

THE PROGRESS OF THE UK'S NEGOTIATIONS ON EU WITHDRAWAL

**MINORITY REPORT OF THE EXITING THE EUROPEAN COMMITTEE
Drafted by Jacob Rees-Mogg MP, issued 18 March 2018**

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INTRODUCTION

The Article 50 negotiations

1. The Article 50 negotiations are at a critical stage. If they are to be completed by October 2018, which is the deadline that has been set by the UK and the EU, there are only eight months left to reach agreement on a host of highly complex issues that will determine the UK's future for decades to come.
2. Since the Committee's last report, the European Council has said that 'sufficient progress' had been made on Phase 1 of the Article 50 negotiations which enabled Phase 2 discussions to begin on the UK's Future Partnership with the European Union - see note 177 On 28 February 2018, the Commission published a draft Withdrawal Agreement,¹⁷⁸ which was based on the Joint Report that was agreed in December 2017 - see note 179 The draft Withdrawal Agreement has been circulated to the EU27 and to the European Parliament's Brexit Steering Group for revision and agreement before being subjected to intense negotiations over the coming months.
3. An enormous amount of work remains to be completed in the limited time that remains under Article 50. Negotiations on citizens' rights, issues relating to the Northern Ireland/Republic of Ireland border, and a wide range of other separation issues are ongoing. Talks on the agreement of a transition/implementation period started in January and are expected to be signed off by the European Council in late March, although there remain significant points of disagreement to work through first. From late March onwards, Phase 2 negotiations are expected to begin. The UK and the European Union want to reach agreement on all these issues by October, to allow time for the texts to be ratified by the European Parliament (EP) and the UK Parliament.
4. The EU said that it was unable to start Phase 2 negotiations until after the March European Council—a gap of over four months since the Phase 1 agreement. On the UK side, the Prime Minister and Cabinet Ministers have set out aspects of the Future Partnership in a series of speeches, and have agreed that it should be based on a model of 'managed divergence'. However, it remains to be seen what this will mean in practice and the extent to which the UK will

diverge from the rules and standards of the European Union after the transition/implementation period.

This report

5. In this report, we consider the current state of the negotiations, the plans for the transition/implementation period, and the work to date on plans for Phase 2.

6. We have drawn upon evidence provided by the Rt. Hon David Davis MP, the Secretary of State for Exiting the European Union, along with evidence from HM Revenue and Customs, the Police Service of Northern Ireland, organisations that specialise in exports and logistics, stakeholders in EU Agencies, and academics and think tank representatives specialising in EU law and politics as well as evidence from the economists Roger Bootle, Dr Gerard Lyons, Julian Jessop and Professor Patrick Minford and the European Parliament's report into 'Smart Borders 2. 0'.

7. We have also undertaken a programme of visits. In December, we visited the Northern Ireland/Republic of Ireland border to learn more about how it will be affected by the UK's withdrawal from the European Union. In January, we visited Cambridge to meet and take evidence from representatives of industry and academia who specialise in world-leading research into the life sciences. Later that month we also visited Dublin where we met Simon Coveney, Tánaiste and Foreign Minister, Heather Humphreys, Minister for the Department of Business Enterprise and Innovation, Members of Oireachtas Joint Committees, and academics and Irish business representatives. Finally, in February we visited Brussels where we met a range of interlocutors, including Sir Tim Barrow, Michel Barnier, Danuta Hübner MEP, Guy Verhofstadt MEP and representatives from the Norwegian and Swiss Missions to the European Union. We would like to thank everyone who has given evidence to the Committee and who met us to inform our inquiries.

Draft Withdrawal Agreement

Introduction

8. On 28 February, the Commission published the draft Withdrawal Agreement which it maintained was based on the Joint Report agreed in December 2017. It sets out the Commission's preferred legal text for the Phase 1 agreements between the EU and the UK. These agreements were on citizens' rights, the Financial Settlement and issues that relate to the Northern Ireland/Republic of Ireland border, as well as other separation issues - see note 180

9. There are several parts of the draft Withdrawal Agreement with which the Government disagrees, particularly with regards to citizens' rights, issues that relate to the border on the island of Ireland and the role of the CJEU. This chapter examines the agreements as outlined in the draft Withdrawal Agreement on the main Phase 1 issues and what remains to be resolved in Phase 2.

Citizens' rights

10. The draft Withdrawal Agreement defined the categories of citizens that fall within its scope as EU citizens who have exercised their right to reside in the UK, as well as their close family members, as set out in Directive 2004/38/EC - see note 181 The draft Withdrawal Agreement also provides the same rights to UK nationals in EU Member States - see note 182

11. Directive 2004/38/EC is also known as the 'Free Movement Directive' - see note 183 It sets out the right of free movement for the citizens of EU Member States. The rights it confers have been extended to nationals of Norway, Iceland and Liechtenstein by the EEA Agreement and to Swiss nationals by a bilateral agreement with the EU on the free movement of persons. The Directive essentially gives EU citizens the right to live and work across the EU, if they are workers, and to those who are not economically active provided that they are not an undue burden on the country of residence - see note 184 This right also extends to close family members that are not EU citizens.

12. The right of residence becomes permanent after five years and citizens can apply for a Permanent Residence document that confirms their rights, although this is not a legal requirement

as Permanent Residence is acquired automatically after individuals have exercised treaty rights for 5 years, without an absence for more than six months - see note 185

13. The Commission's draft Withdrawal Agreement indicated that the cut-off point for when the citizens' rights provisions in the Withdrawal Agreement come into force will be the end of any transitional/implementation period - see note 186 However, the Joint Report stated that the cut-off point, should be "the time of the UK's withdrawal"—29 March 2019 - see note 187

14. We examine this disagreement in more detail in the next chapter on the transition/implementation period.

Unresolved issues

15. The Prime Minister made it clear at an in July 2016 that:

I want to be able to guarantee their rights in the UK. I expect to be able to do that and I intend to be able to do that, to guarantee their rights. The only circumstances in which that would not be possible would be if the rights of British citizens living in other EU member states were not guaranteed - see note 188

It has however taken far longer for the EU27 to bring forward a similar offer for UK citizens living in the EU. Despite this delay the citizens' rights chapter is now one of the most advanced parts of the Joint Report and the draft Withdrawal Agreement. However, there remain many substantial issues that are still to be resolved - see note 189 The Commission's December Technical Note included a list of matters "raised by the UK but that were outside the scope of the EU's mandate" for Phase 1.

These were:

- the continuing protection of rights for UK nationals covered by the Withdrawal Agreement who move after the specified date to take up residence in another Member State;
- posted workers;
- future healthcare arrangements;
- professional qualifications—future recognition decisions, recognition of qualifications of non-residents, and equal treatment for professionals who are neither frontier workers nor resident;
- recognition of licences and certificates that are currently recognised EU-wide;
- lawyers practising under home title; and
- territorial scope of economic rights—particularly secondary establishment and cross-border provision of services.

16. The Secretary of State said that voting rights for UK citizens in the EU and EU citizens in the UK was another issue that was unresolved. He said that the Commission had "not demurred" on the Government's intention to negotiate on the matter bilaterally with individual Member States - see note 190

17. The UK and the EU have been unable to agree on continued onward free movement for UK citizens resident in the EU27 after the Specified Date. The Commission's position, as stated in the draft Withdrawal Agreement, is that ongoing free movement will not apply to UK citizens living in the EU27 - see note 191 The Secretary of State said that ongoing free movement was a matter for Phase 2 and would "interact quite closely with whatever deal we do on services, professional services in particular. The right to move around will be quite an important part of that. " See note 192

18. Before the UK leaves the EU, UK citizens have the right to move to another EU country to live or to work as an employee or self-employed or run a business, provide services cross-border and to benefit from mutual recognition of their qualifications. Without resolution of their ability to move to another Member State after the Specified Date, these rights will be lost.

19. Individuals will lose not just the right to move freely to another EU country, but also the right to provide cross-border services in any country, to have their professional or academic qualification recognised in any country where it is not specifically recognised in the Joint Technical Note, and

lawyers would lose their ability to practice in another Member State based on a qualification obtained in their home state - see note 193

20. On 20 December 2017, the Prime Minister published an open letter to UK nationals living in the European Union to update them on the publication of the Joint Report. The Prime Minister said: I know there are a few important issues that have yet to be concluded. We raised these concerns, including the ability of UK nationals living in the EU to retain certain rights if they move within the EU, but the EU was not ready to discuss them in this phase of the negotiations. We will continue to raise these issues with the EU in the New Year - see note 194

21. While the UK Government made it clear shortly after the referendum that it wished to allow EU citizens in the UK to remain the question of UK citizens in the EU has been less certain. We therefore welcome the progress that has been made on protecting UK Citizens' rights in the EU and the formalisation of the guarantee to EU citizens in the UK. We attribute this progress to the position taken by the Prime Minister, while acknowledging this strand of the negotiations has not yet concluded.

Matter resolved in the Joint Report

22. While the draft Withdrawal Agreement - the Commission's draft legal text - in many areas departed from the agreements in the Joint Report in some there appears to be agreement: These included:

- To ensure legal certainty and consistent interpretation of the Withdrawal Agreement, UK courts shall "have due regard to relevant case law of the Court of Justice of the European Union handed down" after the end of the transition/implementation period - see note 195 In addition, on questions of interpretation of the citizens' rights part of the Withdrawal Agreement, UK courts may be able to request the CJEU "to give a preliminary ruling on that question... The legal effects in the United Kingdom of such preliminary rulings shall be the same as the legal effects of preliminary rulings given pursuant to Article 267 TFEU in the Union and its Member States. " See note 196 This voluntary referral mechanism would be available for eight years from the end of the transition/implementation period.
- EU citizens in the UK, and UK citizens in the EU will be able to be joined by family members, who are such at the end of the transition period, including non-resident spouses, civil partners, children and grandchildren, and dependent parents and grandparents. There is a specific reference in the Joint Report and the draft Withdrawal Agreement to giving a right of family reunification to children and adopted children who will be born after the transition/implementation period - see note 197 However, the draft Withdrawal Agreement, departs from the Joint Report in setting out the Commission's position that future spouses and future civil partners should be covered by the Withdrawal Agreement. The Government disagrees with this proposal - see note 198 The draft Withdrawal Agreement also said that the UK and EU27 shall "facilitate entry and residence" of non-resident partners who are in a durable relationship with an EU citizen before the end of the transition/implementation period - see note 199
- EU citizens in the UK and UK citizens in the EU will have continued access to healthcare and pensions. For example, UK citizens living in Member States before the Specified Date will be able to continue their current healthcare arrangements and take advantage of the EHIC scheme²⁰⁰ but those who visit or are resident after the specified date will not.
- Those who by the end of the transition/implementation period are working as frontier workers, as defined under EU law, will fall within the scope of the Withdrawal Agreement - see note 201
- Professional qualifications that fall under the Free Movement Directive on the Specified Date will be recognised. However, the recognition of other qualifications is a matter for Phase 2 - see note 202

- Rights derived from EU citizenship will be enshrined in the Withdrawal Agreement and given effect through primary legislation in the UK. This will be the Withdrawal Agreement and Implementation Act - see note 203

23. The Joint Report also included an agreement on allowing the UK and any of the EU27 Member States to introduce a system requiring individuals to apply for a status that confers the right of residence—in the UK this will be ‘Settled Status’. Furthermore, it included an agreement that the UK would establish an ‘Independent Authority’ to oversee the rights of EU citizens in the UK. This finds expression in Articles 17 and 152 of the Commission’s draft Withdrawal Agreement. We examine these two agreements in more detail below.

24. We welcome the agreement that UK Courts will oversee the agreement on the rights of EU citizens in the UK and not the CJEU. It is however disappointing that issues that appeared to be agreed in the Joint Report, such as the position of ‘future spouses’ and the cut-off date have been reopened in the European Commission’s draft withdrawal agreement.

25. We recommend that the Government ensures that while treating EU Citizens fairly they balance this against fairness to UK citizens. A key part of that is to ensure that EU citizens are not granted more rights than UK citizens under the Withdrawal Agreement.

Settled Status

26. The draft Withdrawal Agreement said that the UK and any of the EU27 Member States can introduce a system for individuals to apply for a status that confers the right of residence - see note 204. The UK will be introducing such a system, which will provide a new category of residency called ‘Settled Status’. It will provide proof that EU citizens have permission to continue living and working in the UK.

27. The requirements for Settled Status will largely replicate those for Permanent Residence²⁰⁵—five years continuous and lawful residence in the UK as a worker, self-employed person, student, self-sufficient person or family member of an EU citizen; and without absence from the UK for more than six months - see note 206 EU citizens in the UK that hold a Permanent Residence document will be able to exchange it for a Settled Status document, free of charge - see note 207

28. EU citizens in the UK will have to demonstrate EU citizenship, residency in the UK before the Specified Date and pass a criminality and security test. EU citizens who do not have a Permanent Residence document by the Specified Date will be able to apply for ‘temporary status’ until they reach the five-year threshold and can then apply for Settled Status. An application for temporary status or Settled Status must be made within a minimum two-year ‘grace period’. If no application is made for Settled Status within this period, then the rights, in principle, lapse. However, the Commission is proposing that the grace period be extendable for a further year if there are technical problems with registration - see note 208

29. The Government expects the online application system for Settled Status to be ready in the second half of 2018 - see note 209 It has also indicated that it intends the application process to begin six months before the UK leaves the EU, and will operate during the two-year grace period after the Specified Date. During this period, it will be necessary for the Home Office to process potentially 3 million applications - see note 210 Furthermore, the Government has said that it expects to process applications within 2 weeks.

30. The draft Withdrawal Agreement states that the application process must be “smooth, transparent and simple” and the application forms “short, simple and user-friendly” - see note 211

31. There is concern among advocacy groups as to whether the Government’s online system for Settled Status and temporary status will be operational in time to start processing applications later this year.

32. There are also little evidence as to how the Government intends to ensure that those who apply for “Settled Status” are efficiently screened to demonstrate their EU citizenship and lawful residency in the UK before the Specified Date and what processes it has to maintain the integrity of the system through identifying those who do not have a current or future right to “Settled Status” in the UK.

33. There is also little information as to what the “criminality and security test” could amount to in practice and whether the Government foresees that this test could lead to denial of “Settled Status” to those considered to pose a risk to UK Citizens and society.

34. For the conduct of the negotiations it is essential that the Home Office provides reassurance to both EU citizens undergoing the process and to wider society and evidence that the Government can deliver on its undertakings.

Settled Status and those not included in the Withdrawal Agreement

35. The definition of ‘residence’ for establishing Settled Status is based on the Free Movement Directive. Dr Charlotte O’Brien, Senior Lecturer at York Law School in the University of York, and British in Europe and the 3million have outlined categories of vulnerable people who are not covered by the Free Movement Directive, and are therefore not currently in the UK as a result of exercising rights under EU law:

- Children are unable to acquire Permanent Residence in their own right under the Free Movement Directive as their rights are dependent upon those of their parents. Children who have become estranged from their parent(s) or whose parent(s) are not able to fulfil the criteria in the Free Movement Directive, “for reasons related to care, disability, or evidential problems attendant upon having a series of short term, casual and/or zero hours jobs” are particularly vulnerable - see note 212
- Women with work histories that are punctuated with interruptions relating to domestic violence or because they have been caring for others might find it difficult to meet the Free Movement Directive’s criteria for residence. Women providing care “have had their five-year clock not only stopped, but restarted several times over, because care does not count as a reason to bridge gaps between employment under [the Free Movement Directive], and so there is discontinuous lawful residence. ” See note 213
- It is likely that there will be many people who will not understand the need for registration. Examples might include long-term residents, people who have been born in the UK without acquiring UK citizenship, elderly EU citizens, and relatives of migrant workers who do not speak English.
- Some part-time workers have been reclassified as not-workers since the introduction of the minimum earning threshold in 2014. Dr Charlotte O’Brien said that “It is not clear what the future effects of those past re-classifications and negotiations will be. ” See note 214
- Zambrano carers who benefit from rights deriving from Article 20 of the TFEU (on citizenship) do not feature in the agreement at all. As a result, third country nationals who rely on rights as primary carers of British/EU/EEA children will be at risk of removal if they do not meet the requirements of UK or EU27 immigration rules. This would put the welfare of these children at risk - see note 215 It is also not clear what the policy will be towards other third-country nationals who live in the UK under EU rights-based legal judgments - see note 216

36. The draft Withdrawal Agreement did not cover citizens from the EEA EFTA states and Switzerland who are living in the UK or UK citizens living in those states. However, on 16 February 2018 the Government announced that officials had met with EEA EFTA and Swiss counterparts to discuss a reciprocal extension of the arrangements set out in the Joint Report to one another’s citizens - see note 217

37. The current proposals define ‘residence’ by reference to the provisions of the Free Movement Directive. The Directive does not cover a range of vulnerable categories of people who will be experiencing anxiety over their legal status in the UK. As a matter of priority, the Government should seek to identify how many people fall into these categories and ensure that there are appropriate provisions and flexibility for such people to ensure eligibility for Settled Status that will cover vulnerable children and adults, particularly women who have had caring responsibilities or have been temporarily unable to work because of domestic abuse.

UK citizens in the European Union

38. The draft Withdrawal Agreement provides flexibility for other Member States to introduce their version of Settled Status for UK citizens, who are resident in their territory. This provision might be relevant as the current draft Withdrawal Agreement does not allow for continued onward free movement of UK citizens currently resident in the EU27 after the Specified Date. Member States could then initiate a process to identify the UK population in their territories so that they could be identified distinctly from those eligible for free movement across the other EU27 countries. British in Europe and the 3 million said:

The EU thus accepted this departure from EU law. At the last minute an option was included in the [Joint Report] so that EU27 countries may require UK citizens in their boundaries to make fresh applications. This was a proposal on which there was no prior consultation. Were this constitutive approach to be applied—in the UK to EU citizens and potentially in EU27 countries to UK citizens—following the UK's exit, existing EU rights would 'fall away' and citizens could potentially be without a legal status with dire consequences for them and their families - see note 218

39. For UK citizens in the EU27 there is no information currently available on whether those countries intend to apply a variation of Settled Status.

40. Many EU states already require EU citizens to register their residency. The draft Withdrawal Agreement would continue to allow EU Member States to require UK nationals to apply for a new residence document to ensure that their rights are protected beyond a transition/implementation period following the UK's exit from the EU.

41. It is unclear whether any additional Member States are considering the introduction of such a requirement, should free movement for UK citizens in the EU by the Specified Date not be agreed and it becomes an option that is desirable to Member States. The Government should continue to push hard for continued onward free movement rights for UK citizens in the EU by the specified date.

Independent Authority

42. The draft Withdrawal Agreement states that the UK will create an Independent Authority to monitor the citizens' rights part of the Withdrawal Agreement in the UK. The Independent Authority will have the power to receive and investigate complaints from EU citizens and their family members, and to conduct inquiries on its own initiative, concerning alleged breaches by administrative authorities of their obligations. The Independent Authority will have the right to bring a legal action before a competent UK court or tribunal to seek redress. Furthermore, the Independent Authority will inform the Commission of any such legal actions brought before courts or tribunals and may consult the Commission before taking legal action "and the European Commission may suggest to the Authority to bring such legal actions." See note 219

43. The Joint Report said that the "scope and functions" of the Independent National Authority, including its role in acting on citizens' complaints, will be discussed in Phase 2 and reflected in the Withdrawal Agreement. Article 152 in the Commission's draft Withdrawal Agreement is more expansive including a right to bring legal proceedings and an obligation to inform the Commission of those proceedings.

44. The Secretary of State said that the Government chose to create an Independent Authority, rather than give the task to the Home Office, to monitor the citizens' rights part of the Withdrawal Agreement. He said that initially the European Commission wanted to oversee it and "that was not going to fly". He then gave two reasons for why that was the case. He said:

One is that much of this is about anxiety rather than reality, about people being concerned. We wanted to do something that met any concerns, real or imagined - see note 220

45. Second, he said that having independent oversight bodies and ombudsmen were common, and he thought this would be “a way of championing [citizens’] rights and making sure they delivered, in a way that was visible, transparent and clearly designed to deliver on the deal. ” See note 221

46. We welcome the Government’s proposal to establish an Independent Authority to “champion” the rights of EU citizens in the UK and resist EU27 proposals to give the European Commission an oversight role. It would have been entirely unacceptable for the European Commission and the ECJ to hold extra-territorial jurisdiction over EU Citizens in the UK and the acceptance that this will not happen is most welcome.

47. We recommend that the Government publish draft proposals on how the Independent Authority will carry out its work.

Northern Ireland/Republic of Ireland

48. The Commission’s draft Withdrawal Agreement and the Joint Report both stated that there will be no “physical infrastructure or related checks and controls” on the border between Northern Ireland and the Republic of Ireland - see note 222 The UK Government is under no obligation to build additional infrastructure and has stated it will not. The EU may however insist that infrastructure is installed on its side of the border. In order to avoid this the Joint Report presented three options reach a cross border agreement:

[Option A:] The United Kingdom’s intention is to achieve these objectives through the overall EU-UK relationship. [Option B:] Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. [Option C:] In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement - see note 223

49. The Commission’s draft Withdrawal Agreement included a rewrite of Option C that proposed a “common regulatory area” which constitutes “an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected” - see note 224 Under this proposal, Northern Ireland would be considered “part of the customs territory” of the European Union²²⁵ and would require Northern Ireland to follow European Union law on goods, agriculture and fisheries, the Single Electricity Market, certain environmental standards and state aid - see note 226 Michel Barnier described this as “the backstop solution” and that it was “the only way to guarantee that [the EU and UK] joint commitments will be upheld in all circumstances, as the Joint Report requires. ” See note 227

50. Option C was rewritten despite the commitment given in para 56 of the Joint Report that: given the specific nature of issues related to Ireland and Northern Ireland, and on the basis of the principles and commitments set out above both parties agree that in the next phase work will continue in a distinct strand of negotiations on detailed arrangements to give them effect.

51. It is surprising that this paragraph of the Joint Report was not also translated into legal text in the draft Withdrawal Agreement. The Government has consistently ruled out any form of economic border in the Irish Sea. The Secretary of State said, “we have always said that there is not going to be a border in the Irish Sea and that continues to apply. We are not going to have any breakup of the United Kingdom off the back of what we are doing here. ” See note 228

52. The Prime Minister has rejected the Commissions version of Option C because it would “undermine the UK common market and threaten the constitutional integrity of the UK by creating a customs and regulatory border down the Irish Sea” and that “no UK Prime Minister could ever agree to it” - see note 229 The Prime Minister stressed that the Joint Report had “made it clear that there should continue to be trade between Northern Ireland and the rest of the United Kingdom, as there is today. ” See note 230 The Prime Minister was referring to paragraph 50 of the Joint Report which stated that there would be:

no new regulatory barriers develop[ed] between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market - see note 231

53. The Government has said that full alignment could include mirroring EU regulations to providing equivalent regulations or having our own regulations. It did not mean harmonisation. However, despite this, some witnesses said that it was difficult to draw conclusions on the scope of the commitment based on some of the phrasing in the Joint Report. For example, Professor Dougan said that the concept of the all-island economy "could be as broad or as narrow as you really want it to be" - see note 232 When we asked the Secretary of State what was included in the all-island economy, he said:

It was things like the single electricity market we had in mind, which we will somehow have to maintain in place if we are going to have the best outcome for north and south, in terms of cost of electricity, reliability, seasonal adjustment and so on - see note 233

54. These proposals go well beyond the scope of the current areas of cross border cooperation contained in the Belfast Agreement and would run contrary to the commitments in para 44 of the December report which states that "both parties recognise the need to respect the provision of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent. The commitments set out in this joint report are and must remain fully consistent with these provisions".

55. The Secretary of State said that 'full alignment' would be limited to six areas of north-south cooperation listed in the Belfast Agreement: transport, agriculture, education, health, environment and tourism - see note 234. Professor Dougan said that the 'north-south co-operation' phrasing in the joint report was a "relatively clear criterion, in the sense that the two sides have been working on drawing up a list of areas that are the subject of north-south co-operation, underpinned by EU law and policy." See note 235. In Dublin, we heard that 142 potential areas of cooperation had been identified in preliminary work as part of a "mapping exercise", although this has not been published - see note 236. However, this would expand the scope of the agreed areas of cooperation within the Belfast Agreement which would be contrary to December's Joint Report, the commitment to uphold the agreement and would only be possible with the consent of all the parties in Northern Ireland. as well as the UK and Irish governments.

56. It is clear from the draft Withdrawal Agreement and statements surrounding it, that the Commission and the Irish Government do not believe that a commitment to full alignment that is limited to only the six areas of cooperation under the Belfast Agreement would encompass all the necessary product standards for goods laid down in EU legislation. A frictionless border requires cooperation on product standards, customs duties and VAT. Both sides would have to agree a system in which duties were collected and not evaded, despite an absence of customs controls at the border. Products entering either market would need to be guaranteed to meet the standards of that jurisdiction without border checks.

57. The Secretary of State said that the UK would not be following EU rules to the letter but rather it would seek to achieve the same outcomes through different regulatory regimes. He said, "The point of full alignment... is that we intend to get outcome alignment, not harmonisation." See note 237 Professor Anand Menon said:

the missing element in all this is the question of adjudication. Lurking in the text of this document is "we will be aligned; trust us", and that is simply not going to fly for the European Union, because the big question is who gets to say whether or not the rules are the same? What is the form of legal adjudication? See note 238.

58. This UK Government has set out a clear process for this in the context of a Free Trade Agreement:

Second, we will need an arbitration mechanism that is completely independent—something which, again, is common to Free Trade Agreements - see note 239

59. However, Article 11 of the Commission's draft Withdrawal Agreement proposed the extension of EU supervision and enforcement to Northern Ireland. This runs contrary to the UK Government's position that the UK would not be subject to decisions of the ECJ and would result in a serious breach of the commitment to uphold Northern Ireland's status as a full member of the UK.

60. When we visited Dublin in January, Irish politicians, including Simon Coveney, said that the Joint Report represented a clear agreement that there would be no regulatory divergence which could lead to customs checks at the border.

61. We welcome the Government's rejection of the Commission's interpretation of what constitutes full alignment in the draft Withdrawal Agreement in the context of the Belfast Agreement.

62. We welcome the Government's commitment to maintaining no barriers between Northern Ireland and the rest of the UK and upholding the constitutional status of Northern Ireland as set out in the Belfast Agreement. We welcome the commitment of the Government to seek a Free Trade Agreement with the EU.

63. We remain disappointed in the EU27's approach to the Northern Irish/Republic of Ireland border. It is clear that solutions that allow for the free flow of goods across the border have to be settled in the context of an overall agreement with the EU. Seeking to find a solution to the border in the absence of an overall agreement is to approach the question from the wrong starting point.

64. In order to ensure a frictionless border between Northern Ireland and the Republic of Ireland and between the Republic of Ireland and Great Britain we urge the UK government, the Irish government and the EU to explore the current arrangements for monitoring cross border trade, the proposals put forward by the UK government for a frictionless border last August, the report entitled 'Smart Border2.0' given to the European Parliament this year, and recent trade facilitation measures put in place by the EU with China, the US and Canada. We note that Michel Barnier has already stated that innovative and imaginative solutions must be sought to deal with this issue and believe that given political willingness there are solutions which are worthy of consideration.

65. We are disappointed that the draft legal agreement does not reflect the balance of the December report because the text emphasises only the fall-back position—option c, shows only passing recognition to options a and b and gives no recognition to the commitment to having no border between Northern Ireland and the rest of the UK. The text on option c seeks to extend the remit of the Belfast Agreement in terms of the powers of cross border institutions despite the clear commitment that this can only be done with the agreement of all parties in N. I. We note that both the government and the main opposition party have expressed their unwillingness accept the text in its current form and call upon the EU to amend the agreement to reflect the commitments made in the December report.

Government's proposed solutions

66. The Government's preference for maintaining a frictionless border is through the overall EU-UK relationship - see note 240 However, the Government has asked for Options A and B—the Future Partnership and 'specific solutions'—to be considered together - see note 241 'Specific solutions' appears to refer to the implementation of new technical and administrative processes to avoid the need for customs checks. Options A and B are not set out in detail in the draft Withdrawal Agreement as they are contingent on the Phase 2 negotiations which are expected to begin in March. In order to avoid any disincentive to seriously examine options A and B the final agreement on the wording of the protocol on option C should be left open until discussions on the future relationship have been concluded.

67. However, rather than concentrate on Options A & B the draft Withdrawal Agreement allows only for a "subsequent agreement" to supersede Option C:

Should a subsequent agreement between the Union and the United Kingdom which allows addressing the unique circumstances on the island of Ireland, avoiding a hard border and protecting the Belfast Agreement in all its dimensions, become applicable after the entry into force of the Withdrawal Agreement, this Protocol shall not apply or shall cease to apply, as the case may be, in whole or in part, from the date of entry into force of such subsequent agreement and in accordance with that agreement - see note 242

68. This wording again departs from the Joint Report in its interpretation of the Belfast Agreement in a manner that creates new and unknown “dimensions” that could be interpreted by either side as they wish. Adding new ‘dimensions’ to the Belfast Agreement without consultation or agreement is a major departure from December’s report.

69. Last August, the Government published a position paper that included two technical and administrative proposals. Those were:

- A streamlined customs arrangement between the UK and the EU underpinned by the continuation of some of the existing agreements and under which the UK and EU would trade with each other as third parties. Such an arrangement is essentially an agreement to reduce, as far as possible, customs checks.
- A new customs partnership with the EU which would align the UK approach to the customs border in a way that removes the need for a UK-EU customs border. This would be achieved by operating a regime for imports that aligns precisely with the EU’s external customs border for goods consumed in the EU market and requiring the same tariffs and rules of origin as the EU to be applied.

70. Evidence from Jon Thompson, the Chief Executive and Permanent Secretary of HM Revenue and Customs, suggested that the streamlined customs arrangement proposal is the most developed of the two within Government. He said:

First of all, the assumption is that what is adopted in the future is a negotiated settlement with the EU, in which the highly streamlined customs arrangement is adopted. That is a basket of changes that essentially keeps all of the good features of trading with the European Union: for example, you stay in the Common Transit Convention and there is mutual recognition of the Authorised Economic Operator scheme and so on and so forth.

Because of the unique situation of Ireland and Northern Ireland, however, you need to add on three additional things, which are set out in the “Northern Ireland and Ireland” [position] paper. First of all, that is to maximise the Authorised Economic Operator scheme, which you were asking about. Secondly, it is to seek a derogation for small traders, because there needs to be a recognition that the Ireland-Northern Ireland border is very much a local economy in which traders cross the border on a regular basis. We are seeking a derogation for small traders, with the definition of small to be negotiated. Thirdly, we want to move to a system of self-assessment, which is set out in the Union Customs Code and is the direction of travel for the European Union.

If you take the highly streamlined customs arrangements and you add those three things on, we believe that would cover the vast majority of the trade between Northern Ireland and Ireland. If there were any checks, they would be risk and intelligence-based, and they would take place well away from the legal border - see note 243

71. The Prime Minister’s most recent speech on the Future Partnership referred to the two technical and administrative proposals that were presented in the August 2017 position paper and emphasised a desire for an “agreement on customs” as part of the Future EU-UK Partnership - see note 244

72. In recent evidence to the Treasury Committee Peter MacSwiney, Chairman, ASM (UK) Ltd and Chair, Joint Customs Consultative Committee (JCCC), an HMRC-sponsored forum commenting on the proposal for the Customs Partnership stated that

I am really unclear about this five years. I do not like the new customs partnership. I think it is a ridiculous suggestion. It seems to be based partly on the IPR [Inward Processing Relief] regime, which is probably the single largest regime within HMRC that has fiscal anomalies and non-compliance. It seems to be coupled with the enhanced end-use process, which again tracks goods.

That was very unpopular with the trade when the UCC added some bells and whistles to it. I am very sceptical that that solution would ever work, but even if it were to be deployed I cannot see what HMRC is building. This is all based on trade systems, so I am not sure where he got five years from - see note 245

73. However, the Irish Government has said, in broad terms, that it favours maintaining a frictionless border through the future partnership. In February, Leo Varadkar, the Taoiseach, said, "We both prefer Option A as the best option by which we can avoid any new barriers [on the] border in Ireland, and that is through a comprehensive customs and trade agreement involving Britain and Ireland." See note 246 In February, in response to the publication of the draft Withdrawal Agreement, Simon Coveney, the Tanaiste and Foreign Minister, said:

We have always been clear that our preference is to avoid a hard border through a wider future relationship agreement between the EU and the UK, a view we share with the British government. We are also committed to exploring specific solutions to be proposed by the UK. At the same time, there is now the necessary legal provision to implement the backstop of maintaining full alignment in Northern Ireland with the rules of the Single Market and Customs Union necessary to protect North South cooperation and avoid a hard border. This is very much a default and would only apply should it prove necessary - see note 247

74. The UK government has stated that it is seeking a 'bespoke' agreement with the EU in which the special situation of Northern Ireland's border with the Republic of Ireland is recognised. Each state that has relations with the EU has so on different basis as the product of different histories and geography. The reliance (or selective reliance) on EU precedents is therefore of little relevance to the current situation.

75. However, Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law at the University of Liverpool, described the example of the Norway/Sweden border—a border between an EEA country and an EU country. He said:

the Norway/Sweden border is about as closely integrated a border as you can get without being in the Customs Union. Bear in mind that there are no customs tariffs or duties of any kind on most categories of goods between the EEA states that are also EFTA members and the EU member states... There are no internal tariffs between those countries; there are only the external tariffs, which involve third countries. There is pretty much full regulatory alignment and convergence and cooperation within the context of the EEA agreement, but there is still a customs border. It still has to function as a customs border... There is a common border zone between Norway and Sweden, where the customs officials can travel across the border freely as if it were a single territory, but it is still a customs border, and that is about as co-operative and close as you can get. You still have checks, formalities, physical infrastructure and so on - see note 248

76. It is noted that membership of a Customs Union itself does not guarantee the elimination of Customs procedures. For instance, the 1903 South African Customs Union, the oldest in the world, still requires customs checks between its members. The case of Mercosur is even less defined. Even those states that have Customs Unions with the EU require differing degrees of Customs, Andorra requires duty to be paid on food stuffs such as tea and milk and the EU Turkey Customs Union does not extend to agricultural products or the vehicles crossing the border - see note 249,250

77. In November 2017, the European Parliament's Committee on Constitutional Affairs (AFCO) commissioned a report to identify international standards and best practices for creating "a smooth border experience" on the island of Ireland. The report was authored by Lars Karlsson, a former Director of the World Customs Organization and Deputy Director General of Swedish Customs - see note 251 It examined three case studies, the Norway/Sweden border, the United States/Canada border and the Australia/New Zealand border for examples of international best practice. However, the report did not rule out the possibility that some customs infrastructure might be necessary. For example, the report provided an example of a "normal border crossing" that could be facilitated by its proposals:

A company in Northern Ireland needs to move goods to a client in the UK. The company is pre-registered in the AEO database (AEO status or application for AEO Trusted Trader), a simplified export/import declaration is sent, including a unique consignment reference number. The transporting company is pre-registered in the AEO database and the driver of the truck is pre-registered in the Trusted Commercial Travellers database. The simplified export/import declaration is automatically processed and risk assessed. At the border the mobile phone of the driver is recognized/identified and a release-note is sent to the mobile phone with a permit to pass the border that opens the gate automatically when the vehicle is identified, potentially by an automatic number plate registration system. A post-import supplementary declaration is submitted in the import country within the given time period. Potential controls can be carried out by mobile inspection units from EU or UK with right of access to facilities and data, as required - see note 252

78. On 5 March 2018, the Prime Minister told the House of Commons that the report “does give some very good proposals for solutions. ” See note 253

79. For a border that is more frictionless than that of Norway/Sweden, a solution that is bespoke to the unique circumstances of the island of Ireland will be necessary. However, there is a risk that other Member States may not accept a situation where goods entering the European Union through Ireland are subjected to less stringent checks than those entering through other Member States. Without a common system for VAT collection, such a situation could increase evasion of customs duties and VAT as businesses divert their goods into the European Union through Northern Ireland or vice versa.

80. John Bourne, Policy Director of Animal and Plant Health for the Department for Environment, Food and Rural Affairs, said, “Clearly, there is two-way trade across the border. We can decide what we do on our side, but we cannot determine what happens on the other side. ” See note 254 Jon Thompson said, “How exactly the French, the Dutch, the Belgians or the Irish eventually react is not something over which the Government, civil servants or indeed UK plc has much influence. ” See note 255 Although the Prime Minister set out in more detail the nature of its technical and administrative proposals there remains the question of whether they could be operational before the end of the transition/implementation period. For example, the Government has said that it plans to use the EU’s Authorised Economic Operator scheme, or a recognised equivalent, to reduce customs requirements at the border. However, according to the Institute for Government, “the accreditation process for AEO status can take around six months for businesses, meaning that clear guidance is required early to ensure that traders are ready to make the most of the scheme. ” See note 256

81. The Joint Report and the draft Withdrawal Agreement commits to there being no “physical infrastructure” or “customs checks” on the Northern Ireland/Republic of Ireland border. Whilst all the borders we have studied have involved some checking of movements of goods across the frontier, use of existing technology, electronic pre clearance of traded goods, Authorised Economic Operators, mutually recognised accreditation of trusted traders, importer self assessments, inspection zones away from the border for high risk assignments, smart and secure lanes and randomised audits have created a situation where at present delays and need for border checks have been considerably reduced and according to the Permanent Secretary of HMRC 96% of customs applications are cleared within seconds.

82. Further development of these trade facilitation methods, application of latest in vehicle technology along with the exemptions from customs checks for local trade contained in the UK government paper of last August should all be explored to deliver a truly frictionless border between the republic of Ireland and the UK.

83. We welcome the evidence of Jon Thompson that “the vast majority of the trade between Northern Ireland and Ireland” could be covered by a streamlined customs arrangement. We have seen no evidence to show that a ‘Customs Partnership’ is a workable solution or that it provides any additional benefits over those that can be gained either unilaterally or via a streamlined agreement with the EU.

84. While remaining in Customs Union itself has many drawbacks and is not a guarantee of 'frictionless' trade, there are a number of modern technological and administrative solutions that could provide a solution. We have set out in the Annex a range of methods by which the border in Northern Ireland (and elsewhere) could be upgraded to ensure the free flow of goods.

Belfast Agreement

85. In the Joint Report, both the UK and the European Union affirmed "that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation" and that the Belfast Agreement must be protected "in all its parts, and that this extends to the practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the Agreement. " See note 257. Furthermore, the UK and the European Union "recognised the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent" and that the UK "continues to respect and support fully Northern Ireland's position as an integral part of the United Kingdom, consistent with the principle of consent. " See note 258

86. We welcome the commitment in the Joint Report for both sides to respect the principle of consent in the Belfast Agreement and the constitutional status of Northern Ireland. We are disappointed that these commitments were not translated into the European Commission's draft text. We note that the UK Government is one of two parties to the British Irish Agreement and that the agreement cannot be expanded or given new dimensions that were not in the original text.

Financial Settlement

87. The legal position as to the UK's liabilities to the EU on departure has been looked at in length by Martin Howe QC et al of Lawyers for Britain in his paper "potential financial liabilities and the jurisdiction to enforce them" where they:

failed to find a credible legal argument either for a liability on the UK to contribute to the EU's unfunded pension fund deficit, or for any liability to contribute to the EU's ongoing programmes after Brexit day on 29 March 2019, with the possible exception of an obligation to carry on contributing overseas aid of €1 - see note 3bn up to the end of 2020 via the European Development Fund (EDF). " See note 259

That being the case the UK's financial liability to the UK is more one of politics and practicality than law.

88. The Government has estimated that the Financial Settlement will amount to between £35 and £39 billion. This will be spread over many years and will add up to less than what would have been paid had the UK remained a Member State - see note 260 The amount reflects the UK's obligations for the Multiannual Financial Framework that ends at the end of 2020. It also reflects EU assets of which the UK is entitled to a share. The Secretary of State said that the size of the Financial Settlement would be unlikely to rise during Phase 2 - see note 261

89. The Joint Report stated that the UK and the EU have agreed a methodology by which the Financial Settlement will be calculated - see note 262 It notes that the UK will contribute to the European Union's annual budgets for 2019 and 2020. The 2020 budget will most likely be adopted without a vote for the UK.

90. The UK has also agreed to settle its share of the Reste à Liquidier (RAL), which is the difference between the EU's expenditure commitments undertaken and the actual payments made, as at 31 December 2020. These commitments would have been made under the Multiannual Financial Framework (MFF) which was agreed by the UK - see note 263 By the end of 2020, the RAL is expected to amount to €254 billion (£223 billion). The UK's share is apparently 12.7 per cent, based on the UK's average share of contributions in the current budgetary cycle.

91. The UK will also contribute a share of the EU's other financial (contingent) liabilities, including staff pensions and the €1.8 billion (£1.58 billion) macro-financial assistance package for Ukraine. The EU will repay the UK's €3.5 billion (£3.1 billion) of paid-in capital to the European Central Bank and European Investment Bank (EIB), the latter in twelve annual instalments - see note 264. However, the UK has committed to remain liable to provide capital to the EIB as necessary for operations outstanding on the withdrawal date, including a maximum of €35.7 billion (£31.2 billion) of callable capital if the EIB were to be in financial distress. These liabilities will decrease as the EIB's loans outstanding on the UK's withdrawal date amortise.

92. In 2019 and 2020, all EU funding programmes—including Horizon 2020, the Cohesion Fund and the Regional Development Fund—will remain open to UK participants - see note 265. This will entitle UK beneficiaries to payments from those programmes for projects that were agreed to before 31 December 2020, even if actual payments are made after that date. Although the provisional agreement takes note of the UK's intention to participate in some EU programmes after 2020, it does not make any specific provision for such participation. It is expected that this will be included in the negotiations on the transition/implementation period.

93. The draft Withdrawal Agreement said that the UK will remain a participant in the 2014–2020 European Development Funds (EDFs). The EDFs fund development assistance projects in the African, Caribbean and Pacific Group of States.

Financial Settlement and the Future Partnership

94. The Secretary of State said that the Financial Settlement was “conditional” on the UK securing a Free Trade Agreement²⁶⁶ and that was one reason a trade deal needed to be concluded by October - see note 267. He said that he expected the UK “to make the payment during the course of the transition or the implementation period.” However, he also said that the Future Partnership will “take some time to conclude, as the Canadian one did... and that time will happen during the implementation period.” See note 268. This means that the UK will have already paid a proportion of the Financial Settlement before the Future Partnership is ratified. Professor Anand Menon, Director of UK in a Changing Europe, said:

For the European Union, [“nothing is agreed until everything is agreed”] is a reference to Phase 1 ... From the EU's perspective, there is no link between the Financial Settlement and any future trade talks, for a very practical reason ... We are not going to be in a position to sign off a trade deal until several years after we have been paying the money we have already agreed to pay anyway, because this agreement has to be signed and sealed in October next year. The timing is simply wrong - see note 269

95. We welcome the Government commitment that the payment of the Financial Settlement is contingent on the agreement of the Future Partnership. However, the agreements and treaties that will establish the Future Partnership will not be ratified until after the UK has already made a substantial proportion of these payments. It is therefore imperative that the UK Government achieves a substantial and binding commitment by October 2018 to a heads of terms for agreement while preparing to the possibility that no acceptable agreement may be forthcoming.

96. The Government continue to explain that if there is no realistic prospect of a future trade agreement by October 2018 it will not be making any further financial contributions.

TRANSITION/IMPLEMENTATION PERIOD

Introduction

97. Negotiations on the transition/implementation period have started and it is expected that its terms will be agreed at the next European Council on 22–23 March. On 29 January, the European Council published Supplementary Directives for the negotiations on the transition/implementation period and on 7 February the Commission published a more detailed position paper that outlined in “legal terms” how such arrangements should be given effect in the Withdrawal Agreement - see note 270

98. This position paper has been incorporated (with some amendments) into its draft Withdrawal Agreement that was published on 28 February 2018. Since the Prime Minister’s Florence Speech in September 2017, which was the first time that the Government formally requested a transition/implementation period, the Government has published a ‘Technical Note on International Agreements’, ‘Draft Text for Discussion: Implementation Period’, and a paper on ‘EU citizens arriving in the UK during the implementation period’ - see note 271.

Purpose

99. The Secretary of State set out the Government’s view of the purpose of a transition/implementation period in a speech in Teesport in January. He said:

- It will allow the UK time to build new infrastructure, and set up new systems, to support the Future Partnership and allow for as free and frictionless trade as possible and will allow European governments to do the same;
- It will ensure business is ready and business will only have to adjust to one set of changes;
- The EU maintains it is not legally able to conclude an agreement with the UK as an external partner while it is a Member State. It is only possible for the UK to sign this agreement when it is outside the EU; and
- An agreement on the Future Partnership will require the appropriate legal ratification, which would itself take time. This will need to happen during the implementation period - see note 272.

Duration

100. On 29 January, the European Council said that the transition/implementation period will start on the day that the Withdrawal Agreement comes into force and “should not last beyond 31 December 2020.” This suggests a period of 21 months - see note 273 The Commission’s position paper said the same - see note 274 The EU selected this date because it coincides with the end of the current Multiannual Financial Framework (MFF—the European Union’s seven-year budgetary cycle); the last one to which the UK has agreed to contribute - see note 275 However, the Government’s ‘Draft Text for Discussion: Implementation Period’ does not commit to this timeframe. It said:

101. The UK believes the period’s 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. The UK agrees this points to a period of around two years, but wishes to discuss with the EU the assessment that supports its proposed end date - see note 276

Extension

102. As the Government has set out in the Teesport Speech and the Draft Text for Discussion, the transition/implementation period will need to allow time for the ratification of the treaties/agreements that will establish the Future EU-UK Partnership and to implement new processes and systems.

103. The Commission intends to set out the details of the Future Partnership in a Political Declaration that will accompany the Withdrawal Agreement. We heard in Brussels that the

Commission and the European Parliament would like the Political Declaration to be detailed. Negotiators plan to reach this point in October 2018. Once the Political Declaration has been agreed, negotiations will begin on the treaties and agreements that will establish the Future Partnership. Michel Barnier said that the Future Partnership would be established by several agreements, some of which will be treaties - see note 277

104. The Government is confident that a substantial amount of the Future Partnership will have been agreed before the start of the transition/implementation period. In evidence to us, the Secretary of State said that the “substance” of an EU-UK trade agreement will have been agreed before UK withdrawal - see note 278 He also said that it was important that material aspects of the Future Partnership are not negotiated during the transition/implementation period. He said: It would be unwise, in my view, apart from that it practically does not meet the requirements of a transition period, to get sucked into doing a negotiation that is substantive or major during the transition period itself. Why? The balance of power in the negotiation alters and the aim then, on the part of the Commission, will be to spin out the negotiation - see note 279

105. In her Munich Speech, the Prime Minister said that “key aspects of our Future Partnership in [foreign affairs and defence] would already be effective from 2019. ” See note 280 However, Michel Barnier suggested that it was possible that not all aspects of the Future EU-UK Partnership will have been agreed before UK withdrawal. He said:

I can say that within a short period of time we cannot do absolutely everything. We do have to set priorities, but we will be in a position to conclude at least the Free Trade Agreement, if not more. I will work with that in mind, because we want to ensure good trade co-operation. That is a very important condition in the interests of your country as well as the European Union - see note 281

106. As well as time for ratification, the Government will also need time to implement new administrative processes and systems. For example, new customs arrangements, new trade agreements and new immigration policies will all need to be devised.

107. If more time were needed to negotiate the Future EU-UK Partnership, the Government could seek an extension to the Article 50 period. This would require unanimous agreement amongst the EU27. It would allow more time to negotiate a detailed Political Declaration and potentially more time to negotiate the treaties/agreements that will establish the Future Partnership before the start of the transition/implementation period, depending on the length of the extension. However, extending Article 50 would break the Government’s commitment to leave the EU and its institutions by the end of March 2019.

108. If a longer transition/implementation period were needed for ratification and the implementation of new administrative processes and systems, an extension is possible. However, the Secretary of State said that a transition/implementation period that lasted much longer than two years might not be possible. In Brussels, we heard that a three-year transition/implementation period was probably the legal limit of what Article 50 could support.

109. It should be noted that an EU precedent for delay in negotiating trade agreements does not necessitate delay in this case. For a number of reasons:

- The UK is already fully aligned with the EU. The time in trade agreements is usually spent on discussions on convergence. The average time the USA takes to negotiate FTAs with its partners is 1.5 years. Australia–USA took 22 months - see note 282
- The EU can act in a hurry when it wishes to. We have seen this in numerous Eurozone crises where initial delay in acting would end up with a rapid implementation when absolutely necessary. There is also an example of Ukraine, whereas the Association agreement took 2 years, the initial cut in tariffs was done in 6 weeks.

Example of the EU acting swiftly:

Ukraine trade agreement “autonomous trade preferences”

- 11 March 2014 – EU proposal to reduce Ukraine Tariffs²⁸³
- 2–3 April European Parliament approves the tariff cut.

- 14 April 2014 EU foreign Affairs Council Approves measures
- End of April 2014, cut is put into force²⁸⁴

110. It should be noted that any delay could be costly. The European Scrutiny Committee has stated that an extension of the transition/implementation period would come with a financial cost of potentially £5bn - see note 285

111. The Government believes it can agree the “substance” of its Future Partnership with the EU before October 2018. The UK Parliament will need absolute clarity on the Future EU-UK Partnership, including the arrangements for the Northern Ireland/Republic of Ireland border.

112. A transition/implementation period of 21 months should be ample to implement a heads of agreement agreed in October 2019. If a detailed agreement is not forthcoming the UK should not consider itself bound by any financial commitments and prepare to withdraw unilaterally.

113. A prolonged transition/implementation period would be difficult for the UK and would not respect the referendum result. During this time, the UK would be bound by the full *acquis*, with no say in the Union’s decision-making bodies. It would also be bound by the CJEU (and its fines) without a UK Judge on the Court. Furthermore, it would have to make financial contributions to the EU’s new seven-year budget, with no say on how it is to be spent. The UK would also be subject to new EU laws over which it had not had voting rights.

Citizens’ rights

114. It is the Government’s view that the Specified Date, or ‘cut-off’ point, for when the citizens’ rights provisions in the Withdrawal Agreement come into force should be the 29 March 2019. However, the Commission’s view, as set out in the draft Withdrawal Agreement, is that the Specified Date should be the end of the transition/implementation period. The timing of the Specified Date has consequences for several aspects of the citizens’ rights part of the Withdrawal Agreement. For example, the Joint Report stated that concepts of EU law in the citizens’ rights chapter of the Withdrawal Agreement are to be interpreted in line with the case law of the CJEU by the Specified date. In addition, UK courts will be able to make referrals to the CJEU for “litigation brought within 8 years from the date of application of the citizens’ rights Part”. It will only be possible to know when this period will start once the Specified Date has been agreed. In a recent policy paper on EU citizens arriving during the transition/implementation period, the Government said:

The expectations of EU citizens arriving in the UK after our exit will not be the same as those who moved here before our withdrawal, and the same will be true of UK nationals moving to an EU Member State. It should therefore be for the UK and for Member States to determine the rights and pathways to settlement that new arrivals will have if they wish to remain beyond the implementation period - see note 286

115. However, the Government also said that during the transition/implementation period EU citizens will be offered “eligibility after the accumulation of five years’ continuous and lawful residence to apply for indefinite leave to remain”; “a temporary status in UK law that will enable them to stay after the implementation period has concluded—this means that they will be able to remain lawfully in the UK working, studying or being self-sufficient for the five years needed to obtain settlement”; and “an opportunity to secure this temporary status during the implementation period, with an additional three month window for applications after the period, ensuring that there is no cliff-edge.”

117. The Government’s offer to permit applications for indefinite leave to remain will be based on UK immigration law, not on the Withdrawal Agreement, which means that EU citizens who arrive during the transition/implementation period would not have the same rights as those that arrive before the start of the transition/implementation period; for example, the right to seek rulings from the CJEU for an eight-year period. Furthermore, the Government has offered the ability for EU citizens to be joined by family members after the transition/implementation period. However, this

right will be “on a par with British citizens” which is more restrictive than what those EU citizens will have who will be covered by the Withdrawal Agreement,²⁸⁷

118. In Brussels, we heard that the European Parliament would not accept a situation whereby EU citizens who arrive during the transition/implementation period are treated differently to those that are already living in the UK.

119. On 31 January, Guy Verhofstadt MEP, the EP’s Chief Brexit Coordinator said, The maintenance of EU Citizens’ rights during the transition is not negotiable. We will not accept that there are two sets of rights for EU citizens. For the transition to work, it must mean a continuation of the existing acquis, with no exceptions - see note 288

120. He has since said that “I think it is possible in the coming days and coming weeks ... (to) make progress on this and (that) we can conclude on this. ” See note 289

121. We note the Government’s view that the Specified Date for the citizens’ rights chapter of the Withdrawal Agreement should be the 29 March 2019. We believe the Government should retain that as its primary objective. However, we note that the Government has also made a unilateral offer to provide EU citizens arriving during the transition/implementation period with the opportunity to apply for indefinite leave to remain in the UK. Under this proposal EU citizens that arrive in the UK will have different rights to those that are living in the UK before the transition/implementation period.

122. The Government should be mindful that the referendum result was in part a rejection of EU free movement of persons and that any further extensions of the current system or loss of control over our immigration system after we have left the EU risks damaging the voters trust in our democracy.

Participation in EU decision-making

123. In the Florence Speech, the Prime Minister said that during the transition/implementation period, the UK will be subject to “the existing structure of EU rules and regulations” but that it would not be participating in the EU’s main decision-making bodies. She said:

The United Kingdom will cease to be a member of the European Union on 29th March 2019. We will no longer sit at the European Council table or in the Council of Ministers, and we will no longer have Members of the European Parliament - see note 290

124. The EU’s Supplementary Directives suggest that the UK will have limited opportunities to influence decisions during the transition/implementation period. They said that while the UK will be subject to the “full competences of the Union institutions”, the UK will “no longer participate in or nominate or elect members of the Union institutions, nor participate in the decision-making or the governance of the Union bodies, offices and agencies. ” Furthermore, the Supplementary Directives state that as a general rule, the UK will not attend “Commission expert groups and other similar entities or of the agencies, offices or bodies where Member States are represented. ”

125. Where the Supplementary Directives do allow for consultation with the UK, the terms are ambiguous. They state that the UK should be consulted on the “fixing of fishing opportunities (total allowable catches) during the transition period. ” See note 291 The Supplementary Directives also give two scenarios in which the UK could be invited to attend meetings in which Member States are represented but only on a case-by-case basis and without voting rights:

- the discussion concerns individual acts to be addressed to the United Kingdom or to United Kingdom natural or legal persons; or
- the presence of the United Kingdom is necessary and in the interest of the Union, in particular for the effective implementation of the Union acquis during the transition period - see note 292 These exceptions are drafted broadly and therefore the exact scope of potential UK participation in meetings is not clear. The Supplementary Directives state that the “Withdrawal Agreement should define the precise conditions and the clear framework under which such exceptional attendance should be allowed. ” See note 293

New EU rules and regulations

126. The Commission said that during any transition/implementation period, the UK will be required to adopt new EU laws. Michel Barnier said, "It is a question of maintaining the status quo, as Theresa May has said, and this will only be possible if the dynamic nature of this acquis can be accepted. " See note 294 The European Council's Supplementary Directives stated, "Any changes to the Union acquis should automatically apply to and in the United Kingdom during the transition period. " See note 295 The Government has said that most new EU rules and regulations that will come into force during the transition/implementation period will have been formulated while the UK was a Member of the EU's institutions.

127. When asked whether the UK would accept new EU rules during the transition/implementation period, the Secretary of State said:

The average time to put a regulation into effect in the European Union is 22 months. The proposal we have with the European Union at the moment is that we leave over 21 months. In other words, there will be nothing that we did not have a say in. As to what happens where that is not exactly right and it does not work out quite that way, we will see when we come to it, but at the moment no - see note 296

128. The Government has said that there could be exceptions where the UK could be subjected to new rules without a say over how they were devised. In evidence to the European Scrutiny Committee, Sir Tim Barrow, Permanent Representative of the United Kingdom to the European Union, provided the example of EU tertiary legislation. He said:

there is tertiary legislation as well and that primarily comes through agencies and bodies, and that is why, as the Minister has said, we need to have a Joint Committee: so that we can resolve concerns, if we have concerns, about actions in [the transition/implementation period] - see note 297

129. It is also possible that the UK could be bound by changes to EU sanctions policy, which could be devised and implemented rapidly, during the transition/implementation period.

130. On 26 January, the Secretary of State said that the Government will seek a mechanism that will enable it to influence new EU rules and regulations that are formulated after the UK has left EU institutions but that are scheduled to come into force during the transition/implementation period. He said,

we will have to agree a way of resolving concerns if laws are deemed to run contrary to our interests and we have not had our say and we will agree an appropriate process for this temporary period" and "It's very, very important. If there are new laws that affect us, we have the means to resolve any issues during that period - see note 298

131. The Government's Draft Text for Discussion for the Implementation Period proposed a Joint Committee for this purpose. The Joint Committee would have specific functions in relation to the implementation period, including resolving any issues which might arise concerning the proper functioning of the Agreement, having regard to the duty of mutual good faith which should apply between the UK and the EU, for example, in relation to acts of Union law adopted during the implementation period. Arrangements will need to protect the rights and interests of both parties.

Example: Financial Transaction Tax

As one example of a proposal that could be brought in without a UK say might be the proposal for a Financial Transaction Tax.

The EU's impact assessment calculates that it could raise €57billion, a disproportionate share coming from the UK - see note 299 At present the UK has a veto over tax policy but it is unclear whether it would during a transition period.

132. Under the European Union's proposals for the transition/implementation period, the UK will be a 'rule-taker' with few formal rights to consultation under the current proposals for the transition/implementation period. It will have significantly fewer rights to influence decisions than EEA states which have fewer EU obligations than the UK will have in the transition/implementation period.

133. The Withdrawal Agreement should include a right for the UK Parliament to have the final say on new EU laws during the Transition in particular in areas, such as tax, where the UK currently has a veto.

EU-third country agreements

134. The European Union has a large number of international agreements with non-EU third countries to which the UK wishes to remain a party during the transition/implementation period. The EU has bilateral relationships with over 100 third countries that cover a wide range of policy areas including trade, nuclear cooperation and aviation.

135. The Supplementary Directives state:

During the transition period ... the United Kingdom should remain bound by the obligations stemming from the agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly, while the United Kingdom should however no longer participate in any bodies set up by those agreements - see note 300

136. In our last report, we called upon the Government to "set out its plans for the UK's continuing participation in these agreements, its approach to how it is prioritising agreements, and what can be achieved during the Article 50 timeframe. " See note 301 On 8 February 2018, the Government published a 'Technical Note on International Agreements' - see note 302 The Note set out that the UK will seek to obtain the agreement of the EU and the third countries concerned to interpret the existing agreements as still applicable to the UK. The Government appears to envisage some system of collective informal agreement to continuing the international agreements during the transition/implementation period. It said:

137. It would not be necessary... to deal individually with each EU Treaty. The key requirement would be the clear agreement of the parties that the underlying treaty continued to apply to the UK during the implementation period - see note 303

138. The Note said that this approach is underpinned by international law and practice, including Article 31 of the Vienna Convention on the Law of Treaties.

139. It is to be noted that the former Trade Minister Lord Price has stated that all the UK's non EU trade partners that are currently under an EU trade agreement have agreed to continue the current arrangements: "We will roll over the 60 odd other deals we are party to currently. . . All have agreed roll over. " See note 304

140. The EU has a large number of bilateral international agreements with non-EU third countries to which the UK wishes to remain party during the transition/implementation period. The UK, the EU and third countries may have a mutual interest in continuing these agreements on current terms, at least for the duration of the transition/implementation period.

141. It is to be welcomed that some third countries may also see an opportunity to improve upon the current terms. There are potentially huge benefits for the UK from opening up its market in return for greater access in the non EU markets than the EU does at present.

New free trade deals

142. The UK intends to negotiate—and, where possible, sign—new trade agreements during the transition/implementation period, although they would not enter into force until after the period had ended - see note 305

143. The Secretary of State said, “we will not be subject to the duty of sincere co-operation, which is what stops us from arriving at trade deals, negotiating and signing trade deals now. That freedom will exist.” The Secretary of State said that the freedom to negotiate new trade agreements was a key reason for leaving the EU’s institutions in March 2019 and not extending Article 50 to allow for more time to negotiate the Future EU-UK Partnership. He said:

[New trade deals] matter enormously. If we do it this way, the way we are doing it, they will come into effect very soon after conclusion in 2020–21. If we extend our membership, we will not be in a position to do that. Those two years are going to be extremely important for inward investment, for establishing trade arrangements and for bolstering the economy - see note 306

However, the potential for new trade deals will almost certainly be contingent on the progress of the negotiations on the Future UK-EU Partnership which will have implications for the terms of any other trade agreement that the UK may wish to enter.

144. The Commission’s draft Withdrawal Agreement said that the UK will still be the subject of a duty of sincere cooperation towards the EU - see note 307 It said, “during the transition period, the United Kingdom may not become bound by international agreements entered into in its own capacity in the areas of exclusive competence of the Union, unless authorised to do so by the Union.” See note 308. This is less extensive than the Supplementary Directives as the word “exclusive” has been added. However, it still leaves uncertainty whether the UK can negotiate or sign an agreement with a third country even if it does not come into binding effect until after the transition/implementation period.

145. The Government should continue to ensure that we are able to negotiate and sign trade agreements during the transition, even if they are to come into effect on the day of exit from transition. The Government should seek to remove this obligation or, failing that, when deciding whether to negotiate and sign agreements the Government should rely on its own interpretation of “sincere cooperation” and not that of the EU.

Financial Settlement

146. The EU has proposed that the transition/implementation period should end by 31 December 2020 but the Government’s paper on the transition/implementation period does not commit to that end date. If the period continues into 2021, there could be significant consequences for the UK taxpayer as the UK would likely be committed to making contributions to the EU’s new seven-year budget.

Negotiations on the transition/implementation period

147. In our last report, we called on the Government to publish a White Paper on the implementation period as soon as possible after the European Council had met in December 2017 - see note 309 The Prime Minister did not set out detailed objectives for the period in her Lancaster House and Florence Speeches, and the Government has not made its views any clearer in answers to questions in the House of Commons and its Select Committees - see note 310 On 24 January 2018, the Secretary of State for Exiting the European Union said that he did not believe that a White Paper was required. However, he did not rule out the prospect that one would be published at some point:

... [the implementation period] will not of itself require a White Paper, unless it is a White Paper preceding the withdrawal and implementation Bill ... It is possible there, but it depends on whether it justifies it. It may well be that this is a relatively straightforward negotiation - see note 311

148. While the Government has not decided on whether it is necessary to publish a White Paper, the Secretary of State said that the Government would “almost certainly” publish “some papers on elements of [the transition/implementation period].” See note 312 In January and February 2018, the Government published three short papers on aspects of the transition/implementation period, including papers on international agreements and citizens’ rights. The EU has published negotiation papers on its objectives for a transition/implementation period. Most recently, the European

Council published specific Supplementary Directives for the negotiations on the transition/implementation period and the Commission published a more detailed position paper that outlined in “legal terms” how such arrangements should be given effect. This was then included in the Commission’s draft Withdrawal Agreement - see note 313

149. In our last report, we recommended that the Government publish a detailed White Paper on the transitional/implementation period setting out the Government’s objectives in detail. However, just days before the transition/implementation deal is expected to be agreed, the Government has still not published a substantial policy paper that sets out what it wants in precise terms. This is regrettable. By contrast, the EU has set out its objectives for the transition/implementation period in clear terms. The Government’s reluctance to clearly state its objectives unambiguously and in detail at an early stage has given the European Union the upper hand in setting the parameters for the negotiations on the transition/implementation period.

FUTURE PARTNERSHIP

Introduction

150. The Prime Minister has said consistently that the Government does not favour the adoption of any existing model for its Future Partnership with the European Union - see note 314 The Secretary of State said that the Government would seek a “Canada Plus-Plus-Plus” agreement, signalling a preference for an agreement that was more comprehensive than the EU-Canada trade and security agreement (CETA) and inclusive of financial services - see note 315 Michel Barnier said that the future economic relationship will “have to work on a model that is closer to the agreement signed with Canada”, based on the UK 10 Government’s red lines, as outlined in the slide below: ‘EU Exit Analysis—Cross Whitehall Briefing’ – see note 316.

151. HM Treasury has modelled the economic implications of three “off the shelf” options for the UK’s future trade relationship with the European Union—an “average” Free Trade Agreement (FTA) with the EU,³¹⁷ membership of the European Economic Area (EEA) and World Trade Organization (WTO) Most Favoured Nation rules (a ‘no deal’ scenario). HM Treasury did not model the effects of a bespoke ‘deep and comprehensive’ Free Trade Agreement with the EU—the Government’s end state objective—presumably because it has not set out in precise terms what this would entail.

152. The high-level results of the modelling, entitled ‘EU Exit Analysis—Cross Whitehall Briefing’ (‘EU Exit Analysis’), was leaked to BuzzFeed, an online news website, which published a report on the contents on 29 January 2018 - see note 318

153. All three of the scenarios modelled in the analysis show the UK growing. The analysis did include the potential for a UK/USA trade deal but no other major agreements with fast growing states that the UK currently has no agreement with.

154. Crucially the Government’s own preferred relationship was not modelled, dynamic effects were not taken into account, the potential for trade liberalisation were not modelled and it is unclear what assumption was made for the UK border. Importantly it is unclear what assumption was made for the alternative of EU membership: was it a benign liberalising EU or the one based on current policies?

155. In addition it is unclear whether the addition of the UK’s budget contribution and return of economic resources such as fisheries were included in the assumptions. Nor was it clear what assumption had been made for better regulation and the GDP effect of controlling immigration.

156. Commentators on the analysis pointed out that previous Treasury, BoE and IMF forecasts of Brexit were all far too pessimistic and proved to be wrong. For an alternative detailed analysis of the economic modelling used please see the Alternative Brexit Economic Analysis by Roger Bootle, Dr Gerard Lyons, Julian Jessop and Professor Patrick Minford in the Appendix.

157. It is a matter of regret that this Government analysis was produced to model scenarios that the Government itself is not intending to follow. It is a matter of further regret that it was leaked. Without being able to analyse the underlying assumptions and economic model used the release of this analysis would not add to our knowledge of Brexit.

158. In contrast the analyses the UK has a bright future post Brexit. With more and better trade agreements, better regulation, a return of the UK budget contribution the UK economy has the potential to outdo that which it would have pursued in the EU.

Future Partnership UK negotiation objectives

159. In February and March 2018, the Prime Minister made two wide ranging speeches on the Future EU-UK Partnership.

160. On 17 February 2018, the Prime Minister gave a speech on future EU-UK security cooperation. She said that the UK was “unconditionally committed to maintaining” European security. Furthermore, the Government would seek continued involvement in pan-European crime fighting

agencies such as Europol and Eurojust, as well as the European Arrest Warrant. The Prime Minister acknowledged that continued involvement in these agencies and programmes would entail a recognition of the remit of the CJEU. She said, "When participating in EU agencies the UK will respect the remit of the European Court of Justice". She added that it would also be necessary for the EU "to respect our unique status as a third country with our own sovereign legal order". On defence, the Prime Minister said that the Government wanted "a future relationship with the European Defence Fund and the European Defence Agency". The Prime Minister said that the Government would also be "open" to contributing to "EU development programmes and instruments" to deliver mutual interests. The Prime Minister said that "aspects" of the future security partnership could "already be effective" in 2019 - see note 319

161. On 2 March 2018, the Prime Minister gave a speech on the future EU-UK trade relationship. She reiterated the Government's policies that the UK would leave the Single Market, the Customs Union, the jurisdiction of the CJEU, the Common Agricultural Policy and the Common Fisheries Policy. However, the Prime Minister also acknowledged that there would be trade-offs as a result. For example, she said, "Our access to each other's markets will be less than it is now" and that "EU law and the decisions of the [CJEU] will continue to affect us."

162. The Prime Minister was clear that only a bespoke Future Partnership would be in the interests of the European Union and the UK. She said there should be no introduction of tariffs or quotas and that goods should need only be subjected to one approval process which would require "a comprehensive system of mutual recognition." Furthermore, for goods and services, the UK would commit to maintaining regulatory standards that were at least as high as those of the European Union. The Government will seek to match the same regulatory outcomes as the EU in many areas that relate to trade in goods and services and seek membership of a number of EU agencies. However, if Parliament decided it wished to achieve different outcomes, "it would be in the knowledge that there may be consequences for our market access." The Prime Minister said that there will need to be an "independent mechanism" to oversee these arrangements. She called for the Future EU-UK Partnership to include provisions on broadcasting and financial services. However, for financial services, she said that there should be a regulatory framework that is "reciprocal, mutually agreed, and permanent". The Prime Minister also set out objectives for other areas where the UK and EU economies are closely integrated, including energy, transport, digital, law, science and innovation, and education and culture - see note 320

163. The EU27 is expected to agree its negotiation guidelines on 22–23 March, after which Phase 2 negotiations on the Future EU-UK Partnership can begin. As we have noted, the UK and EU agree that the Future Partnership should be set out in a detailed Political Declaration that will accompany the Withdrawal Agreement in October - see note 321 From October, the EU expects to begin negotiations on the treaties/agreements that will establish the Future Partnership. Michel Barnier said there would be several agreements, some of which will be treaties - see note 322

164. In Brussels, we heard that these agreements/treaties would be negotiated in parallel and could be agreed separately. We heard in Brussels that the Commission is working on the basis that the Future Partnership will be separated into four pillars, which are trade, 'areas of thematic cooperation', justice and home affairs, and Common Security and Defence Policy and foreign affairs. We heard that these agreements/treaties would be negotiated in parallel and could be agreed separately.

165. We welcome the Prime Minister's recent speech on the Future EU-UK Partnership and its bold plan for the UK outside of the EU Customs Union and Single Market. The Prime Minister's suggestion of a bespoke Future Partnership was inevitable as all EU trade agreements are bespoke to one degree or another.

166. We welcome to the Prime Minister's outlining of mutual recognition as a basis for our future relationship and look forward to the EU27's considered response over the coming weeks.

167. We welcome to the Prime Minister's desire to cooperate with the EU on issues such as security and fighting crime. We hope that the EU can see the benefit of co-operating with the UK in these

matters and does not let its institutional inflexibility get in the way of the safety of UK and EU citizens.

168. We are however concerned that the EU's desire to secure its share of the UK Fisheries will not be fully protected in the negotiations. It remains unclear to what degree the UK will be able to take back control of its waters after Brexit in the transition and that it will not be used as a point of negotiation after that. We ask the Government to bear in mind the referendum vote which was for many a desire to take back control of our resources that were given away in the 1970s.

169. We welcome the Government's approach to these negotiations, which in leaving the Customs Union & Single Market and taking back control of our borders, laws, money and resources respects the referendum result.

ANNEX: NORTHERN IRELAND BORDER

The UK/Ireland border

The UK will leave the EU on 29 March 2019. At this point the UK/Republic of Ireland (RoI) border will no longer be an internal EU border.

The UK Government is committed to not being in a Customs Union with the EU. It is also committed to being outside of the EU's Single Market in order to ensure that the UK does not become a 'rule taker' and can build an independent trade policy.

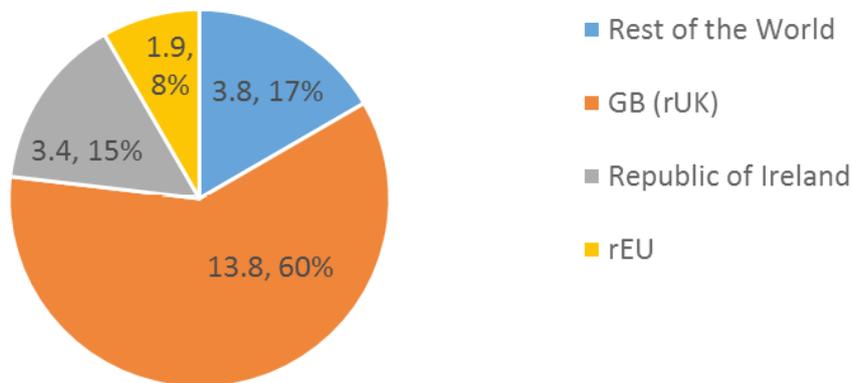
The RoI PM Varadkar and the UK PM have stated that they aim for "a comprehensive free trade agreement and customs arrangement that allows us to avoid not just a hard border north and south but also new barriers to trade east and west. " See note 323

- The UK does not wish to see any new border, the Republic of Ireland agrees.
- The UK cannot be forced to install new customs posts and with 200 border crossings this would be an impractical proposition.
- The question is whether the EU will force the Republic of Ireland to impose a full external EU border.

UK Single Market

The UK market is the major market for Northern Irish accounting for 60% of Northern Irish exports - see note 324 / 325

Northern Irish Exports 2015 £bn



The primary economic interest of Northern Ireland is to maintain frictionless trade with the rest of the UK. This entails keeping one set of harmonised regulations across the UK and that the external border to the UK's single market is at the extremity of the UK and not the Irish Sea.

- The starting point is that there is a NI/RoI border in terms of 3rd state immigration, counterfeiting and tax.
- The Belfast Agreement and N/S cooperation is not dependant on the EU.

Minimising friction with the EU

The UK will leave the EU in March 2019 and remain in an 'implementation' period during which (it is assumed) the status of the border will remain the same. At the end of this period the border may be governed by the terms of "a comprehensive free trade agreement and customs arrangement", a

limited agreement or potentially no agreement. The provisions of the WTO will apply in all these scenarios.

The best outcome is to reduce friction on all EU/UK trade. This would help NI/ROI trade, ROI to rUK and rUK to rEU trade via ports such as Dover and Holyhead. A Northern Ireland specific solution would be a second best solution.

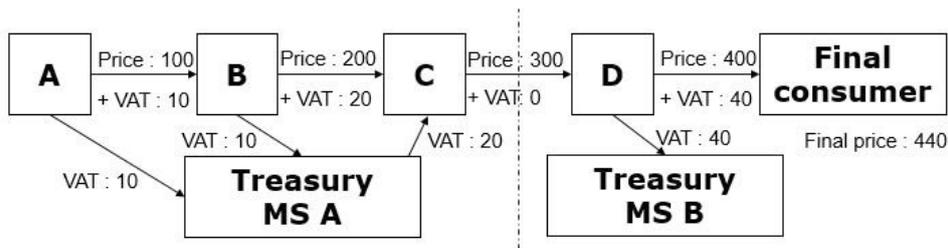
A Smart Border: Potential areas for co-operation

- Behind the border. The border should, as far as possible, be actioned at a business's premises, with forms filed electronically before transit. The more that is done away from the border in advanced, the less that needs to be done at the border.
- Trusted Trader Programmes. This should allow regular traders to continue with little supervision. This should be backed up by risk assessment measures (and exchange of risk data) so effort is focused on potentially irregular traffic.
- Authorised Economic Operators (AEO). The mutual recognition of AEOs would help minimise disruption for high frequency trade. This could be linked to a fast track at any busy crossings. These programmes already exist in the ROI and UK under EU law (Article 39 of the Union Customs Code). The UK has only 604 AEOs compared to 6,000 in Germany. This should be expanded pre Brexit.
- Joint customs checks. Norway and Sweden (via a Norway/EU agreement) have agreed to have one set of Customs clearances for the two states minimising the administration. This is compatible with the WTO's multilateral Trade facilitation Agreement. This should allow for the transfer of export and import data to prevent duplication.
- Self-Assessment for AEOs. Under a US/Canada agreement their equivalent of AEOs (The Free And Secure Trade Programme FAST) allows for the completion of eManifests online one hour before transit. This is linked to a pre-arrival processing system.
- De Minimi. There is already an approximate 6000 Euro de minimis threshold below which customs checks do not apply anyway included in the EU Union Customs Code - see note 326
- Use of the Transports Internationaux Routier (TIR) Convention of 1975 and the Common and Union Transit Procedure for ROI transit goods. TIR enables goods to move under customs control across international borders without the payment of the duties and taxes that would normally be due at importation - see note 327,328,329
- WTO Trade Facilitation Agreement. The WTO has recently agreed the Trade Facilitation Agreement that sets out basic standards aimed at cutting the costs of cross-border trade - see note 330
- Unilateral UK reductions in administration. For instance recognising ROI AEOs and EU SPS standards.

VAT on cross border trade:

The UK is currently in the single EU VAT. This requires harmonization of VAT rules, the ECJ and restrictions on the rates charged. Since 1992 the UK's external border is a VAT frontier for goods coming in from outside of the EU this will be extended to those coming in from the EU - see note 331 The Taxation (Cross-Border Trade) Bill (s 42-43) currently before Parliament repeals (or rather does not retain) most EU laws relating to VAT and reasserts the UK frontier as the external UK border for tax purposes.

- Current VAT on intra EU sales. VAT registered businesses account for VAT on imports from the EU on their VAT return at the rate at which they would have paid if they had sourced the goods from the UK (zero, standard, reduced rate etc).



[This system is open to Missing Trader and Carousel Fraud.] See note 332.

- Imports from non EU states. VAT registered businesses are charged VAT on imports at the same rate as if they had been supplied in the UK. This then becomes the input tax - see note 333 Goods coming in or going to the EU are treated differently on the basis of whether the sales are Business to Business, Business to final consumer or digital. This will determine what rate of VAT is chargeable - the UK rate or the rate in the EU state of sale. The main difference on Brexit will be that import tax will become payable as the goods cross the border rather than on sale to the end customer. This would entail a cash flow cost for businesses that import from the EU, in the way that businesses that import from outside the EU do.

Mitigation

- De Minimis. Introduce a larger De Minimis threshold or 'own consumption' threshold for goods imported to the UK, extending the current EU exemption. This would prevent the need to stop individuals crossing the border.
- Reduce the cost of VAT administration. The BCC claims administration of £10bn can be cut out of tax administration in this Parliament - see note 334 This should be allied to a modern smart border for customs.
- Move the tax administration point behind the border. While the tax point will be the border the administration should be done away from the border.
- Merge the VAT on imports system with a smart Customs tariff collection process. This would eliminate the need for two sets of administration.
- Use a Certified Taxable Person scheme. Which allows for a risk based approach to VAT on cross border goods.
- Cash flow remedies. It would be possible to minimise the cash flow hit to EU importers (and existing non EU importers) by making tax due at the border but actually payable at the point of onward sale. This has been suggested by the BCC - see note 335

Technology to aid the above:

- Automated Number Plate Recognition (ANPR) and CCTV. Northern Ireland has DVLA APNR on a number of border points.
- Radio Frequency Identification (RFID). The US/Canadian border
- A single online portal. A simplified 100% electronic customs declaration system that re-uses export data for imports. This should also take advantage of barcode scanning technology.

Problem sectors?

1. Cross border Agricultural exports.

There is a large RoI to UK export trade in food and live animals (46% of RoI total) and an integrated border economy with regards to issues such as the transport and collection of milk from farms. The UK exports a smaller amount to the RoI in return.

To maintain this traffic the UK and EU will have to agree to mutual recognition of Sanatory and Phyto-Sanitary measures (SPS). This should be able to do within the context of the WTO which has an agreed SPS Agreement - see note 336

The larger issue for RoI exporters will be whether the UK is able to agree a zero tariffs trade agreement with the EU, and if so how fast it seeks to liberalise its external tariff barriers with lower cost producers.

2. Electricity

There is no threat to Northern Irish electricity supply from Brexit. Cross-Border cooperation is beneficial but a combination of indigenous generation capacity and the interconnectors suffice to supply the domestic market.

People / Services

Due to the Common Travel Area there should be no change to RoI or British citizens trading services across the border. With regards to EU citizens resident in the RoI, they will have at a minimum the protection of GATS Mode IV travel for short periods.

The Common Travel Area

The UK and RoI operate a common travel area, dating back to RoI independence in 1922, this allows for the absence of passport controls. As the RoI has an exemption from Schengen there is no reason that this should not continue.

There is a question as to how to enforce controls on EU/EEA nationals travelling from the RoI to the UK. This issue arises at the moment with 3rd party states. For this the UK and RoI rely shared immigration data under a Memoranda of Understanding. This system could be expanded to include EU/EEA nationals considered an immigration risk.

However, if this is not possible to extend the MoU to EU/EEA nationals it need not cause concern.

The UK is highly unlikely to enforce migration controls against EU nationals at its own external border. EU/EEA citizens will either travel to the UK visa free, under a visa waiver programme (A UK ESTA) or be entitled to a tourist visa. Either way there would be no incentive for an EU/EEA to travel to the RoI to cross to the UK in order to work illegally in the UK. Those who did enter the UK via NI would do so illegally and be in the same position as someone who had overstayed their visa.

For some EU nationals the UK might seek to apply a 'Trusted Commercial Travellers programme' for frequent EU national travellers and have separate channels at border crossings. It is noted that UK & RoI police already cooperate on policing cross border EU migrants working illegally across the border - see note 337

Beneficial contents of a potential Comprehensive EU/UK free trade agreement:

- Zero tariffs. This would reduce friction on the border and incentives to avoid legitimate border administration.
- Mutual recognition (MR) of standards. With regards to Northern Ireland, mutual recognition of SPS regulations would be important. MR should also include the MR of conformity assessment and assessment centres.
- Regulatory cooperation. Allied with MR agreement on regulatory cooperation should prevent regulatory divergence creating new barriers to trade evolving.
- Rules of Origin (RoO) and Cumulation. A generous scheme for RoO (UK content) and the ability to cumulate components brought into the UK from EU trading partners as 'UK origin' would help cross border supply chains.
- Joint UK/RoI customs. This should include agreement on electronic border cooperation and a single electronic portal to reduce administration.

In the event of 'no deal'

If there is no "Comprehensive EU/UK free trade agreement" the UK has several courses of action open to it. The first would be to seek to agree as much as possible (mutual recognition, equivalence etc) outside the context of a free trade agreement. If this fails then there remain other options:

- Extend the status quo for a limited period. Under GATT Article 24 (7) (b) the UK and EU could extend the status quo as long as a Free Trade Agreement remains 'in contemplation'. This could potentially last for up to 10 years.
- Unilaterally reduce tariffs. The UK could gradually and unilaterally reduce its own import tariffs and thus remove the burden on importers and consumers and companies that require components from outside the UK to remain competitive.
- WTO. Use the WTO's Trade Facilitation Agreement and other multilateral and plurilateral agreements to reduce the prospect of new barriers to trade.
- Mutual recognition under MFN. Try to take advantage of the EU's mutual recognition agreements with other non EU states. There is a legal argument that the EU has to extend its MR agreements to other WTO states on a MFN basis. A recent example is in the area of Insurance - see note 338.

Further reading:

Legatum Institute: "Mutual Interest How the UK and EU can resolve the Irish border issue" by Shanker Singham et al, 2017339

European Parliament, Constitutional Affairs Committee November 2017 "Avoiding a Hard Border" by Lars KARLSSON, President of KGH Border Services; Former Director of World Customs Organization; Deputy Director General of Swedish Customs – See note 340.

Christopher Howarth, Conservative Home, "How to manage the Northern Ireland Border (November 2016) – See note 34.

Appendix: Alternative Brexit Economic Analysis

Roger Bootle, Dr Gerard Lyons, Julian Jessop and Professor Patrick Minford (to be found at <https://www.economistsforfreetrade.com/wp-content/uploads/2018/02/Alternative-Brexit-Economic-Analysis-20-Feb-18.pdf> (20 February 2018)).

FOOTNOTES

177 Phase 1 covered citizens' rights, the Northern Ireland/Republic of Ireland border, the Financial Settlement and other separation issues

178 Commission, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018

179 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017

180 Commission, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018

181 Commission, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, Article 12, paras 1–3

182 Article 9.

183 EUR-LEX, Directive 2004/38/EC of the European Parliament and of the Council

184 Comprehensive sickness insurance is required for those who are not employed/self-employed and for students

185 Or a single absence less than 12 months in certain circumstances (birth, severe sickness, etc.), or longer for military service.

186 For example, Article 17, 1(b) states, "the deadline for submitting the residence document application shall not be less than two years from the end of the transition period or from the date of arrival in the host State, whichever is later". See also, Commission, Questions & Answers: Publication of the draft Withdrawal Agreement between the European Union and the United Kingdom, 28 February 2018

187 Since the Joint Report was agreed, the EU and the UK have disagreed on the definition of the 'Specified date'. See Transition/implementation Period chapter, Citizens' rights

188 PM, July 2016: <https://www.theguardian.com/politics/2016/jul/27/theresa-may-eu-citizens-rights-britons-abroad>

189 Q401 [Professor Dougan]

190 Q761

191 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 23, Article 32

192 Q763

193 British in Europe and The3million, Securing Citizens' Rights under Article 50, 23 January 2018

194 Prime Minister, A letter from the Prime Minister to UK nationals living in Europe, 20 December 2017

195 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European

Union and the European Atomic Energy Community, 28 February 2018, page 5, Chapter 1, Article 4(5)

196 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 91, Part 6, Article 151

197 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 8, Article 9(a-e)

198 See also Q422

199 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 9, Article 4(5)

200 Article 28.

201 Article 26

202 Article 9(1)

203 Article 4

204 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 11, Article 17

205 Permanent residence is an EU law concept. At present, EU law entitles EU citizens to permanent residence after five years of lawful, continuous residence in another Member State. The conditions for acquiring permanent residence and the rights that go with it are set out in the 2004 Free Movement Directive. EU citizens are not required to apply for permanent residence but may choose to do so.

206 The Joint Report does not mention comprehensive sickness insurance but guidance issued by the Government says that this “will no longer be considered as a requirement for acquiring Settled Status”.

207 The Government has said that exchanging a Permanent Residence document for a Settled Status document will incur “no cost”. The cost of residency documents otherwise will not exceed that imposed on nationals for the issuing of similar documents. The Government has previously used the cost of issuing a UK passport as a guide. An adult’s passport costs £72.50 regardless of how you apply. The Government recently announced that, as of 27 March 2018, the price of a British passport is to rise by £12.50 to £85 for postal applications and rise by £3 to £75.50 for online applications.

208 Article 17(c).

209 38 Home Affairs Committee, The work of the Home Secretary, oral evidence 17 October 2017, Q19. See also Civil Service World, Home Office to recruit 1,500 more staff to deal with Brexit, Civil Service World, 18 Oct 2017

210 The Home Affairs Committee has said, “The UK Government’s approach means that registration casework of this cadre of EU nationals will continue for up to five years beyond the two-and-a-half-year window as those initially granted temporary status may then pursue Settled Status when eligible to do so.” See, Home Affairs Committee, Home Office delivery of Brexit: immigration, Third Report of Session 2017–19, HC 421, footnote 9.

211 Article 17(f).

212 NEG0008 Dr Charlotte O’Brien

213 NEG0008 Dr Charlotte O’Brien

214 NEG0008 Dr Charlotte O’Brien

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who is dependent upon them to exercise their Treaty rights. Metock allows a non-EU national in the UK illegally to remain if they form a genuine relationship with an EU citizen. Surinder Singh allows non-EU national partners who have been exercising Treaty rights in another Member State to become resident in the UK under EU, rather than UK, rules.

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220 Q766

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225 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 100, Article 4(2)

226 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 101–102, Articles 4–9
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234 Andrew Marr Show, Interview with the Rt Hon. David Davis MP [transcript], 10 December 2017, page 7

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244 Prime Minister, PM speech on our future economic partnership with the European Union, 2 March 2018

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248 Q393 [Professor Dougan]

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258 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 44

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261 Q814

262 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 57 & 58

263 MFFs must be adopted by unanimity, and the UK voted in favour of the most recent one (adopted in 2013). There is currently RAL outstanding from the 2007–13 and 2014–2020 MFFs, but outstanding commitments from the former are expected to be fully paid out by December 2020.

264 There will be 11 instalments of €300 million. The final, twelfth instalment will amount to €195 million.

265 The European Agricultural Guarantee Fund, which provides direct payments for farmers under the CAP, would not be open to UK farmers in 2020. This is because the CAP works on a reimbursement basis, where Member States pay farmers in one year and then get reimbursed by the EU in the following year. As a result, direct payments that happen in 2020 will be covered in the EU budget in 2021 and therefore the next MFF. However, the Government has already guaranteed that the current level of agricultural funding under CAP will be upheld until 2020, as part of the transition to new domestic arrangements.

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