year period; or
- a ratified Withdrawal Agreement provides for a different date for the treaties to cease to apply to the UK,

the domestic definition of “exit day” can then be altered by regulations to reflect that ‘extension’ in EU law. Those regulations are made by a Minister of the Crown subject to the approval of both Houses of Parliament (i.e. the affirmative procedure).

Imitating this approach would provide a relatively minor role for Parliament with regard to Article 132. It would only have the power to approve the domestic consequences of a decision of the Joint Committee to extend transition. This would not, as such, be a ‘veto’ over any decision the UK Government might be party to in the Joint Committee itself.

If Parliament were to refuse to approve regulations in those circumstances, it would not (as such) invalidate any Joint Committee decision under Article 132. However, it might prevent the UK from being able to honour its obligations under the Withdrawal Agreement during any extended transition period. Hence such refusal might operate as a de facto ‘veto’.

## Parliamentary ‘veto’ over extension

Another approach might be for the *WA Bill* to require the UK Government to secure Parliamentary approval for a proposal to extend transition before it can agree to or make a proposal in the Joint Committee. Parliamentary approval could take (at least) two different forms.

### Authorisation by Act of Parliament

One form of approval might require a bespoke Act of Parliament authorising a request or decision to extend transition. Such an Act might look similar to the [EU \(Notification of Withdrawal\) Act 2017](#), which explicitly authorised a notification of intent to withdraw to be made under Article 50.

### Approval on a motion by both Houses

Alternatively, a form of approval might be borrowed from [section 10](#) of the (now repealed) [European Union Act 2011](#). Under that Act, Ministers of the Crown were prevented from voting in favour of, or otherwise supporting, certain decisions taken by EU bodies unless:

in each House of Parliament a Minister of the Crown moves a motion that the House approves Her Majesty’s Government’s intention to support the adoption of a specified draft decision, and each House agrees to the motion without amendment.<sup>290</sup>

Applied to an extension of transition, such a model would require one or both Houses to approve a motion before the UK’s representatives on the Joint Committee were empowered to agree to, or to propose, an extension. The legislation would need to address whether the motion

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<sup>290</sup> [Section 10\(5\) European Union Act 2011](#)

was amendable; unamendable motions avoid the legal ambiguity that can arise should an amendment be passed but reduce the scope of Parliament's role.

### Parliamentary instruction to request an extension

The conduct of foreign affairs and negotiation of treaties are part of the Royal Prerogative and are a function of the executive under the UK's constitutional arrangements. However, the Royal Prerogative can be constrained by legislation.

Such an approach could entail a greater role for Parliament than the aforementioned alternatives. The *WA Bill* could, in addition to giving Parliament a veto over a Government proposal for an extension, also include provisions to:

- empower the Commons/Parliament to require the UK Government to request an extension at the Joint Committee; or
- require the UK Government to request an extension at the Joint Committee if certain statutory conditions have been met.

## 11.2 The treaty/treaties on the future relationship

### "Best endeavours" to negotiate future agreements

**Article 184** of the WA provides:

The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the political declaration of 25/11/2018 and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.

It is not yet clear whether the inclusion of this provision in the Withdrawal Agreement rather than in the Political Declaration has any legal significance. Ultimately it may be the case that no treaty on the future relationship is reached even if the two parties negotiate in good faith.

Nothing in the WA could compel the EU or the UK to ratify a future treaty, the terms of which in any case have yet to be negotiated. Moreover, nothing in the text of the PD legally binds the UK Government or the EU as to what it may or may not negotiate by mutual agreement in the future.

The fact of the inclusion of Article 184, however, prompts related questions about Parliament's role in the approval of any treaty or treaties on the future relationship. Given the significance of any forthcoming treaties, Parliament may wish to consider during its scrutiny of the *WA Bill* what role it should have in the approval of those treaties.

### What is Parliament's default role?

Unless specific legislative provision is made, such treaties would be subject only to the negative form of approval procedure contained in [Part 2](#) of the [CRAG Act 2010](#). Under that process a treaty is laid and the Commons then has a 21- sitting day period within which to debate and resolve against the ratification of it. However, the Government is under no obligation to provide time for debate or vote<sup>291</sup> and, [as the Hansard Society recently observed](#), no treaty laid under *CRAG* has ever been the subject of a vote or a debate.<sup>292</sup>

Depending on the content of the treaties, and the extent to which they require domestic implementation, Parliament's approval may also be needed in the form of one or more Bills. However, unless the *WA Bill* provides otherwise, this approval would only be needed for the **implementation** of those agreements and not as such the **ratification** of them.

## What role has Parliament had in the approval of previous EU Treaties?

Several pieces of domestic legislation have, historically, constrained the ability of the UK to ratify an EU treaty without Parliamentary approval.

### **Act of Parliament needed to increase powers of the EP**

[Section 6](#) of the [European Parliamentary Elections Act 1978](#), later superseded by [section 12](#) of the [European Parliamentary Elections Act 2002](#), provided that:

No treaty which provides for any increase in the powers of the [Assembly/European Parliament] shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament.

### **Act of Parliament needed to amend the founding Treaties**

[Section 5](#) of the [European Union \(Amendment\) Act 2008](#) took the foregoing a step further. It required an Act of Parliament to approve any amendment made (under the ordinary revision procedure) to the TEU, the TFEU or the Euratom Treaty.

That Act also required other forms of Parliamentary approval for certain EU-level decisions.

### **Referendum required in certain circumstances**

[Section 2](#) of the [European Union Act 2011](#) took the 2008 Act a step further. It imposed a referendum requirement for (among other things) certain changes to the TEU and TFEU. Unless both an Act **and** a referendum endorsed the Treaty change, the UK could not ratify the amending treaty.

No treaty was ever brought forward that attracted the referendum requirement in the 2011 Act.

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<sup>291</sup> Such a debate might be held and a vote put on an Opposition Day or by the Backbench Business Committee. Whether this is permissible under SO No. 14(6) has never been authoritatively determined.

<sup>292</sup> Brigid Fowler, [Parliamentary consent to treaty ratifications: another procedure strained by Brexit?](#), Hansard Society, 20 November 2018

### What has happened to these statutes?

Insofar as they were not already repealed and replaced, these statutes imposing special requirements for the ratification of EU treaties have been (mostly) repealed by the June commencement regulations for the *EU (Withdrawal) Act 2018*.<sup>293</sup>

EU Treaties subject to approval under other statutes were normally exempt from the ratification requirements of the *CRAG Act* by virtue of [section 23\(1\)](#). However, the repeal of those other statutes has by necessary implication repealed the exemptions. Treaties on the future relationship would in any case fall by default to be subject to the *CRAG* approval procedure as they would not be covered by those exemptions.

## 11.3 Constitutional status of the Withdrawal Agreement

**Article 4** of the WA contains several provisions of constitutional significance. It addresses the status, interpretation and enforcement of the Withdrawal Agreement and any EU law to which it gives effect.

### Supremacy and the Agreement

#### Current relationship

At the moment, the [European Communities Act 1972](#) (*ECA*) includes provisions that give effect to the supremacy of EU law in [section 2\(4\)](#). That provision requires both prior and subsequent domestic legislation (including primary legislation) to be construed and given effect to “subject to” any rights, powers, liabilities, obligations and restrictions arising from EU law.

#### Extending supremacy to the Withdrawal Agreement

**Article 4(1)** of the WA provides that:

The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

The Government has already said that, despite [section 1](#) of the [EU \(Withdrawal\) Act 2018](#) repealing the *ECA*, legislation would be needed to “save the effect” of parts of the *ECA*. Without this, the *Withdrawal Act* already on the statute book could not itself give effect to a transition period.<sup>294</sup>

However, Article 4 does not simply preserve the effect of the supremacy of EU law; it also gives primacy to the Withdrawal Agreement itself. Crucially, this is true of the Agreement as a whole, not simply the parts of it that relate to transition and citizens’ rights.

It would not, therefore, be sufficient for the Government simply to “save the effects of” the *ECA* for domestic purposes. Provisions in the

<sup>293</sup> The [European Union \(Withdrawal\) Act 2018 \(Commencement and Transitional Provisions\) Regulations 2018](#), SI 2018/808

<sup>294</sup> Department for Exiting the EU, [Legislating for the Withdrawal Agreement between the United Kingdom and the European Union](#), Cm 9674, July 2018, para 61

*WA Bill* would need to address the constitutional status of the WA and its relationship with domestic law.

## Direct effect and the Agreement

Article 4(1) of the WA also provides that:

legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

This means that those WA provisions that are clear, precise and unconditional<sup>295</sup> would need to be given direct effect in the UK: they must be enforceable in the same way as EU law is now. As the European Commission, in its [Q&A on the Irish Protocol](#), says:

This means that UK courts will, in practice, apply this agreement, in the same way as they apply EU law today.

## Judicial and administrative authorities

**Article 4(2)** of the WA provides that:

The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

The UK is already familiar with ‘judicial authorities’ disapplying domestic law that is incompatible with EU law. [Section 2\(4\)](#) of the [ECA](#) requires the courts to do this.<sup>296</sup> What is less clear is what is meant by the required powers of “administrative authorities” to do the same. In the UK constitutional order, ‘administrative’ authorities are not typically responsible for determining the validity of laws. This term may simply be intended to cover court-like domestic bodies which do not possess a strictly judicial-only character (e.g. tribunals may be regarded as administrative bodies). Until the *WA Bill* has been published, we cannot say for certain whether this represents a departure from existing practice.

## Relevance of the Court of Justice of the European Union

**Article 4(4)** of the WA provides that the Agreement and relevant provisions of EU law shall be interpreted “in conformity with” any CJEU judgments handed down before the expiry of transition.

This provision is expressly at variance with [section 6\(1\)](#) of the [EU \(Withdrawal\) Act 2018](#), which provides that:

A court or tribunal is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and cannot refer any matter to the European Court on or after exit day.

The *WA Bill* would therefore have to amend the 2018 Act to reconcile these two provisions.

**Article 4(5)** provides that after transition the UK’s domestic courts “shall” in any case have “due regard to” relevant caselaw subsequently

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<sup>295</sup> This is the traditional test for EU law provisions to have direct effect.

<sup>296</sup> See [R \(Factortame\) \(No. 2\) v Secretary of State for Transport](#) [1990] UKHL 13

handed down. This goes somewhat further than [section 6\(2\)](#) of the [EU \(Withdrawal\) Act 2018](#) without being necessarily inconsistent with it. It provides that:

a court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

The WA therefore **requires** post transition caselaw to be taken into account by domestic courts, whereas the [Withdrawal Act](#) would merely **allow** it. Adaptations may need to be made to section 6(2) to reflect this difference.

# Appendix: parts of the Protocol on Ireland/Northern Ireland that come into force on exit day

**Article 185** of the Withdrawal Agreement states:

“The Protocol on Ireland/Northern Ireland shall apply as from the end of the transition period, with the exception of the following provisions of that Protocol that shall apply as from the entry into force of this Agreement”.

Articles	Scope
<b>Articles 1 to 3</b>	Objectives of the Protocol, subsequent agreement & extension of the transition period.
<b>Article 14(3)</b>	Practical arrangements for how Union representatives will supervise the UK’s implementation of the Protocol, and request UK authorities to carry out control measures, will be determined by the Joint Committee upon proposal from Specialised Committee.
<b>Article 16</b>	The Specialised Committee – its remit & powers.
<b>Article 17(1) to (4)</b>	Joint consultative working group is set up- under supervision of Specialised Committee
<b>Article 17(6)</b>	Also relates to the working group. It will operate during transition but won’t have to meet once a month Article 17(5) or have to share information it gives to the working group with the rest of the EU bodies Article 17(7), until the Protocol comes into force.
<b>Article 21</b>	Annexes 1 to 10. This a ‘commencement provision’. The Annexes won’t be in force as not all will apply during transition.
<b>The last sentence of the third subparagraph of Article 6(1)</b>	The Joint Committee can, before the end of transition, agree to modify Annex 4 to have higher standards for level playing field (these cannot be watered down).

<b>The fourth subparagraph of Article 6(1)</b>	Rules on how goods move between UK and EU will be as per Annex 3, unless the Joint Committee agrees new rules before end of transition.
<b>The last sentence of the fifth subparagraph of Article 6(1)</b>	A commitment that both sides will do their best to negotiate future relationship agreement before transition ends.
<b>Sixth subparagraph of Article 6(1);</b>	Annex 3- (rules on the movement of goods in the proposed customs union) can be amended, but can't contradict "essential" elements of the Protocol or the main Withdrawal Agreement.
<b>The second sentence of the first subparagraph of Article 6(2)</b>	The Joint Committee "shall establish the conditions, including in quantitative terms, under which certain fishery and aquaculture products brought into the customs territory of the Union defined in Article 4 of Regulation (EU) No 952/2013 by vessels flying the flag of the United Kingdom and registered in Northern Ireland are exempted from duties".
<b>The last sentence of Article 12(2)</b>	The Joint Committee will determine the Minimum and Maximum level of support for farms in Northern Ireland- the procedure will be determined by Annex 9.
<b>The third sentence of Article 4(3) of Annex 2;</b>	Joint Committee will look at preparing procedures for the UK to remain part of EU's trade defence + EU's Generalised Scheme of Preferences – the procedures must be set up 6 months before end of transition.
<b>Article 5(2) of Annex 2;</b>	6 months before end of transition Joint Committee will work out provisions for 'mutual administrative assistance' between the UK and EU customs authorities, for when the customs union comes into being.
<b>The second sentence of Article 4(1) of Annex 3</b>	The UK will draw up specimen of the A.UK. movement certificate, which will be required for goods moving in between the UK and the EU, and vice versa. It will send this to the Joint Committee along with explanatory notes.

<p><b>Article 8(1) of Annex 3</b></p>	<p>“The customs authorities of the Member States of the Union and of United Kingdom shall provide each other, through the European Commission, with specimen impressions of stamps used in their customs offices for the issue of A. UK. movement certificates.”.</p>
<p><b>The first sentence of the second subparagraph of Article 13 of Annex 3</b></p>	<p>“The Union shall draw up the specimen of the label referred to in the first subparagraph and inform the Joint Committee thereof.” This for the label for postal consignments, which are exempted from needing movement certificates.”</p>
<p><b>Article 1(4) of Annex 4</b></p>	<p>Joint Committee “may determine the measures necessary” to ensure the UK meets its commitment made in paragraphs 2 &amp; 3 of Article 1, which relate to the UK transposing EU laws relating to tackling tax avoidance- e.g. BEPS.</p>
<p><b>Article 2(3) of Annex 4</b></p>	<p>The Joint Committee will adopt decisions on minimum commitments for the reduction of emissions of atmospheric pollutants &amp; maximum sulphur content of marine fuels.</p>
<p><b>The last sentence of Article 7(2) of Annex 4;</b></p>	<p>The Joint Committee will determine the minimum and maximum level of agricultural support for Great Britain.</p>
<p><b>The first subparagraph of Article 8 of Annex 4</b></p>	<p>This is the procedure for how the Joint Committee will decide the minimum and maximum levels of state aid in respect of agriculture - mentioned in article 7(2) of Annex 4 mentioned directly above.</p>
<p><b>The first subparagraph of Annex 9</b></p>	<p>This is the Annex referred to in Article 12(2) (see above) It sets out how the Joint Committee will decide the “initial maximum exempted overall annual level of support and the initial minimum percentage” for Agricultural support for Northern Ireland.</p>

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