CONTENTS

Business and professional services

Paper 1: Legal Services 5
Paper 2: International Arbitration 15
Paper 3: Financial Services NEW PAPER 21

Judicial Cooperation

Paper 4: Civil jurisdiction and judgements 28
Paper 5: Criminal Justice 39
Paper 6: Family Law 45
Paper 7: Immigration NEW PAPER 51
Paper 8: Insolvency and Restructuring 60

Consumers and employees

Paper 9: Employment Law NEW PAPER 68
Paper 10: Consumer Law NEW PAPER 75
Paper 11: Traffic Accidents NEW PAPER 81

Market Regulation

Paper 12: Intellectual Property UPDATED 89
Paper 13: Competition Law 98
Paper 14: Tax Law 105

Broader Implications

Paper 15: Impact of ‘No Deal’ NEW PAPER 112
Welcome to the second edition of The Brexit Papers.

At the publication of the first edition, my predecessor described Brexit as the most profound legal and constitutional challenge the UK Government has faced, both in terms of complexity and significance for the long-term future of this country.

At the time of writing, moments before Article 50 formally is triggered, the challenges ahead look no less complex.

The Bar Council did not take a position on the UK’s continued membership of the EU. Our objective is to facilitate a transition that minimises the risk of legal uncertainty and the loss of rights whilst pointing to how adverse consequences to the national economy may be mitigated and how we may capitalise on the opportunities.

This series of short, concise papers has been published to give legally trained and lay policymakers, legislators and negotiators ready access to the expertise and real-world experience the Bar has to offer, and to make recommendations as to how the public interest can best be served. In a welter of longer treatises, they have been described as ‘gold dust’.

The Brexit Papers first emerged following a Bar Council roundtable meeting for civil servants from a range of Government departments to discuss how Brexit would impact areas of law including crime, competition, tax, intellectual property, insolvency and family. They also looked at the implications for the legal services sector and the importance of the mutual recognition of UK and EU judgments.

This second edition represents an expansion of the legal fields covered, which now include immigration, financial services, employment, consumer law, traffic accidents and an updated paper on intellectual property. We are also grateful that we can include a paper commissioned by the Foreign Affairs Select Committee on the legal implications of the UK leaving the EU in a ‘no deal’ scenario.

The range of expertise on which these papers are based is considerable. They are written by skilled, experienced practitioners from a wide range of practice areas, and I would like to thank them for giving so freely of their time. This work exemplifies what the Bar strives to do, in the public interest.

More papers will soon be published as issues are identified. Meanwhile, the resources of the Brexit Working Group, as well as those of the Bar Council and of the Bar as a profession, are available to the Government, parliamentarians and the media, and of course to the public.

Andrew Langdon QC, March 2017

Chairman of the Bar Council
Business and Professional services

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

Legal Services

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

Summary

The UK legal services market generated £3.3bn of our net export revenue in 2015. More importantly, our exporters’ confidence in doing business abroad depends greatly on the ability of their lawyers to establish and provide services in the countries where they seek to trade and invest.

The EU Legal Service regime which we may lose, permits UK lawyers with unfettered and non-bureaucratic access to all legal services throughout the EU.

- We therefore urge the Government to preserve in the negotiations the rights of UK lawyers under the Lawyers Services and Establishments Directives to ensure that they may represent clients before the European Court, maintain rights to legal professional privilege and retain freedom of movement for immigration purposes.

- In order to maintain the position of England and Wales as a leading arbitration centre we also urge Government to ensure that immigration hurdles are not imposed for parties, lawyers and arbitrators from EU jurisdictions.
LEGAL SERVICES

1. The UK legal services market is a significant revenue generator for the Exchequer, worth £25.7 billion in total, employing approximately 370,000 people and generating an estimated £3.3 billion of net export revenue in 2015. Central to this is the ability of barristers, solicitors and other legal professionals to provide legal services, including advocacy, across national borders within the EU and EEA. In 2015, of the 1,100 cases registered at the Commercial Court, more than two-thirds had one non-UK based party to proceedings. Equally importantly, our exporters’ confidence in doing business abroad depends greatly on the ability of their lawyers to establish and provide services in the countries where they seek to trade and invest.

2. Although a significant body of work comes to the UK independent of our membership of the EU, there is a very strong business case for maintaining the greatest possible extent of cross-border rights for UK lawyers post-Brexit. We address primarily the position of barristers (including Scottish advocates). But these issues are likely to be equally significant for the solicitors’ profession, and of course many barristers are employed by UK and non UK-law firms.

3. On the other side of the coin, around 100 EU law firms together with a significant number of individual lawyers are established in London and high ranking French Bar representatives have expressed their strong desire to retain free movement rights for French lawyers in the UK, both for establishment of new law firms and also fly in fly out provision of services.

4. Currently, there are numerous aspects of barristers’ work which will no longer be possible if the UK leaves the EEA, unless cross-border rights are preserved. Cross-border rights include, in particular:

4.1. establishment on a permanent basis in other Member States – currently possible under the Lawyers Establishment Directive 98/5/EC, which allows registration with the

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1 There are c. 15,500 members of the Bar in England and Wales, 450 practising advocates in Scotland and 753 practising barristers in Northern Ireland.

2 The solicitors’ profession in England and Wales has c. 138,000 practising members, and the solicitors’ profession in Scotland has c. 11,000 practising members.
host State Bar and, after three years of effective and regular practice in the host Member State, permits an application to acquire the professional title of the host State without any further qualification requirements. (A barrister may also requalify as a full member of the local Bar under Directive 2005/36/EC on the recognition of professional qualifications, by taking an aptitude test.) Some barristers are established in Brussels; many are employed by firms of solicitors in other Member States e.g. in Brussels, Paris and the Netherlands;

4.2. **advising clients in other Member States on a temporary basis**, whether on issues of EU law, domestic law (including the law of the host Member State) or international law – currently possible under the Lawyers Services Directive 77/249/EC, with no requirement to register with the local Bar. This Directive creates both substantive rights and (where local rules are obscure) regulatory certainty. Barristers regularly advise clients throughout the EU, often within the jurisdictions of other Member States;

4.3. **representing clients in the domestic courts and tribunals of other Member States** – currently possible under the Lawyers Services Directive, provided that advocacy is undertaken in conjunction with a host state lawyer. Again, there is no requirement to register with the local Bar, nor any restriction as to the issues on which the advocate may present argument;

4.4. **advising and representing clients in Commission investigations, including in particular competition proceedings** – in practice only possible for EEA-qualified lawyers, since the EU rules only recognise legal professional privilege in relation to lawyers entitled to practise in a Member State. If UK lawyers were to fall outside that principle, even **UK clients** would have to instruct lawyers from other Member States to advise and represent them in these proceedings. It is for this reason in particular that hundreds of solicitors are now registering with the Law Society of Ireland;

4.5. **representing clients in intellectual property proceedings before the EU Intellectual Property Office** – currently possible because barristers are legal practitioners established in the EEA that are entitled to act before the UK Intellectual Property Office; and
4.6. **representing clients in the European Courts** – Article 19 of the Statute of the Court of Justice states that only a lawyer authorised to practise before a court of a Member State or an EEA State may represent or assist a party before the European Court. That extends even to being named on a pleading in the European Court. Absent a specific amendment this means that from the moment the UK exits the EU law no UK-only lawyers will be able so to act. Currently this does not also require EEA nationality, but there is a considerable risk that this too could be changed post-Brexit.

**Examples:** in the Commission’s current EIRD investigation, both JP Morgan and HSBC were represented by UK barristers. Likewise, Intel has instructed UK barristers for its European Court appeals against a Commission antitrust decision. Similar instructions will not be possible post-Brexit unless the UK either remains within the EEA or negotiates an arrangement to allow continued free access to the EU legal services market (including European Court practising rights).

5. In addition, at present barristers who hold the nationality of an EU/EEA Member State are able to move, without immigration controls or prior authorisations, from one Member State to another for the purposes of work on a permanent or temporary basis. This free movement right is the basis upon which barristers physically move within the EU and EEA to work, establish themselves, provide services, and exercise rights of audience in courts physically located in EU/EEA Member States. It is imperative that this right is maintained, if barristers are to be able to continue to work in other EU and EEA Member States.
The importance of cross-border rights to the provision of legal services by barristers is most obvious in relation to the practice of EU law itself. Outside Brussels, London in particular has the highest concentration of lawyers with specialist EU law knowledge and experience anywhere in the world. As the examples above demonstrate, those lawyers are in demand not just for domestically-focused EU law, but also for advice and representation services on behalf of EU and third country clients, including in the national courts of other Member States, Commission investigations, and European Court proceedings.

Barristers also advise and represent clients across the EU in commercial proceedings under the Services Directive, for example where an international contract has an English choice of law clause, and in arbitrations conducted in English. Barristers also act as arbitrators in numerous EU Member States, an activity which in the absence of EU-equivalent guarantees could not be guaranteed to continue in any Member State which classed it as the supply of a legal service. Advisory and advocacy work across the EU in the areas of private and public international law, and in fields such as international financial services and wealth management, is also dependent on the cross-border rights that the legal profession currently enjoys. The cross-border rights of UK lawyers thus help to support the current dominance of English common law as an international benchmark, and of UK financial services in Europe.

Cross-border rights under FTAs – CETA case study: In the case of a so-called “hard Brexit”, the position of UK lawyers would be identical to other third country lawyers. By way of example we attach at Annex 1 a table which compares the position of UK lawyers to that of Canadian lawyers at present (pre-CETA). There are significant restrictions, in particular no rights to appear in court. Even if CETA is ratified, the position of Canadian lawyers will not change. Although CETA provides a framework for the negotiation of Mutual Recognition Agreements covering the recognition of professional qualifications, this does not improve the market access of European lawyers to Canada. It merely offers encouragement to professional regulatory bodies in the EU and Canada to agree to reduce the number of steps involved in requalification in either direction, where this is possible. Furthermore CETA does not change the fact that requalification is simply not possible in many EU Member States due to nationality requirements.
8. All these streams of business rely on UK legal professional qualifications being recognised in other Member States and in the European Courts. These are high-profile and lucrative activities. In EU competition proceedings alone, multinational clients who have been represented by the Bar in recent years (including some major ongoing proceedings) include Microsoft, Google, Apple, Samsung, Ryanair and AstraZeneca. In European Court proceedings, barristers also frequently represent not only major private clients from across the EU and third countries, but also the European Commission, other EU institutions such as the European Parliament and the EMA, and foreign governments (both EU and non-EU).

9. Equally importantly, London is a hub not only for EU transactional work such as merger filings, but also, increasingly, for litigation in the EU courts and follow-on damages litigation related to Commission competition investigations. The same is true for complex multi-national intellectual property litigation in which London is a widely acknowledged centre of expertise with a specialist bar. Major international clients are sophisticated litigators, and are choosing to bring cases in the UK rather than in other Member States because of the critical mass of experience and expertise of UK lawyers, as well as litigation advantages of the UK courts (such as the disclosure rules). A vast amount of this work will be lost if UK lawyers lose access to the EU market for legal services. This will in turn reduce the attractiveness of London to (for example) top US law firms who currently establish offices in the UK and use these as their passport into the EU legal market by instructing or employing barristers.

10. In conclusion, whilst some lawyers will doubtless be in high demand in the short-term, for new, Brexit-related work, the medium and long-term uncertainty in established areas and types of practice is high. The Bar Council therefore urges the government, in formulating its negotiating strategy, to have regard to the contingent nature of much of the legal work that comes to the UK as a consequence of the UK legal profession’s expertise, not least in the law of the EU. The enduring international appeal of the UK for its legal standing will depend on the ability of UK lawyers to provide legal services, including representation, to clients across the EU and elsewhere.
Recommendations

Any post-Brexit arrangement with the EU should, at the very least:

(1) preserve the rights of UK lawyers under the Lawyers Services Directive 77/249/EC and the Lawyers Establishment Directive 98/5/EC;

(2) ensure that, lawyers entitled to practise before UK courts may represent parties before the European Court;

(3) ensure that UK lawyers enjoy the same rights to legal privilege under EU law as lawyers of EU Member States;

(4) maintain freedom of movement for immigration purposes for barristers (and other lawyers), as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

Brexit Working Group

November 2016
### Annex: Practical consequences of a WTO rights based Brexit solution

<table>
<thead>
<tr>
<th>Restrictions faced by an English lawyer in the EU today</th>
<th>Restrictions faced by non-EEA lawyers</th>
<th>Practical Consequences of a WTO rights based Brexit solution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limits on ability to provide legal services without needing to open an office</td>
<td>None</td>
<td>Non-EEA lawyers must register a physical presence in Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Finland, Germany, Hungary, Italy, Latvia and Spain in order to practise law.</td>
</tr>
<tr>
<td>Limits on ability to give advice attracting legal professional privilege to clients</td>
<td>None</td>
<td>Communications with and advice given to clients in the EEA by non-EEA lawyers cannot be kept private. They may be obtained and used by the European Commission in competition proceedings against clients.</td>
</tr>
<tr>
<td>Limits on ability of independent lawyers or lawyers under contract to obtain work permits</td>
<td>None</td>
<td>Economic needs tests apply to non-EEA lawyers working as independent professionals in Belgium, Bulgaria, Czech republic, Denmark, Greece, Spain, Finland, Hungary, Italy, Latvia, Malta, Romania, Slovenia and Slovakia.</td>
</tr>
<tr>
<td>Limits on ability to open an office</td>
<td>Must take one of forms permitted to local lawyers (varied ability in member states to form MDPs, have non-lawyer participation – otherwise no restrictions</td>
<td>Cannot open a fully owned law office in Austria, Denmark, France and Portugal – must have local lawyers involved. Cannot go into partnership with lawyers from Bulgaria, Denmark, Estonia, France, Ireland, Latvia, Lithuania, Malta and Slovenia. Residency for foreign partners required in Sweden and Luxembourg.</td>
</tr>
</tbody>
</table>
| Limits on ability to acquire right to advise on local law | None | No right to requalify in 13 Member States: Austria, Greece, Croatia, Bulgaria, Cyprus, Estonia, Greece, Hungary, Lithuania, Malta, Poland, Portugal, Slovenia.  
Limited rights in 8 Member States: Belgium (reciprocity), Czech Republic, Latvia (language test); Denmark, France Germany, Netherlands, Spain (local qualifications or assessment required). | UK lawyers no longer entitled to requalify as local lawyers within the EU – i.e. ability to provide joined up services possible through EU membership cannot be replaced by acquiring local title in a majority of EU MS. |
| Limits on ability to draw up contracts | None | No right to draw up a legal contract in Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia and Slovakia  
Contracts drafted outside France and Denmark applying in those countries no longer valid | Provision of legal advice to UK businesses continuing to operate within the EU and across different member states could no longer be done without greater recourse to local lawyers. Advice to UK citizens and businesses will be more expensive and not subject to the protections of UK regulators |
| Limits on ability to represent clients in national courts | Must be introduced by a local lawyer | No right of foreign lawyers to appear except in limited and ad hoc circumstances; following application process in Bulgaria, Cyprus, Luxembourg and Poland. | Emergency representation of e.g. UK citizens arrested in EU, of children of mixed EU nationality marriages etc. no longer possible for UK lawyers, neither would be increasingly frequent co-counselling arrangements in commercial matters. |
| Limits on ability to represent clients in European proceedings | None | Cannot provide any representational services before the courts of the EU institutions | Any representation of UK or international clients in cases before the EU courts would go to lawyers with EEA qualifications i.e. Post Brexit litigation on behalf of UK companies not in the hands of UK lawyers |
INTERNATIONAL ARBITRATION

Summary

For decades, London has been the seat of choice for parties seeking to resolve international commercial disputes through arbitration. But the capital’s dominance as a seat for arbitration is not assured. It competes with Singapore, Hong Kong and Dubai as well as with the other well-established arbitration centres in Paris, Geneva, New York, Zurich and Stockholm. There is a risk that, if barriers to entry are created (or even appear to be created) for parties, their lawyers or for arbitrators, business will move elsewhere.

Additionally, there is an obvious risk to the continuation of English lawyers appearing as counsel or arbitrators in overseas hearings should it be made (or even appear) more difficult for English lawyers to appear in arbitrations which take place in the European Union.

- We urge the Government to preserve the rights of UK and EU lawyers under the Lawyers Services Directive 77/249/EC.

- We further urge the Government to maintain the freedom of movement for immigration purposes for arbitrators, arbitration lawyers and clients both from the EU and to the EU as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.
INTERNATIONAL ARBITRATION

1. The Commercial Bar Association is the specialist association of the English and Welsh Commercial Bar. It represents over 1,500 individual members and 38 leading barristers’ chambers, all of whom provide specialist advice, advocacy and mediation services in relation to commercial law for businesses, individuals and other organisations. Its members carry out work nationally and internationally, in the context of transactions, arbitration and litigation.

2. This short paper has been prepared by the Commercial Bar Association’s sub-group considering the effect of Brexit on international arbitration work both in London and overseas. It supplements and supports a paper prepared by the Bar Council concerning access to the EU Legal Services Market Post-Brexit – and is intended to provide some insight into the market for arbitration services in London and the EU. It is provided in advance of a more detailed paper that is intended to provide guidance more broadly on the effect of Brexit on international arbitration in London and steps that might be taken to strengthen London’s position as a leading seat for the resolution of international disputes.

3. Arbitration is regarded by many now as the principal method of resolving international disputes involving states, individuals and corporations. For decades London has been a dominant seat for arbitrations in the maritime and insurance sectors. Over the past 20 years London has become one of the dominant seats for the resolution of international commercial disputes of all varieties by arbitration. Respondents to a recent (2015) survey by White & Case LLP and Queen Mary, University of London revealed that London was both the most used and the preferred seat for arbitration.

4. That position has been achieved in part because of the supportive legislative and judicial environment, in part because of the high quality of the legal services market in London and in part because of the (relative) ease of access to the market. Indeed, these latter two factors explain why it is not uncommon for parties to agree that arbitrations seated outside the UK, should be heard in England.

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3 Redfern and Hunter on International Arbitration, 6th ed, 2015, para 1.01.
4 http://www.arbitration.qmul.ac.uk/docs/164761.pdf
5 The ranking was London (45%), Paris (37%), Hong Kong (22%), Singapore (19%), Geneva (14%), New York (12%), Stockholm (11%)
6 The ranking was London (47%), Paris (38%), Hong Kong (30%), Singapore (24%), Geneva (17%), New York (12%), Stockholm (11%)
7 In addition to the factors mentioned here, London’s position has doubtless been assisted by the UK’s reputation as a centre for study for law students and young lawyers from overseas.
5. The principal institutions administering arbitrations in London are the London Court of International Arbitration ("the LCIA") and the International Chamber of Commerce ("the ICC"). In addition, there is a large volume of arbitrations undertaken under the rules of the London Maritime Arbitrators' Association ("the LMAA") and a large number of ad hoc arbitrations which are not governed by any institutional rules.

6. Commonly in an international arbitration in London neither of the parties will be English, some of the lawyers (whether counsel or lawyers instructing counsel\(^8\)) will be based overseas and one or more of the arbitrators will be based overseas too. So far as each of these elements is concerned:

   a) **Parties**: English law remains the most popular choice of law to govern international commercial contracts. The choice of English law for global commercial contracts is in part driven by the UK's reputation as the leading centre for international dispute resolution\(^9\). Where English law is chosen, London is a natural (but not necessary) choice of seat and venue for resolution of the dispute;

   b) **Lawyers/counsel**: given that there are no restrictions on rights of audience before an arbitral tribunal, not infrequently a London-based arbitration will involve no participation from lawyers based in London. Typically, however, one or more of the English law firms or London-offices of the international law firms will appear. Frequently members of the English Bar will be instructed to appear as counsel either instructed from the UK or overseas\(^10\);

   c) **Arbitrators**: the rules of the LCIA and the ICC impose certain nationality requirements on the selection of arbitrators (see e.g. Article 15.5 of the ICC Rules and Article 6.1 of the LCIA Rules). Thus, if one of the parties is British (or majority-owned by UK shareholders), the chairman of a tribunal appointed under those rules is likely to be from overseas.

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8 The counsel may be, and frequently are members of the English Bar, but sometimes are specialist arbitration counsel within solicitors’ offices or foreign law firms.


10 The City UK estimates that over 1,500 members of the Bar of England and Wales now receive instructions from abroad. See page 6 of The City UK “UK Legal Services Report 2016” at https://www.thecityuk.com/research/uk-legal-services-2016-report/
7. Although information is still awaited from the ICC, the latest statistics from the LCIA and LMAA reveal that:

a) LCIA: 326 arbitrations were referred to the LCIA in 2015. So far as the parties to those arbitrations are concerned, 25% were from Europe\(^{11}\), 15.6% from the UK, 14.8% from Russia and the CIS, 12% from respectively Asia and the Caribbean\(^{12}\) and smaller numbers from the US, Middle East and Latin America. The LCIA does not keep statistics as to the nationalities of the lawyers involved. However, the arbitrators (other than those from the UK) came from Australia, Austria, Brazil, Belgium, Canada, China, Cyprus, Denmark, the Netherlands, France, Germany, Greece, Hungary, Iran, Ireland, Italy, Latvia, Lebanon, New Zealand, Nigeria, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Tunisia, Ukraine and the US\(^{13}\);

b) LMAA: there were approximately 2,000 new arbitration references in 2015 of which probably no more than 100 were seated outside London. Approximately 85% of those cases are dealt with on documents alone – and European lawyers would be involved in about 50% of those cases. In about 5% of the cases that go to a hearing there will be overseas arbitrators and in perhaps 25-30% overseas lawyers will attend (often with English counsel).

8. It will be appreciated from this description of common practice that, despite the stable legislative and judicial environment for international arbitration in the UK, the attraction and success of London as a seat for arbitration may be affected by any restrictions to the ease of access to London for parties, lawyers and arbitrators from overseas, including the EU.

9. Moreover, London’s dominance as a seat for arbitration is not assured\(^{14}\). In view of the international nature of much of the arbitration work in London, it has to compete with other (often more geographically convenient) locations, including Singapore, Hong Kong and Dubai as well as with the other well-established arbitration centres in Paris, Geneva, New York, Zurich and Stockholm. There is a risk that, if barriers to entry

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\(^{11}\) For these purposes Europe includes Germany, Netherlands, Cyprus, Switzerland, Eastern Europe and other Western Europe categories. The Cypriot companies are likely to be foreign-owned

\(^{12}\) Most of the Caribbean companies will be foreign-owned companies

\(^{13}\) Further information can be found at [http://www.lcia.org/LCIA/reports.aspx](http://www.lcia.org/LCIA/reports.aspx)

\(^{14}\) In the Queen Mary survey referred to above, London was identified as the least improved seat over the past five years. See also page 17 of The City UK “UK Legal Services Report 2016” at [https://www.thecityuk.com/research/uk-legal-services-2016-report/](https://www.thecityuk.com/research/uk-legal-services-2016-report/)
are created (or even appear to be created) for parties, their lawyers or for arbitrators, business will move elsewhere\textsuperscript{15}.

10. Similarly, however, given the prevalence of an English choice of law in commercial practice and the high-standing in which English lawyers are held internationally\textsuperscript{16}, it is very common for English lawyers to appear as counsel or arbitrators in hearings that are held overseas, including in Paris and Stockholm. It has not been possible in the time available to obtain any detailed figures relating to those appearances. There is an obvious risk to the continuation of some of that work should it be made (or even appear) more difficult for English lawyers to appear in arbitrations which take place in the European Union.

11. In those circumstances, although London’s reputation as a leading centre for the resolution of international disputes is richly deserved and London remains a robust seat for international arbitration, it is important that the rights of UK and EU lawyers under the Lawyers Services Directive 77/249/EC are preserved and that freedom of movement for immigration purposes is maintained for arbitrators, arbitration lawyers and clients both from the EU and to the EU.

**Recommendations**

Any post-Brexit arrangement with the EU should, at the very least:

1. preserve the rights of UK lawyers under the Lawyers Services Directive 77/249/EC
2. maintain freedom of movement for immigration purposes for barristers (and other lawyers), as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

**Brexit Working Group – International Arbitration Sub-Committee**

**Commercial Bar Association**

**November 2016**

\textsuperscript{15} In this context its important to bear in mind that those advising on or agreeing to the insertion of arbitration clauses do not always consult specialists in the field and may simply take what they perceive to be a “safe” approach.

\textsuperscript{16} The high-standing in which English advocates are held is a consequence of their expertise in advocacy and in certain specialist sectors, but also their exposure to arbitration users; hence the importance of maintaining that exposure.
FINANCIAL SERVICES

Summary

The UK’s pre-eminence as a global financial centre is of immense value to our own economy, as well as to that of the EU and the rest of the world. This role is in danger of becoming greatly diminished in the absence of the financial services “passport” system currently enjoyed. Other mechanisms used by countries outside the EEA such as the equivalence regime and the emergent third country passport, will not fill the gaps created by the loss of the passport. The WTO terms, also, are not sufficiently developed in relation to financial services to suffice.

- We therefore urge the Government to create a bespoke agreement with the EU, replicating the status quo as far as possible and covering the gaps created by the loss of the passport regime.

- We urge the Government to establish this as a transitional arrangement, as well as one more permanent following Brexit. Given the need for legal certainty, phased implementation of a new relationship or, failing the conclusion of negotiations on the new relationship, a transitional period should be a key aspect of HM Government’s approach.

- We also urge the Government to provide legal certainty to businesses and firms, giving specific consideration to the status of contracts covering financial services and products in the Article 50 negotiations.
FINANCIAL SERVICES

Overview

1. The contribution of the financial services industry to the UK economy is well-known, constituting 7% of GDP and directly employing 1.1 million people, two-thirds of them outside the leading global financial centre of London\textsuperscript{17}. The consequential benefits to professional and other service sectors and the significant contribution to fiscal revenue are equally well-documented. Suffice to say that the UK’s pre-eminence as a global financial and related professional services centre benefits not just the UK, but also the EU and the rest of the world. London is a magnet for capital globally and the principal centre for corporate finance raising for manufacturing and other industries across Europe and beyond. From a legislative, regulatory and supervisory point of view, the UK’s experience and expertise has shaped and influenced both international standard-setting measures and the development of EU legislation in this field. An essential aim of HM Government should be to maintain the UK’s role, pre-eminence and influence. This is clearly in the interests of the UK but it would also benefit the EU and the rest of the world.

The Current Position

2. The financial services “passport” is a key benefit of the UK’s membership of the EU. It is available, in respect of certain specified financial services activities and/or products, to all financial institutions authorised and regulated in one of the 31 European Economic Area (“EEA”) Member States. A passport, once obtained, may permit such a firm to:

   a) provide certain cross-border services from its home Member State into any of the other 30 EEA States;

   b) provide certain products cross-border from its home Member State into any of the other 30 EEA States; or

   c) set up a branch to provide certain services in any of the other 30 EEA States.

3. The passport is undeniably beneficial: it avoids the costs and requirements of setting up a subsidiary authorised and regulated in each Member State into which it is desired to do business. The Financial Conduct

\textsuperscript{17} For example: TheCityUK Key facts about the UK as an international financial centre 2016 (March 2016); the House of Lords EU Committee Brexit: financial services (9\textsuperscript{th} Report of Session 2016 – 17, HL Paper 81); and TheCityUK report commissioned from Oliver Wyman, The Impact of the UK’s Exit From the EU on the UK-based Financial Services Sector (4 October 2016)
Authority provided figures to the House of Lords EU Committee\textsuperscript{18} which reveal the large number of passports used both by UK firms to access other EEA markets and by other EEA firms to access the UK market. What cannot be as easily established, however, is the extent to which passports are actually required.

It is good practice for a firm to apply for a passport if it intends to provide certain services and products cross-border within the EEA but it does not follow that there is a legal requirement for the passport. A significant number of services and products, especially in wholesale markets, can be provided cross-border without triggering the need for authorisation and regulation and hence the need for a passport, although the exact detail of what can be offered differs between Member States. Operational models involving, for example, outsourcing and delegation can also facilitate the cross-border supply of services and products. Further, given the failure to complete the single market in retail financial services, it is not clear the extent to which the passport is utilised in retail, as opposed to wholesale, business.

**The Position if nothing is done**

4. There are other mechanisms that allow firms from countries outside the EEA to provide services/activities and products across the EEA. These mechanisms are the equivalence regime and the emergent third country passport. We agree with the House of Lords EU Committee that these existing mechanisms do not suffice to fill the gaps created by the loss of passporting. This is because:

   a) The third country passport is a new concept which has not yet been activated and currently has extremely limited availability.

   b) Utilisation of a third country passport may, based on existing precedents such as AIFMD\textsuperscript{19}, involve the firm in question complying with the relevant EU law requirements, potentially on a global basis.

   c) The equivalence regime is patchy and does not have the same coverage as the passport regime\textsuperscript{20}. For example, retail financial services is not covered.

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\textsuperscript{18} See Brexit: financial services ibid. at para 17

\textsuperscript{19} Alternative Investment Fund Managers Directive.

\textsuperscript{20} According to the European Commission, equivalence means that “in certain cases the EU may recognise that a foreign legal, regulatory and/or supervisory regime is equivalent to the corresponding EU framework”. It allows the EU authorities to rely on the compliance of foreign entities with the equivalent foreign framework, stating that “equivalence decisions may apply to the entire (regulatory) framework of a third country or to some of its authorities only”. Equivalence decisions are taken unilaterally by the Commission, but can be revoked at any time. See: [http://ec.europa.eu/finance/generalpolicy/global/equivalence/index_en.htm](http://ec.europa.eu/finance/generalpolicy/global/equivalence/index_en.htm)
d) The recognition of equivalence of legislation in a particular area is uncertain, time-consuming and potentially influenced by politics, so there can be no guarantee if and when equivalence would be granted.

e) Whilst the UK’s current legislative regime is equivalent to that of the EU, there can be no guarantee that this will remain the case in the future.

5. The WTO rules on financial services are notoriously under-developed and untested. Whilst the recognition of four modes of supply under the General Agreement on Trade in Services (“GATS”) provides a basis for arrangements in some parts of the sector, the regime is still subject to a ‘prudential’ carve-out permitting States to impose restrictions on cross-border supply.

Recommendations

6. In the absence of EEA membership\textsuperscript{21}, even on a transitional basis, we recommend that a bespoke arrangement is necessary to safeguard the interests of both the UK and the EU. A bespoke arrangement could involve a patchwork of alternatives to the existing passporting regime. It could, for example, build on and develop the existing equivalence and/or third country passport regimes. In order to conduct effectively the negotiations, it is essential that an empirical analysis of the existing passporting regime should be undertaken so that the services/activities that can only be carried on and the products that can only be provided cross-border under the aegis of a passport can be identified. This analysis should identify those services/activities that can be carried on, and products that can be provided, in specific Member States without triggering the need for authorisation and regulation (and hence a need for the passport), including through delegation and outsourcing structures. It should also identify those services/activities that could be carried on, and products that could be provided, should the UK be granted full equivalence in all possible areas and if it obtained the available third country passports. The different criteria for equivalence and third country passports should also be set out so as to ascertain the likelihood and attractiveness of these options. This analysis will inevitably identify gaps caused by the loss of the passporting regime that cannot, using existing mechanisms, be filled. It is these gaps that a bespoke arrangement should seek to fill.

7. As noted in the Bar Council’s paper on Jurisdiction and enforcement of judgments, commercial parties require continuity and legal certainty, particularly in relation to contracts extant at the time of Brexit. Parties to financial services contracts would face the same uncertainty detailed in the aforementioned Bar Council

\textsuperscript{21} EEA membership comes closest to continuing the status quo and would enable the UK to retain the passport regime but appears to have been ruled out by the Prime Minister in her speech of 17 January 2017. Were it useful to consider EEA membership, an annex to this paper could be provided.
paper but could also face additional uncertainties due to EU prudential requirements, for example, where a contract concerns U.K. holdings which may not attract the same capital treatment post-Brexit. It is recommended, therefore, that specific consideration is given to the status of contracts covering financial services and products in the Article 50 negotiations.

8. The desire to reach an agreement on the UK’s future partnership with the EU by the conclusion of the Article 50 negotiations is recognised. If this were achieved, then the phased implementation to which the Prime Minister referred in her speech of 17 January 2017 would be possible. It is also possible, however, that it will take longer to negotiate a wholly bespoke relationship and, in such circumstances, we would recommend a transitional period replicating the status quo as much as possible and covering the gap between WTO terms and the establishment of a new arrangement. Given the need for legal certainty, phased implementation of a new relationship or, failing the conclusion of negotiations on the new relationship, a transitional period should be a key aspect of HM Government’s approach. Inevitably many, particularly larger, firms cannot wait until the conclusion of the Article 50 negotiations and are in the process of developing their contingency plans on the basis that the UK does not remain a member of the single market and will no longer benefit from the existing passporting regime. This includes but is not limited to the shifting of functions and therefore jobs to other EEA financial centres. In many instances, this will require the restructuring of operational models to ensure firms retain a presence in the EEA. An early announcement of HM Government’s position on financial services should be made to reassure financial institutions and their customers.

Brexit Working Group

January 2017
Paper Four

Civil jurisdiction and judgments

The Brexit Papers are produced by the Bar Council Brexit Working Group
March 2017
CIVIL JURISDICTION AND JUDGEMENTS

Summary

The ability to enforce judgments of the courts from one state in another is of vital importance for the functioning of society and for retaining the position of England and Wales as the leading dispute resolution centre in the world, with the important economic benefits that follow from this.

Commercial parties require continuity and certainty. The Recast Brussels Regulation ((EU) No 1215/2012) confers important advantages both in terms of recognition and enforcement, which would be lost unless equivalent arrangements are entered into.

- We urge the Government to enter into an agreement based on the Denmark-EU Jurisdiction Agreement and also to sign and ratify the Lugano II Convention and the 2005 Hague Convention on the Choice of Court Agreements.

- We also urge Government to replace Service Regulations with an agreement based on the EU-Denmark Service Agreement. For choice of law, the Rome I and II Regulations can be adopted into domestic law by Act of Parliament.
1. The effective enforcement of judgments is fundamental to the functioning of society. Without it, the rule of law does not exist. If a contract cannot ultimately be enforced by a judgment, it becomes a meaningless piece of paper. If a person who has been injured by the negligence of another cannot be compensated through a judgment of the courts, that person must either be compensated by government or left to suffer the consequences of injustice.

2. In a globalised world, therefore, it is crucial that the judgments of one state are enforced by the courts of another. The current EU regime on enforcement of judgments is effective in ensuring this is the case amongst Member States, and the UK is unique in currently having reciprocal arrangements not only with the EU but also with former commonwealth countries. It is of the utmost importance that UK citizens, businesses, institutions and the UK government retain the right to have judgments which they have obtained in the UK courts efficiently enforced, and to have the jurisdiction of the UK courts recognised, throughout the EU. Such an ability is also of the utmost importance in retaining the position of England and Wales as the leading dispute resolution centre in the world, with the important economic benefits that this brings.

3. EU Member States have a similar interest in relation to their citizens/businesses trading with the UK; to the activities of UK citizens within their territory; and in relation to enforcement over assets in the UK to satisfy EU judgments.

The Current Position

4. The current position is governed by the Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (‘the Recast Brussels Regulation’), in force since January 2015. This applies to “civil and commercial matters” and provides that:

4.1. Judgments of the courts of EU Member States are to be enforced throughout the EU as if they were judgments of a court of the Member State in which enforcement is sought. This includes “protective measures” such as injunctions freezing assets.

4.2. The courts of one Member State may apply “protective measures” to assist with proceedings in another Member State.

4.3. Subject to a number of notable exceptions, persons domiciled in an EU Member State should be sued in that Member State and where this is not what has happened courts are required to decline jurisdiction.
4.4. Where the parties have specified in their contract that disputes should be heard in a particular jurisdiction (an exclusive jurisdiction clause), the courts of other Member States are required to abide by the terms of that jurisdiction clause and to decline jurisdiction.

4.5. Where a person is one of a number of Defendants, he may be joined to proceedings which are commenced in another Member State where he is not domiciled if those proceedings are “so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments”.

4.6. Where proceedings have already been commenced in one Member State, the courts of other Member States are required to stay any subsequent proceedings dealing with the same subject matter until jurisdiction has been decided by the court first seized of the matter (the *lis alibi pedens* principle).

4.7. Clarifies the scope of the exclusion of arbitral proceedings from the jurisdiction rules.

5. Another vital element of legal process is the service of claims by claimants on defendants. Without proper service, as a general rule, a claimant cannot bring a claim against a defendant. The position as to service has also been regularised within the EU. The current position with regards to service is governed by the Service Regulation\(^{22}\), which has applied in the UK since 13 November 2008. It creates a ‘European judicial area’ for the free movement of judicial and extra-judicial documents.

6. These are achievements for which the UK has lobbied hard and effectively in Brussels over many years. They are vital for the healthy functioning of the UK economy in general and the UK legal sector in particular.

**The Importance of an Effective Jurisdiction and Judgments Regime – For the UK as a Whole**

7. As already mentioned, it is of the utmost importance that English\(^{23}\) judgments are enforced and the jurisdiction of the English courts is recognised in as efficient a manner as possible throughout the EU. If a company obtains a judgment in the English courts against an EU party, it is vital that it can be enforced against that EU party’s assets abroad. International trade would be fundamentally undermined if this became too cumbersome or expensive. If a child is injured through the negligent driving of a national of another EU state, it is important that that child is able to obtain the compensation he or she has been awarded by an


\(^{23}\) The term “English” is used here and elsewhere in this paper as a substitute for “England and Wales”. England and Wales as a jurisdiction is the focus of this paper, but most of the points made in relation to England and Wales are likely to pertain for Northern Ireland and Scotland too.
English court. If the UK government brings proceedings against an EU polluter and obtains judgment in its favour, that judgment should be capable of easy enforcement throughout the EU.

The Importance of an Effective Jurisdiction and Judgments Regime – For the Legal Sector in England and Wales

8. England and Wales is the leading centre for dispute resolution worldwide. The English legal sector generated £3.3 billion of revenue in 2015.

9. The reputation of England and Wales as the pre-eminent destination for international dispute resolution will be damaged if appropriate steps are not taken to ensure that the position as to the jurisdiction of the English courts and the enforcement of English judgments are protected. Much of the international dispute resolution work carried out by English lawyers comes to them because the parties to a dispute (either before or after the dispute has arisen) have chosen to have their dispute resolved in the English courts. If jurisdiction clauses designating the English courts are not effectively respected in the EU, this will make English jurisdiction clauses considerably less popular. Further, if the EU *lis alibi pedens* rules do not apply to proceedings in English Courts such that subsequent proceedings in EU Member States’ Courts will not automatically be stayed, this will deter parties from including English jurisdiction clauses in their agreements.

10. Similarly, if the judgments of the English courts are more difficult to enforce in the EU, then jurisdiction clauses naming England and Wales will become a great deal less attractive. The same point applies to “protective measures”, like interim injunctions. If it is more difficult to enforce the “protective measures” of the English court in EU Member States, or if EU Member States decline to make use of their own “protective measures” in support of English proceedings, English jurisdiction clauses will become a great deal less popular.

11. That fact that England and Wales is such a significant hub for international dispute resolution has important knock-on advantages for the UK as a whole. There is, of course, the fee income and tax revenues which flow from the sector. However, there are other advantages too. Given the widespread acceptance of English law as an effective law for governing commercial relationships, and the choice of the English courts as a corollary of this, UK parties can often negotiate that English law be the law which governs their commercial relationships with international parties and that their disputes will be resolved in the English courts. This gives those UK parties the “home advantage” of being able to use a law and courts with which they are familiar, even though they are trading internationally.
12. Finally, a great deal of the attractiveness of the UK in general, and London in particular, as a hub for business (particularly financial services) derives from the attractiveness of the English legal sector. As discussed immediately above, this attractiveness will be considerably diminished if steps are not taken to ensure an adequate legal framework is put in place to ensure that English judgments and jurisdiction clauses are effectively and efficiently enforced.

The position if nothing is done

Jurisdiction and Judgments

13. Commercial parties value continuity and certainty. The Recast Regulation confers important advantages both in terms of recognition and enforcement, which would be lost unless equivalent arrangements are entered into. If the UK becomes a ‘third state’ for the purposes of the Recast Regulation, the Lugano II Convention and the 2005 Hague Convention, the status of English jurisdiction clause and judgments in other Member State courts will become more open to question. It is likely that, if parties consider that the answer to the questions of “Will my jurisdiction clause be respected?” and “Will my judgment be enforced?” will involve adding time and expense as well as uncertainty to any transaction, then this may encourage them to amend their contractual clause in favour of resolving disputes before other Member State courts.

14. There is an increased risk that commercial parties’ negotiated and contractually agreed English jurisdiction clauses will not be respected by the courts in Member States and that the parties are more likely to become embroiled in proceedings in a court other than the court that they have chosen. This is demonstrated by the survey conducted by members of Simmons & Simmons’ offices in Germany, France, Italy, Spain and the Netherlands as to their courts’ approach to English jurisdiction clauses post-Brexit which revealed that over 50% of clients were considering moving away from English choice of law or jurisdiction clauses (see the Simmons & Simmons’ survey at Appendix 1 (the “Survey”).

15. Competitor jurisdictions are likely to take advantage of such uncertainty but would be reassured if there was good reason to believe that continuity was likely. The Survey showed that 88% of clients thought the UK Government should make a public and early statement.

16. Further, it is likely that even where the English courts continue to respect jurisdiction clauses in favour of Members State courts under common law rules, applying the principle of forum conveniens, there may be increased uncertainty as to the approach of the English courts on jurisdictional issues generally.
17. There are some areas where Brexit may have a particular impact. For example, some market participants might consider moving away from English law as the governing law of asset purchase and sale arrangements in securitisation. Similarly, post-Brexit, formerly ‘safe harbours’ will no longer be available in the context of the insolvency or reorganisation commenced in another Member State.

18. Anecdotally, the Bar Council has heard of a number of cases where parties are being advised not to choose English jurisdiction clauses in their contracts, where previously this would have been an almost automatic choice, because of the uncertainty surrounding the jurisdiction and judgments regime. Similarly, anecdotal evidence in September 2016 suggests that cases are already being commenced in other EU jurisdictions which would otherwise have been commenced in England due to the uncertainty over the ultimate enforceability of an English judgment. Large-scale litigation would frequently take longer than two years. Therefore it is of vital importance that interim measures are put in place.

Service

19. The Service Regulation will cease to have effect upon Brexit. At this point the residual service framework will revive which includes the methods of service permitted by the common law and the Hague Service Convention\textsuperscript{24}. If the UK does not enter into an agreement akin to the Denmark-EU Service Agreement\textsuperscript{25}, services of process will become more difficult and expensive as permission to serve out of the jurisdiction may be required and the permitted methods of service will be more cumbersome.

Recommendations

Longterm:

20. The UK Government should:

\begin{enumerate}
\item Enter into an agreement based on the Denmark-EU Jurisdiction Agreement, both with the EU and with Denmark albeit with a clause providing not for interpretative jurisdiction of the CJEU but for ‘due account’ to be taken of the decisions of the courts of all ‘Contracting Parties’;
\item Sign and ratify the Lugano II Convention, to preserve the present regime vis-à-vis Norway, Iceland and Switzerland;
\end{enumerate}

\textsuperscript{24} Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

\textsuperscript{25} Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L/299/62, 16 November 2005
20.3. Sign and ratify the 2005 Hague Convention on Choice of Court Agreements;\textsuperscript{26}

20.4. Enter into an agreement based on the Denmark-EU Service Agreement, both with the EU and with Denmark;

20.5. Adopt the Rome I and II Regulations (which deal with choice of law) in domestic law by way of an Act of Parliament; and

20.6. Adopt specific transitional arrangements to clarify the date on which various features of the above agreements will come into force.

21. Further, the UK Government needs to:

21.1. Make a decision that these will be its aims as soon as possible and that is publicly stated; and

21.2. Ensure that these arrangements take effect immediately upon Brexit so that there is a seamless transition between the existing and new regimes.

**Transitional arrangements:**

22. The UK Government should expressly provide for transitional arrangements in any agreement that it concludes with the EU in order to prevent uncertainty. The following transitional arrangements are suggested, which should be adopted in parallel:

22.1. As to the agreement based on the Denmark-EU Jurisdiction Agreement:

    22.1.1. The Agreement shall apply only to proceedings instituted after its entry into force.

    22.1.2. If proceedings in the state of origin were commenced before the entry into force of the Agreement, judgments given after that date shall be recognised and enforced in accordance with the Agreement.

22.2. As to the Lugano II Convention and the 2005 Hague Convention, the UK is limited by the fact that those treaties are already concluded, meaning that specific transitional regimes are less likely to be agreed. However, the UK might consider issuing a declaration upon ratification of those Conventions to provide for their seamless operation.

\textsuperscript{26} As its name suggests, this Convention is concerned with one aspect of jurisdiction and enforcement: the effect of choice of court agreements. This is not a substitute for the Brussels-Lugano regime.
22.3. As to the agreement based on the Denmark-EU Service Agreement, no specific transitional arrangements are likely to be required, other than to specify the date of the entry into force of the Agreement.

Brexit Working Group

November 2016
APPENDIX 1

Survey of likely responses to English jurisdiction clauses in EU Member States (conducted by Simmons & Simmons)

Once the UK has left the EU, how will civil courts in Member States approach the following scenarios, assuming that (i) the UK is not a signatory to any relevant conventions and (ii) the agreement between the parties contained a jurisdiction clause in favour of the English courts?

*If the clause were an exclusive jurisdiction clause, would the court enforce it and decline jurisdiction?*

Under their domestic provisions, courts in Member States would be likely to recognise an exclusive jurisdiction clause in favour of the courts of a non-Member State.

Exceptions include disputes involving rights granted by EU law, such as those relating to consumers, employment contracts, and compensation for commercial agents on termination of a relationship.

*If the clause were a non-exclusive jurisdiction clause, would the court decline jurisdiction if proceedings had already commenced in England?*

Courts of Member States would have a discretion not to decline jurisdiction in these circumstances. Objections could be raised in the Member State court on the basis of lis pendens by the party who had commenced proceedings in the court first seised.

In all jurisdictions we surveyed, the court would accept jurisdiction regardless of the parallel proceedings if a judgment of the court first seised would be unenforceable in its jurisdiction.

Other factors that might be considered include whether there is a significant link between the dispute and the state where the court is first seised, public policy considerations and whether there will be a fair hearing.

*Would it make any difference if neither party were resident in the UK?*

If the defendant were domiciled in a Member State, the Recast Regulation would apply, but would not alter the position from domestic rules. In France, the domicile of the parties would have no effect on the situation where an exclusive jurisdiction clause was present, but might affect it where a non-exclusive jurisdiction clause had been used as the French court would then consider whether a substantial link to the UK had been established.
Would the Brussels Convention, or any bilateral convention that pre-dated it, still be considered applicable to the choice of jurisdiction?

In at least Italy and Germany, the Brussels Convention would still be considered binding.

If the UK had ratified the 2005 Hague Convention, would the court decline jurisdiction over a dispute where neither party was resident in the UK, but they had agreed to the exclusive jurisdiction of the English courts?

Yes, as long as one of parties is resident in a contracting state that is not a Member State and the dispute is within the scope of the Convention. This requires it to be an international dispute, so the parties would need to be from different domiciles.
Paper Five

Criminal Justice

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

Summary

In this field, the Bar Council is asking the government to consider a number of public security and human rights.

- Firstly, the Government should negotiate a reciprocal measure to replace the European Arrest Warrant which has worked well in securing the speedy arrest of suspects combined with due process and respect for fundamental rights.

- The Government should further seek agreement for the use of Joint Investigation Teams and allow rapid access to identification databases in order to investigate international crime.

- We also urge Government to find an equivalent mechanism for the European Investigation Order which will come into force by mid-2017. The package should further include continuing cooperation through Europol, Eurojust and the European Public Prosecutor’s Office, as well as provide for a measure to transfer prisoners to their home countries.

- We further urge the Government to ensure that British citizens subject to investigation and prosecution in other Member States continue to benefit from the safeguards set out in the European Council Resolution of 30 November 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.
CRIMINAL JUSTICE

1. Crime, especially more serious and organised crime, increasingly does not recognise national borders. Even less serious crimes are likely to have a cross-border element as citizens of the EU have for the last 43 years exercised their Treaty rights of freedom of movement and establishment, and availed themselves of goods and services sent from, or supplied in, EU and other states. British citizens and foreign nationals who commit crimes flee across borders seeking to evade justice. Some crimes can be committed easily across national boundaries, such as child exploitation, fraud and identity theft, often exploiting new technologies. Police and the judicial authorities need to cooperate internationally to combat crime and bring perpetrators to justice.

The EU’s approach to the fight against crime

2. Fighting cross-border crime based on case by case contacts, or even bi-lateral agreements to cooperate, especially where several states are involved, is likely to be slow and cumbersome. Under the EU framework we have been doing so by mutual recognition of key elements of each other’s systems, with minimum standards applicable in all states for certain factors, together with mutual legal assistance measures that are understood and apply in all the Member States.

3. The EU has been especially active in recent years in identifying cross-border policing issues and putting in place regimes to tackle them, such as Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography; and Directive 2011/99/EU on the European Protection Order. The UK will probably wish to continue co-operation in these areas and provide legislation to enable reciprocal arrangements to continue.

4. It is illustrative to refer back to the review of EU competences in the area of criminal justice, carried out three years ago in consequence of the negotiated option contained in Protocol 36 of the Lisbon Treaty for the UK to opt out of all pre-Lisbon criminal justice measures after a five-year transitional period. This detailed process concluded that 35 EU measures were crucial to UK law enforcement, leading to the UK opting-back into them. Many of the remaining measures had been superseded. While this took place in the context of other EU competences continuing, given the geographical proximity of other European nations, the rise in technology-based crime that knows no borders, and the undoubted need to continue some form of trade and service agreements, the Bar would argue that the assessment by UK law enforcement professionals that these

instruments are necessary to enable us to combat cross border crime remains an important and relevant consideration in deciding on UK priorities for the forthcoming negotiations with the EU.

**Recommendations for the UK, post-BREXIT**

5. Thus, as we withdraw from the EU, the UK will need to seek, if possible, measures in an agreement with the EU, including but not limited to ones that:

   a) Secure the speedy arrest of suspects with minimum bureaucracy, but with judicial process and respect for grounds of refusal and fundamental rights, via use of the European Arrest Warrant, of those wanted by the British police who have absconded to the EU. There will need to be some reciprocal measure;

   b) Provide for the use of Joint Investigation Teams to investigate criminal networks that operate across national borders;

   c) Secure evidence from overseas, using EU mechanisms such as the European Investigation Order, which is due to be implemented into national law by mid-2017;

   d) Provide rapid access via fingerprint and other identification databases to overseas convictions, for sentencing and other purposes; and

   e) Provide for the transfer of prisoners or suspects to their home countries to serve their sentence or await trial subject to bail conditions.

6. The courts and police will continue to want properly to identify suspects and defendants from outside the UK with whom they deal, so that justice can be done, and the public protected so far as is possible.

7. Moreover, whatever the outcome of the negotiations on free movement of people, free movement of (criminal) funds across national borders will continue to pose challenges for the criminal justice system, and measures to combat this will need to be included in the package.

8. It is unlikely that the UK Government will want to negotiate 27 separate treaties, or indeed that the remaining EU members will want to negotiate separately either, given the growth in co-operation through Europol, Eurojust and the European Public Prosecutors Office.

9. In addition, the UK will undoubtedly want to secure some bilateral recognition of systems to protect the UK nationals living in and visiting EU states. They, for example, make up the largest group of non-
nationals living in France and Spain, and the second largest living in Germany. The largest non-national groups living in the UK are the Polish and the French, followed by the Portuguese and Spanish. Whilst some people may move country after Brexit, substantial numbers of EU citizens are likely to remain. In addition, if Britain is to be open to the world for business, substantial numbers of visitors can be anticipated.

10. The UK will therefore need to engage with Europol, Eurojust, and the European Judicial Network. If we were to revert to non-EU-led cooperation in the fight against crime, we would be relying on intergovernmental conventions that need to be ratified. There is ample evidence from the past that this is not an effective approach, since there is no obligation for other countries to prioritise requests from the UK, and would be even less so in the face of the growth of technology-enabled crime. The current mechanisms require requests from other EU Member States to be treated with the same celerity as domestic cases and must be answered within a specific period. Moreover, cross-border surveillance is now greatly improved. The police, even at local level, will themselves generally know how the system works, allowing them to deal with cross-border issues themselves. This was not the case even ten years ago. This increases efficiency and speed, which is often of the essence in such cases.

Procedural Safeguards – the EU’s approach

11. The investigation and prosecution of crime necessarily requires procedural safeguards to be in place to ensure fair process, from the moment a person is made aware that they are a suspect of crime. Research has repeatedly shown that the European Convention on Human Rights (the “Convention”) is an insufficient tool to ensure effective protection of suspects’ and accused persons’ rights in the context of enhanced cooperation arrangements. Moreover, to varying degrees, all Member States have been found by the European Court of Human Rights to be in violation of Convention rights. It was therefore acknowledged in the Council Resolution for a Roadmap on procedural rights 2009 that the EU should enhance rights protection for suspected and accused persons. Recognition by the EU in the Lisbon Treaty and subsequent

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implementing laws that these safeguards are necessary is a positive and welcome recognition of fair trial processes, which the Bar endorsed.

12. The EU has so far passed six detailed, concrete Directives binding upon most Member States, that provide rights for all individuals (regardless of nationality) and are enforceable through domestic courts and, if a reference is made to it, the Court of Justice of the European Union.

13. Such measures provide people living in and moving between EU countries with the protection of certain minimum standards throughout the EU. For the UK, which already has extensive, though not all-encompassing, procedural safeguards, this means that British citizens and residents will be able to avail of similar protections to those at home should they become embroiled in the criminal justice system in another Member State. Promotion of fair trial rights can also alleviate some of the concerns about the swift and cursory operation of mutual recognition decisions.

The Challenge post-BREXIT

14. Part of the challenge in negotiating law enforcement measures post Brexit will be to ensure that these procedural standards continue to be available for British nationals and British residents accused before EU courts. Agreements must also provide mechanisms for affected persons to make representations and invoke postponement or refusal grounds where it is appropriate to do so. Improved procedural safeguards will have minimal effect unless there is the opportunity for the affected person to be heard by a judicial authority on the application against them, and with the commensurate fair trial principles that should attach to that process.

Bar Council

November 2016

30 Directive 2012/13/EU on the right to information in criminal proceedings; Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings; Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

31 With some exceptions due to Protocols 21 and 22 to the Treaty on the Functioning of the European Union enabling the UK, Ireland and Denmark to opt out of laws relating to the Area of freedom, security and justice.
Paper Six

Family Law

The Brexit Papers are produced by the Bar Council Brexit Working Group
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FAMILY LAW

Summary

Huge numbers of families in which the partners are from different Member States will be affected by Brexit in relation to divorce and children matters. UK citizens have benefitted in particular from two directly applicable EU Regulations:

- Brussels IIa (Regulation 2201/2003) which covers divorce and custody of children, both in disputes between parents and also where local authorities are involved, and


These instruments provide certainty about jurisdiction, helping affected families to determine where issues concerning the welfare of children, divorce and maintenance can be resolved. They also assist with enforcement and cooperation between authorities on the protection of children’s welfare.

Other conventions and measures would fill some of the gaps if Brussels IIa were to fall away, but not all, and the international protection of children would be weakened by its loss. The 2007 Hague Convention on maintenance, to which the UK could accede, would to a much lesser extent fill the gap left by the Maintenance Regulation.

- We urge the Government to replace the Brussels IIa and Maintenance Regulations on the same basis as the Recast Brussels Regulation and to ensure that the agreement in relation to the Brussels IIa Regulation will apply equally to the proposed Recast Brussels IIa Regulation when that comes into force.

- We also urge the Government to ensure that the new agreements will come into force seamlessly on Brexit in order to protect the welfare of children and the stability of families.
1. English family law is particularly affected by two directly effective EU Regulations:

1.1. Regulation 2201/2003, known to English family lawyers as ‘Brussels IIa’. This Regulation establishes the jurisdictional framework (a) for divorce and (b) for issues about children, both in the private law sphere (disputes between parents and other family members); and also in public law cases where local authorities are involved. This Regulation also has provisions which reinforce the 1980 Hague Convention on international abduction of children.

1.2. Regulation 4/2009, known as the Maintenance Regulation. This establishes the jurisdictional framework for all disputes about family maintenance obligations.

2. Both these Regulations have the same origin as the Recast Brussels Regulation and they share many features with it. In particular they have similar provisions for:

2.1. Recognition and enforcement in other Member States;

2.2. Protective measures;

2.3. Jurisdictional rules;

2.4. In the case of the Maintenance Regulation (but not Brussels IIa) the right to enter into exclusive jurisdiction clauses;

2.5. ‘First in time’ rules, so that where proceedings have been commenced in one Member State, the courts of other Member States are required to stay any subsequent equivalent proceedings until the jurisdiction of the first court has been established.

3. One feature of both Brussels IIa and the Maintenance Regulation is that each Member State is required to designate a Central Authority. The Central Authorities have roles both in cross-border enforcement of orders and (in Brussels IIa) in the exchange of information and general cooperation in matters concerning the welfare of children.

4. The Brussels IIa Regulation is currently undergoing a revision process similar to that which led to the Recast Brussels Regulation. The UK Government opted into the negotiations about this process in October 2016. It is expected that the Recast Brussels IIa Regulation will come into force at some point in 2019.
5. Both Brussels IIa and the Maintenance Regulation have presented some difficulties since they respectively came into force. The interaction between them is sometimes obscure. However, they have been shown to have enormous advantages which far outweigh these difficulties. For example:

5.1. Certainty about jurisdiction. The millions of couples who are of different nationalities and/or live in a Member State other than their own can readily find out where issues concerning the welfare of children, divorce and/or maintenance can and should be resolved.

5.2. Ease of enforcement. Orders concerning arrangements about children and also about maintenance must be recognised and enforced in other Member States.

5.3. Cooperation between Central Authorities is a valuable bulwark for the protection of children’s welfare.

5.4. Protective measures pending resolution of disputes are also a valuable tool for the protection of children’s welfare.

6. If either Brussels IIa or the Maintenance Regulation were to cease to have effect in the UK without a replacement framework being in place, there are other international instruments which would or could help to fill the gaps:

6.1. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (which the UK has already ratified) would significantly (but not entirely) fill the gap left by the children aspects of Brussels IIa. The international protection of children would be weakened by the loss of Brussels IIa.

6.2. The 2007 Hague Convention on maintenance would to a much lesser extent fill the gap left by the Maintenance Regulation. The 2007 Convention does not contain jurisdictional rules. The UK is currently bound by the 2007 Convention as a result of membership of the EU. Once the UK leaves the EU, it will need to accede to the 2007 Convention on its own account. The EU will then be required to accept the UK’s accession, but there may be a risk of a hiatus before that happens.

6.3. If the UK were to ratify the Lugano II Convention post-Brexit, this would fill the gap left by the Maintenance Regulation to a much greater extent.

7. There would nevertheless be major gaps if the two Regulations fell away, including:
7.1. The jurisdictional rules for divorce in Brussels IIa, together with the ‘first in time’ rule summarised above.

7.2. Unless the UK ratifies the Lugano II Convention, the jurisdictional rules (and first in time rule) in the Maintenance Regulation.

8. The loss of the first in time rules would have an important practical consequence. At present when competing divorce and/or financial proceedings are issued in England and in a country which is not a Member State, the English court will decide whether England or the other country provides the ‘forum conveniens’, i.e. the place where the issues can more suitably be tried. This is a very fair system, but it is slow, expensive, and places additional demands on court time. If the first in time rules in the EU Regulations fell away, forum conveniens principles would be applied as between England and the continuing Member States (as they used to be before the Regulations came into force).

9. The legal systems of different Member States in relation to matrimonial finance provide very different outcomes. Many spouses would have an incentive to argue about which country was the forum conveniens. In view of the number of couples who have a substantial connection both with England and with another Member State, there would be likely to be a large increase in the number of disputes of this kind, placing a major additional burden on the already overstretched family court system.

Recommendations

10. The UK Government should:-

10.1. Enter into agreements to replace the Brussels IIa and Maintenance Regulations on the same basis as the agreement recommended in relation to the Recast Brussels Regulation.

10.2. Ensure that the agreement in relation to the Brussels IIa Regulation will apply equally to the proposed Recast Brussels IIa Regulation when that comes into force.

10.3. Ensure that the new agreements will come into force seamlessly on Brexit in order to protect the welfare of children and the stability of families.

Anticipating other EU developments that could affect English family law

11. This paper would not be complete without a mention of other EU activities that may soon affect family law in England and Wales.
12. In July of this year, the EU adopted Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union. This regulation will do away with the need for authentication and translation of a range of civil status documents, including marriage and divorce certificates, adoption certificates etc, when persons are moving from one state to another. Its value added is clear. The main elements are due to enter into force in February 2019, which may well precede formal BREXIT.

13. Having received several petitions, including complaints against UK authorities, the European Parliament is pressing for EU action on cross-border and forced adoptions.

14. These are just two examples of further family law-related EU developments that may become live, and the merits of which will therefore need to be addressed, while the BREXIT process is underway.

Family Law Bar Association
November 2016
IMMIGRATION

Summary

At present the UK enjoys a combination of free movement from the EU and restricted migration from outside the EU, where the former functions flexibly in response to UK economic needs, as well as supplying the numbers of low-skilled migrants that are required by UK businesses. The migration of EU citizens to the UK may be driven in part by factors in home states, but it also reflects the availability of work in the UK and to that extent is not unrelated to market demand in the UK economy. Any consolidated system of economic migration ought to be designed after consideration of the UK’s needs, as well as to attract highly skilled migrants by offering them an appetising ‘package’ of an inward migration route, together with a path to settlement and citizenship.

A work permit system cannot easily match the way in which the present free movement system allows EU citizens to circulate in and out of the UK, remaining where successful, and returning home in fallow periods. It cannot easily match the way it fills gaps in the labour market, facilitates the supply of services, and stimulates entrepreneurial activity.

- We therefore recommend to the Government a possible intermediate solution, less restrictive than a work permit/prior authorisation system but more restrictive than the current system of free movement. Our suggestions of what could be considered are set out at paragraphs 21-22 of this paper.

- We believe that a possible intermediate solution would be of manifest advantage to the UK, in retaining a model of economic migration that allows for flexible service provision, entrepreneurial activity, and business innovation.
Introduction

1. The issue of migration to the UK was of particular salience in the debate leading up to the referendum. As the UK prepares to leave the EU, the shape that immigration control will take in the future is also controversial. The choices to be made include: (i) ought migration to the UK to be circulatory or ought it lead to settlement, (ii) would a rigid system be desirable or would a flexible one that permits migrants to switch between categories such as work and study be a better option, and (iii) is a market-based approach desirable or ought the state to define and control all aspects of movement? Such choices will be made in the context of a highly polarised public debate that pits concerns about integration and numbers on the one hand against a relaxed approach to diversity and social transformation on the other.

2. Two matters provide the context in which these choices fall to be made. Firstly, while migration to the UK dominates the public debate, there is also the position of British citizens in the remaining EU 27 member states to consider. If there is to be reciprocity between the UK and other member states, then the question of what is to be reciprocated needs to be considered, bearing in mind that the answer will govern the position of British citizens who seek to provide services, work and settle elsewhere in the EU.

3. Secondly, there will need to be transitional arrangements to protect the position of EU citizens (and their family members) who have an EU right of permanent residence in the UK, who are on their way to acquiring such a right, or who have merely been present in the UK for a number of years (such as an EU citizen married to a British citizen). It is not beyond doubt that the power to make provision for those who have acquired rights is solely a matter of EU competence. In so far as it may be a shared competence between the EU and member states, the UK faces the possibility of having to make bi-lateral arrangements with each member state, not least so as to protect the position of British citizens resident in those states. In such circumstances there may be wisdom in taking a broad, generous, approach to the protection of EU citizens who have already migrated to the UK by providing for a form for UK permanent residence for those who currently hold an EU right of permanent residence, a route to the same for those who have yet to complete five years continuous lawful residence under EU law, and indefinite leave to remain for EU citizens who are family members of British citizens.

4. Migration to the UK may be divided into three broad categories: economic migration, family reunion and forced migration (the latter typically leading to a grant of asylum). Free movement by EU citizens around EU member states concerns migration for economic purposes (work, self-employment, vocational training,
etc.), as well as family reunion. In addition, the EU operates a Common European Asylum System in which the UK participates. That system sets common standards for the reception of asylum seekers, and the procedure for processing asylum claims and Refugee status determination. It also distributes claims for asylum among member states; something that permits the UK to return an asylum-seeker to the first EU member state she entered.

5. At present, the system of free movement is flexible and market-based. It permits EU citizens to move from one EU member state to another and facilitates migration for work and settlement. However, it also facilitates circulatory migration whereby EU citizens and their family members move back and forth between their home state and the UK (as host state). The EU citizen knows she may leave the UK and return to her home state without prejudicing her position, as she can always return to the UK at a later point.

6. That position is to be contrasted with a work permit system that is rigid and tightly controlled by the state. Such a system requires migrants to obtain prior authorisation to move for work and settlement. It encourages a migrant worker (and her family) to remain in the host state and to settle there, for fear of losing authorisation to remain there, were she to return to her home state for any length of time. A free movement system reduces the number of economic migrants remaining and settling in a host state, whereas a full system of work permits/prior authorisation encourages those that gain entry to remain and settle with their family members on a permanent basis. Between these two poles are a range of intermediate positions yet to be articulated in the public debate. While the question of whether to adopt one is a political choice and thus for elected politicians, it is right to set out and elaborate an example of the form one might take.

The Current position

7. Economically active persons with lawful authorisation to work in the UK are found in each of the three categories of migration (economic migration, family reunion and forced migration). For analytical purposes economic migrants may be sub-divided into the following sub-categories: (i) investors/high net worth individuals, (ii) entrepreneurs and other self-employed persons, (iii) other highly skilled migrants, (iv) skilled workers, (v) intra-company transferees, (vi) low-skilled migrants, (vii) temporary migrants such as short-term service providers, (vii) work experience persons, (ix) business visitors, and (x) persons on vocational training. The current UK framework caters for all these categories in one form or other.

8. At present there are three systems of immigration control that regulate the migration of persons to and from the UK. All three systems contribute to immigration and emigration and thus to the figure for net migration.
9. The first system is that enjoyed by British citizens and confers the right of abode in the UK. Beneficiaries have the right to enter and leave the UK without permission and to live and work in the UK. Typically they enjoy access to the full range of social assistance and political rights.

10. The second system is that enjoyed by EU citizens (and their family members of any nationality). Beneficiaries have the right of admission to the UK; the right to seek and take up offers of work and to reside accordingly; and the right to reside as self-employed persons, students, or persons otherwise self-sufficient. After five years of the exercise of such rights (or less in some cases) a right of permanent residence is automatically acquired. Typically such persons enjoy access to a limited range of social assistance and political rights. It is noteworthy that the need of UK businesses for low-skilled migration, seasonal or otherwise, is met largely through this route.

11. The third system is that applied to persons subject to immigration control, for instance those who hail from countries outside the EU, who are sometimes referred to as third country nationals. Such persons require permission to enter and reside in the UK. The UK Immigration Rules apply exacting criteria and impose conditions upon them. In certain categories the numbers of persons permitted to enter the UK is subject to a cap. Applications for indefinite leave to remain are available in certain migration classes (e.g. for investors and for skilled workers), usually after five years lawful residence (longer in some cases), subject to fulfilment of prescribed conditions. Typically such persons enjoy little or no access to social assistance and no political rights. Of the economic migration subcategories (i)-(x) identified above this system contains no provision for (ii) other self-employed persons, (iii) other highly skilled migrants, or for (vi) low-skilled migrants.

**The impact of EU immigration**

12. While the UK relies on free movement from other EU states to supply low skilled workers, the evidence does not show that there is a pool of British citizens who are thereby displaced from work. Nor does it show that there is a material impact on wages and salaries. Academic studies demonstrate that EU migration and the taxation of EU citizens in work leads to a net fiscal gain and provides the resources from which the government may fund any extra provision for housing, education, and healthcare.

13. The LSE study ‘**BREXIT and the Impact of Immigration on the UK**’ notes that ‘there is absolutely no statistically significant relationship (negative or positive) of EU immigration on unemployment rates of those
born in the UK’ (p. 9). The report also notes that ‘Wages of UK-born workers changed at much the same rate in areas with high EU immigration as in areas where the change in EU immigration was low’, (p. 10). UK workers are protected by UK employment laws; they are also protected by the fact that the ambit of contribution-based social security schemes and other schemes for social assistance is regulated at UK level.

**On and after the UK’s departure from the EU**

14. On departure from the EU, the second system of immigration control, described above, that of EU free movement, will cease to exist and its beneficiaries will be redistributed to the third system as persons subject to immigration control. While much attention has been paid to the question of what is to happen to EU citizens (and their family members) already present in the UK, the more difficult question to answer is: what choices will be embraced in the newly enlarged system of immigration control?

15. At present the UK enjoys a combination of free movement from the EU and restricted migration from outside the EU, where the former functions flexibly in response to UK economic needs, as well as supplying the numbers of low-skilled migrants that are required by UK businesses. As regards skilled migrants, most are EU citizens exercising rights of free movement. Net inward migration of those exercising EU free movement rights (skilled or otherwise) in the year to September 2015 was 172,000 (source: LSE Study cited above), whereas the UK under its Tier 2 (General) migration route, issues merely 20,700 work permits (‘certificates of sponsorship’) a year to skilled migrants from outside the EU seeking to enter the UK on salaries of less than £155,300 per year.

16. The migration of EU citizens to the UK may be driven in part by factors in home states, but it also reflects the availability of work in the UK and to that extent is not unrelated to market demand in the UK economy. It is suggested that any consolidated system of economic migration ought to be:

   (i) Designed after consideration of the UK’s needs, where the latter is defined by evidence-based analysis not merely to embrace current skill shortages but also to stimulate entrepreneurial activity, and

   (ii) Designed to attract highly skilled migrants by offering them an appetising ‘package’ of an inward migration route, together with a path to settlement and citizenship. Highly skilled

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32 See also the UCL study ‘The Fiscal Impact of Immigration to the UK’ and Oxford University’s Migration Observatory reports on ‘The Fiscal Impact of Migration in the UK’ and ‘EU Migration to and from the UK’.
migrants compare the ‘packages’ on offer in the US, Canada, the EU, and elsewhere, before deciding which country to favour.

17. If a system of UK immigration control is to replace the free movement system as regards economic migration from EU member states, the UK Immigration Rules will need to be redesigned and the administrative resources for immigration control massively expanded, resulting in increased red tape and costs accordingly.

18. If the primary goal of Government is to reduce - in absolute terms - the numbers of persons migrating to the UK, with the UK’s economic and social needs subordinated to that goal, this will impact upon the design of this system. As regards the needs of the UK economy, such an outcome risks impairing what works well at present, imposing a sub-optimal system that ill-fits the society it seeks to serve.

Three key matters

19. Three key matters ought to be borne in mind:

(i) A consolidated scheme of immigration control, providing for a system of work permits, would be dependent on efforts to identify labour market shortages on a sector-by-sector basis; it would also require applicants to obtain prior authorisation before beginning to work;

(ii) At present EU citizens exercising rights of free movement are well suited to filling jobs that require the short-term supply of services. EU citizens are able to travel quickly and cheaply to and from the UK as required, and

(iii) There is no fixed number of jobs in the UK economy (to hold that there is a fixed number is the ‘lump of labour’ fallacy).

20. A work permit system cannot easily match the way in which the present free movement system allows EU citizens to circulate in and out of the UK, remaining where successful, and returning home in fallow periods. It cannot easily match the way it fills gaps in the labour market, facilitates the supply of services, and stimulates entrepreneurial activity.

Recommendations: A possible intermediate solution?

21. An intermediate position, which is less restrictive than a work permit/prior authorisation system but which is more restrictive than the current system of free movement, deserves consideration. Consideration might be given to the following:
(i) The right of admission to the UK for EU citizens, without the requirement to obtain a visa or to seek permission to enter,

(ii) The ability to seek work without restriction,

(iii) Free movement for the self-employed and those looking to establish businesses (their migration has not been the subject of controversy),

(iv) Free movement for students and the self-sufficient (their migration has not been the subject of controversy), and

(v) Any system of immigration control of employment to be limited to a requirement to register employment, once it has been obtained (similar to the registration scheme introduced in the UK for those EU citizens from the Eastern European countries that joined the EU in 2004).

22. Such a workers’ ‘registration scheme’ has the following advantages:

(i) It would allow optimum labour market flexibility, while allowing the Government to monitor the numbers of EU citizens coming to the UK to work and for which jobs,

(ii) As a scheme of economic migration, it would be a choice of the UK Government in the exercise of sovereignty,

(iii) It would provide data as to the parts of the economy that benefit from economic migration,

(iv) It would avoid the cumbersome, rigid approach of a work permit scheme requiring prior authorisation before a job offer was accepted,

(v) The domestic labour force would be protected by the continuing security afforded by UK employment law and, further, by the ability to determine at UK level the terms on which EU citizen workers were to be given access to contributory social security schemes and other forms of social assistance, and

(vi) It would permit the Government, where necessary, to use its own criteria, to refuse admission or to effect expulsion/deportation.

Conclusion

23. We believe that a possible intermediate solution (as suggested by paragraphs 21-22 above), would be of manifest advantage to the UK, in retaining a model of economic migration that allows for flexible service
provision, entrepreneurial activity, and business innovation. It makes no sense to damage what works well at present in furtherance of other objectives when those objectives may be accommodated in a UK-controlled system that serves the UK economy.

Brexit Working Group

February 2017
INSOLVENCY AND RESTRUCTURING

Summary

In general terms, the existing EU legislation governing insolvency and restructuring works well, and the amendments reflected in the upcoming Recast EUIR (Regulation No 1346/2000) have been broadly welcomed by practitioners as sensible improvements.

The UK is undoubtedly seen as a centre of excellence in this field and this can be maintained with some effort, provided that there is sufficient clarity at an early stage as to what the legal consequences of Brexit will be.

As in civil and commercial matters, and perhaps even more so in the context of insolvency and restructuring, it is generally accepted that it is essential to have a clear and consistent basis for the allocation of jurisdiction in insolvency proceedings, and the recognition and enforcement of orders made in those proceedings.

- We urge the Government to consider that there is increasing national competition in this field. Singapore is aggressively promoting its legal system in international restructuring and insolvency cases. In addition, certain EU member states (for example, the Netherlands) have adopted, or are in the process of adopting, restructuring regimes analogous to schemes of arrangement which may be an attractive alternative for businesses with a significant presence within the EU.

- We therefore urge the Government to seek a successor regime which keeps these advantages.
1. This note sets out the potential consequences of Brexit in the field of restructuring and insolvency law. It forms a part of a larger project being undertaken by the Bar Council intended to consider the effect of Brexit on civil justice, criminal justice and legal services. It should be read in conjunction with the papers which consider the effect of Brexit on (a) jurisdiction, and the recognition and enforcement of judgments, in civil and commercial matters\(^3\), (b) the authorisation and regulation of banks and other financial institutions, if any, and (c) the authorisation and regulation of the insurance sector if any.

2. At present, the principal pieces of EU legislation which govern insolvency and restructuring generally (both corporate and individual) are the Council Regulation (EC) No 1346/2000 on Insolvency Proceedings (“the EUIR”) and Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“the Recast Brussels Regulation”).

2.1. The EUIR determines which member state has jurisdiction to open insolvency proceedings, provides for the proper law to be applied in those proceedings and provides for EU-wide recognition and enforcement of orders made in those proceedings, with only a limited basis for refusal of recognition. So far as main proceedings are concerned, it uses the “centre of main interests” (“COMI”) test for jurisdiction. COMI is a concept which has generated controversy, in particular where COMI-shifting is employed to enable a debtor to take advantage of a more debtor-friendly jurisdiction. It nevertheless appears to be accepted as a sound basis for the allocation of jurisdiction, and for the purposes of recognition and enforcement, and it was subsequently adopted as the basis for recognition of main proceedings under the UNCITRAL Model Law, which is dealt with below.

2.2. The EUIR applies only to many but not all types of insolvency proceedings (those identified in its annex) and, further, applies only to proceedings which are particularly “insolvency” in nature. A notable exception from the ambit of the EUIR are schemes of arrangement under the Companies Act 2006 (“the 2006 Act”). Complex cross-border schemes, including in respect of foreign companies, have been a notable feature of the UK legal market over a number of years. Although there remains a degree of uncertainty, the current view is that schemes fall within the Recast Brussels Regulation. So also do proceedings which, although taking place in an insolvency context, are not necessarily “insolvency” in nature; for example, proceedings against a director for breach of duty. These too fall within the Recast Brussels Regulation.

\(^3\) See the Bar Council’s paper on this subject dated 11 November 2016.
In relation to the EUIR, two further points should be noted:

3.1. The EUIR is shortly to be replaced by Regulation No. 2015/848 (“the Recast EUIR”), which will come into force on 26th June 2017. This followed the 10-year review of the application of the EUIR, which the EUIR itself required. It has made certain amendments to the EUIR, in particular in relation to the COMI test, the scope of proceedings capable of falling within the EUIR, and better coordination between main and secondary proceedings, as well as in the context of group insolvencies.

3.2. Neither the EUIR nor the Recast EUIR attempt to harmonise the substantive insolvency law applicable to insolvency proceedings falling within the EUIR. However, on 22nd November 2016 (and following the EC’s recommendation of 12th March 2014 and as part of the Capital Markets Union action plan of September 2015) the EC published its Proposal for a Directive on Insolvency, Restructuring and Second Chance. The focus of the proposal is very much on restructuring and rehabilitation, and current UK law is essentially consistent with much of its content (note also that the Insolvency Service is conducting a consultation, based on its consultation paper “A Review of the Corporate Insolvency Framework” published on 25th May 2016, which covers some of the same ground as the proposal). Nevertheless, the proposal represents a significant change of EU legislative intent in this area.

4. In general terms, the EUIR seems to have worked reasonably well, and the amendments reflected in the Recast EUIR were (I think) broadly welcomed as sensible improvements. As in civil and commercial matters, and perhaps even more so in the context of insolvency and restructuring, it is generally accepted that it is essential to have a clear and consistent basis for the allocation of jurisdiction in insolvency proceedings, and the recognition and enforcement of orders made in those proceedings.

5. In addition to the general EU legislation referred to above, there is “sector specific” EU legislation dealing with the insolvency and restructuring of particular types of businesses which are excluded from the scope of the EUIR, and which are subject to wider legislative regimes; namely, insurance businesses, and banking and other financial institutions.

6. Provision for jurisdiction and enforcement is made by the Insurers Winding Up Directive and the Credit Institutions Winding Up Directive (“the CIWUD”), which have been transposed into UK law by the Insurers (Reorganisation and Winding Up) Regulations 2004 and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004. In summary, reorganisation and winding up measures proceed only in the “home member state” (the state with responsibility for authorising the conduct of business by the relevant entity), there can be no secondary proceedings, and the proceedings are automatically recognised and given
effect throughout the EU (in other words, there is no need for separate recognition and enforcement proceedings).

7. Further, and in relation to the financial sector and banking and other financial institutions, there has been an increasing trend towards harmonisation of substantive law, historically to prevent systemic risk and more recently as a response to the 2008 financial crisis.

7.1. So far as systemic risk is concerned, there is:

7.1.1. The Settlement Finality Directive, which was transposed into UK law by the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 and which inter alia protects transfer orders entered on designated payment and settlement systems from specified provisions of insolvency law; transaction avoidance provisions

7.1.2. The Financial Collateral Directive, which was transposed into UK law by the Financial Collateral Arrangements (No 2) Regulations 2003 and which inter alia exempts security falling within scope from effects which would otherwise follow; for example, stays on enforcement.

7.2. The EU response to the 2008 financial crisis (or one of them) is the Resolution and Recovery Directive (“the BRRD”), which provides for a minimum degree of harmonisation of the laws of EU members states and a common approach to the recovery and resolution of banks and investment firms falling within its scope. It sits alongside the jurisdictional and recognition provisions of the CIWUD. The BRRD was transposed into UK law inter alia by way of amendments to the Banking Act 2009 and the Financial Markets and Services Act 2000.

7.3. It is difficult to form a view about the operation of these “sector specific” provisions. It is probably fair to say that the resolution of the affairs of at least some financial institutions, and therefore the operation of the CIWUD, both before and after the coming into force of the BRRD, has been controversial. However, this is perhaps inevitable, or at least not unlikely, in an area where a single business can be so critical to the stability of an economy, and where the resolution or reorganisation of its affairs is or can be a highly political endeavour (particularly where it consists of or includes the exercise of bail-in powers).

8. The potential impact of Brexit will be obvious from the brief summary of the existing position set out above.
8.1. The basis upon which the UK courts can or should assume jurisdiction in respect of the restructuring, management and winding up of the affairs of insolvent or financially distressed debtors will become uncertain and will require to be developed. Where a debtor's affairs are conducted in the UK and in EU member states, there is at least a risk of a clash of jurisdictions, which is undesirable.

8.2. Recognition, and the enforcement of orders and judgments made and given in, foreign insolvency proceedings will no longer be automatic where those proceedings are being conducted in an EU member state. The giving or recognition and assistance will be governed instead by

8.2.1. The common law doctrine of modified universalism which allows for recognition and assistance, but not the enforcement of orders and judgments: *Rubin v Eurofinance SA* [2012] UKSC 46; *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36;

8.2.2. Section 426 of the Insolvency Act 1986, which gives a statutory power to assist upon request for assistance by courts of designated jurisdictions, which are for the most part Commonwealth jurisdiction, but including one EU member state - the Republic of Ireland;

8.2.3. The Cross-Border Insolvency Regulations 2006 (“the CBIRs”), which enact into UK law the Model Law adopted by UNCITRAL in 1997. The CBIRs provide for recognition and the giving of assistance, but not the enforcement of orders and judgment (although UNCITRAL is currently considering the extension of the Model Law to cover enforcement); and

8.2.4. Probably, so far as enforcement is concerned, and in the absence of any other treaty or convention, the common law principles governing the enforcement of the orders of foreign courts.

8.3. In general terms, so far as UK restructuring and insolvency proceedings are concerned (including schemes of arrangement under the 2006 Act), recognition, assistance and enforcement in the EU will depend upon the domestic private international law principles applied by the courts of the relevant EU member state. In this context, it should be noted that only four EU member states (Greece, Poland, Slovakia and Slovenia) have incorporated the UNCITRAL Model Law into their domestic law. There will be, therefore, a considerable degree of uncertainty as to the extent to which UK insolvency proceedings, and orders made by UK courts, will be recognised and enforced in EU member states.
8.4. Where EU legislation provides for or contemplates “third state” or “third country” recognition (as does, for example, the Recast Brussels Regulation and the BRRD), then these provisions will take the place of the existing regime. However, recognition and enforcement is obviously less certain in the case of third country recognition.

9. It is difficult to assess with certainty what impact Brexit will have on the legal market for the provision of services in this field. The UK is undoubtedly seen as a centre of excellence in this field and, anecdotally, at least some hold the view that this can be maintained with some effort, provided that there is sufficient clarity at a sufficiently early stage as to what the legal consequences of Brexit will be. However, there is increasing national competition in this field; Singapore is aggressively promoting its legal system in international restructuring and insolvency cases, and certain EU member states (for example, the Netherlands) have adopted, or are in the process of adopting, restructuring regimes analogous to schemes of arrangement which may be an attractive alternative for businesses with a significant presence within the EU.

10. Apart from the points dealt with above, Brexit will create a very substantial task of legislative drafting and amendment. This is obvious and common across the legal sector, and so is not dealt with further.

**Requests:** Any post-Brexit arrangement with the EU should, at the very least:

1. Ensure that, as part of the agreement between the UK and the EU governing the UK’s departure from the EU, provision be made for the continuing application of the EUIR (or at least as many provisions thereof) after Brexit.

2. In any event, and particularly if no such agreement is possible, it will be crucial to ensure that clear transitional provisions are put in place to cater for UK insolvencies which commenced before Brexit but which will be concluded after Brexit.

Chancery Bar Association
November 2016
EMPLOYMENT LAW

Summary

The UK has played a central role in bringing about law reform at an EU level in the area of equality and employment rights. Currently, principles of CJEU jurisprudence prevent individual EU member states from overriding these rights with their own laws; protection which will fall away for UK workers in the event of a Brexit, and which the WTO rules will not replace. This is particularly the case for rights arising from UK secondary legislation, and in CJEU case law.

The effect of this for individual rights is set out in the table contained within this paper. Specifically, compensation for discrimination, maternity and pregnancy rights, working time and holiday pay, and agency workers’ rights are areas of particular risk.

- We therefore urge the Government to guarantee employment and equality rights in any bilateral treaty with the EU.
- Post-Brexit, the acquis (body of EU law) must be given an enhanced status in the interpretation of UK employment law. Particular regard should be given to the acquis in the context of: compensation for discrimination, maternity and pregnancy rights, and working time.
- Finally, we urge the Government to retain existing domestic legislation which relates to agency workers.
EMPLOYMENT LAW

Current position: How are EU workers’ rights guaranteed at present?

1. Employment and equality rights in the UK which derive from EU law are currently protected by the ECA 1972, while principles of CJEU case law stop conflicting national law trumping such rights. Once the ECA 1972 itself is repealed, Parliament will be able to remove or legislate contrary to working and equality rights which are currently guaranteed by EU Treaties, directives and regulations and which comprise a minimum ‘floor’ under which the UK cannot sink.34

How could workers’ rights be guaranteed outside the EU/EEA?

EFTA or a bespoke Bilateral Agreement

2. If the UK is neither a member of the EEA nor the EU, it will be under no obligation to adhere to EU law on employment (or any other) matters a priori. The UK may opt for a “Swiss” model: European Free Trade Association (EFTA) membership without EEA membership, or a new agreement model with the EU. The UK may decide to enter into bilateral agreements which incorporate an obligation to give effect to EU social law, including EU employment and equality rights. It is worth noting that a trade deal under World Trade Organisation rules will not guarantee employment rights whatsoever as WTO rules are silent on social rights.

Through domestic legislation: The Great Repeal Bill (the “Bill”)

3. The aim of the Bill is to repeal the 1972 EU Communities Act and to incorporate existing EU law (the “acquis”) into domestic law. The acquis has been important in the development of key concepts concerning equality and workers’ rights in English Law.

How could rights presently guaranteed by EU Law be changed post Brexit?

Primary Legislation

34 This long established constitutional principle was nonetheless encapsulated in s 18 European Union Act 2011: “Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.”
4. Rights bestowed by primary legislation, such as prohibitions on discrimination provided by the Equality Act 2010 and rights protecting employees and workers under the Employment Rights Act 1996, will not require modification by new Acts of Parliament since such already form part of English Law.

Secondary Legislation

5. Secondary legislation made under Acts other than the ECA (such as the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 made under the Employment Rights Act 1999) can be changed by other secondary legislation. Secondary legislation made under the ECA 1972 will cease to have effect when the ECA is repealed, unless such secondary legislation is ‘saved’ by provisions in primary legislation or by provisions in the Bill.

CJEU Case Law

6. Pre-Brexit: Up to the point of Brexit, pre-Brexit employment rights will continue to be interpreted by the courts in light of the acquis by virtue of the Bill.

7. Post-Brexit: There is no certainty that the acquis will be afforded a particularly protected status with regard to the interpretation of UK employment law. This may impact on the development of UK law particularly in relation to the protection of workers’ rights and in the context of equality law.

8. The table below exemplifies the effect that removing the current status of CJEU judgments may have on some aspects of UK employment law:

<table>
<thead>
<tr>
<th>Case</th>
<th>Act</th>
<th>Effect of removal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stringer v HMRC C-520/06</td>
<td>Working Time Regulations 1998</td>
<td>Right for annual pay to accrue during sick leave may no longer apply.</td>
</tr>
<tr>
<td>Marshalls Clay v Coulfield C-131/04</td>
<td>Working Time Regulations 1998</td>
<td>Employers could designate part of the pay that a worker receives for work already done as holiday pay.</td>
</tr>
<tr>
<td>Case</td>
<td>Source</td>
<td>Summary</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Williams v British Airways C-155/10</strong></td>
<td>Working Time Regulations 1998</td>
<td>Employers may only be required to provide workers with their basic pay for the purposes of holiday pay.</td>
</tr>
<tr>
<td><strong>Dekker C-177/88</strong></td>
<td>Equality Act 2010</td>
<td>Discrimination on grounds of pregnancy may not also be on grounds of sex.</td>
</tr>
<tr>
<td><strong>Tele Danmark A/S v Handels C-109/00</strong></td>
<td>Equality Act 2010</td>
<td>Employers may not have to assume the risk of the economic and organisational consequences of the pregnancy of employees.</td>
</tr>
<tr>
<td><strong>Chez Razpredelenie Bulgaria C-83/14</strong></td>
<td>Equality Act 2010</td>
<td>The concept of direct discrimination by association may be narrowed again and may not apply to claims of indirect discrimination as well as those of direct discrimination.</td>
</tr>
<tr>
<td><strong>Webb v EMO C-32/93</strong></td>
<td>Equality Act 2010</td>
<td>It may be permissible to compare the situation of a woman who finds herself incapable, by reason of pregnancy, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons.</td>
</tr>
<tr>
<td><strong>Enderby Frenchay HA C-127/92</strong></td>
<td>Equal Pay Act 1970</td>
<td>Where statistics show an appreciable difference in pay between men and women between jobs of equal value, the burden may no longer pass to the employer to objectively justify the disparity.</td>
</tr>
</tbody>
</table>

**Employment rights susceptible to change post Brexit**

**Compensation for discrimination**

9. The principle, derived from EU law, that financial compensation must be adequate in order to achieve equality (set out in *Marshall No (2)*)\(^{35}\) means that, at present, compensation is potentially unlimited. However, this principle may be vulnerable post-Brexit and the limit on compensation for discrimination may be capped.

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Maternity and Pregnancy Rights

10. EU law has developed important principles in this area such as the importance of substantive equality between men and women and the protection of the special relationship between mother and child. These principles may be vulnerable to erosion post-Brexit.

Working Time

11. The common law provides very little to workers with respect to working time and holiday pay. If ECJ decisions are no longer binding post-Brexit, workers will be left with weak protection. For instance, Claimants will no longer be able to rely on the principles set out by the CJEU in Williams v British Airways PLC, followed in Bear Scotland v Fulton, that calculations of holiday pay must include particular types of overtime in the definition of “normal pay”.

12. UK employees could also lose the EU-derived ability to take annual leave accrued during sick leave and maternity leave outside those periods: see Merino Gomez v Continental Industrias del Caucho SA (C342/01) [2004] E.C.R. I-2605 and Stringer v Revenue and Customs Commissioners (C-520/06) [2009] All E.R. (EC) 906.

Agency Workers’ Rights


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36 (C-155/10) [2012] ICR 847
37 [2015] ICR 221
Recommendations

Any post-Brexit arrangement with the EU should, at the very least:

(1) Guarantee employment and equality rights in any bilateral treaty with the EU;

(2) Give the post-Brexit acquis an enhanced status in the interpretation of UK employment law;

(3) Have particular regard to the pre and post-Brexit acquis in the context of: compensation for discrimination, maternity and pregnancy rights, and working time; and

(4) Retain domestic legislation regarding agency workers.

Employment Law Bar Association

February 2017
Paper Ten

Consumer Law

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

Summary

The laws governing relations between consumers and businesses are of vital importance to the future success of the UK. Consumers will be much more likely to purchase goods and services, whether domestically or across borders, if they can be confident that their rights and ability to enforce those rights remain the same. Likewise, businesses are likely to benefit from the continuation of a legal and regulatory regime with which they have become familiar; if they are to be expected to come to terms with a new legal order they will require legal certainty.

The influence of EU law and CJEU jurisprudence on UK consumer law is so all-pervading that even maintaining the status quo will require considerable work. There will be difficulty in achieving the Government’s twin aims set out in the White Paper of preserving EU law, and of bringing an end to the jurisdiction of the CJEU in the UK; at least if the latter is intended to truly separate the development of UK consumer law from the jurisprudence of that Court. EU law is a moving target, both because legislative changes to consumer law are still work in progress in some areas and because of developing CJEU jurisprudence. Divergence between EU and national law is likely to occur unless some mechanism is devised to prevent this.

- We therefore urge the Government to clarify its intentions as to the route to be followed in relation to EU consumer law, both as to issues of interpretation of existing law and as to intentions for the future, by reference to developments of the existing law within the EU and in relation to EU laws which are currently in the process of negotiation or which await implementation.

- We urge the Government to give detailed consideration to the manner in which EU consumer law is to be adopted under the Great Repeal Bill. Some of the measures likely to be necessary will in addition have to be agreed at the level of future (including transitional) UK/EU arrangements – particularly where reciprocity is required.
THE IMPACT OF BREXIT ON CONSUMER LAW

Consumer Contracts

1. Contracts for the sale or supply of goods, services and digital content are governed by the Consumer Rights Act 2015. This implements some EU provisions, such as Council Directive 93/13/EEC on unfair terms in consumer contracts, and also contains some purely domestic provisions. The interrelationship of domestic remedies for breach of sale of goods contracts with European remedies has been the subject of a number of legislative changes, with further EU legislation proposed.

2. The key test of unfairness in relation to terms in consumer contracts has recently been interpreted by the Supreme Court following a decision of the CJEU. The CJEU has had a crucial role in the development of the law in this area, and is likely to continue to do so. The Government will therefore need to decide whether and to what extent past and/or future CJEU decisions are to have effect in relation to this area.

Unfair commercial practices

3. The Consumer Protection from Unfair Trading Regulations 2008 implement the Unfair Commercial Practices Directive (Directive 2005/29/EC). The Regulations are the key enforcement mechanism relating to the manner in which goods and services are sold to consumers. They prevent consumers from falling prey to misleading and/or aggressive practices by providing for criminal offences relating to misleading actions, misleading omissions, aggressive commercial practices and actions which are contrary to the standards of professional diligence. In each case offending behaviour attracts criminal liability and/or civil liability under the enforcement provisions of the Enterprise Act 2002.

4. Again, the decisions of the CJEU have been fundamental in developing understanding of the key concepts underlying the Directive and therefore also the Regulations. For example, the concept of a “transactional decision” is central: if a trader’s actions would not have influenced a consumer’s transactional decision there is no liability. However, the interpretation given to that phrase by the High Court was markedly different to the approach taken subsequently by the CJEU. These cases show that there is clear potential for significant divergence in the future.

38 Beavis v Parkingeye Ltd [2015] UKSC 67; Case C-415/11 Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa.


40 Office of Fair Trading v Purely Creative [2011] EWHC 106 (Ch); and Case C-281/12 Trento Sviluppo.
Consumer finance

5. The UK has a complex and sophisticated system of regulation of consumer lending, much of which pre-dates European legislation. The provisions of the Consumer Credit Act 1974 have been affected by the Consumer Credit Directive (Directive 2008/48/EC) in a number of ways, and in some ways the Directive has provided for a system which is simpler than its UK predecessor – for example the requirements of the Consumer Credit (Agreements) Regulations 2010 (which reflect the requirements of the Directive) are much less prescriptive than the 1983 Regulations which they have (partially) replaced. A European standard method for calculation of the APR is likely to continue to be considered a good idea.

6. The biggest single issue for businesses in this area is likely, however, to be the authorisation regime. Consumer lenders are currently able to take advantage of the “passporting” system where they wish to trade in another Member State, thus avoiding the need to satisfy many different regulatory requirements. The continued operation of a system of this nature will be very important.

Cross-border enforcement

7. The Consumer Protection Cooperation Regulation (Regulation 2006/2004) currently provides a mechanism whereby enforcement bodies in each Member State can take action against breaches of consumer law by a trader in another Member State. Although this rarely takes the form of court proceedings, there are numerous instances where UK regulatory bodies take action on behalf of regulatory bodies in other Member States and vice versa. There are plans for reform of this mechanism within the EU. The Government should in our view give serious consideration to retaining this important form of protection, or to negotiating a similar scheme of cooperation post-Brexit.

Holidays and Travel

8. The peculiarities of the relationship between UK and EU law, and the difficulties of providing for an orderly maintenance of the status quo, are well demonstrated in the context of compensation for delays and cancellation to flights. Regulation 261/2004 gives passengers certain rights in the context of denied boarding and of cancellation or long delay of flights. On its face, the Regulation only provides for monetary compensation in the event of denied boarding or cancellation. However, the CJEU has ruled that this right to monetary compensation also extends to cases of delay. The UK Courts have followed the CJEU’s approach and these decisions are also followed routinely by UK ADR bodies which decide cases in this area.

41 Cases C-402 and 432/07 Sturgeon v Condor Flugdienst; Cases C-581 and 629/10 Nelson v Deutsche Lufthansa.
9. If it is intended that the Regulation, as interpreted by the CJEU, is to continue to have effect for UK airlines, thought will need to be given, among other matters, to: (1) whether UK airlines are to be “EU carriers” within the Regulation and, if not, how that is to be avoided, given that they will presumably still fly to EU destinations; and (2) how the UK is to be designated within that Regulation, i.e. whether UK airports are to be treated as an equivalent to “an airport located in the territory of a Member State” for the purposes of take-off and landing. The EU will need by some mechanism to agree with this designation. Failure to engage with the Regulation might well encourage passengers to choose other European airlines.

10. Another relevant Directive is the Package Travel Directive, which with effect from 1 July 2018 will be repealed and replaced by Directive 2015/2302 on package travel and linked travel arrangements, which extends passenger rights to arrangements where the traveller selects travel service components and purchases them from a single business, and to linked travel arrangements where a traveller who has booked one travel service online (e.g. a flight) is invited to book another travel service (car, hotel etc.) through a targeted link, and the second booking is made within 24 hours. Travel agencies and tour operators already have to have an eye to holidays which may be offered to customers in 2018 and their liabilities need to be understood.

11. It may be sensible for the Government to consider the future of these regimes, so far as they concern air passengers, in tandem with other issues of interest to the aviation community such as airspace access and the European aviation safety regime.

Other pending reforms

12. European consumer law is subject to frequent change. At present the Commission is engaged in a number of major projects, concerning the digital single market, online sale of goods and a review of consumer law as part of the Commission’s Regulatory Fitness and Performance Programme (REFIT). It is likely that at least some of these projects will produce new Directives which alter the current law. We consider it almost inevitable that the digital single market proposals will also create new European provisions which are likely to diverge from the position adopted by the UK in relation to digital content.

13. The extent to which the Government proposes to follow and implement any such proposals in the short to medium term is a matter which will be of considerable interest to businesses which trade across borders.

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Conclusion and recommendations

- We urge the Government to clarify its intentions as to the route to be followed in relation to EU consumer law. The examples in this paper raise questions of interpretation of existing law and development of the existing law within the EU and new EU laws that are currently in the process of negotiation or which have been adopted but await implementation.

- We urge the Government to give detailed consideration to the manner in which EU consumer law is to be adopted under the Great Repeal Bill. Some of the measures likely to be necessary will in addition have to be agreed at the level of future (including transitional) UK/EU arrangements – particularly where reciprocity is required.

Law Reform Committee/Brexit Working Group

February 2017

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43 This paper is an edited version of a document prepared for the Working Group by the LRC. The full document can be made available on request.
Paper Eleven

Traffic Accidents

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

Summary

Currently, EU citizens are able to pursue claims for personal injury in their home member state where the injury has occurred in another. Any claim an injured Claimant makes in relation to a foreign accident is at present governed by the applicable choice of law rules in the Rome II Regulation 864/2007, with the effect that a judgment in one EU member state can be enforced in another.

The UK is consequently relieved of £100s of millions of expenditure on treatment costs, social care and benefits, and the victim is able to bring in the UK the claim which s/he would be entitled to bring in the EU State, but without the complication and expense of bringing a claim using a foreign lawyer, using a different language, in the Courts of a foreign country. Without this simplified process, many UK victims of road accidents abroad are likely to reject the complex process of running a compensation claim in a foreign country from the UK. The result would be injustice to such victims and very considerable expense to UK public funds. A UK Great Repeal Bill will also not provide for the enforcement of UK judgments in EU member states.

- We therefore urge the Government to guarantee enforcement of UK judgments within the EU through the Lugano Convention (or a new updated convention).

- We also urge the Government to translate the provisions of the Sixth Motor Insurance Directive and the Rome II Regulation into domestic law.

- Finally, we urge the Government to construct a legally binding instrument containing the system of inter-bureaux guarantees and cooperation between the Motor Insurers Bureau, acting in its capacity as the Guarantee Fund in respect of Uninsured Drivers and Untraced Vehicles and Compensation Body on the one hand, and the Guarantee Funds and Compensation Bodies of the EU Member States on the other.
TRAFFIC ACCIDENTS

Present System of Protection

1. EU law provides for a detailed system of protection of the injured victim as the weaker party where that person has suffered personal injury caused by a vehicle. Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability operates in conjunction with the Brussels Regulation Recast 1215/2012 to permit injured Victims to make claims in their home jurisdiction in relation to accidents that occurred abroad.

2. Underpinning the Directive is a sophisticated settlement process involving the reciprocal enforcement of rights and responsibilities of those bodies tasked with compensating victims who have suffered injury as a result of the actions of an uninsured driver or an unidentified vehicle. The protection provided by Directive 2009/103/EC (the Sixth Motor Insurance Directive) includes:

(a) Mandatory provision of insurance against civil liability

(b) Abolition of checks on green cards for vehicles normally based in a Member State

(c) Minimum harmonisation of the conditions of insurance, including minimum levels of cover and the extent to which exclusions can apply

(d) Establishment of guarantee bodies for uninsured and unidentified drivers

(e) Establishment of a direct right of action against insurers

(f) Establishment of an offer and settlement procedure to be carried out in the home country of the injured Victim

(g) Establishment of a system of claims representatives of insurers in the home country with authority to handle claims of Victims injured abroad

(h) Establishment of information centres to provide information on the identity of the relevant insurer

(i) Establishment of Compensation Bodies in the State of the Claimant in relation to claims involving uninsured or untraced vehicles and where claims representatives have not timeously responded to a claim made by an injured Victim
Beneficial Settlement Process

3. UK resident claimants involved in an accident in another EU State may make a claim in the UK. A foreign insurer must appoint a claims representative to handle such a claim including the making of offers to settle such a claim. Where claims do not settle, a Claimant may sue the foreign insurer by way of direct right of action under the Brussels Regulation Recast in the Courts of the place where the Claimant is domiciled. In effect the whole process of claims handling, settlement and/or litigation is imported into the State of domicile of the Claimant.

4. In addition, where the claim is in respect of an uninsured or untraced driver, the entitlement of the injured Claimant to bring a claim against the Compensation Body of the State where the Claimant is resident provides similar safety-net protection in the Claimant’s home State.

5. As a result, the UK benefits from the guaranteed provision of compensation by foreign motor insurers, thus relieving the UK State of £100s of millions of expenditure on treatment costs, social care and benefits.

6. Insurers and motorists benefit from the requirement that all motor policies must cover liabilities incurred in the EU. Insurers are relieved of the administrative burden of writing additional cover for foreign vehicle use, and the millions of UK citizens who drive abroad do not have to obtain separate cover in order to do so.

7. Unlike commercial claims involving contracting parties who are free to choose the law and the courts which apply to any commercial bargain, victims of torts, as the weaker party, are not in a position beforehand to choose where litigation may take place. Therefore, the extra protection provided by the Brussels Regulation Recast (Articles 11 and 13) in conjunction with the settlement systems prescribed by Directive 2009/103 allows injured Claimants a significant and important degree of protection.

8. In summary, the victim is able to bring in the UK the claim which s/he would be entitled to bring in the EU State, but without the complication and expense of bringing a claim using a foreign lawyer, using a different language, in the Courts of a foreign country.

9. Without the existence of that easy process, many UK victims of road accidents abroad are likely to reject the complex, lengthy and expensive process of running a compensation claim in a foreign country from the UK, go uncompensated, and then look to the NHS/Local Authorities/DWP to meet their sometimes very substantial needs. That would bring injustice to such victims and very considerable expense to UK public funds.
Security of Judgments and Financial Benefits

10. Any claim an injured Claimant makes in relation to a foreign accident are currently governed by the applicable choice of law rules to be found in the Rome II Regulation 864/2007 (normally the law of the place of the accident). Such law applies to the quantification and assessment of loss. Therefore, claims against foreign insurers normally apply foreign law to the calculation of future loss, including the important question as to whether future loss is compensable by reference to a lump-sum award of compensation or an award of compensation payable by reference to periodical payments or annuities.

11. Such a compensation system can only provide adequate security to an injured Claimant should there be an adequate system for the enforcement of judgments, including awards of costs against a foreign domiciled insurer.

12. If there is a legislative lacuna post-Brexit in relation to the establishment of adequate procedures for jurisdiction and the recognition of judgments, injured Claimants are likely to suffer a detriment by (i) not pursuing cases they would (and should) be compensated for; (ii) incurring extra costs by issuing protective proceedings pre-Brexit in more than one Member State to protect against the need for enforcement post-Brexit; and/or (iii) issuing proceedings in a Court of second choice in the EU with any or several of the following disadvantages: delay, inconvenience of language, a less favourable costs regime and/or funding regime, and an unfamiliar choice of legal representation as compared with the prevailing position in relation to proceedings in the home jurisdiction of first choice.

13. The lack of certainty as to enforcement will not only affect future claims, but may also impact settlements now in relation to the risk as to the future enforceability of orders or settlement agreements in respect of the payment of future losses and costs. This will have a particular impact on those injured Victims who have suffered Catastrophic Injury whose continuing care needs make them most at risk (and who would need State support in any event were adequate compensation not available).

Treatment as a Third State

14. The free movement of persons (and vehicles) is particularly pertinent should there be no hard border between the Republic of Ireland and Northern Ireland, post-Brexit.

15. Under Directive 2009/103/EC there is provision for ensuring that all Third State vehicles which enter the territory of the EU shall have insurance which meets with the requirements of EU law (see Article 7). Therefore, all UK registered vehicles which enter the EU post-Brexit will in any event need to comply with
European requirements and UK insurers will be subject to the jurisdictional rules under the Brussels Regulation Recast when foreign Claimants make claims against them in relation to accidents in the EU.

16. When the UK leaves the EU, a decision will have to be taken as to whether the Rome II Regulation is to be transposed into domestic law. If it is not, and the antecedent rule in Harding v Wealands is revived, such a position would put the UK at odds with our former partners in relation to how loss is quantified which is now considered as a substantive issue part of the proper law.

Conclusions and recommendations

17. Whilst the assimilation of relevant EU law into UK law via a Repeal Bill can clearly replicate the obligations to which UK citizens and insurance companies are subject, that process cannot of itself preserve the system of mutual obligations between EU Member States and the UK that facilitates claims to be brought, and judgments enforced, in relation to foreign accidents. In particular:

(a) A UK Repeal Bill cannot oblige insurers domiciled in EU states to maintain an accessible presence in the UK to which UK road accident victims can look for compensation;

(b) Nor can it oblige the MIB equivalents of EU states to co-operate with the MIB in the process of insurer identification, claims handling or claims settlement;

(c) A UK Repeal Bill cannot make UK judgments enforceable in EU member states once the UK is outside the scope of the Brussels II Regulation.

18. In order to preserve the substantial benefit to the UK public funds, and its citizens who are the victims of road accidents abroad, the following steps are recommended:

(a) The enforceability of UK judgments within the EU is guaranteed by accession to the 2007 Lugano Convention (or a new updated convention). This step is likely to be widely sought in the commercial world in any event as a key feature of any continuing and future trading relationship with the EU;

(b) The provisions of the Sixth Motor Insurance Directive and the Rome II Regulation be translated into domestic law;

(c) The system of inter-bureaux guarantees and cooperation between the Motor Insurers Bureau, acting in its capacity as the Guarantee Fund in respect of Uninsured Drivers and Untraced Vehicles and Compensation Body on the one hand, and the Guarantee Funds and Compensation Bodies of the
EU Member States on the other, be contained in a legally binding instrument (whether between the Funds/Compensation Bodies inter se, or by way of binding International Agreement).

Personal Injuries Bar Association

February 2017
Market Regulation

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

The UK is a highly attractive place for R&D and the creative industries, in which intellectual property plays a key part, but it may not remain so if it is not central to European activities.

The intellectual property bar is very active and the excellence of the courts is widely appreciated, making a significant positive contribution to our success in this field.

However, given the large degree of EU harmonisation of laws in this field, the consequences of Brexit could be particularly severe.

Particular dangers exist where rights are directly granted under EU law which are effective in the UK (such as EU registered trade marks and designs). The impact of ceasing to be a member of the EU would be that the rights in question would cease to exist in the UK (unless otherwise provided for).

To counteract this, UK Intellectual Property Office is considering whether to provide for equivalent rights under English law or, at least a set of transitional measures to ensure that existing rights owners do not face a gap in protection.

- We urge the Government to ensure that the UK remains more efficient and quicker as a litigation forum than other EU countries and EU courts. If the Unified Patent Court goes ahead, which the Government very recently said it will participate in, the UK should be fully able to participate in it post-Brexit.
INTELLECTUAL PROPERTY

Intellectual property cases involving barristers in England and Wales

1. Intellectual property disputes in the English courts mainly concern the following areas, although some cases cover overlapping areas:

a. **Patents.** These tend to be high value (>£10 million) disputes which are currently heard in the High Court, Patents Court, predominantly between international litigants fought over multimillion pound markets and some smaller cases <£500,000 value fought before the Intellectual Property Enterprise Court (IPEC). Barristers are heavily involved in both kinds of case. Although patent law is mainly derived from the EPC, not from EU law, significant areas of patents have been harmonised by EU law including the important area of Supplementary Protection Certificates and the areas of biotech inventions and Compulsory Licences.

b. **Trademarks and passing off.** These are largely disputes heard by the High Court and IPEC, and before the UK Intellectual Property Office (IPO) (and on appeal to the Appointed Persons or the High Court) and the EUIPO (and on appeal to the General Court and CJEU). Many of these cases, particularly of higher value or importance, involve barristers. Almost all trade mark law is derived from the EU either by way of the Trade Marks Act 1994 (implementing the Trade Marks Directive) or by way of the EU Trade Mark Regulation providing for EU Trade Marks (EUTM). The English court has regularly made references to the CJEU in these disputes.

c. **Copyright and designs.** There is a great diversity in copyright cases- some involve very substantial industry disputes (over, for example, rights licensing principles) and in cases between individual rights owners and users, often in IPEC. Barristers are involved in a large proportion of them. A large proportion of copyright law is derived from EU law, through the implementation of EU Directives.

There is also a EU Registered Designs system and a UK system pursuant to EU law. Legal representation in such cases (large and small) is often undertaken by teams involving barristers.

d. **Confidential information.** These cases are very diverse. Higher value cases are brought in the High Court and barristers are almost always involved. The principles of trade secrecy law have recently been harmonised by a EU Directive although the UK has not yet implemented it. Those
principles are broadly similar to those already existing in English law and English law may be influenced by the development of EU jurisprudence in this area.

e. **Related areas of law.** Other kinds of work which may be undertaken by barristers include Plant Varieties, Protected Geographical Indications and Protected Designations of Origin, which are the subject of EU laws.

In addition, intellectual property cases often involve elements of EU competition law in which barristers are involved. There is a significant element of EU law relating to remedies for breach of intellectual property rights under the Enforcement Directive.

**Impact of Brexit**

2. Brexit is likely to have an impact on intellectual property practice in the following ways.

a. **Substantive law.** In areas where rights are directly granted under EU law which are effective in the UK (such as EU registered trade marks and designs), the impact of ceasing to be a member of the EU would be that the rights in question would cease to exist in the UK (unless otherwise provided for). To counteract this, the UKIPO is considering whether to provide for equivalent rights under English law or, at least, a set of transitional measures to ensure that existing rights owners do not face a gap in protection. These considerations will address the various complexities, including the basis upon which the rights of proprietors and third parties may be protected. In this, the UK Government faces a challenging exercise, with no guarantee that the outcome will satisfy everyone. Assuming UK rights can be secured in this way, it seems unlikely that they would be identical to those conferred by the EU systems. That said, in many cases they would probably be similar. Moreover, this is likely to be an issue for specific areas of intellectual property law since much of it is enacted in domestic legislation or SI’s made under the ECA 1972. The latter SIs would probably fall with simple repeal of the ECA but could be preserved by appropriate UK legislation.

Consideration will also need to be given to the future application of the principle of the free movement of goods and the doctrine of exhaustion of rights, whereby the proprietor of a UK IP right cannot exercise his right to prevent the importation and sale in the UK of goods which were first placed on the market in another EU Member State by him or with his consent (i.e. parallel imports).

b. **Interpretation of law.** As indicated above, a significant proportion of current intellectual property rights are conferred pursuant to EU legislation (arising under EU Regulations or UK statutes implementing EU Directives) and their scope ultimately falls to be determined by the CJEU upon
reference from national courts. If that ceases to be possible following Brexit, the UK courts would have the final say as to the scope of rights originally conferred under EU law. There is a real risk of jurisprudential divergence. Moreover, unless provision was made to ensure that the UK (and undertakings in the UK) could continue to present arguments at the CJEU, including in cases pending at the date of exit, by way of interventions, the influence of English law principles, which has been considerable (and positive), in this area would be seriously diminished.

c. **Development of law.** After Brexit, unless steps are taken to ensure that the interests of businesses in the UK and of businesses in other countries wishing to continue trading and to protect their rights in the UK, are taken into account in developing new IP regimes in the EU, such undertakings will not be adequately catered for in the UK and may be less able to influence the legislative process. At present, the UK’s voice is of considerable importance both at the legislative stage and in interpretation of the law at CJEU level. For example, the EU is currently undertaking a thorough revision of its copyright regime, an exercise in which the UK ideally should be influential.

d. **New courts and tribunals – the UPC.** In the field of patents, the coming into effect of the Unified Patent and the Unified Patents Court regime currently depend on ratification by the UK. The UK government has indicated that it was proceeding with preparations to ratify the UPC. The UK has been important in establishing the UP/UPC and is currently set to play a major role in it. London was strongly promoted by the UK Government as the location of one of the central divisions under the UPC. Patents with life sciences as their subject matter are to be litigated in this division. It is therefore of significant economic importance, not simply form the point of view of the provision of legal services but in other respects that life sciences patent litigation under the UPC to be conducted in London. London and the South East is one of the world’s most important clusters of activity in this area. However, at the moment, it is unclear whether and upon what terms the UK would be able to participate in the UPC (and the Unified Patent) following Brexit.

e. **Recognition and enforcement** The Bar’s concerns about the potential loss of the Brussels I regime are set out in its paper on Jurisdiction and Judgments, which we endorse. Suffice it to say here that those calls for a new post-BREXIT arrangement should also cover the special provisions in the Brussels I Regulation recast relating to claims concerned with the validity of IP rights.

f. **Professional practice.** At present, English barristers are entitled to represent clients before the following EU courts and tribunals (or would be once the UPC is established):
3. A significant proportion of cases involving patents and designs, copyright and trade marks originally commenced in English courts give rise to issues which are also litigated before these courts and tribunals. There is often parallel litigation in which English barristers may be instructed both before the UK and parallel EU courts or tribunals. Unless specially provided for, and unless possibly the UK became a member of the EEA, Brexit would mean that, uniquely among lawyers in the present EU, English barristers would not be able to provide clients a full service of representation before all of these tribunals, thus placing them at a competitive disadvantage.

**EU market access**

4. Please refer to the Bar Council Position on Access to the EU Legal Services Market Post-Brexit for an overview of the current EU arrangements allowing UK lawyers to offer their services on a permanent or temporary basis in other EU Member States, including their enjoyment of rights of audience.

5. These market access rules give clients freedom of choice to include English barristers in their legal teams regardless of forum\(^4\). The advantage to both the clients and the Bar would be lost if these rules do not survive Brexit.

6. Moreover, to the extent that Brexit adversely affects the practices of solicitors’ firms, and patent and trade mark attorneys which frequently instruct barristers, that will have an additional impact. Those firms may lose the possibility to present themselves as able to perform the lead litigation/co-ordination role in the EU. If, as is likely to happen unless steps are taken to prevent it, the rights of those Attorneys to represent parties before the EUIPO are also adversely affected, there is likely to be a loss of work for barristers who are instructed by them which may be significant.

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\(^4\)For example, English barristers work closely with Irish barristers in substantial multinational patent cases in the courts of Ireland. Moreover, US firms (for example) frequently instruct English barristers in preference to other EU lawyers in cases where they have a choice.
7. Overall, unless specific steps are taken to remedy the damage that Brexit may cause, the demand for the services of the English Bar is likely to fall.

Infrastructure for R&D and creative industries

8. These adverse impacts are all the more regrettable, since intellectual property law is an area which provides essential commercial infrastructure to the research intensive and creative industries in the UK.

9. More generally, the UK is a highly attractive place for such activities, but it may not remain so if it is not (or is not perceived to be) central to European activities. London and its periphery, in particular, provide a cluster of activities both in R&D and creative industries and their support services, of which intellectual property protection is a significant part.

Recommendations

10. Intellectual property services are currently a flourishing area in the UK and the UK has significant influence in this area. Rights are well protected but subject to sensible defences. The intellectual property bar is very active and the excellence of the courts is widely appreciated, making a significant positive contribution. It is suggested that the UK Government (HMG) should do the following to ensure that this remains the case:
Securing rights to provide professional services

(a) Rights of representation/practice - The IPBA joins and endorses the recommendations and requests set out in the Bar Council Position on Access to the EU Legal Services Market Post-Brexit.

(b) UK as forum of choice - HMG should explore ways to ensure that the UK retains its position as a forum of choice for intellectual property matters in Europe. This should include steps to ensure that the UK remains more efficient and quicker as a litigation forum than other EU countries and EU courts. It should also include attempts to ensure that the UK is able fully to participate in the UPC post-Brexit and that, if the UK is not able to do so, the UK is nonetheless well-placed to remain a first-choice forum for resolution of patent disputes in Europe.

(c) Prioritisation. HMG should ensure that the area of specialist legal services, including rights of representation in intellectual property cases, is given no less priority than that given to any other area of services provision in Brexit negotiations in which rights of access to the EU may be important.

(d) Avoidance of approaches to Brexit which would be most likely to damage this sector. The UK should avoid any general approach to Brexit which would make such arrangements harder to secure.

Ensuring that post-Brexit there is equivalent protection for intellectual property in the UK as currently exists under harmonised EU law, that there is no gap in protection with regard to existing rights and that defences which currently exist to infringement of intellectual property rights continue to apply unless and until specifically altered.

Ensuring continuing influence on substantive and procedural EU law which may affect industry in the UK

(a) HMG should take steps to ensure that the UK perspective continues to be heard by EU legislative and judicial authorities, where decisions are made that may have an impact on UK law and practice.

(b) This may involve ensuring that HMG makes timely responses to EU consultations on legislative change and that it intervenes (and ensures generous rights of intervention for others) in CJEU cases which may have a direct impact on UK undertakings and an indirect impact on UK law after Brexit.

The IPBA would be happy to assist the UK Government in formulating appropriate strategies to this end.
Paper Thirteen

Competition Law

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

Summary

Competition enforcement and current levels of consumer protection will be severely weakened unless post-Brexit arrangements allow UK consumers to rely on decisions of the European Commission.

Preserving the powers under the Competition Act 1998 to enable UK courts and consumers to continue to enforce the decisions of the European Commission will be very important.

There is also a powerful public interest in ensuring that the European Commission can continue to include the UK in its EEA-wide investigations into competition distortions.

A key driver of competition enforcement in both the UK and EU is the use of leniency arrangements, under which participants in cartels may obtain immunity or reduction in fines in exchange for cooperation. At present an application in the UK is sufficient to trigger leniency across the EU and in respect of the Commission. If that “one stop” approach were lost, there would diminished incentive to apply for leniency.

Following Brexit, coordinating measures would be highly desirable.

- We therefore urge Government to preserve the powers contained in the Competition Act 1998 to render Commission infringement decisions binding and enable UK consumers and businesses to seek injunctive relief on that basis.
- We also urge Government to preserve the immunity protection for leniency applicants and ensure mutual recognition and protection for immunity statements from disclosure.
COMPETITION LAW

1. Competition law is an important driver of the UK’s economy, estimated by the CMA to produce annual average direct consumer benefits of £745 million between 2012-13 and 2014-15.\(^{45}\)

2. Over the last 20 years, successive Governments have implemented a series of reforms which have strengthened that regime and the remedies which it offers. As the Government said in 2013, launching its most recent reforms:\(^{46}\)

   *Competition creates growth and is one of the pillars of a vibrant economy. A strong competition regime ensures the most efficient and innovative businesses can thrive, allowing the best to grow and enter new markets, and gives confidence to businesses wanting to set up in the UK. It drives investment in new and better products and pushes prices down and quality up. This is good for growth and good for consumers.*

3. At present, businesses and consumers in the UK enjoy the protection of two parallel, and closely linked regimes. The principal provisions of UK competition law are contained in the Competition Act 1998 (CA 98). It contains prohibitions on cartels and other forms of collusive agreements, as well as abuse of dominant position.\(^ {47}\) Its provisions are closely mirrored on the requirements of EU law.\(^ {48}\)

The present position

4. Enforcement of competition law takes place in two ways, “public” or “private”. Public enforcement is by the competition authorities: the CMA in the UK and other sectoral regulators\(^ {49}\) and the European Commission at EU level. Decisions of those authorities are binding on the English Courts and give rise to substantial penalties.

5. Decisions of the UK authorities are confined to anti-competitive conduct within the UK; the European Commission considers distortions of competition in cases with an effect on trade within the EU.

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\(^{45}\) National Audit Office Report, February 2016.


\(^{47}\) Chapters I and II of the Competition Act 1998.

\(^{48}\) Treaty on the Functioning of the European Union, Articles 101 and 102. S. 60 of the CA98 ensures consistency of approach with the EU by requiring that questions arising under the Act in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union.

\(^{49}\) Covering communications and post, water, road and rail, gas and electricity, air traffic and airport operations, financial and payment services and healthcare.
6. The European Commission, which tends to focus its enforcement activity on large international cartels, levied fines between 2012 and 2016 in the sum of €8.6bn. By contrast, the UK competition authorities issued £65 million of competition enforcement fines between 2012 and 2014. The Commission’s enforcement activity extends to cartels which distort competition in the United Kingdom and worldwide and in practice serves to expand the reach of enforcement action within the UK, beyond that of the CMA, and enhance greatly the protection which consumers and businesses receive even within the UK.

7. Private enforcement consists of claims for injunctive relief and damages brought by companies or individuals (acting alone, or as part of a class action under reforms introduced in 2015). It is at least as important as public enforcement in practice. It enables those harmed by infringements of competition law to obtain direct redress, and provides an important constraint on anti-competitive behaviour. As the Government has said:

> Private actions are a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators – getting the compensation they deserve.

8. Under the CA 98, a decision of either a UK regulator or the European Commission that there has been a breach of competition law is binding upon national courts for the purpose of a competition damages action.

9. This is a hugely beneficial regime for consumers: claimants do not need to prove a breach of competition law – just the damages they have suffered as a result. They can instead take advantage of the enforcement activity of both national regulators and the Commission. In practice most competition law damages actions at least partly rely upon such decisions. There are huge impediments to claimants seeking to prove the existence of cartel arrangements for themselves, not least the secret and frequently international nature of such cartels with consequent asymmetry of information and difficulties in obtaining evidence.

10. The London courts have become a leading international centre for private competition litigation of this kind, and in recent years have seen claims for damages brought in respect of international infringements concerning LCD screens, air cargo, credit card fees, vitamins, rubber and many others. By way of example a class action against MasterCard was recently launched on behalf of consumers, seeking £14bn in damages.

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51 A World Class Competition Regime White Paper 2001

52 s58A (read with s47A) of the Competition Act 1998
The English Courts, have seen the highest proportion of follow-on damages between 2006-2012 within the EU. This is a reflection upon the confidence placed in our system of courts and tribunals the efficacy of the remedies provided by English law and the calibre of legal services.

The implications of Brexit

11. Whilst Brexit will not affect the ability of UK authorities to enforce UK competition law in the UK, those authorities in fact take very few competition enforcement decisions. In practice, the system of competition law protection in the UK would be substantially weakened, constrained by the far more limited resources and territorial reach of the national regulators.

12. If our current system of efficacious remedies and consumer protection is to remain in place it is critical that consumers in the UK are able to rely upon decisions of the European Commission. Otherwise, competition enforcement (both public and private) will be severely weakened.

13. The starting point is that the CA98 gives effect both to our domestic competition law and also permits decisions of the European Commission to be relied upon in order to found follow on actions. The formal position is that those provisions would not be affected by repeal of the European Communities Act 1972 as they are contained in primary legislation.

14. It is likely that preserving those powers would therefore enable UK courts and consumers to continue to enforce the decisions of the European Commission. The Commission will however continue to make decisions which impact upon UK business which trade in the EU. At present, its investigations encompass distortions of competition within the whole EEA, including the UK. Depending on the terms of Brexit, that may well come to an end, unless steps are taken to ensure that UK markets and consumers stay within its remit for competition law purposes. There is a powerful public interest in arrangements which enable it to continue to do so.

55 See ss 47A and 58A of the CA 98.
56 We understand there is some difference of opinion as to whether these provisions of the CA98 would be sufficient, on the basis that this would amount to the application of foreign rules of public policy.
15. One model of such arrangements is provided by the EEA Agreement. Its competition provisions are materially identical to the EU regime. As a consequence, competition enforcement decisions of the Commission expressly apply the provisions of the EEA Agreement and frequently consider cartel activity throughout the EEA, so as to encompass markets in Iceland, Norway and Liechtenstein as well as the EU. If the UK entered into comparable arrangements, then there would be no detrimental impact to the efficacy of the competition regime arising from Brexit.

16. There are two further more technical matters of practical significance.

17. First, a key driver of competition enforcement in both the UK and EU is the use of leniency arrangements, under which participants in cartels may obtain immunity or reduction in fines in exchange for cooperation. At present an application in the UK is sufficient to trigger leniency across the EU and in respect of the Commission. Use and disclosure of that material is carefully controlled. If that “one stop” approach were lost, there would diminished incentive to apply for leniency, and a need for multiple filings. Thus, following Brexit, coordinating measures would be highly desirable.

18. Secondly, there would be a need for protection for UK enterprises from the risk of double jeopardy in the form of fines for the same conduct in the UK and by the Commission or other regulatory authorities in the EEA.

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57 See Arts 53 and 54 of the EEA Agreement and Protocol Z1 and Annex XIV to the EEA Agreement.

58 Consequential changes would be required to the Competition Act 1998, but not in respect of matters of substance.
Recommendations

Any post-Brexit arrangement with the EU should:

(1) preserve the powers contained in the Competition Act 1998 which render Commission infringement decisions binding and enable UK consumers and business to seek damages and injunctive relief on the basis of those decisions.

(2) preserve the immunity protection for leniency applicants and ensure mutual recognition and protection for immunity statements from disclosure in administrative or judicial proceedings;

(3) protect against double jeopardy of competition fines in respect of the same conduct.

There is in addition a powerful public interest in arrangements which would extend future infringement decisions by the Commission to UK markets.

Bar Council

November 2016
The Brexit Papers are produced by the Bar Council Brexit Working Group
March 2017
TAX LAW

Summary

Should the UK decide to leave the Customs Union, which would almost certainly increase the costs of trading with the EU, one of the main challenges will be to develop a comprehensive Customs Code. The UK currently benefits from free trade agreements entered into by the EU with third countries which give access to preferential duty rates. Unless and until the UK has its own agreements with such third countries, duty rates faced by UK exports are likely to increase.

In the area of VAT, post-Brexit, decisions of the European Court will effectively be remain ‘binding’ in the UK for so long as the UK’s system mirrors that of the EU. The UK courts will however no longer be able to seek guidance from the CJEU nor will the UK have any influence over how EU law is developed by the CJEU.

At present the UK benefits from EU-wide administrative cooperation on exchanging information and tackling tax evasion, in particular in the form of the Mutual Assistance Directive which enables cross-EU border enforcement of tax debts. This will only be able to continue to the extent that the UK has or enters into bilateral agreements replicating this network. There are also a number issues to address on direct taxation, stamp duties, and state aid.

- As with all aspects of Brexit negotiations, the Government’s approach to arrangements on tax law will be contingent on other considerations which will reflect the Government’s political leadership. We therefore urge the Government to consider the implications of the different approaches, as outlined in this paper.
1. Taxpayers, particular business taxpayers, need certainty as to the legal and fiscal position in order to make sensible commercial decisions as to investment, jobs, etc. Recent UK Governments have gone some way towards achieving this by outlining a “Business Tax Road Map” which has sought to identify policy goals and broad routes to achieving such goals. That process is now under considerable pressure as a result of the vote to leave the EU, the current debate as to how and when to trigger Article 50 and the absence, as yet, of any published guidance as to how the Government sees the UK tax system developing in a post-Brexit world.

2. There is anecdotal evidence, at least, that some investment destined for the UK has been re-routed elsewhere or deferred and that plans are now well advanced to move businesses (and jobs) out of the UK if greater clarity is not achieved, particularly in the financial services sector. While tax is only one factor in such considerations it is an important one. What follows is an outline summary (no doubt incomplete) of the main issues that will need to be resolved over the next two years or so.

**Customs duties**

3. At present the UK is a part of the EU customs union which allows free of movement of goods between member states without any customs formalities or duties/tariffs. On leaving the EU the UK will need to decide if it is to remain inside the customs union and, assuming that it does not, the UK will need to introduce its own comprehensive customs code. This will require the UK to determine how it wishes to categorise goods, what goods will suffer what duties and how it is to operate customs formalities (clearance mechanisms, financial security for duties, registration requirements). As it is likely that duties/tariffs will be imposed on trade in goods between the UK and the remaining EU member states, the administrative costs of trading with the EU will increase.

4. Furthermore, the UK currently benefits from free trade agreements entered into by the EU with third countries which give access to preferential duty rates. Unless and until the UK has its own agreements with such third countries, duty rates faced by UK exports are likely to increase.

**VAT**

5. VAT is an EU tax, derived from (now) the Principal VAT Directive (“PVD”). Post-Brexit, the UK will need to introduce its own VAT system and, in theory at least, the UK has full freedom to design the new UK VAT system as it sees fit, irrespective of the PVD. However, while some ‘UK specific features’ might be
expanded (e.g. an extension in the scope of zero rating or changes in rates), in practice the new UK VAT system will likely have to mirror very closely the EU equivalent so as to ensure that UK business can trade with the EU, and EU businesses can trade with the UK, on an equal footing without the fear of VAT double-taxation or VAT non-taxation.

6. This is likely to mean that decisions of the European Court (“CJEU”) interpreting the PVD will, de facto, remain ‘binding’ in the UK for so long as the UK’s system mirrors that of the EU. This is particularly so since the UK courts have to interpret the UK VAT legislation in accordance with the legislative intention of the UK Parliament and the intention of Parliament when enacting the majority of the current UK VAT legislation was to ensure a harmonised VAT system with the rest of the EU. The UK courts will however no longer be able to seek guidance from the CJEU nor will the UK have any influence over how EU law is developed by the CJEU59.

7. Other specific issues that will need to be resolved in a new UK VAT system include: (1) whether the UK will continue to benefit from the EU ‘one-stop shop’ mechanisms that are designed to remove the burden for a business requiring 28 VAT registrations across all member states; (2) whether the UK will continue with the principles of ‘triangulation’ whereby goods move from (say) a manufacturer in EU member state 1 to the end customer in EU member state 3 without the supplier in EU member state 2 being required to VAT register in either state 1 or 3; (3) in the financial services and insurance sectors, transactions with non-EU counterparts give rise to VAT recovery on costs for UK businesses; it is unclear whether this is to continue post-Brexit and whether it will then apply to transactions with any non-UK counterpart; (4) under the PVD, travel in the EU is taxed under the tour operators' margin scheme whereas non-EU travel is not; how is non-UK travel to be taxed post-Brexit?

Direct taxes

8. The UK’s direct tax legislation (corporation tax, income tax etc.) is made by the UK Parliament and, in the main, not based on EU law. Such taxes are, however, subject to the principles of EU law which require, e.g. freedom of establishment and free movement of capital. Such principles have therefore shaped and adapted the UK direct tax code. It is currently unclear whether such principles will continue to influence the courts in the UK as regards future, post-Brexit, periods. In particular, in the context of group reliefs (for e.g. losses) it is EU law principles that have required the concept of a group to be traced through international

59 The CJEU is continuing to hear UK cases which were referred prior to the referendum and new VAT cases are still being sent from the UK. It is unclear what will happen to references in the pipeline at the CJEU as Brexit approaches.
and not just one member state entities; it remains to be seen whether the UK will return to defining groups by reference only to UK entities. Similarly, the scope and content of the UK’s controlled foreign companies regime has been heavily influenced by freedom of establishment principles and, again, it is to be determined how such rules might be applied going forward where such freedoms have (let’s assume) no further role to play.

9. In addition, there are some areas of direct tax where EU Directives require particular legislative regimes in the UK. To take three main examples:

10. The Parent-Subsidiary Directive provides that a parent company in one EU member state which receives distributions from a subsidiary company in another member state cannot be taxed in the member state of the parent company. Post-Brexit a group of companies with a parent company in the UK and subsidiaries in an EU member state (or with a parent company in a member state and subsidiaries in the UK) may become subject to double taxation in respect of profit distributions unless a double tax treaty or similar arrangement prevents this.

11. The Merger Directive is designed to remove fiscal obstacles to cross-border reorganisations. In the case of mergers involving a company transferring assets and liabilities to one or more companies in a different EU member state, the Directive provides for a deferral of the taxes that could be charged on the difference between the real value of such assets and liabilities and their value for tax purposes, subject to certain conditions.

12. The Interest and Royalties Directive ensures that interest and royalties can be paid free of withholding taxes from one EU country to another. This freedom from withholding taxes will disappear unless a given payment is protected by the network of the UK’s bilateral double tax treaties.

Stamp duties

13. At present the UK is subject to the Capital Duties Directive which prevents, in some instances, EU member states charging indirect tax in respect of the raising of capital by companies (for example, by issuing shares or other securities). UK legislation currently imposes a 1.5% SDRT charge on issues of shares and securities to depositary receipt issuers and clearance services in certain circumstances. However, as a result of the Capital Duties Directive and decisions of the CJEU and the UK courts the UK no longer imposes this charge. Post-Brexit the UK would be free to impose this SDRT charge and also to impose a new capital duty.
Administration

14. At present the UK benefits from EU-wide administrative cooperation on exchanging information and tackling tax evasion, in particular in the form of the Mutual Assistance Directive which enables cross-EU border enforcement of tax debts. This will only be able to continue to the extent that the UK has or enters into bilateral agreements replicating this network.

Other issues

State aid

15. Assuming the UK is no longer part of the EU, the EEA and does not join EFTA, it will no longer be subject to EU law restrictions when seeking to grant state aid. The corollary of that, however, is that it will no longer have any recourse through the EU against member states introducing state aid that disadvantages UK businesses. The EU may well, however, in that situation seek to introduce some form of State aid or subsidy control in any trade agreement that is negotiated with the UK.

“Abuse of law” and anti-avoidance

16. The decision of the CJEU in Halifax & Others (Case C-255/02) introduced into English law, at least for the purposes of VAT, the concept of abuse of law, a principle relied on heavily by HMRC in recent years. The concept presupposes an attempt to achieve as result contrary to the purpose of the PVD which will not work, or work as well, once the UK adopts its own VAT system. One solution, not without some difficulty where the UK adopts a model based on the current, EU derived, VAT system, would be to extend the GAAR regime to include VAT.

Grandfathering and transitional rules

17. Taxpayers, particularly businesses, will need to know well in advance of the post-Brexit new world becoming operational, when and in what circumstances there will be grandfathering and/or transitional rules.

Revenue Bar Association

November 2016
Broader Implications

The Brexit Papers are produced by the Bar Council Brexit Working Group
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Paper Fifteen

The 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 initially commissioned by the House of Commons Foreign Affairs Select Committee for their inquiry Article 50 Negotiations: Implications of ‘no deal’

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.
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 \textit{en masse} to subsidiaries in the EU.

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60 The Bar Council Working Group on Brexit provided advice and feedback which has been incorporated into this evidence. We are indebted to David Anderson QC for reviewing the draft in its final stages.

61 Brick Court Chambers, Emeritus Professor of Law, University of Oxford.

62 Brick Court Chambers.
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.”63 There will, it seems, be some 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


117
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.

**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 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.” 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 agreement will also deal with “the institutional and financial consequences of leaving the EU including resolving all budget, pension and other liabilities…”

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.” 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.”

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

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64 White Paper, paragraph 6.3.
66 White Paper, paragraph 12.2.
67 White Paper, paragraph 8.3.
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”\(^{68}\). The Brexit White Paper refers to a number of EU agencies\(^{69}\) 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.”\(^{70}\)

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,\(^{71}\) and require the consent of the European Parliament.

*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.

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\(^{68}\) See Note 5.

\(^{69}\) 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.

\(^{70}\) Paragraph 8.42.

\(^{71}\) 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 practice this would mean 20 EU countries amounting to 65% of the population of all EU countries minus the population of the UK.
**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, 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 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

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72 That is to say, companies incorporated in England and Wales, Scotland, or Northern Ireland.
arrangements) will include those rules giving EU migrants\textsuperscript{73} 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 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.

\textsuperscript{73} 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.
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. 74

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.\textsuperscript{75}

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.\textsuperscript{76} 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?

\textsuperscript{75} http://www.thelocal.se/2017/02/14/uk-and-sweden-agree-everybody-should-be-able-to-stay-after-brexit-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…”


See in particular Chapter 5 on old-age pensions.
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.

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?

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 acting 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.\textsuperscript{77} 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. 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.

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.

The card is issued free to nationals of EU countries who are entitled to benefit from the coordination at EU

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79 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.)


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.

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. 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?**

<table>
<thead>
<tr>
<th>Hypothetical Example No 5</th>
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<tbody>
<tr>
<td>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</td>
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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 own patients. 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 case 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, 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

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81 This route is available under Council Regulation (EC) No 883/2004 (referred to in NHS information and guidance as the “S2” (formerly “E112”) route.

82 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.
is an EU country. 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?

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.

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

83 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.

84 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
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. 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 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

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85 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.
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 23rd 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. It has been noted that the current tariff schedules of the EU have not been certified.

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. Disagreements unresolved in March 2019 would not necessarily

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86 The House of Lords EU Committee received conflicting evidence on this, see paragraphs 191 and 192 of its 5th Report of Session 2016-2017 Brexit: the options for trade

87 Ibid., paragraph 191

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.

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, 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.10 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

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89 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.

90 There are 30+ countries to which the UK exports tariff-free under agreements between the EU and non-EU countries.
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. 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 could no longer fulfil its free trade obligations in respect of the UK. 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

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91 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.

92 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 a 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.
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 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%.

68. The UK enjoys tariff free access to the markets of numerous non-EU countries via EU agreements with those countries. 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. 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 high).

93 There might be constitutional procedures to be completed in country C which militate against a speedy agreement to continuation of the status quo.

94 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-9535f1074175ec0.0004.02/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 For general information on trade with Chile, see https://www.gov.uk/government/publications/exporting-to-chile/doing-business-in-chile-trade-and-export-guide

95 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.

96 Source: http://www.civitas.org.uk/reports_articles/potential-post-brexit-tariff-costs-for-eu-uk-trade/
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.\(^7\) 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 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\(^8\) for

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\(^8\) 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:
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”,\(^99\) and it is clear from the Prime Minister’s Lancaster House Speech, that this reference was intended to cover financial services.\(^{100}\)

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 plans to set up a subsidiary within the EU, to secure its EU insurance business post-Brexit.\(^{101}\) 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.

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\(^99\) White Paper, paragraph 8.3.

\(^{100}\) https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech

\(^{101}\) http://www.cityam.com/258619/could-luxembourg-lloyds-london-insurance-market-narrows
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.”

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 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. UK companies could retain the benefits of holding existing and seeking new EU wide marketing authorisations

102 Paragraph 8.42.

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. Responsibility for issuing certificates is generally entrusted to the EASA, which may act itself or through national aviation authorities.

81. EASA itself takes direct responsibility for certifying aeronautical products and aircraft types, and for certifying airline operators registered in non-EU countries. 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.

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

104 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.


106 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.
UK. 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”. The REACH regulation requires firms to provide information on chemicals used in certain quantities to the Helsinki-based ECHA, so 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. 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.

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 acts 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 to 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 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

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109 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.

110 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.”
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.\(^{111}\)

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 is 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.\(^{112}\) 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.\(^{113}\) 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 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

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\(^{113}\) Ibid., Article 14.
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, 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. 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. The ECB then has ongoing supervisory powers as regards credit institutions to ensure their compliance with regulatory and prudential rules.

97. ESMA has responsibility for the direct licensing and supervision of credit ratings agencies and trade repositories which are involved in derivatives trading. 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 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. 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.

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114 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.

115 Regulation 575/2013, Article 4(1).


117 Ibid., Article 16.

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

119 Directive 2014/65/EU, Article 6(3).
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**

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.

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.

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

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,120 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 issues of EU law to arbitration - that would be incompatible with the exclusive jurisdiction of the EU Court of Justice.121 While the UK’s liability would be governed by international law, the assessment of that liability would involve consideration of the

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120 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.

121 See e.g., Article 344 TFEU.
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.”

122 Before considering the impact of an unplanned Brexit on the 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:

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122 Paragraph 4.10.
“The return of a “hard border” between Northern Ireland and the Irish Republic looks inevitable if Britain leaves the European Union’s single market.”

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:

“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

123 [http://uk.reuters.com/article/uk-britain-eu-ireland-idUKKBN14T0U1](http://uk.reuters.com/article/uk-britain-eu-ireland-idUKKBN14T0U1)

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 (6th 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.”

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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.

126 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


126 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.
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. 127

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:

“So 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.” 128

“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 Northern Ireland. 129 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.”

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. 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.

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.

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. 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

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-


133 http://www.lawcentreni.org/policy/policy-briefings/203.html

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.

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