

# Paper Fifteen

## Impact of 'No Deal'



The Brexit Papers are produced by the  
Bar Council Brexit Working Group  
March 2017

# The Impact of 'no deal'



This paper was originally commissioned by the House of Commons Foreign Affairs Select Committee and published in March 2017

## Executive Summary

### **A “no-deal” would bring loss of rights, serious economic damage, and confusion and uncertainty**

1. If no withdrawal agreement has been put in place by the end of the two year period under Article 50, the EU Treaties will cease to apply to the UK. EU legal rights will disappear overnight. The effects will be loss of rights, serious economic damage, and confusion and uncertainty. For good reason, this has been described as “falling over the cliff-edge”.
2. Effects of a no-deal include:
  - Trading on WTO terms with resulting disruption of UK free trade in goods and services with the EU, and with dozens of countries the UK trades with via EU free trade agreements.
  - Uncertainty for millions of UK and EU migrants about their residence rights, along with their rights to work, to health care, and to state pension rights.
  - UK migrants at risk of different treatment in different EU countries with their rights depending on the state of national law in the EU country in question at the time of Brexit
  - A seriously increased risk of a “hard” border between Ireland and Northern Ireland, to enforce collection of tariffs of 30-40% on agricultural products currently traded without tariffs and without customs checks across the open border.
  - Loss of the rights of UK tourists and business travellers to use their European Health Insurance Card in EU countries, reduced access to EU air passenger rights, loss of protection from excessive roaming charges, loss of rights of NHS patients to cross border health care, and uncertainty over visa-free access to EU countries.

### **Disruption of trade in goods and financial services**

3. While tariffs on UK exports to the EU would on *average* be low, in some sectors they would be high enough to inflict serious damage on UK trade. Imports and exports of cars would face 10% tariffs. The confidence of inwardly investing manufacturers, such as Nissan, would be shaken, and their future commitment to the UK would be called in question.

4. Trade on WTO terms would mean the transfer of the EU-facing business of numerous UK banks and other financial businesses from London to subsidiaries in the EU, involving the transfer of highly paid jobs whose holders would in future pay their tax in EU countries rather than in the UK.

### **Could the UK walk away for its exit liabilities? Could the EU sue the UK?**

5. One cause of a no-deal could be deadlock over the UK's exit liabilities, with reports that the EU might claim €60 billion from the UK.

6. There is no international court with compulsory jurisdiction over such a claim. EU law does not bind the UK after it has left the EU, and does not determine the UK's exit liabilities. Public international law would in principle apply. UK liabilities should be settled by agreement, and failing agreement, should be determined on an equitable basis. It would be open to the UK and the EU to submit the issue of exit liabilities to arbitrators of their choosing, and to specify the principles and criteria to be applied, but this would be policy choice and not an obligation.

### **Regulatory Gaps as EU agencies terminate services to UK businesses**

7. Unplanned Brexit would separate EU regulatory agencies (such as the European Chemicals Agency, the European Medicines Agency, and the European Aviation Safety Agency), from the commercial activities in the UK which they currently service and regulate. The UK would either have to ensure that new or existing home-grown agencies could fulfil these responsibilities, or seek to maintain links with the relevant EU bodies after Brexit.

### **Falling over the cliff-edge need not mean the end of negotiations, and a belated withdrawal agreement might be put in place**

8. If the UK and the EU fall over the cliff-edge, that need not be end of negotiations. The economic and political shock for the UK and the EU could lead to renewed attempts to deal with outstanding issues. The position might be recovered, and a belated withdrawal agreement which included transitional arrangements might be put in place.

**The failure of negotiations would be a worst case scenario, and every effort should be made to avoid it**

9. It is always possible that negotiations might fail. Trade on WTO terms could continue for a prolonged period. Public opinion on both sides might harden. Relations between the UK and the EU might deteriorate so badly over trade as to damage highly important non-trade issues such as co-operation over internal and external security. This is a worst case scenario, but it is one which cannot be ruled out. It is surely an outcome to avoid, and every effort should be made to avoid it.

**The possibility of a no-deal is sufficiently real to make contingency planning essential**

10. While most of the Government's efforts should go into securing the best possible agreement with the EU, so as to avoid the cliff-edge, and a hard Brexit, the possibility of a "no-deal" is sufficiently real to justify planning how to manage it, including continued negotiations to recover the position.

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### The committee's request for evidence

11. The Committee invited the Bar Council to provide evidence which would set out, for an ordinary or lay audience, what the impact would be on day-to-day life if the UK leaves the EU with no withdrawal agreement in place ("unplanned Brexit"). We were asked to address the questions with reference to a few illustrative examples that can be clearly explained. This evidence aims to provide a general assessment of how disruptive a 'no deal' scenario would or would not be, and of the outstanding issues that would have to be resolved (including a sense of the processes by which such resolution might happen).

12. The potentially damaging consequences for individuals and businesses of (for example) uncertainty over rights to residence, health care and state pension entitlements, 30-40% tariffs on agricultural imports and exports, and the abrupt withdrawal of the rights of UK banks and insurance companies to carry on direct business in the EU, or are too obvious to be stated. They explain why the scenario we are asked to examine is often referred to as the "cliff-edge".

13. We seek to indicate, where possible, how an unplanned Brexit might be managed, by the UK Government, and by businesses. But that does not mean that we think that *all* the consequences of an unplanned Brexit necessarily could be managed, and we indicate possible "worst case scenarios" of, e.g., a prolonged period of trading under WTO rules in which inwardly investing manufacturers in the UK downsize their investment plans, and the EU-facing business of UK financial services providers is transferred *en masse* to subsidiaries in the EU.

14. We note that in its recent White Paper on Brexit, the Government has said that it intends to reach an agreement on the UK's future relationship with the EU by the time the two year Article 50 process has been concluded. But it adds that no deal is better than a bad deal, and "In any eventuality we will ensure that our economic and other functions can continue, including by passing legislation as necessary to mitigate the effects of failing to reach a deal."<sup>1</sup> There will, it seems, be some

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<sup>1</sup> Cm 9417 The United Kingdom's exit from and new partnership with the European Union,

contingency planning for an unplanned Brexit. While most of the Government's efforts and resources should certainly go into securing a satisfactory agreement with the EU, in order to avoid the damage and uncertainty of a "no-deal", the possibility of a "no-deal" is sufficiently real to make contingency planning essential.

15. We have sought to reduce to a minimum technical legal analysis in the text, while providing references in footnotes to the legal basis for conclusions in the text. We refer on the whole to "EU countries" rather than to "EU Member States", and to "EU nationals" rather than to "Citizens of the Union." When we refer to "EU countries" and "EU nationals" we generally include the EFTA countries who are members of the European Economic Area (EEA), namely, Norway, Iceland and Liechtenstein, and their nationals, since EU single market rules, and certain other EU rules and policies, apply to those countries as well as to EU countries.

### **The structure of our evidence and its aims and limitations**

16. We include in our evidence a section entitled "identifying the consequences of a *planned* Brexit" which describes the counter-factual to an *unplanned* Brexit, and explains why we consider that that latter scenario might produce the consequences which we identify.

17. In Part A of our evidence we examine some of the consequences of an unplanned Brexit for individuals (migrants, tourists and consumers), and businesses (UK exporters of both manufactured and agricultural products and, in a general way, UK financial services providers). We consider the particular problem of the impact of unplanned Brexit on the role of those EU agencies which currently figure directly in the UK regulatory framework (regulating medicines, aircraft safety, chemicals, food safety and some financial services), and whose separation from the UK market could lead to regulatory gaps. Throughout we offer illustrative examples, and explain them. We have had to be selective, and have chosen situations readily recognisable to the non-specialist, and (we hope) likely to be of interest to a general audience.

18. In Part B of our evidence we examine the consequences of an unplanned Brexit for the UK Government. We consider the steps that the UK Government might take to retrieve the situation. We also consider the particular problem of the impact of trade on WTO terms on the open land border between Ireland and Northern Ireland.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589191/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf) paragraphs 12.2 and 12.3. Henceforth referred to simply as the "White Paper".

**Forecasting the future involves some speculation, but without at least some speculation, no plans can be made**

19. It is not easy, looking into the future, to distinguish between consequences which might follow from the absence of a withdrawal agreement, and consequences which might follow from Brexit anyway, even if a withdrawal agreement is concluded. We acknowledge that there is an inevitable speculative element in this exercise, but without some degree of speculation, no plans for the future can be made. It is clearly essential that such plans should be made, and that Parliament and public be so far as possible empowered to understand and participate in that process.

**If the withdrawal agreement has not been concluded, neither will the transitional agreement and the future trade agreement**

20. If the UK leaves the EU without having concluded a withdrawal agreement with the EU, there will be legal and practical consequences. Some of these consequences will follow from lack of agreement on matters which require settlement in the withdrawal agreement, such as the amount of any outstanding financial liabilities of the UK to the EU, and the rights of British citizens working and/or resident in the EU at the time of withdrawal. Other consequences will flow from the lack of transitional arrangements, and a future trade agreement. Because if there is no withdrawal agreement, there will also be no agreement on transitional arrangements, and no future trade agreement will have been agreed. In those circumstances, the UK and the EU will fall back on trade on WTO terms.

**Identifying the consequences of a planned Brexit. The counter-factual to an unplanned Brexit - what a *planned* Brexit would look like**

21. In order to demonstrate how we identify the unfilled gaps left by an unplanned Brexit, we describe in the following paragraphs what a planned Brexit would look like.

***Removing uncertainty for migrants and agreement on severance payments by the UK***

22. The withdrawal agreement will provide legal rights for individuals whose status at the time of Brexit has been agreed to merit permanent or transitional protection, for example, British citizens lawfully resident in EU countries, and citizens of EU countries resident in the UK. The Government has said that “[s]ecuring the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU is one of this Government’s early priorities for the forthcoming negotiations.”<sup>2</sup> Such persons are likely to be granted rights of residence after Brexit, accompanied by appropriate rights to work as employed or self-employed persons, and to receive health care and other benefits. We note and agree with the view of the House of Commons ExEU Committee that the withdrawal

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<sup>2</sup> White Paper, paragraph 6.3.

agreement will also deal with “the institutional and financial consequences of leaving the EU including resolving all budget, pension and other liabilities...”<sup>3</sup>

*Ensuring a smooth transition with transitional arrangements provided for in a withdrawal agreement based on Article 50*

23. The Government has said that it wants to avoid a “disruptive cliff-edge,” and indicated that the withdrawal agreement will also provide for a “phased process of implementation” as the UK moves from EU Membership to “a new partnership with the EU.”<sup>4</sup> That new partnership “may take in elements of current Single Market arrangements in certain areas as it makes no sense to start again from scratch when the UK and the remaining Member States have adhered to the same rules for so many years.”<sup>5</sup>

24. We think it likely that the “phased process of implementation” would be more than that, and would include transitional trading arrangements which would to a greater or lesser extent replicate those which currently apply to trade between the UK and the EU. Transitional arrangements might also cover, as the House of Commons ExEU Committee has suggested, “the status of EU agencies currently based in the UK”, and “the UK’s ongoing relationship with EU regulatory bodies and agencies”<sup>6</sup>. The Brexit White Paper refers to a number of EU agencies<sup>7</sup> and says that “[as] part of exit negotiations the Government will discuss with the EU and Member States our future status and arrangements with regard to these agencies.”<sup>8</sup>

25. The right of the UK to benefit from free trade agreements between the EU and non-EU countries might possibly be preserved under a transitional agreement, but that would entail the UK remaining inside the customs union, unless the UK made immediate legally binding arrangements with the non-EU countries concerned to carry on trading with them so far as possible as if Brexit had not happened. If the UK remained within the customs union during the transitional period, it might be agreed with the EU that the UK would be free to negotiate and conclude free trade agreements with non-EU countries to take effect after the expiry of the transitional period. A withdrawal agreement under Article 50 of the Treaty on European Union would be agreed by a “super” qualified majority in the Council,<sup>9</sup> and require the consent of the European Parliament.

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<sup>3</sup> The Committee’s first report, *The Process for exiting the European Union and the Government’s negotiating objectives*, p. 6, para. 21.

<sup>4</sup> White Paper, paragraph 12.2.

<sup>5</sup> White Paper, paragraph 8.3.

<sup>6</sup> See Note 5.

<sup>7</sup> The European Medicines Agency (EMA), the European Chemicals Agency (ECHA), the European Aviation Safety Agency (EASA), the European Food Safety Authority (EFSA) and the European (Financial Services) Supervisory Agencies.

<sup>8</sup> Paragraph 8.42.

<sup>9</sup> Article 50(4) provides that a qualified majority shall be defined in accordance with Article 238(3)(b) TFEU and that provision refers to “72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.” In



*Extending the two year period under Article 50 remains an option*

26. It is true that a transitional regime might be put in place by extending the two year period referred to in Article 50. This would require the unanimous agreement of the UK and the other EU countries (in contrast to the qualified majority procedure for concluding a withdrawal agreement). There might be little difference in practice, as regards benefits and burdens for those concerned, between a transitional extension of EU membership, on the one hand, and provision in the withdrawal agreement for transitional application to the UK of elements of EU membership. But different decision making procedures would apply, and it might be politically more acceptable in the UK to have a transitional trading arrangement after Brexit than an extension of EU membership.

*Brexit without a withdrawal agreement would not necessarily mean that negotiations on a withdrawal agreement would come to an end*

27. If the UK leaves the EU without having negotiated a withdrawal agreement, and without having put in place a future trade agreement, it should not be assumed that negotiations to conclude a withdrawal agreement will come to an end, nor that negotiations to conclude a future trade agreement will come to an end. While Brexit unaccompanied by the conclusion of a withdrawal agreement, and a future trade agreement, would have a number of adverse consequences (for example, tariffs on trade conducted on WTO terms, and loss of important market access rights for UK financial services providers), the position could be recovered fairly quickly if the political will was there, and particularly if the EU took the view that it retained the power, after Brexit, to carry on seeking to reach an agreement under Article 50. The economic and political shock for the UK and the EU of Brexit without a withdrawal agreement, and without a future trade agreement, could lead to renewed attempts to deal with outstanding issues, including (in principle) international arbitration on outstanding issues of post-Brexit liability, and the putting in place of a transitional trade agreement.

*Distinguishing the consequences of unplanned Brexit from consequences which will in any event flow from Brexit*

28. Even if the UK negotiates a “comprehensive” future trade agreement with the EU, neither that agreement, nor the withdrawal agreement, will *necessarily* provide rights for British citizens, and “British” companies,<sup>10</sup> which they currently enjoy as a result of EU membership. In some cases, rights might be safeguarded in a transitional agreement, but not figure in the future trade agreement. That would simply be a consequence of Brexit. But the general point, that it is difficult to

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practice this would mean 20 EU countries amounting to 65% of the population of all EU countries minus the population of the UK.

<sup>10</sup> That is to say, companies incorporated in England and Wales, Scotland, or Northern Ireland.

distinguish, looking into the future, the consequences of an unplanned Brexit from the consequences of what turns out to be a planned Brexit, is worth making.

*The Great Repeal Bill becomes the Great Repeal Act (and the Great Maintaining in Force Act); EU law is absorbed by UK law, with appropriate repeals, amendments and gap filling*

29. Brexit will mean that new EU rules will no longer apply to the UK (leaving aside the terms of any transitional arrangement). It will also mean that some EU rules which apply in the UK at the time of Brexit will be repealed and will no longer apply. These consequences will follow when what has been described as the “Great Repeal Bill” becomes law. Rules which will no longer apply (subject to any transitional arrangements) will include those rules giving EU migrants<sup>11</sup> rights to reside and work in the UK, and rules which authorise the Court of Justice of the European Union, and the European Commission, to exercise powers which are binding on the UK authorities.

30. But the enactment of the Great Repeal Act will also ensure that most EU legislation in force in the UK at the time of Brexit will remain in force, unless and until reviewed, and amended or repealed, in due course. The subject matter of the rules which will remain in force are likely to include product labelling, product specifications, advertising, consumer protection, regulation of cartels and mergers, product liability, public health, environmental protection, equality law, and employment rights. The reason for maintaining most EU legislation in force after Brexit is that it is neither practicable nor necessary to undertake an immediate review, followed by possible reform or repeal, of all elements in the UK legal system comprising or derived from EU law. It is not practicable because the government, civil service and Parliament lack the resources to carry out such an extensive review, followed by possible reform or repeal. It is not necessary because the mere fact that rules in force in the UK are derived from EU law does not mean that they are bad rules or even suspect rules. In most cases such rules were supported by the UK government of the day, and in most cases the application of the rules in the UK is not politically controversial.

31. There is no doubt that maintaining most EU legislation in force in the UK is both convenient, and possible. The Great Repeal Act could cover most EU law by a general provision that EU legislation in force would continue to have effect. But such a general saving provision would not be adequate to deal with all situations. Where, for example, EU agencies exercise regulatory functions which apply to UK economic operators within the UK, Brexit will leave regulatory gaps. This sort of situation requires a tailor-made solution, perhaps involving negotiated continued participation in the activities of the agency in question, and/or amendments to UK legislation, including the terms of EU legislation which is maintained in force. In the event of unplanned Brexit, negotiations would not have produced the possible

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<sup>11</sup> References in this evidence to EU migrants include EEA migrants from Norway, Iceland, and Liechtenstein, and references to the EU are where appropriate references to the EEA.

solution of continued UK participation in certain EU agencies, and there could be significant gaps in the UK's regulatory framework as a result. Gaps such as this are one of the possible consequences of an unplanned Brexit, and are examined in this evidence.

## **A - The consequences of unplanned Brexit for individuals and businesses**

### **The position of EU migrants in the UK and UK migrants in the EU after an unplanned Brexit**

#### Hypothetical Example No 1

A, B and C are non-UK EU nationals. A has lived and worked in the UK for 6 years, B has done so for 3 years, and C has been in the UK for one month, is seeking work, but has yet to find a job. What is their legal position after an unplanned Brexit?

22. After Brexit, A, B and C have no rights under EU law in the UK.

23. Under EU law, A had acquired a right of permanent residence in the UK after five years lawful residence in the UK, but the question he will wish to have answered is whether UK law will honour that.

24. B was entitled under EU law to continue residing and working in the UK, to claim in-work benefits, and to claim job-seeker's allowance to find another job if she became unemployed. B's rights now depend upon UK law.

25. C was entitled under EU law to look for work in the UK, was entitled to claim job-seeker's allowance for three months, and was entitled to take up a job if she found one. If she had not found a job in six months, she could be required to leave the UK.

26. It is possible that the status of EU migrants in the UK after Brexit will be resolved by the UK before Brexit. Even if this is not the case, the UK is likely to announce at some point that EU migrants arriving in the UK after a certain date cannot expect to be granted permanent residence after Brexit. Those who have arrived prior to that date are likely to be granted a right of permanent residence in the UK, but that right could be restricted to those with a right of permanent residence under EU law, based on five years prior lawful residence in the UK. British citizens who had been resident in an EU country for five years at the time of Brexit would be eligible (although no longer EU nationals) for a grant of permanent residence in that country under EU law. <sup>12</sup>

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<sup>12</sup> Article 4(1) of Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003L0109>

27. The status of EU migrants in the UK and UK migrants in the EU should be one of the less controversial aspects of a withdrawal agreement, and agreement in principle is likely to have been reached in negotiations even if a withdrawal agreement has not been concluded at the time of Brexit. In the event of unplanned Brexit, the right way forward for the UK and the EU would be to implement any such agreement, or recognise rights of residence on a provisional basis pending conclusion of a withdrawal agreement after Brexit. This might be easier said than done, since it might, at least initially, depend upon national action, as well as EU level action.

32. High levels of anxiety must be being felt by the millions of EU migrants in the UK, and UK migrants in the EU, about their future rights of residence. The sooner the UK and the EU take steps to give them the benefit of certainty about their future rights to residence, and associated matters such as rights to work, and healthcare, the better.

33. To return to the position of our hypothetical EU migrants in the UK, it must be frankly admitted that their position in the event of an unplanned Brexit cannot be forecast with certainty. We think that A will be granted the right to permanent residence in the UK (having already acquired a right of permanent residence under EU law prior to Brexit), B is likely - in due course - to be granted either permanent residence or some transitional residence rights, and C is unlikely to be granted a right of residence in the UK, unless she qualifies under future rules for EU migrants. The UK counterpart of A resident in an EU country would be eligible for permanent residence in that country under EU law (see above), but it is impossible to forecast the position of the UK counterparts of B and C in the EU if there is no withdrawal agreement covering their position, because UK migrants in different EU countries might be treated differently, at any rate pending the adoption of any common rules by the EU.

34. The worst case scenario for UK migrants in the EU would be that they would be treated differently in different EU countries, at any rate where they had resided in an EU country for fewer than five years. They would be subject to national rules, which might, at the time of Brexit, provide them with no automatic rights of residence, work, or health care and benefits. Attitudes to UK migrants in EU countries might have become unsympathetic in the wake of failed negotiations between the UK and the EU, but the need to reach an accommodation in respect of EU migrants in the UK would be bound to be a moderating influence. Urgent and informal negotiations between the UK and the EU countries concerned could be expected, to arrange either provisional or longer term arrangements, depending on the state of play of any continuing efforts between the UK and the EU to conclude a belated withdrawal agreement. If this sounds somewhat chaotic, that is how it might turn out to be. The position of EU migrants in the UK and UK migrants in the EU in the event of an unplanned Brexit is something the UK Government (and the

Governments of other EU countries) should be planning for in advance. Press reports suggest that this is happening.<sup>13</sup>

**The pensions position of EU migrants in the UK, and UK migrants in the EU, who have made contributions to a state pension scheme in more than one country**

35. Mention should be made of the pensions position of EU migrants in the UK, and UK migrants in EU countries, who have paid contributions under state pension schemes in more than one country. Contributions in one EU country may be taken into account for purposes of eligibility to a pension in another, and a pensioner may be entitled to a pension from more than one EU country, with the amount of the pension, and the costs of providing it, being calculated on a pro rata basis.<sup>14</sup> Those already in receipt of pensions calculated on this basis prior to Brexit are likely to be treated under a withdrawal agreement as having accrued rights and continue to be paid on the same basis after Brexit.

Hypothetical Example No 2

D is a non-UK EU national who has reached pensionable age and has seven qualifying years on her national insurance card in the UK. She worked in T, an EU country other than the UK for 16 years and paid contributions to that country's State pension.

Before Brexit she will meet the minimum qualifying years to get a UK state pension (10 years) because account will be taken of her contributions in the EU country other than the UK. The amount of her pension in the UK will only be based on the 7 years of National Insurance contributions made in the UK and will thus be proportionate to her contributions in the UK, but she will also be entitled to receive a similarly proportionate pension (pro rata to her contributions there) at the expense of the EU country where she had previously worked.

What would D's position be if she reaches retirement age after an unplanned Brexit?

36. In the immediate aftermath of an unplanned Brexit D will face uncertainty and perhaps delay as regards a proportionate UK pension, and perhaps considerable delay as regards any proportionate pension from EU country T.

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<sup>13</sup> <http://www.thelocal.se/20170214/uk-and-sweden-agree-everybody-should-be-able-to-stay-after-brex-it-eu-minister> The Swedish EU Affairs Minister is quoted as saying "We have the same vision that it should be possible for everybody to stay, but there are many details. It's not so easy.."

<sup>14</sup> Regulation (EC) no 883/2004 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:166:0001:0123:en:PDF>  
See in particular Chapter 5 on old-age pensions.

37. Questions such as this, relating to rights which might be regarded as being accrued rights under the EU social security rules, are likely to be settled in a withdrawal agreement. An agreed solution would probably involve pensions authorities in the UK and EU countries continuing to take into account contributions already made in the UK and EU countries, cooperation between the social security institutions of the UK and of EU countries, and pro rata pension payments continuing to be made by those institutions.

38. In the event of pensioners resident in the UK claiming a pension after an unplanned Brexit, the UK would be likely (but not certain) to maintain those rules which would allow a person claiming a pension in the UK to count contributions in an EU country to establish eligibility, and would continue to base the amount of the UK pension solely on national insurance contributions in the UK. EU countries would be likely (but not certain) to take the same approach. It is unlikely that the UK and EU countries would unilaterally accept liability for paying pensions on a pro rata basis to migrants no longer resident within their territory, in the absence of an agreement to that effect, providing for reciprocity, and ongoing cooperation between the national authorities in the countries concerned. It is likely that some sort of an agreement would be forthcoming in due course, even if there were an initial failure to conclude a withdrawal agreement, leading to an unplanned Brexit. In the meantime there would be uncertainty for those approaching pensionable age.

**The right of UK tourists to visit EU countries and EU tourists to visit the UK - would visa-free holiday travel be affected?**

39. The current position is that British citizens are free to visit all EU countries as tourists without a visa. Would the position change after an unplanned Brexit?

Hypothetical question no 3

E, F, G and H are a family of British citizens resident in the UK who are planning a holiday in France when Brexit occurs. Will they have to apply for visas?

40. Quite apart from the formal legal position, it is always possible that our hypothetical family would encounter problems entering France simply because of uncertainty on the part of national officials in the immediate aftermath of an unplanned Brexit. The family in the hypothetical example would not have to apply for visas unless France imposed a visa requirement or the EU amended its common visa rules policy to require British citizens to obtain visas for travel into the Schengen area. Neither eventuality seems likely, unless the UK required nationals of one or more EU countries to apply for visas for the UK, and that too seems unlikely, not least because of the problems it would cause for the open land border between Ireland and the UK. All our suggestions of what is likely, however, are based on the calculation that national authorities will act in a rational and reasonable manner, and we appreciate that the possibility of some recriminations and retaliatory behaviour in the aftermath of failed negotiations over Brexit cannot be ruled out.

41. Most EU countries, plus Norway, Iceland, Liechtenstein and Switzerland, (26 countries in all) are in the Schengen area, and these countries apply a common visa policy. That policy is laid down by EU rules.<sup>15</sup> In the event of unplanned Brexit, the default position would be that the countries in Schengen would not be obliged to require British citizens to apply for visas to travel into the Schengen area, since the UK is not listed as one of the countries requiring a visa. It is unlikely that the EU would add the UK to that list unless the UK imposed a visa requirement on nationals of an EU country, but the possibility cannot be ruled out, in the aftermath of failed negotiations.

42. But nor does the UK appear in the list of countries entitled to visa free access for short stays (up to 90 days in any half year period). This means that Schengen countries are not *bound* to grant visa free travel to the UK. In theory, in the event of unplanned Brexit, individual Schengen countries could require British citizens to obtain a visa. Once again, this is not really likely, except as retaliation for the imposition of a visa requirement by the UK, but it cannot be ruled out. In any event, uncertainty could lead to delays for British tourists in the immediate aftermath of an unplanned Brexit,

43. Not all EU countries participate in the common visa policy. Bulgaria, Croatia, Cyprus, Ireland, and Romania do not, though Bulgaria and Romania will soon join Schengen.

44. If the UK did impose visa requirements on the nationals of any EU country, this would lead to tension with the UK Government's aim to maintain free movement without passport checks across the border between Ireland and Northern Ireland. It would lead to tension because nationals of all EU countries are free to travel to and within Ireland, and it would be impossible to fully enforce UK visa requirements (which would make a visa a precondition for entry to the UK) for some such nationals in the absence of passport checks at the border with Northern Ireland. We address this issue in more detail in Part B of our evidence.

45. By the time of a hypothetical unplanned Brexit, the legal position of travellers from non-EU countries in the Schengen area might have changed somewhat. Non-EU citizens entitled to visa-free travel in the Schengen area might nevertheless be required to seek online authorisation to travel, and pay a €5 euro fee.<sup>16</sup> The UK might adopt a similar scheme in respect of EU travellers to the UK. One advantage would be in respect of checking the status of EU nationals who had travelled from Ireland to Northern Ireland.

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<sup>15</sup> Made under Article 77(2)(a) TFEU, see Council Regulation (EC) No 539/2001, as amended, and consolidated version published in June 2014 see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02001R0539-20140609>

<sup>16</sup> [http://europa.eu/rapid/press-release\\_MEMO-16-3706\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-3706_en.htm)

46. The best case scenario for British tourists travelling to EU countries after an unplanned Brexit would be for the EU to list the UK as a country whose nationals were entitled to short-stay visa-free entry to the Schengen area, along with agreed visa-free access to EU countries not in Schengen. The worst case scenario would be facing sudden and different visa requirements from different EU countries. A general requirement for a visa for British citizens visiting the Schengen area might be preferable to some countries requiring visas for entry to the area and some not, because the position would be more clear. An online authorisation to travel with a €5 euro fee would probably apply in all cases anyway.

**Would UK tourists in the EU forfeit use of their European Health Insurance Cards, and face high roaming charges for their phone calls and data access?**

Hypothetical example No 4

J and K have booked a holiday in Spain. They both have European Health Insurance Cards. The last time they visited Spain the roaming charges for calls and data downloads had been capped. They had read more recently that all roaming charges had been abolished in the EU.

Brexit occurs while they are on holiday. Will it affect their EU rights to health care in Spain and how much they pay to use their mobile phones while on holiday?

47. A European Health Insurance Card (EHIC) is issued by national authorities acting under EU rules.<sup>17</sup> The card is issued free to nationals of EU countries who are entitled to benefit from the coordination at EU level of social security rules including those providing for health care. A card can be used by a national of one EU country who is temporarily visiting another EU country to secure equal access to health treatment which is either provided by state authorities or funded by a state scheme. The card cannot be used if the holder is travelling to another EU country for the purpose of receiving health care, but there are other EU rules providing for this possibility, and they are explained below. The card does not guarantee free health treatment, but it guarantees access to health treatment on the same basis as that treatment is provided to local residents. Thus for example, the card holder might have to pay for the treatment s/he receives, but will be entitled to reimbursement by the state authorities of, say, 70% of the cost of the care provided, because that is the way that the health care system in that country works.

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<sup>17</sup> 2003/751/EC: Decision No 189 of 18 June 2003 aimed at introducing a European health insurance card to replace the forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 as regards access to health care during a temporary stay in a Member State other than the competent State or the State of residence (Text with relevance for the EEA and for the EU/Switzerland Agreement.)

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003D0751>

Council Regulation (EC) No 883/2004 repealed and replaced Regulation 1408/71, and Council Regulation (EC) No 987/2009 repealed and replaced Regulation 574/72.



48. In the event of unplanned Brexit while J and K, the characters in our hypothetical example are on holiday in Spain, their EU health cover would end. The same would be the case for EU tourists in the UK, who would normally be entitled to free treatment by the NHS, but who would, after Brexit, presumably have to pay the charges normally charged to nationals of those countries outside the EU who cannot claim the benefit of a reciprocal health care agreement with the UK.

49. J and K might also find that the cost of using their mobile phones in Spain will increase sharply if they take their holiday after an unplanned Brexit. In recent years, EU legislation has capped and reduced the charges which telecoms providers in EU countries make to providers in other countries in return for providing connections for the latter's customers when they want to use their mobile phones and devices abroad. The current EU plan is to abolish all discriminatory charges in respect of EU residents using their phones and devices when they travel to another EU country.<sup>18</sup> In the event of an unplanned Brexit, UK residents would no longer be resident in an EU country and telecoms providers in the EU would be at liberty to impose discriminatory charges in respect of their calls at levels which have in the past been described as excessive.

**Would NHS patients who travel to an EU country to receive medical treatment be denied free or reduced charges or NHS reimbursement?**

Hypothetical Example No 5

L wishes to arrange to have a hip replacement as soon as possible because he is suffering considerable pain. The hip replacement is available on the NHS, but L is reluctant to wait for four months, and is considering surgery in France. He has read on the NHS website that patients might receive treatment free or at a reduced rate in other EU countries, and that NHS England reimburses the cost of private treatment in EU countries.

Will it affect his options if he travels to France for surgery after an unplanned Brexit?

50. EU law offers two possible options for patients considering medical treatment in another EU country. Under the first, the patient must seek NHS approval for treatment abroad on the ground that the treatment cannot be provided in the UK without a delay that is medically unjustifiable. This route provides access for NHS patients to state health care schemes in the EU under the same conditions as that of nationals of the country concerned. This may mean free health care, or that the patient bears part of the cost, and the arrangement works in much the same way as does the European Health Insurance Card, referred to above. The NHS reimburses the provider of the treatment the same proportion of the cost of treating the NHS patient which would be borne by the foreign health care provider in respect of its

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<sup>18</sup> [http://europa.eu/rapid/press-release\\_IP-17-193\\_en.htm](http://europa.eu/rapid/press-release_IP-17-193_en.htm)

own patients.<sup>19</sup> In some cases this results in the NHS reimbursing the full cost of the treatment, in which case there is no charge made to the NHS patient by the foreign provider. But in other cases, where patients of the foreign health care system in question bear some of their own costs, the NHS patient will be responsible for making a similar payment to the foreign health care provider, while the NHS is responsible for the rest. In the event of unplanned Brexit, state health care schemes in EU countries would no longer be obliged to apply the EU rules to patients from the UK, and UK patients would be guaranteed neither free treatment, nor treatment at a reduced rate.

51. There is a second option under EU rules,<sup>20</sup> whereby a UK patient is entitled to claim from the NHS the cost of medical treatment received and paid for by the patient in another EU country (whether from a state or private provider), provided that the treatment is of a type available in the UK, and that the cost does not exceed that of the same care under the NHS. After an unplanned Brexit, the UK would no longer be bound to make this option available, but could if it wished continue to reimburse the cost of treatment, either generally, or where that treatment had been arranged prior to Brexit. If the UK simply maintained in force the UK Regulations which implement the underlying EU rules, under the Great Repeal Act, L would presumably receive reimbursement, despite the fact that the text of the Regulations presupposes that the UK is an EU country.<sup>21</sup> If the UK adopts primary legislation which repeals some EU based UK legislation, and maintains other such legislation in force, the intent must be that the latter be so far as possible be given effect unless and until it is repealed and amended. We do not assume, however, that the UK would necessarily wish to continue to provide this option to NHS patients if the UK left the EU.

### **Air passenger rights under EU law - assistance and compensation for flyers in respect of delayed or cancelled flights to and from the EU and third countries**

#### Hypothetical Example No 6

M has arranged business meetings in Italy and the USA. His flight to Italy is cancelled. After travelling on to the USA, his return flight to the UK is subject to a long delay. He has to spend an extra night in the USA. Is he entitled to assistance and compensation in respect of his delayed and cancelled flights if they occurred after an unplanned Brexit?

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<sup>19</sup> This route is available under Council Regulation (EC) No 883/2004 (referred to in NHS information and guidance as the "S2" (formerly "E112") route.

<sup>20</sup> Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, transposed by The National Health Service (Cross-Border) Regulations 2013 (SI 2013/2269). In the case of specialist treatments, the patient must seek prior authorisation.

<sup>21</sup> See e.g., the reference to "Reimbursement of cost of services *provided in another EEA state* where expenditure incurred on or after 25 October 2013" in regulation 7.

52. Under EU rules, passengers whose flights are subject to cancellation or long delays, or are denied boarding, are entitled, according to circumstances, to assistance including food and accommodation, to refunds on tickets, to free return or onward transport, and to compensation. Flights are covered if they depart from an EU airport, or depart from a country outside the EU to an EU destination, provided in the latter case that the carrier is an EU airline. Airlines only qualify as EU airlines if they are owned and controlled by EU state authorities, or nationals of EU countries.<sup>22</sup>

53. In the above hypothetical situation, after an unplanned Brexit, M's flight from the UK to Italy is a flight from a non-EU country to an EU country, and would only be covered by the EU rules if M's airline is an EU airline. If M's flight to Italy is operated by an EU airline, M can claim his EU air passenger rights, irrespective of whether the UK Great Repeal Act provides that the EU rules continue in force - the EU airline is still bound by the EU rules. M's flight from the USA to the UK would not be covered by the EU rules.

54. The Great Repeal Act might, however, not only provide that the EU rules shall continue to apply, but that flights departing from a UK airport shall be deemed to be flights from an EU airport, that flights which depart from a country outside the EU to a UK airport shall be deemed to be flights to an EU destination, and that an airline owned and controlled by British citizens shall be deemed to be an EU airline. This might be the policy choice of the UK, because if the UK appeared to be creating "loopholes" in air passenger rights, this might not be popular with air passengers. In that case, M would have a claim in respect of his cancelled flight to Italy, even if his airline was owned and controlled by British citizens. Equally, M would have a claim in respect of his long delayed flight from the USA to the UK, providing that the airline was an EU airline, or a UK owned and controlled airline.

55. If the UK provided for the continued application, as UK law, of the EU rules on air passenger rights, the question whether UK courts should continue to follow judgments of the CJEU in interpreting UK rules derived from EU rules would arise in stark form. This is because the European Court in several cases "interpreted" the rules in a way which led to criticisms that the Court had in reality amended and extended the rules, rather than explained what they meant. As written, the rules confine compensation to cases of cancellation and denial of boarding, while providing only for assistance (meals, accommodation, etc) in the case of delay. In controversial rulings, the Court of Justice held that passengers subject to delays of more than three hours should nevertheless be entitled to compensation.<sup>23</sup> In this case, it would probably be appropriate to interpret the UK rules in accordance with the controversial judgments of the CJEU, if the policy aim of the UK Government was to ensure that passengers flying to and from UK airports and on UK airlines should not

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<sup>22</sup> Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights

<sup>23</sup> Joined Cases C-402/07 *Sturgeon v Condor* and C-432/06 *Bock v Air France*; Joined Cases C-581/10 and C-629/10, *Nelson and Tui*.

enjoy a lower standard of protection than those flying from EU airports and on EU airlines.

**Falling over the “cliff edge” - unplanned Brexit - would lead to trade between the UK and the EU (and perhaps between the UK and non-EU countries with which the EU has free-trade agreements) on WTO terms, and that would impose costs on businesses and consumers in the UK and the EU**

*(a) Tariffs on trade as a result of unplanned Brexit*

56. An unplanned Brexit would mean a Brexit without a transitional trade arrangement having been put in place, since it would have been the withdrawal agreement that would have put in place the “safety net” of transitional arrangements in time for Brexit. It would also mean that there would be no future trade agreement in place, because that could only be concluded after Brexit. The only option in the immediate aftermath of an unplanned Brexit would be to trade on WTO terms.

57. The UK is a member of the WTO but for most purposes the EU acts for the UK within the framework of the WTO, as it does for all EU countries. Members of the WTO have tariff schedules listing the tariffs to which they are committed in trade with other countries. WTO members apply their tariffs to all trading partners equally. This is known as “most favoured nation” (MFN) treatment. Free trade agreements and customs union arrangements are exceptions to this principle. Since the EU is a customs union, the UK applies the EU’s common customs tariff (CCT) to all imports from non-EU countries, unless the imports are from a country which has a free trade agreement or customs union arrangement (as does Turkey) with the EU. When the UK leaves the EU, the UK will “stand on its own feet” in the WTO, and apply its own tariff schedules to imports from other countries, unless the imports are from a country with which the UK has entered into a free trade agreement. In order for the UK to apply its own tariff schedules, it will have to acquire its own set of schedules. This means securing the consent of all other members of the WTO to the UK’s list.

58. The UK plans to adopt the same tariff schedules as it currently applies as part of the EU, that is to say, the tariffs contained in the EU CCT. That aim, and the process by which it is hoped that that aim will be achieved, was outlined on the 23<sup>rd</sup> January by the UK’s Ambassador and Permanent Representative to the UN and other international organisations in Geneva, Julian Braithwaite, in the FCO’s blog:

*“There is a process in the WTO that allows the UK to submit new schedules. But they can only be adopted – or certified – and thus replace our existing EU schedules if none of the WTO’s other 163 members object to them. So to minimise any grounds for objection, we plan to replicate our existing trade regime as far as possible in our new schedules. Before we take any formal steps in the WTO we will hold extensive informal consultations with the WTO membership. Every member will have an opportunity to raise any issues or concerns with us before we proceed. We intend to work closely with the EU during this process.”*

59. It is perhaps appropriate to distinguish between two potential problems. The first is the UK securing certification of its tariff schedules relating to non-agricultural products through agreement with WTO members. It is not certain that the UK will have secured agreement on its schedules by March 2019. But that lack of agreement would not necessarily cause problems for the UK in practice in trading on WTO terms after Brexit.<sup>24</sup> It has been noted that the current tariff schedules of the EU have not been certified.<sup>25</sup>

60. The second potential problem concerns agricultural products, and it involves dividing the EU's tariff rate quotas on agricultural products between the UK and the EU, in negotiations which will also involve the countries which benefit from the quotas.<sup>26</sup> Disagreements unresolved in March 2019 would not necessarily impede trade in agricultural products unaffected by such disagreements, but tripartite disagreement over undivided quotas would affect trade in the products concerned, and disputes over such trade could spill over and affect trade in other products with the countries concerned.

61. In the event of an unplanned Brexit, it seems likely that the UK would be in a position to trade with the EU on WTO terms, with the EU applying the CCT, and the UK applying its own tariff schedules, based on the CCT. Leaving aside for a moment countries with which the UK currently has the benefit of free trade under agreements negotiated by the EU, the UK would also trade on WTO terms with the rest of the world. Although we have not been asked to quantify the effects of unplanned Brexit, we have sought in the following two examples to refer to actual tariffs which would apply, rather than simply refer to "tariffs". There are two reasons for this. One is that referring to tariffs without giving some indication of how high they would be might leave the reader wondering whether tariffs on trade with the EU would make much difference. The second reason is that citing an *average* tariff conceals the large variations in rates which go to make up the average, and the potentially damaging effects of relatively high tariffs in some sectors, for example, 10% on cars, and 30-40% on some agricultural products.

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<sup>24</sup> The House of Lords EU Committee received conflicting evidence on this, see paragraphs 191 and 192 of its 5<sup>th</sup> Report of Session 2016-2017 Brexit: the options for trade <http://www.publications.parliament.uk/pa/ld201617/ldselect/ldEUcom/72/72.pdf>

<sup>25</sup> *Ibid.*, paragraph 191

<sup>26</sup> <https://www.sussex.ac.uk/webteam/gateway/file.php?name=briefing-paper-1.pdf&site=18>

Hypothetical example no 7

N plc is a manufacturer of cars in the UK. N imports components (tariff-free and paperwork-free) from other EU countries, and incorporates these parts into its finished products. It exports 60% of its cars (tariff-free and paperwork-free) to other EU countries, 8% to EEA countries Norway, Iceland, and Liechtenstein, (tariff-free but not paperwork-free) and a further 4% of its production (tariff-free but not paperwork-free) to a non-EU country, C, with which the EU has a free trade agreement.

What will be the position in the event of an unplanned Brexit?

62. The UK and the EU, trading on WTO terms, will impose a 10% tariff on imports of cars. N's cars will thus face a 10% tariff on its exports to EU countries. The UK will in turn impose tariffs of approximately 5% on parts imported from the EU. N might request the UK to exempt imported parts from customs duties. The UK might give what is called "inward processing relief" to car parts imported from outside the UK which are incorporated into products exported from the UK, but this relief would have to be applied irrespective of the origin of the products to comply with WTO MFN rules.

63. N will also face increased paperwork on the import of parts into the UK and the export of its cars to the EU, but this would happen in any event unless the UK remains in the EU customs union, which the government has ruled out. Within the customs union, trade in products and parts over the EU's internal frontiers are for practical purposes "paperwork-free", and customs checks to establish dutiable status are confined to external frontiers. The UK has ruled out remaining within the EU customs union, because it wishes to be free to conclude its own trade agreements with countries outside the EU. That being the case, if the UK concludes a free trade agreement with the EU, that agreement will be confined to products originating in the EU and the UK (i.e., wholly or mainly produced in the EU or the UK), and it will be necessary to have customs checks between the UK and the EU to determine the tariff status of goods crossing borders, since excessive non-originating content in a product could attract a tariff.

64. In the example, N plc exports to EFTA countries Iceland, Norway and Liechtenstein, which are parties to the EEA agreement, which extends the EU single market (but not customs union) to the three countries concerned. In the event of an unplanned Brexit, the EEA agreement will cease to provide a basis for tariff-free trade between the UK and those three countries. It is likely that in the longer term, the UK will conclude a free trade agreement with these three EFTA states, in similar terms to those which it agrees with the EU. In the immediate aftermath of an unplanned Brexit, however, the UK would wish to carry on trade with these countries as if the EEA agreement were still in force. The UK might achieve this by

an exchange of notes, in the international law sense,<sup>27</sup> with the countries concerned, agreeing to conduct their trade by reference as far as possible to the EEA agreement, as if it were still in force between the parties concerned. This would in effect amount to a transitional arrangement as regards the UK and the three countries concerned, to be superseded in due course by a free trade agreement between the UK and the EFTA countries. It is true that the UK is a party to the EEA agreement, but it is so in its capacity as an EU country, which is not a sufficient basis for it to continue to rely upon the agreement, post Brexit, either as against the three EFTA countries, or as against EU countries. Some of the comments in the following paragraphs are also applicable to this question.

65. In the example of the UK carmaker, N plc exports to the EU, to the three EFTA countries of the EEA, and to a hypothetical non-EU country C with which the EU has concluded a free trade agreement.<sup>28</sup> Pre-Brexit, N exports cars tariff-free to country C. Post-Brexit, there are two possibilities for the treatment of N's car exports.

66. One possibility is that the UK continues to trade with country C on the same basis as set down in the trade agreement between the EU and C, for the same reasons as suggested above in the case of the EFTA countries. The agreement is a "mixed" agreement, but the fact that the UK is a party to the FTA does not ensure it will retain rights under the agreement after Brexit. In fact the UK is unlikely to claim that it is so entitled. The short way of putting this is to say that the UK is only party to the agreement in its capacity as an EU country. The longer legal equation is as follows. Let us suppose the agreement contains a fairly standard provision (similar to that in the EEA agreement between the EU and the three EFTA countries) on the definition of the parties which makes the EU and individual EU countries parties to the agreement to the extent of their respective competences under the EU Treaty.<sup>29</sup> This would mean that it was the EU and not the UK which was party to the provisions on tariff-free trade (which is within EU competence). In the aftermath of Brexit, the EU's position would be that the trade agreement no longer applied to the UK, and the EU was no longer responsible for ensuring the UK complied with the agreement. Country C would be entitled to renounce the agreement vis-à-vis the UK, on the grounds that there had been a fundamental change of circumstances, and that the EU

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<sup>27</sup> That is to say, a binding international agreement in the simplified form of an exchange of correspondence containing or incorporating by reference the terms of agreement.

<sup>28</sup> There are 30+ countries to which the UK exports tariff-free under agreements between the EU and non-EU countries.

<sup>29</sup> For example, as in the EU-Chile agreement, "For the purposes of this Agreement, the Parties shall mean the Community or its Member States or the Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, on the one hand, and the Republic of Chile, on the other." For completeness we add that the UK could not derive rights from such an agreement against the EU, since the UK is a co-party with the EU (and the other EU countries) on the one side of the agreement, with the non EU country on the side of the agreement. The agreement does not purport to give rights of free trade to EU countries against themselves.

could no longer fulfil its free trade obligations in respect of the UK.<sup>30</sup> In fact country C might be keen to carry on trading with the UK on the same basis after Brexit, but would be unlikely to see the trade agreement with the EU as a secure legal platform for that trade. The UK would also wish to continue trading with C on the same basis as under the EU FTA, but would also want to put the arrangement on a sounder legal footing. It might achieve this by agreeing in an exchange of notes (in the international law sense) with country C to continue trade after Brexit on the same terms as before, referring to the agreement in question, and to any clarifications or modifications necessary to ensure continuity of performance of the trade obligations under the treaty. By such means, the UK might avoid WTO trade on the one hand, and putting a wholly new trade agreement in place, on the other, which would take time, and would not be achievable before Brexit. It is not certain that in all cases this form of simplified agreement would work, either for technical<sup>31</sup> or political reasons.

67. Another possibility is that the UK loses the benefit of that FTA, and N's exports to C are subject to its normal WTO tariff of 6%.<sup>32</sup> C might not be keen to continue trading with the UK on the same basis as before, and might renounce the FTA vis-à-vis the UK on the grounds of fundamental change of circumstances.

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<sup>30</sup> See Articles 61 and 62 of the Vienna Convention on the Law of Treaties. The third country might say that it is the EU, and not the UK, which is a party to the provisions of the agreement relating to the abolition of customs duties on trade with the UK, since those provisions fall within the competence of the EU, and not the UK. After Brexit, the EU could be said to be party to the agreement in respect of free trade obligations it could no longer perform, because they involved imports into the UK, which was no longer an EU country, while the UK could not rely on those provisions in respect of its exports, because it had never been a party to them. It might be said that the Treaty should be given a dynamic interpretation, so that the EU and individual EU countries are parties to the agreement in accordance with their respective competences *from time to time*, since the respective scope of such competences do not necessarily stand still. This argument has more force while the EU and individual EU countries share responsibility for performance of a mixed agreement such as that under discussion, than it would once an EU country has left the EU, and the EU no longer had any competence at all in respect of the territory of the country concerned. In such circumstances, the non-EU party to the free trade agreement might say that the extent of its obligations to the EU and the UK have been radically transformed by Brexit, and that the UK's membership of the EU constituted an essential basis for its being bound by the Treaty in respect of the UK.

<sup>31</sup> There might be constitutional procedures to be completed in country C which militate against a speedy agreement to continuation of the status quo.

<sup>32</sup> This part of the example is loosely based on sales of Minis from BMW's Oxford plant to buyers in Chile. For the EU-Chile agreement, see [http://eurlex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535f1074175eaf0.0004.02/DOC\\_2&format=PDF](http://eurlex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535f1074175eaf0.0004.02/DOC_2&format=PDF) BMW has said of exports of Minis from its Oxford plant that success has been a result of "high customer demand in almost 80 countries around the world, from Chile to China..." [https://www.press.bmwgroup.com/united-kingdom/article/detail/T0020037EN\\_GB/a-million-minis-exported-from-plant-oxford?language=en\\_GB](https://www.press.bmwgroup.com/united-kingdom/article/detail/T0020037EN_GB/a-million-minis-exported-from-plant-oxford?language=en_GB) For general information on trade with Chile, see <https://www.gov.uk/government/publications/exporting-to-chile/doing-business-in-chile-chile-trade-and-export-guide>



68. The UK enjoys tariff free access to the markets of numerous non-EU countries via EU agreements with those countries.<sup>33</sup> It might be that even in the case of an unplanned Brexit, the UK could in most cases continue to trade on the same basis with those countries, if it could secure simplified agreements to do so, on the terms indicated above. In the event of a planned Brexit, transitional arrangements might maintain the UK's access to these markets for a further period of years, which would give the UK and the countries concerned an opportunity to put in place any necessary adjustments to their trading relationships.

Hypothetical example no 8

O is a farmer in Northern Ireland who exports (tariff-free and paperwork-free) beef, lamb and dairy products to Ireland and to other EU countries.

What will be his position in the event of an unplanned Brexit?

69. O would face tariffs of between 30% and 40% on meat and dairy produce.<sup>34</sup> Tariffs at this high level might deprive O of some of his customers in Ireland and elsewhere in the EU. The effect on Irish exports to Northern Ireland and the rest of the UK would be equally severe (or more severe if the £ sterling remains weak against the €). We note that 65% of Ireland's exports of cheddar cheese go to the UK, and 54% of Irish meat and livestock exports go to the UK.<sup>35</sup> Such high tariffs could seriously disrupt patterns of trade whereby, for example, Northern Ireland dairy farmers export milk to Irish farmers, who use the milk to product yoghurt, which they export to Northern Ireland.

70. The need to impose tariffs and in some cases high tariffs on goods traded in each direction across the land border between Ireland and the UK, and the incentives for traders to circumvent tariffs, would be a challenge to the declared aim of the UK and Irish governments to avoid putting in place a "hard" border between Ireland and Northern Ireland, and we refer to that further below, in Part B of our evidence.

*(b) Restrictions on cross-border business of UK financial institutions*

71. One effect of an unplanned Brexit would be on the "passporting" rights of UK financial institutions (banks, insurance companies, etc.,) providing cross-border

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<sup>33</sup> <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/> It is to be noted that not all trade agreements between the EU and non-EU countries provide for tariff-free trade in goods.

<sup>34</sup> Source: [http://www.civitas.org.uk/reports\\_articles/potential-post-brexit-tariff-costs-for-eu-uk-trade/](http://www.civitas.org.uk/reports_articles/potential-post-brexit-tariff-costs-for-eu-uk-trade/)

<sup>35</sup> Source:

<http://www.bordbia.ie/corporate/press/Documents/2016/BrexitBriefingInformation.pdf>

services to clients in the EU. What “passporting” means is that a UK financial operator capitalised and regulated in the UK can carry on business throughout the EU either directly or through branches, without the need for subsidiaries in other EU countries to be capitalised and regulated in those countries.

72. We do not attempt in this brief treatment to distinguish between the various legal regimes which apply to the various types of financial operator, and we do not attempt to offer a hypothetical example, in the way we have for pensioners or tourists, car makers or farmers. We confine ourselves to making two points.

73. The first is that if unplanned Brexit leads to trade on WTO terms, this would lead to immediate loss of passporting rights for UK financial services providers, because such rights are available under EU single market legislation, but would not be guaranteed under WTO rules. It is only right to say that this loss might occur in due course anyway, since there is no guarantee that a future trade agreement between the UK and the EU will provide for passporting, and indeed, no EU trade agreement with non-EU countries has to date done so. But unplanned Brexit would be more likely to bring with it a transitional arrangement prolonging the period during which UK financial operators could rely on their passporting rights. This would allow the UK a breathing space to seek to negotiate passporting rights, either based on current single market arrangements, or on “equivalence regimes,” or perhaps amounting to an enhanced equivalence regime<sup>36</sup> for the future, should it wish to or be able to do so. For its part, the White Paper says that a future trade agreement may “take in elements of current single market arrangements”,<sup>37</sup> and it is clear from the Prime Minister’s Lancaster House Speech, that this reference was intended to cover financial services.<sup>38</sup>

74. Loss of passporting rights in March 2019, for a UK financial institution relying on those rights to carry on cross-border business in the EU, would lead to immediate termination of such business unless the institution in question had set up a subsidiary which was capitalised and regulated within the EU.

75. The second point we would make is that the prospect of such a loss of passporting is leading to UK banks and other financial institutions safeguarding their positions by making contingency plans to set up subsidiaries within the EU post Brexit. It has, for example, recently been reported that Lloyds of London has made

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<sup>36</sup> TheCityUK, which champions the interests of the financial services industry, has said that “It is in the economic interests of the UK and the EU to continue to provide and have access to the widest possible range of financial and related professional products and services without the need to establish a commercial presence in both markets. This will require the UK and the EU to agree:

a framework for the mutual recognition of regulatory regimes, building on and going beyond the existing equivalence regimes...” <https://www.thecityuk.com/assets/2017/Reports-PDF/Brexit-and-UK-based-financial-and-related-professional-services.pdf> point 10.

<sup>37</sup> White Paper, paragraph 8.3.

<sup>38</sup> <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

plans to set up a subsidiary within the EU, to secure its EU insurance business post-Brexit.<sup>39</sup> If an unplanned Brexit begins to look likely, rather than possible, financial institutions may feel under pressure to pre-empt unplanned Brexit by activating their contingency plans in order to maintain their EU business.

76. This might in turn reduce the incentive for the UK Government to invest negotiating capital in seeking to maintain passporting or enhanced equivalency rights in a future trade agreement. A point might be reached where the achievement of that goal would seem like shutting the stable door after the horse had bolted. It might still be said, however, that on a longer term view, achieving passporting or enhanced equivalence rights for UK financial service providers as part of a future trade agreement with the EU would be worth having. London will remain the EU's leading financial centre. EU facing business which has been transferred from London by UK financial operators could be transferred back again and that eventuality seems worth providing for.

**Unplanned Brexit would decouple EU agencies which currently figure in the UK regulatory and supervisory framework from the markets and activities for which they are responsible**

77. Unplanned Brexit would create gaps in the UK legal system, where EU law has established regulatory bodies (in this context we use the word “regulatory” loosely to cover both rule-making and “supervision”, or monitoring, applying and enforcing rules) which play an active role in regulating the UK market. When the UK leaves the EU, the EU bodies in question will no longer take decisions in respect of the UK, and the UK will either have to ensure that new or existing home-grown agencies can fulfil these responsibilities, or seek to maintain links with the relevant EU bodies after Brexit. Although there are 40 or so EU agencies described as “working for you” in an EU brochure of that name published in 2015, only a handful of these regulate UK business activities in the UK in a way that would be immediately missed in the event of an unplanned Brexit. We would identify the following in particular: the European Medicines Agency, the European Aviation Safety Agency, the European Chemicals Agency, the European Food Safety Agency, and the European (Financial Services) Supervisory Agencies. The Brexit White Paper refers to these agencies, and says that “[as] part of exit negotiations the Government will discuss with the EU and Member States our future status and arrangements with regard to these agencies.”<sup>40</sup>

*The European Medicines Agency*

78. The European medicines regulatory system is based on a network of around 50 regulatory authorities from the 28 EU countries plus Iceland, Liechtenstein and

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<sup>39</sup> <http://www.cityam.com/258619/could-luxembourg-lloyds-london-insurance-market-narrows>

<sup>40</sup> Paragraph 8.42.

Norway, the European Commission and the European Medicines Agency (EMA). A centralised procedure allows the marketing of a medicine on the basis of a single EU-wide assessment and marketing authorisation which is valid throughout the EU. Pharmaceutical companies submit a single authorisation application to EMA. The Agency's Committee for Medicinal Products for Human Use (CHMP) or Committee for Medicinal Products for Veterinary Use (CVMP) then carries out a scientific assessment of the application and makes a recommendation to the European Commission on whether or not to grant a marketing authorisation. Once granted by the European Commission, the centralised marketing authorisation is valid in all EU countries. The use of the centrally authorised procedure is compulsory for most innovative medicines, including medicines for rare diseases.

79. For a company to hold an EU wide marketing authorisation it must be established in the EU.<sup>41</sup> UK companies could retain the benefits of holding existing and seeking new EU wide marketing authorisations by maintaining or setting up a place of business within the EU. This would not necessarily be convenient in all cases. The UK could choose to continue to recognise marketing authorisations granted by the Commission. But for those authorisations for marketing in the UK which are currently handled by the EMA and the Commission, the UK would need to empower a UK body to evaluate, grant and monitor authorisations.

#### *European Aviation Safety Agency ('EASA')*

80. The EASA, based in Cologne, regulates aviation safety at EU level. Safety standards are policed through a system of certification of equipment, aircrew, and undertakings involved in civil aviation.<sup>42</sup> Responsibility for issuing certificates is generally entrusted to the EASA, which may act itself or through national aviation authorities.<sup>43</sup>

81. EASA itself takes direct responsibility for certifying aeronautical products and aircraft types, and for certifying airline operators registered in non-EU countries.<sup>44</sup> The national authorities of EASA member countries certify aircraft, organisations and personnel located within their territories. In the UK this responsibility is exercised by the Civil Aviation Authority (CAA). Certification by national authorities is subject to EASA monitoring. All certificates, whether issued by EASA itself or by the national authorities subject to its monitoring, are valid throughout the EU, to ensure uniform standards of safety and equal access to the market for operators throughout the EU.

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<sup>41</sup> Regulation (EC) No 726/2004 of the Parliament and the Council, Article 2, para 2 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:136:0001:0033:en:PDF>

<sup>42</sup> All EU countries are members of the EASA, as Iceland, Norway, Switzerland and Liechtenstein. References to "EU countries" in the text cover these countries too.

<sup>43</sup> Regulation (EC) No 216/2008 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008R0216-20130129>

<sup>44</sup> Commission Regulation (EU) No 452/2014 of 29 April 2014 laying down technical requirements and administrative procedures related to air operations of third country operators.

82. The EASA is also responsible for providing advice and recommendations on policy issues to the Commission, which may form the basis for new specifications and legislation that would apply across the EU (including where relevant to undertakings located in non-EU countries, but operating aviation services in EU countries).

83. In the event of Brexit, the UK would have to take over the regulatory functions which are currently carried out by EASA. This could be achieved by transferring those functions to the CAA. The UK would also have to take steps to maintain recognition in EU countries of UK regulatory certificates which are currently recognised throughout the EU, which could be achieved through an agreement between the EU and the UK.<sup>45</sup> Obtaining recognition should not be problematic at least from a technical point of view, since UK law is currently fully compliant with EU law. But new arrangements would take time to make, and in the meantime unplanned Brexit could lead to a regulatory gap and to uncertainty and delays.

Hypothetical example no 9

P Ltd is an airline registered in the UK. It operates several aircraft with which it provides holiday flights between airports in the UK and destinations in EU countries. It is registered in the UK and holds an Air Operator Certificate (AOC) granted by the CAA, which is recognised in all EU countries.

Would the position change in the event of an unplanned Brexit?

84. P Ltd's AOC would no longer be valid for EU countries. Since P Ltd would now be an airline registered in a non-EU country, it would be required to apply for an authorisation from the EASA to operate into the EU. It would be likely to receive such authorisation, but in the short term there could be a regulatory gap, with the possibility of uncertainty and delays for the airline.

*European Chemicals Agency (ECHA)*

85. The EU has adopted complex rules to regulate the manufacture and use of chemicals: the Registration, Enforcement, Authorisation and Restriction of Chemicals Regulation, or "REACH".<sup>46</sup> The REACH regulation requires firms to provide information on chemicals used in certain quantities to the Helsinki-based ECHA, so

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<sup>45</sup> As provided for by the EASA legislation: Regulation (EC) No 216/2008 of the Parliament and Council, Article 12(1) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0216&from=EN>

<sup>46</sup> Regulation (EC) No 1907/2006. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1907-20140410> The REACH regime applies to EU countries and Iceland, Norway and Liechtenstein.

as to allow the chemicals to be registered, scrutinised, controlled and approved. The object of the exercise is to protect human health and the environment.

86. The REACH regulation imposes obligations on manufacturers of chemicals who are located within the EU, and on importers of chemicals who are located within the EU when they import chemicals from non-EU countries.

87. The ECHA reviews the chemicals registered by manufacturers and importers. National authorities have responsibility for evaluating substances of particular concern and determining any restrictions on use. A failure to register chemicals and to comply with any measures imposed under the REACH Regulation renders the marketing or use of those chemicals prohibited in the EU.

88. Registration of chemicals is obligatory for manufacturers of chemicals, and importers of chemicals into the EU, if they are established in the EU.<sup>47</sup> A business located outside the EU which manufactures a chemical imported into the EU and has no place of business in the EU may appoint a sole representative based in the EU, who is responsible for discharging all the duties of registration that would otherwise be borne by a manufacturer or importer established within the EU.<sup>48</sup>

#### Hypothetical example no 10

Q plc manufactures chemicals in the UK, and has registered 30 products under the EU's REACH Regulation (designed to protect public health and the environment) which has ensured they can be marketed throughout the EU. Q acts as the sole representative for registration purposes of a number of chemical manufacturers based outside the EU who market their products in the EU.

In the event of unplanned Brexit, can Q plc continue to market its products in the EU, and to act for its clients outside the EU?

89. Q plc will no longer be established in the EU and will no longer be able simply to rely upon the registrations under the REACH Regulation which it has made. In order for Q plc to retain its right to market its products in the EU, its options are to appoint a sole representative established in the EU, who will undertake responsibility for registration of its chemical products, or to rely upon its customers in the EU to do so.

90. ECHA's data indicates that UK undertakings have so far made more than 5,000 registrations under REACH, second only to Germany. 40% of these

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<sup>47</sup> See the definition of "registrant" in Article 3(7) of the Regulation, and 3(9) and 3(11) which makes it clear that a manufacturer or importer must be established in the EU.

<sup>48</sup> Article 8. The English text refers, quaintly, to an "only representative", which in the French text is rendered as "représentant exclusif". The reader might prefer the more normal "sole representative."

registrations have been made on behalf of firms in third states, for which the UK undertaking acts as their sole representative.

91. There could be significant practical and financial consequences for the UK's chemicals industry if an unplanned Brexit occurred. In the short term, UK businesses would have to appoint sole representatives within the EU in order to maintain their ability to market their products in the EU, and there might be something of a scramble to arrange this, given the large numbers of UK businesses which have current registrations under REACH, though many companies are likely to make contingency plans. The appointment of sole representatives in the EU might turn out to be the only available long term solution for the companies concerned.

### *European Food Safety Authority*

92. The EFSA is an expert scientific body based in Parma, Italy. Its remit is to evaluate products involved in the food chain and to provide scientific advice and opinions to the Commission and to EU countries. It provides technical support for EU rules and policies in all fields which have a direct or indirect impact on food safety.<sup>49</sup>

93. The decision whether a product may be placed on the market is one for the Commission or the competent authorities of the various EU countries (depending on the type of product). The processes of scientific assessment, and risk assessment, are deliberately separated so as to ensure that the EFSA's role remains independent. EFSA assesses products and provides scientific advice that the decision-maker then takes into account. In the case of pesticides, for example, maximum residue levels designed to avoid harmful effects on human or animal health are set by the Commission at EU level. If a national authority receives an application for use of a pesticide which might require modification or addition to current rules it forwards the application to the EFSA and the Commission.<sup>50</sup> The EFSA conducts an assessment of the proposed maximum residue level and provides it to the Commission which must take that assessment into account when taking a decision on the application.<sup>51</sup> A similar process of scientific assessment by EFSA, followed by a final regulatory decision by the Commission or national bodies, is made for a range of food-related products, such as GM products, feed additives, and claims as to the health effects of foods.

94. In the event of an unplanned Brexit, EU food safety legislation would (at least initially) be re-enacted in domestic law, under which certain proposals must (on the face of the legislation) be referred to EFSA when an act for which approval is needed is proposed. It would therefore be necessary for the UK to decide whether to

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<sup>49</sup> Regulation (EC) No 178/2002, Article 22(2) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02002R0178-20140630>

<sup>50</sup> Regulation (EC) No 396/2005, Article 8.

<sup>51</sup> *Ibid.*, Article 14.

replicate the work done by EFSA at UK level, to seek to remain within the EFSA system, or to pursue a new model of regulation.

### *European (Financial Services) Supervisory Agencies*

95. Several EU agencies and institutions have a regulatory or policy function in relation to financial services, which overlap and interact with the functions of national authorities. The European Securities and Markets Authority (ESMA), and the European Banking Authority (the EBA) and the European Insurance and Occupational Pensions Authority, are European supervisory authorities within the European system of financial supervision ('ESFS'). The ESFS includes the European Systemic Risk Board. The European Central Bank (the ECB) also has regulatory functions.

96. The roles of the three European supervisory authorities are for the most part advisory and policy-oriented,<sup>52</sup> but there is also some direct regulation of financial institutions. National banking regulators and the ECB have shared responsibilities for the regulation and supervision of "credit institutions", which include banks, building societies and any undertaking whose business is taking deposits from the public and lending.<sup>53</sup> An application for a banking licence is submitted to national authorities and scrutinised by those authorities for compliance with national law rules, and then by the ECB for compliance with EU level rules.<sup>54</sup> The ECB then has ongoing supervisory powers as regards credit institutions to ensure their compliance with regulatory and prudential rules.<sup>55</sup>

97. ESMA has responsibility for the direct licensing and supervision of credit ratings agencies and trade repositories which are involved in derivatives trading.<sup>56</sup> The direct regulation of financial institutions is otherwise largely a matter for national authorities. However, national regulators presently apply a suite of rules made at the EU level in which these agencies do have a role, and the authorisations granted by national regulators have effect throughout the EU. Taking firms offering investment services as an example, under the existing Markets in Financial

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<sup>52</sup> As the Commission explains, their functions are (Report from the Commission to the Parliament and Council, 8 August 2014, COM(2014) 509 final, pp.3-4): Developing draft technical standards and issuing guidelines and recommendations, respecting better regulation principles; issuing opinions to the European Parliament, the Council, and the European Commission; resolving cases of disagreement between national supervisors, where legislation requires them to co-operate or to agree; contributing to ensuring consistent application of technical rules of EU law (including through peer reviews); a coordinating role in emergency situations; in the case of ESMA, exercising direct supervisory powers for Credit Rating Agencies and Trade Repositories; and collecting the necessary information to carry out their mandate.

<sup>53</sup> Regulation 575/2013, Article 4(1).

<sup>54</sup> Council Regulation (EU) No 1024/2013, Article 14.

<sup>55</sup> *Ibid.*, Article 16.

<sup>56</sup> see Article 8(1)(l) of Regulation (EU) No 1095/2010 (establishing the ESMA) and Article 15 of Regulation (EC) No 1060/2009.



Instruments Directive (“MIFID”), and under the new MIFID rules (“MIFID II”), which will take effect over the coming 12 months, an authorisation granted by a national authority will be valid throughout the EU.<sup>57</sup> The conditions for the grant of the authorisation are laid down in rules made at the EU level, and the application of those rules is subject to supervision by EU institutions.

98. In the event of an unplanned Brexit, the ECB would no longer have a role in authorising the licensing of UK credit institutions. To the extent that any EU-level rules currently applied by the ECB are thought appropriate, it would be necessary to transfer responsibility for administering those rules to the UK authorities. As regards credit ratings agencies, and trade repositories (currently regulated by ESMA), it would be necessary for such entities based in the UK to seek renewed approval from ESMA as entities located in non-EU countries for their services to be used in the EU, and the UK would also have to decide how such bodies would be regulated domestically in the future. The ability of UK-based financial institutions to operate throughout the EU on the basis of authorisations granted by the UK’s regulators – passporting – would be removed (as discussed above).

**B - The consequences of unplanned Brexit for the UK Government - could it turn an unplanned Brexit into a planned Brexit? Could it manage the impact of trade tariffs on the open border between Ireland and Northern Ireland?**

**Brexit without a withdrawal agreement would not mean that negotiations on a withdrawal agreement would come to an end**

99. We say above that the shock for the UK and the EU of Brexit without a withdrawal agreement, and without a future trade agreement, could lead to renewed attempts to deal with outstanding issues, including international arbitration on post-Brexit liability (though we think that would be fairly unlikely), and the putting in place of a transitional trade agreement.

100. There might be several different reasons for Brexit occurring without a withdrawal agreement having been put in place. One possibility would be delay in formally concluding an agreement which had been reached in principle. The European Parliament might delay in giving its consent, which would in turn prevent the Council concluding the withdrawal agreement. A delay on the UK side could not be ruled out. On this hypothesis, Brexit might occur because of the lapse of the two year period specified in Article 50, but a withdrawal agreement might shortly follow, putting in place a transitional period, and allowing negotiations on a future trade agreement to go forward, and/or preparations for a smooth transition to the future trade agreement.

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<sup>57</sup> Directive 2014/65/EU, Article 6(3).

*Could the Council still act by qualified majority under Article 50 after Brexit?*

101. The above scenario (a withdrawal agreement and transitional arrangement concluded shortly after Brexit) raises a technical legal question, which could have some political consequences: would Article 50 remain available as a legal basis for the EU to conclude a withdrawal agreement with the UK after Brexit? As indicated above, the conclusion of an Article 50 withdrawal agreement requires (on the EU side) a super qualified majority vote in the Council and the consent of the European Parliament. That is not to say that the EU could not find any other legal basis to conclude a withdrawal agreement which included a transitional trading arrangement, but such a basis might require unanimity in the Council (depending on the content of the agreement, including its transitional arrangements), and it might be a mixed agreement, requiring the individual consent of all EU countries. If Article 50 remained applicable, it would certainly simplify the process of recovering from an unplanned “hard” Brexit.

102. We think that Article 50 might continue to be applicable, even if a withdrawal agreement has not been concluded at the time of Brexit. There is nothing in Article 50 which expressly rules this out. And it might seem arbitrary that a delay in concluding a withdrawal agreement, by even a matter of days, could be said to remove the power of the EU to act under this provision, which has been designed to make provision for all the nuts and bolts of the withdrawal process. It is true that if agreement were within reach, a unanimous decision of the Council could authorise the extension of the two year period specified in Article 50. But one or two EU countries at risk of being outvoted under the Article 50 procedure might refuse to extend the two year period, in the hope of putting the withdrawal agreement, and the transitional arrangements, onto a footing which might require unanimity in the Council, and perhaps the agreement of national parliaments, if the agreement, considered outside the framework of Article 50, could be regarded as containing mixed elements of EU competence and national competence.

*Could a withdrawal agreement under Article 50 turn out to be a “mixed” agreement, requiring the consent of the parliaments of all EU countries as well as a qualified majority in Council and the consent of the European Parliament?*

103. It is also appropriate to comment on another, connected question, could a withdrawal agreement made under Article 50 be characterised as a “mixed” agreement, requiring the consent of national parliaments, as well as a vote in Council and in the EP? Our view is that Article 50 bestows an exclusive competence on the EU to conclude all arrangements incidental to the withdrawal of an EU country from the EU, including transitional arrangements to ensure smooth transition to a future trade agreement, even if a trade agreement of that kind with a non-EU country would normally require the participation of all individual EU countries as well as the EU. If a withdrawal agreement containing transitional arrangements could be regarded as a mixed agreement, there would be no certainty that the transitional arrangements could fulfil their purpose of ensuring a smooth transition to a future trade agreement, since there could be no certainty as to when the agreement might

be concluded, or come fully into force. The better view is that Article 50 bestows exclusive competence on the EU, and leaves no room for the doctrine of mixity.

### **A potential impasse over UK liabilities - could the EU sue the UK?**

104. One reason for an unplanned Brexit might be an impasse in negotiations on the terms of the withdrawal agreement. There have been press reports that the EU might claim a sum of €60 billion from the UK in respect of EU commitments for which the UK is alleged to be responsible. The EU might claim the UK is liable for amounts in settlement of its exit liabilities which the UK regards as unacceptable, and/or a timescale for payment which the UK regards as unacceptable. Locked in argument, the UK and the EU might fall over the “cliff edge” of the two year period specified in Article 50. If this happened, the consequences identified in Part A of our evidence would have to be addressed. But neither the UK nor the EU would be likely to find this a satisfactory outcome. Negotiations might continue in order to resolve the impasse, to put in place a transitional agreement, and to bring an end to trade on WTO terms.

105. There is no international court or tribunal with compulsory jurisdiction over the UK before which the EU could sue the UK for its alleged exit liabilities. EU law would not bind the UK after it has left the EU, and EU law would not be determinative of alleged UK liabilities which arise because the UK has withdrawn from the EU. The law applicable to any claim by the EU would be public international law.

106. One possibility is that the UK and the EU might seek to break an impasse over liabilities by submitting the issue to arbitration. This might be done before Brexit by a provision in the withdrawal agreement. We think this is fairly unlikely. In the first place, the dispute would be wholly or mainly an argument about amounts or a timescale for payment. In principle, public international law would govern the arbitration. There would be no precise legal rules in play, and a submission to arbitration might smack of being a submission to the arbitrators’ political judgment,<sup>58</sup> though this might be avoided or mitigated if the UK and the EU specified the criteria to be applied by the arbitrators.

107. Arbitration could also pose technical legal problems on the EU side. The EU could submit the question of the UK’s liabilities to arbitration, but it could not submit

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<sup>58</sup> Rules and principles of public international law on state succession would be relevant, at any rate by analogy, but the rules are unsettled. The Vienna Convention on Succession of States in respect of State Property Archives and Debts, applied by analogy, would suggest that the passing of EU liabilities to the UK would be by agreement and in the absence of agreement be apportioned on an equitable basis, see, e.g., Article 37. It should be noted, however, that the Vienna Convention has only been ratified by 7 states, and is not in force, and that it cannot be said with confidence that the principle in question could be regarded as one of customary international law. The fact that the relevant rules of international law are difficult to identify does not however cast doubt on the applicability in principle of public international law to a dispute over exit liabilities.

issues of EU law to arbitration - that would be incompatible with the exclusive jurisdiction of the EU Court of Justice.<sup>59</sup> While the UK's liability would be governed by international law, the assessment of that liability would involve consideration of the UK's participation in EU procedures, and EU rules relating to the multiannual financial framework, and the pensions of civil servants. The drafters of any agreement between the EU and the UK to submit UK financial liabilities to arbitration would need to ensure that it respected the exclusive jurisdiction of the EU Court of Justice.

108. While the above considerations tend to argue against arbitration, the possibility of arbitration cannot be ruled out. It might be the only way of breaking an impasse over quantum and/or time to pay, and moving on to other issues, such as activating transitional arrangements and designing a future trade agreement.

109. What is perhaps more likely is that the pressure caused by unplanned Brexit would concentrate the minds of both the UK and the EU and produce an agreement on exit liabilities, and a transitional arrangement. Unplanned Brexit could lead to a short, sharp shock, rather than a lengthy period of economic dislocation and political acrimony. But a favourable outcome would be far from certain.

#### **Worst case scenario in attempts at further negotiations after an unplanned hard Brexit**

110. While efforts to negotiate a withdrawal agreement, and a transitional agreement, might continue, if serious differences remained, the negotiations might fail. The prospect of a prolonged period of trade on WTO terms could lead to inward investors such as Nissan reconsidering their commitment to the UK. Much of the EU-facing business of UK financial services providers could be relocated to the EU, leading to significant job losses in the UK, while taxes previously paid in the UK would be paid in other UK countries. Public opinion on both sides might harden. Relations between the UK and the EU might deteriorate to an extent which impinged on crucially important non-trade issues such as co-operation over internal and external security. This is a worst case scenario, but it is a scenario which cannot be completely ruled out.

#### **Managing the impact of unplanned Brexit on the open border between Ireland and Northern Ireland**

111. We note that the UK and Irish governments have the same policy on the land border between Ireland and the UK - that policy is to maintain an open border. The Brexit White Paper says that "[a]n explicit objective of the UK Government's work on EU exit is to ensure that full account is taken for the particular circumstances of Northern Ireland."<sup>60</sup> Before considering the impact of an unplanned Brexit on the

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<sup>59</sup> See e.g., Article 344 TFEU.

<sup>60</sup> Paragraph 4.10.

border, we shall address the impact of a planned Brexit, followed by a FTA between the UK and the EU.

112. We note that Ireland's EU Commissioner, Phil Hogan, stated in January 2017 that:

*"The return of a "hard border" between Northern Ireland and the Irish Republic looks inevitable if Britain leaves the European Union's single market."*<sup>61</sup>

113. Even an orderly and planned Brexit will require some creative thinking if the open border between Ireland and Northern Ireland is to be maintained. In the event of an unplanned Brexit, the need to impose tariffs, and in some cases substantial tariffs, on trade in both directions between Ireland and Northern Ireland, would be much harder to reconcile with a policy of avoiding a "hard" border between north and south.

*Maintaining the open border will be a challenge even if there is a smooth transition from the status quo to a free trade agreement between the UK and the EU*

114. If we imagine a planned and orderly Brexit, in which there is a smooth transition from the status quo to a free trade agreement between the UK and the EU, there are two potential problems to be surmounted if an open border is to be maintained. One arises from the need to check imports of products in either direction, and the other relates to the need to check people moving in either direction.

115. It seems certain that in any future trade agreement between the UK and the EU, free trade in goods will be confined to goods *originating* in the UK or the EU. That is the pattern for the EU's free trade agreements, including those with the EFTA countries. It is an inevitable pattern which could only be avoided if the UK remained in a customs union with the EU, which the Government has ruled out, because in a customs union with the EU the UK would be unable to negotiate its own free trade agreements with countries outside the EU. It follows that at frontiers between the UK and EU countries, including Ireland, originating goods have to be distinguished from non-originating goods, and non originating goods are liable to be subject to whatever external tariffs are applied by the UK and EU respectively.

116. By way of a possible comparison with the Ireland/Northern border after Brexit, David Anderson QC has described border procedures between EFTA/EEA country Norway and EU country Sweden as follows:<sup>62</sup>

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<sup>61</sup> <http://uk.reuters.com/article/uk-britain-eu-ireland-idUKKBN14T0U1>

<sup>62</sup> David Anderson QC, Brick Court Chambers Brexit Law Blog, *Brexit and the Border* <https://brexit.law/2017/01/09/brexit-and-the-border/https://brexit.law/2017/01/09/brexit-and-the-border/>

“The situation of Norway is instructive, as described in a fact-finding report in The Times from October 2016. In the single market but outside the customs union, Norway operates automatic number-plate recognition on each of its 80 road crossings to Sweden, and designates some of them as “green lanes” which are closed to dutiable goods. (There were, similarly, approved crossing points and crossing times in force at the Irish border pre-1973). But commercial vehicles are also obliged to stop at customs stations to make a declaration (occupying on average 8 minutes, even though Norway and Sweden have been able to negotiate dual controls). There are spot checks, X-ray facilities and warehouses for contraband at the border, and occasional 30-minute tailbacks are reported where there is intelligence of smuggling operations.

If a Canada-type FTA arrangement is negotiated, the UK will be outside the single market as well as the customs union. There will thus be further reasons for border checks including food safety, plant safety, pharmaceutical safety and packaging rules. This would also be the case, of course, in the event of a truly hard Brexit in which trade would continue on WTO terms.”

117. We note that a forecast of the Ireland/UK border after Brexit that would be close to David Anderson’s description of the Norway/Sweden border has appeared recently in the Irish Examiner (6<sup>th</sup> February 2017). The authors of the article seem to contemplate a “hard border” in the form of border posts:

*“Furthermore, Ireland and the UK could agree that there is only one border stop so that an export from Ireland is treated at the same time as an import into the UK, and vice versa.*

*This can be achieved either through a joint border office in which officials from both countries are working, or by empowering, eg, the customs officials of Ireland to act also on behalf of the UK.”*<sup>63</sup>

118. In the event of a FTA between the UK and the EU of either an EEA type (with harmonised standards for food safety and plant safety, etc.) or a Canada-type (tariff-free trade for originating products but no harmonisation of standards), it is possible that a lighter touch than that applied at the Norway/Sweden border could be applied to the Ireland/UK land border, with reliance on automatic number-plate recognition, designation of most road crossings as “green lanes”, and spot checks in the vicinity of the border but not at the border. Commercial vehicles could be required to make declarations at customs depots but these depots could be located away from the border. Such a system would not be watertight, but no system at the Ireland/UK land border could be.<sup>64</sup>

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<sup>63</sup> <http://www.irishexaminer.com/viewpoints/analysis/the-irish-border-after-brexit-will-be-real-but-can-be-simplified-442136.html>

<sup>64</sup> The border is twice the length of the English-Welsh border and three times the length of the English-Scottish border, with nearly 300 formal crossing points and many informal ones, see Anderson, op. cit..

*Trade on WTO terms would test the open border policy to its limits*

119. A system along the above lines would be severely stretched if, in the wake of an unplanned Brexit, trade between Ireland and Northern Ireland were conducted on WTO terms, with tariffs of up to 40% on products regularly traded in both directions. Tariff levels as high as this might in some cases bring lawful cross-border trade to a standstill, and provide huge incentives for smuggling. There is no doubt the UK would make every effort to maintain the status quo and avoid any semblance of a “hard” border, as would Ireland, but Ireland would not be a free agent, having to account to the EU for its collection of tariffs on UK exports to Ireland, 80% of which would amount to “own resources” of the EU.<sup>65</sup>

120. And then there is the question of the free movement of people across the Ireland/UK land border. David Anderson QC recently summarised the current position as follows:

“Since its establishment in 1922, the Common Travel Area (CTA) has enabled UK and Irish nationals to travel freely to each other’s countries. These arrangements are permitted by Protocol 20 to the TFEU and there seems to be no reason why they should not be continued after Brexit.

But as the twists and turns of the CTA have shown over time, it has depended for its survival on significant *policy coordination* and *practical cooperation* between the UK and Ireland where non-UK and Irish nationals are concerned. Thus, the controls in place between 1939 and 1952 on Irish Sea crossings were lifted only when Ireland and the UK agreed to operate similar immigration policies.

Such coordination and cooperation have been achieved in recent years where third-country nationals are concerned (e.g. by visa data exchange, and joint visa schemes for India and China, introduced in 2014). Where EU nationals are concerned, the free movement rules in the Treaty have rendered such coordination largely automatic.”<sup>66</sup>

*“Operation Gull” provides checks on movement of persons and seeks to compensate for the lack of a hard border*

121. Illegal movements of non-EU nationals across the Ireland/UK land border are currently addressed by co-operation between the UK and Irish authorities designed to address abuse of the Common Travel Area. Methods used include the interviewing of suspected persons at airports and ports in the UK including

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<sup>65</sup> Council Decision 2014/335/EU, Euratom, Article 2(1)(a) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0335&from=EN>

<sup>66</sup> David Anderson QC, Brick Court Chambers Brexit Law Blog, *Brexit and the Border* <https://brexit.law/2017/01/09/brexit-and-the-border/https://brexit.law/2017/01/09/brexit-and-the-border/>

Northern Ireland.<sup>67</sup> The description “Operation Gull” is often attached to this cooperation, or to elements of it. As regards ports, according to the UK Border Agency

*“Immigration officers in Northern Ireland check the status of passengers arriving from, or leaving for, Great Britain targeting routes shown to be most at risk.”<sup>68</sup>*

122. In 2008 a British government proposal to introduce passport checks for those who fly from Belfast to the rest of the UK was dropped after strong opposition from Conservatives and Ulster Unionists.<sup>69</sup> On the Irish side, there are reports of Irish police setting up checkpoints in the vicinity of the border and detaining illegal entrants who have crossed the border from Northern Ireland.<sup>70</sup>

123. There has been criticism of Operation Gull on the UK side by human rights groups. It has been accused of racial profiling in its identification of individuals selected for interview in UK ports and airports.<sup>71</sup>

124. We noted in Part A of our evidence that if the UK did impose visa requirements on the nationals of any EU country, this would conflict with the UK Government’s aim of maintaining free movement without passport checks across the border between Ireland and Northern Ireland. In practice EU nationals requiring a visa to enter the UK would be able to cross from Ireland into Northern Ireland without having such a visa. The Secretary of State for Northern Ireland has been reported as saying that Operation Gull would be expanded to close any potential back door to Britain post Brexit.<sup>72</sup> There must be a strong policy argument for all EU nationals to be allowed short stay visa-free access after Brexit, whatever the position as regards the rights of EU nationals to work or reside in the UK. The monitoring of EU nationals entering the UK from Ireland without a passport check or stamp would be facilitated if the UK adopted for EU nationals the scheme which the EU is planning to introduce for non-EU nationals with visa-free access to the EU, i.e., online authorisation to travel, subject to a modest fee (see paragraph 41 above).

*The return of a hard border cannot be ruled out if there is any prolonged period of trade on WTO terms*

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<sup>67</sup> <http://www.belfasttelegraph.co.uk/news/northern-ireland/concern-at-illegal-immigrant-advice-28770129.html>

<sup>68</sup> UK Border Agency COMMON TRAVEL AREA Review of New Arrangements at Northern Ireland Sea Ports

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257182/cta.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257182/cta.pdf)

<sup>69</sup> <http://www.theguardian.com/uk/2009/jan/15/uk-irish-republic-border-passports>

<sup>70</sup> <http://www.independent.ie/irish-news/gardai-man-checkpoints-on-north-border-to-grab-illegals-31448868.html>

<sup>71</sup> <http://www.lawcentreni.org/policy/policy-briefings/203.html>

<sup>72</sup> <https://www.theguardian.com/politics/2016/oct/09/ireland-could-carry-out-britain-passport-checks-post-brexit>



125. We think that the imposition of tariffs on trade in goods between Ireland and Northern Ireland would pose a greater threat to the open border than divergences between immigration rules between Ireland and the UK. The impact of divergences in immigration rules could be mitigated by the UK giving short stay visa-free access to nationals of EU countries, and by application of a system of online authorisation/advance notification of travel. “Leakage” could probably be contained by expansion of Operation Gull.

126. Similarly, we think it likely that the level of customs checks needed to monitor a free trade agreement between the UK and the EU, where trade is confined to originating products, could be achieved without fixed customs posts at the border between Ireland and Northern Ireland.

127. But enforcing the payment of high tariffs on trade in goods which are currently regularly traded across the open border without any restrictions whatsoever could be a different matter. Devices such as spot-checks, and customs depots away from the border, might be enough, but they might not. It is true that policy decisions to accept fairly large scale evasion of tariffs might be made, on both sides of the border. After all, there would be fairly large scale evasion in any event, given the porous nature of the border. But Ireland would not be a free agent in the matter, and there might be limits on the EU’s tolerance of evasion of the EU’s common external tariff. It is impossible to avoid the conclusion that an unplanned hard Brexit followed by trade on WTO terms would place maintenance of the open border seriously at risk.

### **The Bar Council Brexit Working Group**

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