House of Commons

Exiting the European Union Committee

The progress of the UK's negotiations on EU withdrawal: December 2017 to March 2018

Third Report of Session 2017–19

HC 884

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Exiting the European Union Committee

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1. We welcome the progress that has been made on protecting citizens' rights so far. Both sides have taken a largely pragmatic approach to protecting those rights. However, the citizens' rights strand of the negotiations has not concluded and many issues remain to be agreed in Phase 2 which are some of the most sensitive in the negotiations. These must be resolved with transparency and speed. (Paragraph 16)

2. We recommend that the Government commit to repeating its offer to allow an unlimited return for EU citizens in the UK if UK citizens in the EU retain free movement, alongside the associated rights that flow from that, including recognition of professional qualifications and the right of establishment. The EU's position on EU citizens' rights in the UK has been to insist on no diminution of rights. UK citizens in the EU should be able to expect the same treatment. (Paragraph 17)

3. The Joint Technical Notes have been a valuable resource for citizens affected by Brexit. We recommend that the Government seek to work with the Commission to publish a new Joint Technical Note which sets out the outstanding citizens' rights issues for agreement in Phase 2, with the respective UK and the EU positions on each. This should be done immediately after the European Council meeting in March when the Phase 2 talks are expected to begin. Joint Technical Notes should also be published after each negotiating round. (Paragraph 22)

4. There is considerable scepticism that the Government's online system for Settled Status and temporary status will be operational in time to start processing applications later this year. Furthermore, depending on the outcome of transition negotiations, there could also be a system to register EU citizens arriving during the transition period. Concerns have been raised by EU citizens in the UK and by the European Parliament about the efficiency and effectiveness of the Home Office's processes. It is important that the Home Office ensures the online system for settled status and temporary status is operational by the end of this year, although past experience indicates that this may be a challenge for the Department. (Paragraph 30)

5. The current proposals define 'residence' by reference to the provisions of the Free Movement Directive. The Directive does not cover a range of vulnerable categories of people who will be experiencing anxiety over their legal status in the UK. As a matter of priority, the Government must ensure that there are specific provisions and flexibility for such people to ensure eligibility for Settled Status that will cover vulnerable children and adults, particularly women who have had caring responsibilities or have been temporarily unable to work because of domestic abuse. The Government should also ensure that different types of part-time or irregular work are considered fairly and plans detailing this should be published as soon as practicably possible after the March negotiating round. (Paragraph 33)

6. The draft Withdrawal Agreement would allow EU Member States to require UK nationals in the EU to apply for a new residence document to ensure that their rights are protected beyond a transition/implementation period following the UK's exit from the EU. While the negotiations on citizens' rights are ongoing it is unclear whether any Member States are considering the introduction of such a requirement, should free movement for UK citizens in the EU by the Specified Date not be agreed and it becomes an option that is desirable to Member States. The Government should continue to push hard for continued free movement rights for UK citizens in the EU by the specified date and for an EU Member State equivalent to "settled status" for UK nationals living and working in the European Union after the United Kingdom has withdrawn from the EU (Paragraph 36)

7. We agree with the Government's proposal to establish an Independent Authority to "champion" the rights of EU citizens in the UK. We recommend that the Government publish draft proposals on how the Independent Authority will carry out its work. There are a number of important ways in which Parliament can have a role in ensuring the independence of those in charge of public bodies. A number of roles are subject to pre-appointment hearings with departmental select committees. For example, the Treasury Select Committee has a statutory veto over the appointment and dismissal of the Chair of the Office for Budgetary Responsibility. The appointment of the Chief Executive of the Financial Conduct Authority is also subject to a pre-appointment hearing with the Treasury Select Committee and the Government has accepted that if it disagrees with a negative report from the Committee, it will table a motion disagreeing with the Committee in Government time. We call on the Government to publish the details of arrangements for appointing the Chair of the Independent Authority as soon as possible, including which Committee it would envisage as having a statutory veto or the right to an appointment hearing. (Paragraph 40)

8. We note that the draft legal agreement does not reflect all the options in the December Joint Report. We support the Government's rejection of the Commission's interpretation of what constitutes the previously agreed fall-back position of full alignment in the draft Withdrawal Agreement in the context of the Joint Report's commitment to uphold the Good Friday Agreement. This is because the UK Government's commitment was to the United Kingdom—not just Northern Ireland—maintaining "full alignment" with those rules of the internal market and the customs union which support north-south co-operation, the all-island economy and the protection of the 1998 agreement. Whatever solution is reached to resolve issues around the Border must involve the whole of the UK. While we recognise it is the least favoured option for both the Government and the European Union, it has, potentially, far reaching consequences for Northern Ireland, the United Kingdom and Ireland. The Irish Government has said that it sees the Joint Report as an unambiguous commitment to there being no divergence that could lead to a hard border, including any physical infrastructure or related checks and controls. We note that Michel Barnier has already stated that innovative and imaginative solutions must be sought to deal with this issue and believed that given political willingness there are solutions that are worthy of consideration. Because the UK Government has not explained what full alignment means, it should now provide answers to the following questions:

- Will the commitment to full alignment cover all traded goods?
- Which rules of the Single Market and Customs Union are included in the full alignment commitment?
- What is the exact scope of the all-island economy, given that the Government's aim of an open border for all goods in the context of the all-island economy must by definition be wider than the six areas of North-South cooperation.
- What method of legal adjudication would the Government seek to underpin an agreement that is based on full alignment of regulatory outcomes?

Paragraph 47 of the Phase 1 Agreement said, "The two parties have carried out a mapping exercise, which shows that north south co-operation relies to a significant extent on a common European Union legal and policy framework". We believe the Government should publish the results of this mapping exercise in order to provide clarity about what is covered by north south co-operation. (Paragraph 50)

9. If the Government is unhappy with sections of the draft withdrawal agreement then it should produce its own suggested legal text. (Paragraph 51)

10. The Joint Report and the draft Withdrawal Agreement commits to there being no "physical infrastructure" or "customs checks" on the Northern Ireland/Republic of Ireland border. We know of no international border, other than the internal borders of the EU, that operates in the frictionless manner of the border that is between Northern Ireland/Republic of Ireland. When the UK leaves the European Union, it will become a third country. Even the border between Norway (an EEA member state) and Sweden (an EU member state) requires some checks and physical infrastructure. (Paragraph 61)

11. We agree with both sides that maintaining a frictionless border through the Future Partnership and Specific Solutions is the best option. We look forward to scrutinising the Government's proposals, when they are presented. In their absence, however, we remain of the view that we cannot see how it will be possible to maintain an open border with no checks and no infrastructure if the UK leaves the Customs Union and the Single Market. (Paragraph 62)

12. 10 April 2018 will be the twentieth anniversary of the signing of the Good Friday Agreement. We welcome the commitment from the Government, as co-guarantor to the Agreement, and from the EU to protect the Agreement "in all its parts". We also welcomethe Government's commitment to support fully "Northern Ireland's position as an integral part of the United Kingdom." There must be no hard border North-South or East-West. (Paragraph 64)

13. We welcome the agreement of the Financial Settlement in the Joint Report which enabled the EU27 to agree that sufficient progress had been made and that negotiations could move to Phase 2. The Government has outlined its view that the payment of the Financial Settlement is contingent on the agreement of the Future Partnership. However, the treaty establishing the Future Trade Agreement part of the Future partnership will probably not be ratified until after the UK has already made a substantial portion of these payments. (Paragraph 74)

Transition/implementation period

14. The Government believes it can agree the "substance" of its Future Partnership with the EU before October 2018. In the short time that remains, it is difficult to see how it will be possible to negotiate a full, bespoke trade and market access agreement, along with a range of other agreements, including on foreign affairs and defence cooperation. The UK Parliament will need absolute clarity on the Future EU-UK Partnership, including the arrangements for the Northern Ireland/Republic of Ireland border. We look forward to monitoring progress over the coming months. (Paragraph 84)

15. The Secretary of State has said that the "substance" of an EU-UK trade agreement will have been agreed before UK withdrawal in March 2019. The Prime Minister has said that key aspects of our Future Partnership in foreign affairs and defence will be effective by the same date. Yet, the Government has also given October 2018 as the date by which it expects to have agreed the "substance" of its Future Partnership with the EU. The Government should give regular updates to Parliament on progress. (Paragraph 85)

16. If substantial aspects of the Future Partnership remain to be agreed in October, the Government should seek a limited extension to the Article 50 time to ensure that a Political Declaration on the Future Partnership that is sufficiently detailed and comprehensive can be concluded. It would meet the Government's objective that negotiations on substantive aspects of the Future Partnership should not take place in the transition/implementation period. That time should be used to finalise details and implement administrative measures and infrastructure that is necessary for the Future Partnership. (Paragraph 86)

17. If a 21-month transition/implementation period is insufficient time to conclude and ratify the treaties/agreements that will establish the Future Partnership or to implement the necessary technical and administrative measures along with any necessary infrastructure at the UK border, the only prudent action would be for the Government to seek a limited prolongation to avoid unnecessary disruption. It would, for example, be unacceptable for business to have to adapt their import and export processes twice. We therefore recommend that the Withdrawal Agreement include a provision to allow for the extension of the transition/implementation period, if necessary, and with the approval of Parliament. However, we note that there is a risk that a transition/implementation period that lasts much more than two years might exceed the vires of Article 50 and be subject to a legal challenge in the CJEU. (Paragraph 87)

18. During a prolonged transition/implementation period, the UK would be bound by the full acquis, with no say in the Union's decision-making bodies. It would also be bound by the CJEU without a UK Judge on the Court. Furthermore, it would have to make financial contributions to the EU's new seven-year budget, with no say on how it is to be spent. The UK would also be subject to new EU laws over which it had not had voting rights. (Paragraph 88)

19. We note the Government's view that the Specified Date for the citizens' rights chapter of the Withdrawal Agreement should be the 29 March 2019 but that it has also made a unilateral offer to provide EU citizens arriving during the transition/implementation period with the opportunity to apply for indefinite leave to remain in the UK. However, under this proposal EU citizens that arrive in the UK will have different rights to those that are living in the UK before the transition/implementation period. We believe that this is not consistent with full acceptance of the acquis which is fundamental to the transition/implementation period. (Paragraph 92)

20. The UK will be a 'rule-taker' with few formal rights to consultation under the current proposals for the transition/implementation period. We agree that the Withdrawal Agreement should establish a mechanism under which the UK can have a say on new EU laws that will apply to the UK during the period but which are devised after it has left the European Union's institutions and call on the Government to come forward with proposals for such a mechanism as soon as possible. (Paragraph 99)

21. The EU has a number of bilateral international agreements with non-EU third countries to which the UK wishes to remain party during the transition/implementation period. The UK has asked the EU to seek agreement with those third countries to continue with these agreements during that time. These third countries and the UK may have a mutual interest in continuing these agreements on current terms. However, the Government's approach to reaching agreement on the continuation of these agreements after the transition period is over is not clear and the progress that the Government have made to date is unknown. (Paragraph 105)

22. Failure to reach a timely deal on continuing these agreements during the transition/implementation phase could lead to UK exporters no longer being able to take advantage of the EU's existing free trade agreements, while exporters located in countries with EU FTAs would continue to benefit from preferential access to the UK market on the same terms as now. This would be unacceptable. (Paragraph 106)

23. In our last report, we recommended that the Government publish a detailed White Paper on the transitional/implementation period setting out the Government's objectives in detail. This would provide much needed clarity for citizens, business, institutions and our partners in the EU27, as well as providing Parliament with an opportunity to scrutinise and potentially improve the Government's plans. However, just days before the transition/implementation deal is expected to be agreed, the Government has still not published a substantial policy paper that sets out what it wants in precise terms. This is regrettable. By contrast, the EU has set out its objectives for the transition/implementation period in clear terms. (Paragraph 114)

Future Partnership

24. The Government's EU Exit Analysis modelled the economic impact of three scenarios for the UK's Future Partnership with the European Union—an "average" Free Trade Agreement with the EU, membership of the European Economic Area and World Trade Organization Most Favoured Nation rules (a 'no deal' scenario). The Government is only now starting to measure the economic consequences of different EU-UK trade models. It is therefore concerning that the Government drew red lines on the Future EU-UK trade relationship without having conducted any assessment of the possible impact of these red lines on the UK economy. Moreover, there is no evidence that the Government has modelled the impact of its preferred end state relationship with the European Union. (Paragraph 122)

25. We welcome the Prime Minister's recent speech on the Future EU-UK Partnership because it provided more details on the Government's approach and acknowledged the inevitable trade-offs that will result from the UK leaving the Single Market and Customs Union. Furthermore, it acknowledged that the EU's standards, regulations and enforcement structures would continue to have a significant effect on the UK. However, the speech failed to outline which EU standards and rules the Government expects the UK to continue to abide by and which it wants to diverge from or the economic case for either approach. (Paragraph 131)

26. We welcome the Prime Minister's statement that the UK will wish to remain associated with certain EU agencies after exit. However, some EU agencies do not currently permit third country participation and the UK's contribution to decision-making would not be guaranteed. It is acknowledged that the UK has great expertise to contribute in a number of fields that is valued within a number of EU agencies. However, the UK needs to make specific proposals for how it envisages continuing to make an important contribution after exit. Clarity must also be provided on what the UK's role will be in EU agencies during the transition period. (Paragraph 132)

27. The Commission has suggested that the negotiations on the treaties/agreements will be divided into four pillars to be negotiated in parallel and agreed separately. This structure seems sensible, as it will avoid the rigid, obstructive phasing that has characterised the Article 50 negotiations. However, the Government has not yet set out to Parliament its own view on how this process should be organised or acknowledged that the negotiations on a new partnership will in practice occupy a significant part of the transition/implementation period. It should now outline exactly how the process should be structured and then seek agreement with the European Union. This must be done well in advance of October. (Paragraph 133)

28. We are currently examining different types of trade and partnership agreements into which the EU has entered with third countries. These include CETA, the EFTA and the EEA agreements, the Ukraine Association Agreement, the EU-Turkey Customs Union and TTIP, which was a proposed trade agreement between the United States and the EU which was halted after the 2016 US presidential election. We will present our findings in our next report together with our views on the structure of the future negotiations. (Paragraph 134)

1 Introduction

The Article 50 negotiations

1. The Article 50 negotiations are at a critical stage. If they are to be completed by October 2018, which is the deadline that has been set by the UK and the EU, there are only seven months left to reach agreement on a host of highly complex issues that will determine the UK's future for decades to come.

2. Since our last report, the European Council and the UK agreed that 'sufficient progress' had been made on Phase 1 of the Article 50 negotiations which enabled Phase 2 discussions to begin on the UK's Future Partnership with the European Union.[1] On 28 February 2018, the Commission published a draft Withdrawal Agreement,[2] which was based on the Joint Report that was agreed in December 2017.[3] The draft Withdrawal Agreement has been circulated to the EU27 and to the European Parliament's Brexit Steering Group for revision and agreement before being subjected to intense negotiations over the coming months. The UK Government does not accept the text relating to Northern Ireland.[4]

3. An enormous amount of work remains to be completed in the limited time that remains under Article 50. Negotiations on citizens' rights, issues relating to the Northern Ireland/Republic of Ireland border, and a wide range of other separation issues are ongoing. Talks on the agreement of a transition/implementation period started in January 2018 and are expected to be completed by the European Council in late March 2018, although there remain significant points of disagreement to work through first. From late March onwards, Phase 2 negotiations are expected to begin. The UK and the European Union want to reach agreement on all these issues by October, to allow time for the texts to be ratified by the European Parliament (EP) and the UK Parliament.

4. The EU said that it was unable to start Phase 2 negotiations until after the March European Council—a gap of over four months since the Phase 1 agreement. On the UK side, the Prime Minister and Cabinet Ministers have set out aspects of the Future Partnership in a series of speeches, and have agreed that it should be based on a model of 'managed divergence'. However, on 7 March, when Donald Tusk published the EU27 draft guidelines for a post-Brexit Free Trade Agreement between the EU and the UK, he appeared to reject the 'managed divergence' model saying that the only option available would be an off the shelf Free Trade Agreement.[5] It remains to be seen what this will mean in practice and the extent to which the UK will diverge from the rules and standards of the European Union after the transition/implementation period.

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

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

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

4 HC Deb 28 February 2018, Vol. 636, Col. 823

5 City AM, Brexit latest: Donald Tusk rejects managed divergence as he reveals EU27's draft negotiating guidelines, 7 March 2018

This report

5. This is the second report in our overarching inquiry on the Article 50 negotiations. In this report, we consider the current state of the negotiations, the plans for the transition/implementation period, and the work to date on plans for Phase 2.

6. We have drawn upon evidence provided by the Rt Hon David Davis MP, the Secretary of State for Exiting the European Union, along with evidence from HM Revenue and Customs, the Police Service of Northern Ireland, organisations that specialise in exports and logistics, stakeholders in EU Agencies, and academics and think tank representatives specialising in EU law and politics. We have also undertaken a programme of visits. In December, we visited the Northern Ireland/Republic of Ireland border to learn more about how it might be affected by the UK's withdrawal from the European Union. In January, we visited Cambridge to meet and take evidence from representatives of industry and academia who specialise in world-leading research into the life sciences. Later that month we also visited Dublin where we met Simon Coveney, Tánaiste and Foreign Minister, Heather Humphreys, Minister for the Department of Business Enterprise and Innovation, Members of Oireachtas Joint Committees, and academics and Irish business representatives. Finally, in February we visited Brussels where we met a range of interlocutors, including Sir Tim Barrow, Michel Barnier, Danuta Hübner MEP, Guy Verhofstadt MEP and representatives from the Norwegian and Swiss Missions to the European Union. We would like to thank everyone who has given evidence to the Committee and who met us to inform our inquiries.

7. We will continue to publish reports on the progress of the Article 50 negotiations at regular intervals. We plan to report next on existing EU-third country trade and partnership agreements, and the Future Partnership between the UK and the EU.

2 Draft Withdrawal Agreement

Introduction

8. On 28 February, the Commission published their draft Withdrawal Agreement which was based on the Joint Report that was agreed in December 2017. It sets out the Commission's interpretation of the Phase 1 agreements between the EU and the UK. These agreements were on citizens' rights, the Financial Settlement and issues that relate to the Northern Ireland/Republic of Ireland border, as well as other separation issues.[6] There are several parts of the draft Withdrawal Agreement with which the Government has said that it disagrees, particularly with regards to citizens' rights, issues that relate to maintaining a 'frictionless' border on the island of Ireland and the role of the CJEU. This chapter examines the agreements as outlined in the draft Withdrawal Agreement on the main Phase 1 issues and what remains to be resolved in Phase 2.

Citizens' rights

9. The draft Withdrawal Agreement defined the categories of citizens that fall within its scope as EU citizens who have exercised their right to reside in the UK, as well as their close family members, as set out in Directive 2004/38/EC.[7] The draft Withdrawal Agreement also provides the same rights to UK nationals in EU Member States.[8]

10. Directive 2004/38/EC is also known as the 'Free Movement Directive'.[9] It sets out the right of free movement for the citizens of EU Member States. The rights it confers have been extended to nationals of Norway, Iceland and Liechtenstein by the EEA Agreement and to Swiss nationals by a bilateral agreement with the EU on the free movement of persons. The Directive essentially gives EU citizens the right to live and work across the EU, if they are workers, and to those who are not economically active provided that they are not an undue burden on the country of residence.[10] This right also extends to close family members that are not EU citizens. The right of residence becomes permanent after five years and citizens can apply for a Permanent Residence document that confirms their rights, although this is not a legal requirement as Permanent Residence is acquired automatically after individuals have exercised treaty rights for 5 years, without an absence of more than six months.[11]

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

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

8 Commission, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, Article 9.

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

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

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

11. The Commission's draft Withdrawal Agreement indicated that the cut-off point for when the citizens' rights provisions in the Withdrawal Agreement come into force will be the end of any transitional/implementation period.[12] However, the Joint Report stated that the cut-off point, should be "the time of the UK's withdrawal"—29 March 2019.[13] This is the Government's interpretation of the Specified Date. However, the Joint Report also stated that "adaptations" may be needed if a transition/implementation period is agreed during Phase 2.[14] We examine this disagreement in more detail in the next chapter on the transition/implementation period.

Unresolved issues

12. While the citizens' rights chapter was the most advanced part of the Joint Report and the draft Withdrawal Agreement, there were some substantial issues that are still to be resolved.[15] The Commission's December Technical Note included a list of matters "raised by the UK but that were outside the scope of the EU's mandate" for Phase 1. These were:

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

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

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

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

14 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 5

15 Q401 [Professor Dougan]

16 Q761

14. The UK and the EU have been unable to agree on continued free movement for UK citizens in the EU27 after the Specified Date. The Commission's position, as stated in the draft Withdrawal Agreement, is that ongoing free movement will not apply to UK citizens living in the EU27.[17] The Secretary of State said that ongoing free movement was a matter for Phase 2 and would "interact quite closely with whatever deal we do on services, professional services in particular. The right to move around will be quite an important part of that."[18] In their summary of the negotiations following the European Council meeting in October, British in Europe and the3million said:

> It appears that the UK has offered to grant an unlimited right to return to EU citizens in the UK in exchange for freedom of movement for UK citizens within the [Withdrawal Agreement]—if this is confirmed, it should be accepted immediately. This proposal would ensure reciprocity so that EU citizens in the UK and their children and family members would have the unlimited right to return to the UK, and UK citizens in the EU with their children and family members would continue to enjoy their existing rights of free movement across the EU27.

15. Before the UK leaves the EU, UK citizens have the right to move to another EU country to live or to work as an employee or self-employed or run a business, provide services cross-border and to benefit from mutual recognition of their qualifications. Without resolution of their ability to move to another Member State after the Specified Date, these rights will be lost. Individuals will lose not just the right to move freely to another EU country, but also the right to provide cross-border services in any country, to have their professional or academic qualification recognised in any country where it is not specifically recognised in the Joint Technical Note, and lawyers would lose their ability to practice in another Member State based on a qualification obtained in their home state.[19] British and Europe and the3Million object to the insertion of the phrase "and based on past life choices" in the Joint Report to qualify whether these rights would have been within the scope of the negotiations.

16. **We welcome the progress that has been made on protecting citizens' rights so far. Both sides have taken a largely pragmatic approach to protecting those rights. However, the citizens' rights strand of the negotiations has not concluded and many issues remain to be agreed in Phase 2 which are some of the most sensitive in the negotiations. These must be resolved with transparency and speed.**

17. **We recommend that the Government commit to repeating its offer to allow an unlimited return for EU citizens in the UK if UK citizens in the EU retain free movement, alongside the associated rights that flow from that, including recognition of professional qualifications and the right of establishment. The EU's position on EU citizens' rights in the UK has been to insist on no diminution of rights. UK citizens in the EU should be able to expect the same treatment.**

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

18 Q763

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

18. On 20 December 2017, the Prime Minister published an open letter to UK nationals living in the European Union to update them on the publication of the Joint Report. The Prime Minister said:

> I know there are a few important issues that have yet to be concluded. We raised these concerns, including the ability of UK nationals living in the EU to retain certain rights if they move within the EU, but the EU was not ready to discuss them in this phase of the negotiations. We will continue to raise these issues with the EU in the New Year.[20]

19. British in Europe and the3million are concerned that the negotiations on citizens' rights have lost urgency since the Joint Report was published. They said in a joint response to the Phase 1 agreement:

> The issue of citizens' rights has thus widely—but incorrectly—been portrayed as resolved. the3million and British in Europe, as well as the European Parliament (see EP resolution of 13 December 2017), consider that the stated aim of ensuring that nothing would change for EU27 nationals in the UK and for UK nationals in the EU, is not met by the 'Common Understanding' reached in Phase 1 owing to glaring shortcomings, omissions and ambiguities, be it because issues were excluded from the negotiations contrary to the initial mandate or because of political expediency to reach a compromise.[21]

20. There has been little progress on the remaining citizens' rights issues since December 2017. The Commission has published several 'Programmes of EU-UK Article 50 negotiations' that set out which subjects would be discussed in the negotiations. Citizens' rights were mentioned only once and that was on a "technical clarification to the Joint Report".[22] This is because the outstanding issues are viewed by the European Union as contingent on the Phase 2 negotiations, which will not start until the end of March 2018.[23]

21. The Commission published a Joint Technical Note alongside the Joint Report which "expresses the detailed consensus of the UK and EU positions".[24] This Note builds on similar Joint Technical Notes that were published after the second, third and fourth rounds of the negotiations. These Joint Technical Notes have consisted of a table listing the areas for negotiation on citizens' rights, the respective UK and EU positions and a traffic light system that indicates which issues have been agreed, which issues require further clarification and which issues are unresolved.[25]

20 Prime Minister, A letter from the Prime Minister to UK nationals living in Europe, 20 December 2017
21 British in Europe and The3million, Securing Citizens' Rights under Article 50, 23 January 2018
22 Commission, Programme of EU-UK Article 50 negotiations, 16 January, 2 February, 16 February, 23 February, 5 March
23 Q761
24 European Commission, Joint Technical Note on Citizens' Rights, 8 December 2018
25 European Commission, Joint Technical note on EU-UK positions on citizens' rights after the second round of Article 50 negotiations, 20 July 2017; Joint technical note on EU-UK positions on citizens' rights after third round of negotiations, 31 August 2017; Joint technical note on EU-UK position on citizens' rights after fourth round of negotiations, 28 September 2017.

22. **The Joint Technical Notes have been a valuable resource for citizens affected by Brexit. We recommend that the Government seek to work with the Commission to publish a new Joint Technical Note which sets out the outstanding citizens' rights issues for agreement in Phase 2, with the respective UK and the EU positions on each. This should be done immediately after the European Council meeting in March when the Phase 2 talks are expected to begin. Joint Technical Notes should also be published after each negotiating round.**

Matter resolved in the Joint Report

23. The draft Withdrawal Agreement presented the Commission's interpretation of the agreements that were set out in the Joint Report. These included:

- To ensure legal certainty and consistent interpretation of the Withdrawal Agreement, UK courts shall "have due regard to relevant case law of the Court of Justice of the European Union handed down" after the end of the transition/implementation period.[26] In addition, on questions of interpretation of the citizens' rights part of the Withdrawal Agreement, UK courts may be able to request the CJEU "to give a preliminary ruling on that question… The legal effects in the United Kingdom of such preliminary rulings shall be the same as the legal effects of preliminary rulings given pursuant to Article 267 TFEU in the Union and its Member States."[27] This voluntary referral mechanism would be available for eight years from the end of the transition/implementation period.

- EU citizens in the UK, and UK citizens in the EU will be able to be joined by family members, who are such at the end of the transition period, including non-resident spouses, civil partners, children and grandchildren, and dependent parents and grandparents. There is a specific reference in the Joint Report and the draft Withdrawal Agreement to giving a right of family reunification to children and adopted children who will be born after the transition/implementation period.[28] Furthermore, the draft Withdrawal Agreement also sets out the Commission's position that future spouses and future civil partners should be covered by the Withdrawal Agreement. However, the Government disagrees with this proposal and it will be a matter for Phase 2 negotiations.[29] The draft Withdrawal Agreement also said that the UK and EU27 shall "facilitate entry and residence" of non-resident partners who are in a durable relationship with an EU citizen before the end of the transition/implementation period.[30]

26 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 5, Chapter 1, Article 4(5)

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

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

29 See also Q422

30 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018,Article 4

- EU citizens in the UK and UK citizens in the EU will have continued access to healthcare and pensions. For example, UK citizens living in Member States before the Specified Date will be able to continue their current healthcare arrangements and take advantage of the EHIC scheme[31] but those who visit or are resident after the specified date will not.
- Those who by the end of the transition/implementation period are working as frontier workers, as defined under EU law, will fall within the scope of the Withdrawal Agreement.[32]
- Professional qualifications that fall under the Free Movement Directive on the Specified Date will be recognised. However, the recognition of other qualifications is a matter for Phase 2.[33]
- Rights derived from EU citizenship will be enshrined in the Withdrawal Agreement and given effect through primary legislation in the UK. This will be the Withdrawal Agreement and Implementation Act.[34]

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

Settled Status

25. The draft Withdrawal Agreement said that the UK and any of the EU27 Member States can introduce a system for individuals to apply for a status that confers the right of residence.[35] The UK will be introducing such a system, which will provide a new category of residency called 'Settled Status'. It will provide proof that EU citizens have permission to continue living and working in the UK.

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

32 Commission, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, Article 9

33 Commission, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, Article 26

34 Commission, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, Article 4

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

26. The requirements for Settled Status will largely replicate those for Permanent Residence[36]—five years continuous and lawful residence in the UK as a worker, self-employed person, student, self-sufficient person or family member of an EU citizen; and without absence from the UK for more than six months.[37] EU citizens in the UK that hold a Permanent Residence document will be able to exchange it for a Settled Status document, free of charge.[38] EU citizens in the UK will have to demonstrate EU citizenship, residency in the UK before the Specified Date and pass a criminality and security test. EU citizens who do not have a Permanent Residence document by the Specified Date will be able to apply for 'temporary status' until they reach the five-year threshold and can then apply for Settled Status. An application for temporary status or Settled Status must be made within a minimum two-year 'grace period'. If no application is made for Settled Status within this period, then the rights, in principle, lapse. However, the Commission is proposing that the grace period be extendable for a further year if there are technical problems with registration.[39]

27. The Government expects the online application system for Settled Status to be ready in the second half of 2018.[40] It has also indicated that it intends the application process to begin six months before the UK leaves the EU, and will operate during the two-year grace period after the Specified Date. During this period, it will be necessary for the Home Office to process potentially 3 million applications.[41] Furthermore, the Government has said that it expects to process applications within 2 weeks.[42] However, British in Europe and the3million, advocacy groups for citizens affected by Brexit, said that "a firm commitment to such a 2-week period as sought by the House of Lords has not been forthcoming to date" and that because of "well-documented Home Office problems we have serious doubts about this timeline."[43] The two-week target is more ambitious than, for example, the target time for the UK Passport Office to process "straightforward renewal applications."[44]

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

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

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

39 Article 17(c).

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

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

42 Guardian, Minister outlines how EU nationals will apply for UK 'settled status', 12 December 2017

43 British in Europe & the3million, Securing Citizens' Rights under Article 50: Reflections on Phase 1 & Considerations for Phase 2 of the negotiations, 23 January 2018

44 Gov.uk, Renew or replace your adult passport

28. The draft Withdrawal Agreement states that the application process must be "smooth, transparent and simple" and the application forms "short, simple and user-friendly".[45]

29. British in Europe & the3million said that the online Settled Status application process is centred on applicants who have previously engaged with the "UK Government, communicate in English and are computer literate." Those advocacy groups highlighted that the Government has said that services will be provided at some "local libraries and that in exceptional cases home visits will be carried out to assist with applications for the new status. However, the details of this have been scarce." Furthermore, British in Europe & the3million are concerned that the Home Office "will not be sufficiently funded and equipped", following budget cuts.[46]

30. **There is considerable scepticism that the Government's online system for Settled Status and temporary status will be operational in time to start processing applications later this year. Furthermore, depending on the outcome of transition negotiations, there could also be a system to register EU citizens arriving during the transition period. Concerns have been raised by EU citizens in the UK and by the European Parliament about the efficiency and effectiveness of the Home Office's processes. It is important that the Home Office ensures the online system for settled status and temporary status is operational by the end of this year, although past experience indicates that this may be a challenge for the Department.**

Settled Status and those not included in the Withdrawal Agreement

31. The definition of 'residence' for establishing Settled Status is based on the Free Movement Directive. Dr Charlotte O'Brien, Senior Lecturer at York Law School in the University of York, and British in Europe and the3million have outlined categories of vulnerable people who are not covered by the Free Movement Directive:

- Children are unable to acquire Permanent Residence in their own right under the Free Movement Directive as their rights are dependent upon those of their parents. Children who have become estranged from their parent(s) or whose parent(s) are not able to fulfil the criteria in the Free Movement Directive, "for reasons related to care, disability, or evidential problems attendant upon having a series of short term, casual and/or zero hours jobs" are particularly vulnerable.[47]

- Women with work histories that are punctuated with interruptions relating to domestic violence or because they have been caring for others might find it difficult to meet the Free Movement Directive's criteria for residence. Women providing care "have had their five-year clock not only stopped, but restarted several times over, because care does not count as a reason to bridge gaps between employment under [the Free Movement Directive], and so there is discontinuous lawful residence."[48]

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

46 British in Europe & the3million, Securing Citizens' Rights under Article 50: Reflections on Phase 1 & Considerations for Phase 2 of the negotiations, 23 January 2018

47 NEG0008 Dr Charlotte O'Brien

48 NEG0008 Dr Charlotte O'Brien

- It is likely that there will be many people who will not understand the need for registration. Examples might include long-term residents, people who have been born in the UK without acquiring UK citizenship, elderly EU citizens, and relatives of migrant workers who do not speak English.
- Some part-time workers have been reclassified as not-workers since the introduction of the minimum earning threshold in 2014. Dr Charlotte O'Brien said that "It is not clear what the future effects of those past re-classifications and negations will be."[49]
- Zambrano carers who benefit from rights deriving from Article 20 of the TFEU (on citizenship) do not feature in the agreement at all. As a result, third country nationals who rely on rights as primary carers of British children will be at risk of removal if they do not meet the requirements of UK or EU27 immigration rules. This would put the welfare of these children at risk.[50] It is also not clear what the policy will be towards other third-country nationals who live in the UK under EU rights-based legal judgments.[51]

32. The draft Withdrawal Agreement did not cover citizens from the EEA EFTA states and Switzerland who are living in the UK or UK citizens living in those states. However, on 16 February 2018 the Government announced that officials had met with EEA EFTA and Swiss counterparts to discuss a reciprocal extension of the arrangements set out in the Joint Report to one another's citizens.[52]

33. **The current proposals define 'residence' by reference to the provisions of the Free Movement Directive. The Directive does not cover a range of vulnerable categories of people who will be experiencing anxiety over their legal status in the UK. As a matter of priority, the Government must ensure that there are specific provisions and flexibility for such people to ensure eligibility for Settled Status that will cover vulnerable children and adults, particularly women who have had caring responsibilities or have been temporarily unable to work because of domestic abuse. The Government should also ensure that different types of part-time or irregular work are considered fairly and plans detailing this should be published as soon as practicably possible after the March negotiating round.**

49 NEG0008 Dr Charlotte O'Brien

50 British in Europe & the3million, Securing Citizens' Rights under Article 50: Reflections on Phase 1 & Considerations for Phase 2 of the negotiations, 23 January 2018

51 Third country EU-derived rights include those from the Zambrano, Metock and Surinder Singh cases. Zambrano allows a non-EU national to reside in the UK if they are a carer of an EU national who is dependent upon them to exercise their Treaty rights. Metock allows a non-EU national in the UK illegally to remain if they form a genuine relationship with an EU citizen. Surinder Singh allows non-EU national partners who have been exercising Treaty rights in another Member State to become resident in the UK under EU, rather than UK, rules.

52 Department for Exiting the European Union, Plans outlined to extend 'Settled Status' deal to citizens from Iceland, Liechtenstein and Norway, 16 February 2018. EEA EFTA citizens are covered by free movement provisions through the EEA Agreement. This allows them to move to the UK and other EU states, and UK citizens can move to the EEA EFTA states.

UK citizens in the European Union

34. The draft Withdrawal Agreement provides flexibility for other Member States to introduce their version of Settled Status for UK citizens, who are resident in their territory. This provision might be relevant as the current draft Withdrawal Agreement does not allow for continued free movement of UK citizens in the EU27 after the Specified Date. Member States could then initiate a process to identify the UK population in their territories so that they could be identified distinctly from those eligible for free movement across the other EU27 countries. Responding to the Joint Report, British in Europe and the3million said:

> The EU thus accepted this departure from EU law. At the last minute an option was included in the [Joint Report] so that EU27 countries may require UK citizens in their boundaries to make fresh applications. This was a proposal on which there was no prior consultation. Were this constitutive approach to be applied—in the UK to EU citizens and potentially in EU27 countries to UK citizens—following the UK's exit, existing EU rights would 'fall away' and citizens could potentially be without a legal status with dire consequences for them and their families.[53]

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

36. **The draft Withdrawal Agreement would allow EU Member States to require UK nationals in the EU to apply for a new residence document to ensure that their rights are protected beyond a transition/implementation period following the UK's exit from the EU. While the negotiations on citizens' rights are ongoing it is unclear whether any Member States are considering the introduction of such a requirement, should free movement for UK citizens in the EU by the Specified Date not be agreed and it becomes an option that is desirable to Member States. The Government should continue to push hard for continued free movement rights for UK citizens in the EU by the specified date and for an EU Member State equivalent to "settled status" for UK nationals living and working in the European Union after the United Kingdom has withdrawn from the EU.**

Independent Authority

37. The draft Withdrawal Agreement states that the UK will create an Independent Authority to monitor the citizens' rights part of the Withdrawal Agreement in the UK. The Independent Authority will have the power to receive and investigate complaints from EU citizens and their family members, and to conduct inquiries on its own initiative, concerning alleged breaches by administrative authorities of their obligations. The Independent Authority will have the right to bring a legal action before a competent UK court or tribunal to seek redress. Furthermore, the Independent Authority will inform the

53 British in Europe and The3million, Securing Citizens' Rights under Article 50, 23 January 2018, page 5

Commission of any such legal actions brought before courts or tribunals and may consult the Commission before taking legal action "and the European Commission may suggest to the Authority to bring such legal actions."[54]

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

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

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

Second, he said that having independent oversight bodies and ombudsmen were common, and he thought this would be "a way of championing [citizens'] rights and making sure they delivered, in a way that was visible, transparent and clearly designed to deliver on the deal."[55]

40. **We agree with the Government's proposal to establish an Independent Authority to "champion" the rights of EU citizens in the UK. We recommend that the Government publish draft proposals on how the Independent Authority will carry out its work. There are a number of important ways in which Parliament can have a role in ensuring the independence of those in charge of public bodies. A number of roles are subject to pre-appointment hearings with departmental select committees. For example, the Treasury Select Committee has a statutory veto over the appointment and dismissal of the Chair of the Office for Budgetary Responsibility. The appointment of the Chief Executive of the Financial Conduct Authority is also subject to a pre-appointment hearing with the Treasury Select Committee and the Government has accepted that if it disagrees with a negative report from the Committee, it will table a motion disagreeing with the Committee in Government time. We call on the Government to publish the details of arrangements for appointing the Chair of the Independent Authority as soon as possible, including which Committee it would envisage as having a statutory veto or the right to an appointment hearing.**

54 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, Article 152

55 Q766

Northern Ireland/Republic of Ireland

41. The Commission's draft Withdrawal Agreement and the Joint Report both stated that there will be no "physical infrastructure or related checks and controls" on the border between Northern Ireland and the Republic of Ireland.[56] The Joint Report presented three options to meet this objective:

> [Option A:] The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. [Option B:] Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. [Option C:] In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.[57]

42. The Commission's draft Withdrawal Agreement set out its interpretation of how Option C should be translated into a legal text that reflected the progress of the negotiations at the time that it was published. The draft Withdrawal Agreement proposed a "common regulatory area" which constitutes "an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected".[58] Under this proposal, Northern Ireland would be considered "part of the customs territory" of the European Union[59] and would require Northern Ireland to follow European Union law on goods, agriculture and fisheries, the Single Electricity Market, certain environmental standards and state aid.[60] Michel Barnier described this as "the backstop solution" and that it was "the only way to guarantee that [the EU and UK] joint commitments will be upheld in all circumstances, as the Joint Report requires."[61]

43. The Prime Minister has rejected this proposal because it would "undermine the UK common market and threaten the constitutional integrity of the UK by creating a customs and regulatory border down the Irish Sea" and that "no UK Prime Minister could ever agree to it".[62] The Prime Minister stressed that the Joint Report had "made it clear that

56 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 43

57 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 49

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

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

60 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, Articles 4–9 The draft Withdrawal Agreement states that with regards to State Aid, "only measures that affect trade between the territory of Northern Ireland and the Union shall be considered as aid within the meaning of Article 107(1) TFEU."

61 Commission, Press statement by Michel Barnier following the publication of the draft Withdrawal Agreement between the EU and the UK, 28 February 2018

62 HC Deb 28 February 2018, Vol. 636, Col. 823. The Prime Minister repeated the Government's commitment to there being no "customs and regulatory border down the Irish Sea". See, Prime Minister, PM speech on our future economic partnership with the European Union, 2 March 2018

there should continue to be trade between Northern Ireland and the rest of the United Kingdom, as there is today."[63] The Prime Minister was referring to paragraph 50 of the Joint Report which stated that there would be:

> In the absence of agreed solutions, as set out in the previous paragraph, the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market.[64]

This paragraph of the Joint Report was not translated into legal text in the draft Withdrawal Agreement. Although that may be because this is an internal matter for the UK. The Government has consistently ruled out any form of economic border in the Irish Sea. The Secretary of State said, "we have always said that there is not going to be a border in the Irish Sea and that continues to apply. We are not going to have any breakup of the United Kingdom off the back of what we are doing here."[65]

44. While the Government has rejected the Commission's interpretation of Option C, it has not, so far, set out its own interpretation of what 'full alignment' means in any detail. When updating the House on the Joint Progress Report, the Prime Minister stated that the Government's intention is to deliver a "deep and special partnership"[66] with the European Union, an essential part of which involves an agreement on the Irish border. She went on:

> Because we recognise the concerns felt on either side of the border, and we want to guarantee that we will honour the commitments we have made, we have also agreed one further fall-back option of last resort. If we cannot find specific solutions, the UK will maintain full alignment with those rules of the internal market and the customs union that, now or in the future, support north-south co-operation, economic co-operation across the island of Ireland and the protection of the Belfast agreement.[67]

The Government has said that full alignment could include mirroring EU regulations to provide equivalent regulations or having our own regulations.[68] It did not mean harmonisation. However, some witnesses said that it was difficult to draw conclusions on the scope of the commitment based on some of the phrasing in the Joint Report. For

63 HC Deb 28 February 2018, Vol. 636, Col. 823

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

65 Q717

66 HC Deb 11 December 2017, Vol. 633, Col. 27

67 HC Deb 11 December 2017, Vol. 633, Col. 27

68 On 11 December 2017, the Prime Minister said, "Full alignment means that we will be achieving the same objectives. I set out in my Florence speech that there are a number of ways in which we can approach this. There will be some areas where we want to achieve the same objectives by the same means. In others we will want to achieve the same objectives by different means. If we look at the areas covered currently by north-south co-operation, we see there are six of those areas. Two of them are not covered generally by the acquis—education and health—but there are other issues, such as the environment, waste and water management, the electricity market, agriculture, and questions relating to road and rail transport." See, HC Deb 11 December 2017, Vol. 633, Col. 42

example, Professor Dougan said that the concept of the all-island economy "could be as broad or as narrow as you really want it to be".[69] When we asked the Secretary of State what was included in the all-island economy, he said:

> It was things like the single electricity market we had in mind, which we will somehow have to maintain in place if we are going to have the best outcome for north and south, in terms of cost of electricity, reliability, seasonal adjustment and so on.[70]

45. The Secretary of State said that full alignment would be limited to six areas of north-south cooperation listed in the Good Friday Agreement: transport, agriculture, education, health, environment and tourism.[71] Professor Dougan said that the 'north-south co-operation' phrasing in the Joint Report was a "relatively clear criterion, in the sense that the two sides have been working on drawing up a list of areas that are the subject of north-south co-operation, underpinned by EU law and policy."[72] In Dublin, we heard that 142 potential areas of cooperation had been identified in preliminary work as part of a "mapping exercise", although this has not been published.[73] In evidence to the Northern Ireland Affairs Committee, Mr Robin Walker MP, Parliamentary Under-Secretary of State, Department for Exiting the European Union said that the 142 areas of cooperation related to:

> existing areas of co-operation; these are areas that are either covered under the six principles of the Belfast agreement and the six co-ordination bodies there, or they are areas where the Northern Ireland Executive has signed off on co-operation that exists between the north and the south under the auspices of the North-South Ministerial Council.[74]

It is worth noting that the Belfast Agreement was drawn up at a time when both the UK and the Republic of Ireland were members of the EU so many of these issues did not arise.

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

69 Q380
70 Q773
71 Andrew Marr Show, Interview with the Rt Hon. David Davis MP [transcript], 10 December 2017, page 7
72 Q380
73 The 'mapping exercise was also referred to in the Joint Report. See, Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 47
74 See Northern Ireland Affairs Committee, Oral evidence: The land border between Northern Ireland and Ireland, HC 329, 29 November 2017, Q232

47. On 24 January 2018, the Secretary of State said that the UK would not be following EU rules to the letter but rather it would seek to achieve the same outcomes through different regulatory regimes. He said, "The point of full alignment… is that we intend to get outcome alignment, not harmonisation."[75] On 20 December 2017, Professor Anand Menon said:

> the missing element in all this is the question of adjudication. Lurking in the text of this document is "we will be aligned; trust us", and that is simply not going to fly for the European Union, because the big question is who gets to say whether or not the rules are the same? What is the form of legal adjudication?[76]

Article 11 of the Protocol on Ireland and Northern Ireland to the Commission's draft Withdrawal Agreement proposed the extension of EU supervision and enforcement to Northern Ireland. This would involve CJEU rulings having direct effect in Northern Ireland.

48. When we visited Dublin in January, Irish politicians, including Simon Coveney, said that the Joint Report represented a clear agreement that there would be no regulatory divergence which could lead to customs checks at the border. We were also told that the obligation to maintain full alignment had replaced the original wording "to avoid regulatory divergence". EU accession states were expected to achieve "full alignment" of regulations with the EU as part of the accession process; so, the words "full alignment" in paragraph 49 of the Joint Report should be seen in this context. And the Taoisearch has stated that any form of border analogous to that of the US-Canada border for example, "is definitely not a solution that we can possibly entertain."[77]

49. During our visit to Armagh, concerns were raised with us about any impact on daily life of any changes on the border or changes arising from Brexit.

50. **We note that the draft legal agreement does not reflect all the options in the December Joint Report. We support the Government's rejection of the Commission's interpretation of what constitutes the previously agreed fall-back position of full alignment in the draft Withdrawal Agreement in the context of the Joint Report's commitment to uphold the Good Friday Agreement. This is because the UK Government's commitment was to the United Kingdom—not just Northern Ireland—maintaining "full alignment" with those rules of the internal market and the customs union which support north-south co-operation, the all-island economy and the protection of the 1998 agreement. Whatever solution is reached to resolve issues around the Border must involve the whole of the UK. While we recognise it is the least favoured option for both the Government and the European Union, it has, potentially, far reaching consequences for Northern Ireland, the United Kingdom and Ireland. The Irish Government has said that it sees the Joint Report as an unambiguous commitment to there being no divergence that could lead to a hard border, including any physical infrastructure or related checks and controls. We note that Michel Barnier has already stated that innovative and imaginative solutions must be sought to deal with this issue**

75 Q719
76 Q378
77 RTE, Varadkar quashes May's suggestion of looking at US-Canada style border, 5 March 2018

and believed that given political willingness there are solutions that are worthy of consideration. Because the UK Government has not explained what full alignment means, it should now provide answers to the following questions:

- **Will the commitment to full alignment cover all traded goods?**
- **Which rules of the Single Market and Customs Union are included in the full alignment commitment?**
- **What is the exact scope of the all-island economy, given that the Government 's aim of an open border for all goods in the context of the all-island economy must by definition be wider than the six areas of North-South cooperation.**
- **What method of legal adjudication would the Government seek to underpin an agreement that is based on full alignment of regulatory outcomes?**

Paragraph 47 of the Phase 1 Agreement said, "The two parties have carried out a mapping exercise, which shows that north south co-operation relies to a significant extent on a common European Union legal and policy framework". We believe the Government should publish the results of this mapping exercise in order to provide clarity about what is covered by north south co-operation.

51. **If the Government is unhappy with sections of the draft withdrawal agreement then it should produce its own suggested legal text.**

Government's proposed solutions

52. The Government's preference for maintaining a frictionless border is through the overall EU-UK relationship.[78] However, the Government has asked for Options A and B—the Future Partnership and 'specific solutions'—to be considered together.[79] 'Specific solutions' appears to refer to the implementation of new technical and administrative processes to avoid the need for customs checks. Options A and B are not set out in detail in the draft Withdrawal Agreement as they are contingent on the Phase 2 negotiations which are expected to begin in March. Nevertheless, the draft Withdrawal Agreement allows for a "subsequent agreement" to supersede Option C:

> Should a subsequent agreement between the Union and the United Kingdom which allows addressing the unique circumstances on the island of Ireland, avoiding a hard border and protecting the 1998 Agreement in all its dimensions, become applicable after the entry into force of the Withdrawal Agreement, this Protocol shall not apply or shall cease to apply, as the case may be, in whole or in part, from the date of entry into force of such subsequent agreement and in accordance with that agreement.[80]

78 Liaison Committee, Oral evidence: The Prime Minister, HC 637, 20 December 2017, Q3

79 Commission, Press statement by Michel Barnier following this week's round of Article 50 negotiations (6th-9th February), 9 February 2018

80 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 105, Article 15

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

- A streamlined customs arrangement between the UK and the EU underpinned by the continuation of some of the existing agreements and under which the UK and EU would trade with each other as third parties. Such an arrangement is essentially an agreement to reduce, as far as possible, customs checks.
- A new customs partnership with the EU which would align the UK approach to the customs border in a way that removes the need for a UK-EU customs border. This would be achieved by operating a regime for imports that aligns precisely with the EU's external customs border for goods consumed in the EU market and requiring the same tariffs and rules of origin as the EU to be applied.[81]

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

> First of all, the assumption is that what is adopted in the future is a negotiated settlement with the EU, in which the highly streamlined customs arrangement is adopted. That is a basket of changes that essentially keeps all of the good features of trading with the European Union: for example, you stay in the Common Transit Convention and there is mutual recognition of the Authorised Economic Operator scheme and so on and so forth.
>
> Because of the unique situation of Ireland and Northern Ireland, however, you need to add on three additional things, which are set out in the "Northern Ireland and Ireland" [position] paper. First of all, that is to maximise the Authorised Economic Operator scheme, which you were asking about. Secondly, it is to seek a derogation for small traders, because there needs to be a recognition that the Ireland-Northern Ireland border is very much a local economy in which traders cross the border on a regular basis. We are seeking a derogation for small traders, with the definition of small to be negotiated. Thirdly, we want to move to a system of self-assessment, which is set out in the Union Customs Code and is the direction of travel for the European Union.
>
> If you take the highly streamlined customs arrangements and you add those three things on, we believe that would cover the vast majority of the trade between Northern Ireland and Ireland. If there were any checks, they would be risk and intelligence-based, and they would take place well away from the legal border.[82]

81 Department for Exiting the European Union, Future customs arrangements, 15 August 2017. See also, Department for Exiting the European Union, Northern Ireland and Ireland, 16 August 2017

82 Department for Exiting the European Union, Northern Ireland and Ireland: position paper, 16 August 2017 & Q191 [Jon Thompson]

Mr Thompson also referred to the considerable costs associated with HMRC border contingency planning for the whole of the UK, involving the recruitment of "somewhere between three and five thousand, probably at the upper end of that range" new staff at a cost of "the order of £200 million extra to our current budget… on an annual basis."[83]

54. The Prime Minister's most recent speech on the Future Partnership referred to the two technical and administrative proposals that were presented in the August 2017 position paper and emphasised a desire for an "agreement on customs" as part of the Future EU-UK Partnership.[84]The Irish Government has said, in broad terms, that it favours maintaining a frictionless border through the future partnership. In February, Leo Varadkar, the Taoiseach, said, "We both prefer Option A as the best option by which we can avoid any new barriers [on the] border in Ireland, and that is through a comprehensive customs and trade agreement involving Britain and Ireland."[85] In February, in response to the publication of the draft Withdrawal Agreement, Simon Coveney, the Tanaiste and Foreign Minister, said:

> We have always been clear that our preference is to avoid a hard border through a wider future relationship agreement between the EU and the UK, a view we share with the British government. We are also committed to exploring specific solutions to be proposed by the UK. At the same time, there is now the necessary legal provision to implement the backstop of maintaining full alignment in Northern Ireland with the rules of the Single Market and Customs Union necessary to protect North South cooperation and avoid a hard border. This is very much a default and would only apply should it prove necessary.[86]

55. We agree with the Prime Minister who said in her speech on 2 March 2018 that, "it is not good enough to say, 'We won't introduce a hard border; if the EU forces Ireland to do it, that's down to them'. We chose to leave; we have a responsibility to help find a solution."[87] The political and technical challenges of maintaining a frictionless border outside the Single Market and Customs Union are likely to be significant. In our last report, we concluded that we did "not see how it was possible to reconcile there being no border with the Government's policy of leaving the Single Market and the Customs Union" and called upon the Government to set out in more detail how it would be done.[88] There is no example[89] of a border between the EU and a third country that is as frictionless as that which currently exists between Northern Ireland and the Republic of Ireland. Even EFTA-EEA countries, which are closely aligned with the European Union, are still subject to customs, VAT and rules of origin checks for their exports into the Single Market. Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law at the University of Liverpool, described the example of the Norway/Sweden border—a border between an EEA country and an EU country. He said:

83 Qq225–227
84 Prime Minister, PM speech on our future economic partnership with the European Union, 2 March 2018
85 Guardian, Brexit: Varadkar and May to work on plan for frictionless Irish border, 12 February 2018
86 MerrionStreet, Tánaiste welcomes publication of draft EU-UK Withdrawal Agreement, 28 February 2018
87 Prime Minister, PM speech on our future economic partnership with the European Union, 2 March 2018
88 Exiting the EU Committee, The progress of the UK's negotiations on EU withdrawal, Second Report of Session 2017–19, HC 372, 1 December 2017, para 47
89 Except Vatican City

> the Norway/Sweden border is about as closely integrated a border as you can get without being in the Customs Union. Bear in mind that there are no customs tariffs or duties of any kind on most categories of goods between the EEA states that are also EFTA members and the EU member states… There are no internal tariffs between those countries; there are only the external tariffs, which involve third countries. There is pretty much full regulatory alignment and convergence and cooperation within the context of the EEA agreement, but there is still a customs border. It still has to function as a customs border… There is a common border zone between Norway and Sweden, where the customs officials can travel across the border freely as if it were a single territory, but it is still a customs border, and that is about as co-operative and close as you can get. You still have checks, formalities, physical infrastructure and so on.[90]

56. In November 2017, the European Parliament's Committee on Constitutional Affairs (AFCO) commissioned a report to identify international standards and best practices for creating "a smooth border experience" on the island of Ireland. The report was authored by Lars Karlsson, a former Director of the World Customs Organization and Deputy Director General of Swedish Customs. It examined three case studies, the Norway/Sweden border, the United States/Canada border and the Australia/New Zealand border for examples of international best practice. However, the report assumes that some customs infrastructure might be necessary. The report provided an example of a "normal border crossing" facilitated by the report's proposals. In the example, a company transporting goods would be pre-registered in an AEO database and the driver would be pre-registered in a Trusted Commercial Travellers database. A simplified export/import declaration would be automatically processed and risk assessed. Once at the border, the driver's mobile phone would be sent a release-note and a permit that would open a "gate automatically when the vehicle is identified, potentially by an automatic number plate registration system." A post-import supplementary declaration would also be submitted in the import country within a given time period. Any necessary controls would be carried out by "mobile inspection units" from the EU or the UK with a "right of access to facilities and data".[91] On 5 March 2018, the Prime Minister told the House of Commons that the report "does give some very good proposals for solutions."[92] We note, however, that the report envisages infrastructure on the border—i.e. gates and staffed border posts—which would appear to rule it out as an answer given the Government's commitment to no physical infrastructure or related checks and controls. The Prime Minister also said that the customs arrangements being looked at included the border between the United States and Canada, although that border cannot be described as 'frictionless'.

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

90 Q393 [Professor Dougan]

91 European Parliament AFCO Committee [Lars Karsson], Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons, November 2017

92 HC Deb 5 March 2018, Vol. 637, Col. 37

Anand Menon, Director of UK in a Changing Europe, said that it was difficult to identify a precedent for the EU taking a flexible approach to border requirements. He gave the example of the Poland/Ukraine border:

> The Poles had a very open border with Ukraine to the east, and as a result western Ukraine flourished economically, because there was a lot of trade going on with the more developed Polish economy. The Poles begged the European Union to be flexible when it came to imposing an external EU border, because they said, absolutely rightly, "This will have a very detrimental effect on the west Ukrainian economy". The European Union just ignored that and imposed the border—it is an external EU border—and showed very little in the way of flexibility about that.[93]

The Committee recognised that no comparison of border issues would be exact with the situation on the Northern Ireland Border.

58. John Bourne, Policy Director of Animal and Plant Health for the Department for Environment, Food and Rural Affairs, said, "Clearly, there is two-way trade across the border. We can decide what we do on our side, but we cannot determine what happens on the other side."[94] Jon Thompson said, "How exactly the French, the Dutch, the Belgians or the Irish eventually react is not something over which the Government, civil servants or indeed UK plc has much influence."[95]

59. Although the Prime Minister set out in more detail the nature of its technical and administrative proposals there remains the question of whether they could be operational before the end of the transition/implementation period. For example, the Government has said that it plans to use the EU's Authorised Economic Operator scheme, or a recognised equivalent, to reduce customs requirements at the border. However, according to the Institute for Government, "the accreditation process for AEO status can take around six months for businesses, meaning that clear guidance is required early to ensure that traders are ready to make the most of the scheme."[96] This would involve the Government taking steps to speed up the process.

60. The issue of the border is not only one of trade. It has wider political implications and is also an issue of law enforcement and security. Evidence from the PSNI pointed out the security implications of any physical infrastructure at the border. PSNI Assistant Chief Constable Stephen Martin told us:

> If there was infrastructure such as you describe, buildings and people that reemphasised the border in a physical, tangible, visible way, I think it is highly foreseeable that dissident republicans would seek to take action against that and that could include attacking the buildings and the people.[97]

93 Q386
94 Q191 [John Bourne]
95 Q193
96 Institute for Government, Implementing Brexit: Customs, 11 September 2017
97 Q254

His colleague Deputy Chief Constable Drew Harris stressed to us the importance of common EU legal processes and databases in current law enforcement. He said,

> We would also highlight the European arrest warrant. It is very important for both the speedy removal of suspects to other nations but also bringing suspects to this nation. In Northern Ireland last year, we were engaged in 69 European arrest warrant movement of individuals. We also access the Schengen information system, which is a very important system for us. We use it at our ports in addressing the point about human trafficking.
>
> …
>
> I would highlight Eurojust, which is a joint investigation team. That has been very successful, particularly with human trafficking and drug trafficking… We would also highlight the Prüm system—the hit/no hit by a metric check—and the vehicle recognition system.[98]

61. **The Joint Report and the draft Withdrawal Agreement commits to there being no "physical infrastructure" or "customs checks" on the Northern Ireland/Republic of Ireland border. We know of no international border, other than the internal borders of the EU, that operates in the frictionless manner of the border that is between Northern Ireland/Republic of Ireland. When the UK leaves the European Union, it will become a third country. Even the border between Norway (an EEA member state) and Sweden (an EU member state) requires some checks and physical infrastructure.**

62. **We agree with both sides that maintaining a frictionless border through the Future Partnership and Specific Solutions is the best option. We look forward to scrutinising the Government's proposals, when they are presented. In their absence, however, we remain of the view that we cannot see how it will be possible to maintain an open border with no checks and no infrastructure if the UK leaves the Customs Union and the Single Market.**

Belfast/Good Friday Agreement

63. In the Joint Report, both the UK and the European Union affirmed "that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation" and that the Good Friday Agreement must be protected "in all its parts, and that this extends to the practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the Agreement."[99] Furthermore, the UK and the European Union "recognised the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent" and that the UK "continues to respect and support fully Northern Ireland's position as an integral part of the United Kingdom, consistent with the principle of consent."[100]

98 Q268

99 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 42

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

64. **10 April 2018 will be the twentieth anniversary of the signing of the Good Friday Agreement. We welcome the commitment from the Government, as co-guarantor to the Agreement, and from the EU to protect the Agreement "in all its parts". We also welcome the Government's commitment to support fully "Northern Ireland's position as an integral part of the United Kingdom." There must be no hard border North-South or East-West.**

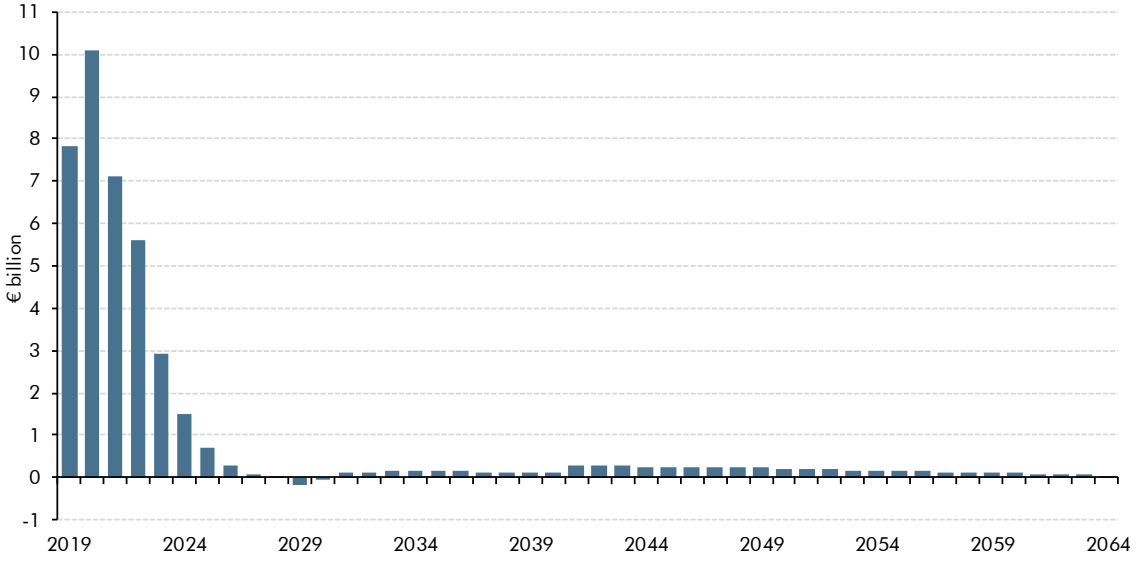
Financial Settlement

65. The Government has estimated that the Financial Settlement will amount to between £35 and £39 billion.[101] This will be spread over many years and will add up to less than what would have been paid had the UK remained a Member State. The amount reflects the obligations the UK would have had in the event of remaining a Member State for the Multiannual Financial Framework that ends at the end of 2020. It also reflects EU assets of which the UK is entitled to a share. The Secretary of State said that the size of the Financial Settlement would be unlikely to rise during Phase 2.[102] The Office for Budget Responsibility has set out the composition and timeline in the following charts:

Figure 1: Settlement components and time periods, OBR

	Payment period	Amount	
		€ billion	£ billion
Total	**2019-2064**	**41.4**	**37.1**
of which:			
UK participation in EU annual budgets to 2020	2019-2020	18.5	16.4
Reste à liquider	2021-2028	20.2	18.2
Other net liabilities	2019-2064	2.7	2.5

Figure 2: Annual path of financial settlement payments, OBR[103]



101 HC Deb 11 December 2017, Vol. 633, Col. 44
102 Q814
103 Office for Budget Responsibility, Economic and fiscal outlook – March 2018, 13 March 2018, Annex B

66. In response to a question on the Spring Statement about the use of the savings arising from lower contributions to the EU budget, the Chancellor said that the OBR:

> has assumed that any saving from a lower contribution to the European Union will be recycled to fund things that would have been funded by the EU, but will no longer be so. How we choose to use that money and what our priorities are will, of course, be an issue for this Parliament, but we should note that we have already made certain commitments—to our agricultural community, for example—to maintain spending at EU levels until the end of this Parliament.[104]

67. During a statement to the House of Commons on 5 March 2018 the Prime Minister confirmed that the Financial Settlement agreed as part of the Joint Report did not include financial contributions that might be required in order to retain UK membership of key European Institutions. She said:

> We also want to explore the terms on which the UK could remain part of EU agencies, such as those critical to the chemicals, medicines and aerospace industries. That would mean abiding by the rules of those agencies and making an appropriate financial contribution, and the UK would also have to respect the remit of the ECJ in that regard.[105]

68. The Joint Report stated that the UK and the EU have agreed a methodology by which the Financial Settlement will be calculated.[106] It notes that the UK will contribute to the European Union's annual budgets for 2019 and 2020. The 2020 budget will most likely be adopted without a vote for the UK.

69. The UK has also agreed to settle its share of the Reste à Liquider (RAL), which is the difference between the EU's expenditure commitments undertaken and the actual payments made, as at 31 December 2020. These commitments would have been made under the Multiannual Financial Framework (MFF) which was agreed by the UK.[107] By the end of 2020, the RAL is expected to amount to €254 billion (£223 billion). The UK's share is apparently 12.7% or approximately 28.3 billion, based on the UK's average share of contributions in the current budgetary cycle.

70. The UK will also contribute a share of the EU's other financial (contingent) liabilities, including staff pensions and the €1.8 billion (£1.58 billion) macro-financial assistance package for Ukraine. The EU will repay the UK's €3.5 billion (£3.1 billion) of paid-in capital to the European Central Bank and European Investment Bank (EIB), the latter in twelve annual instalments.[108] However, the UK has committed to remain liable to provide capital to the EIB as necessary for operations outstanding on the withdrawal date, including a maximum of €35.7 billion (£31.2 billion) of callable capital if the EIB were to be in financial distress. These liabilities will decrease as the EIB's loans outstanding on the UK's withdrawal date amortise.

104 HC Deb 13 March 2018, Vol. 637, Col. 736

105 HC Deb 5 March 2018. Vol. 637, Col. 26

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

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

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

71. In 2019 and 2020, all EU funding programmes—including Horizon 2020, the Cohesion Fund and the Regional Development Fund—will remain open to UK participants.[109] This will entitle UK beneficiaries to payments from those programmes for projects that were agreed to before 31 December 2020, even if actual payments are made after that date. Although the provisional agreement takes note of the UK's intention to participate in some EU programmes after 2020, it does not make any specific provision for such participation. It is expected that this will be included in the negotiations on the transition/implementation period.

72. The draft Withdrawal Agreement said that the UK will remain a participant in the 2014–2020 European Development Funds (EDFs).[110] The EDFs fund development assistance projects in the African, Caribbean and Pacific Group of States.

Financial Settlement and the Future Partnership

73. The Secretary of State said that the Financial Settlement was "conditional" on the UK securing a Free Trade Agreement[111] and that was one reason a trade deal needed to be concluded by October.[112] This conditionality is not specified in the Joint Report. He said that he expected the UK "to make the payment during the course of the transition or the implementation period." However, he also said that the Future Partnership will "take some time to conclude, as the Canadian one did… and that time will happen during the implementation period."[113] This means that the UK will have already paid a proportion of the Financial Settlement before the Future Partnership is ratified. Professor Anand Menon, Director of UK in a Changing Europe, said:

> For the European Union, ["nothing is agreed until everything is agreed"] is a reference to Phase 1 … From the EU's perspective, there is no link between the Financial Settlement and any future trade talks, for a very practical reason … We are not going to be in a position to sign off a trade deal until several years after we have been paying the money we have already agreed to pay anyway, because this agreement has to be signed and sealed in October next year. The timing is simply wrong.[114]

74. **We welcome the agreement of the Financial Settlement in the Joint Report which enabled the EU27 to agree that sufficient progress had been made and that negotiations could move to Phase 2. The Government has outlined its view that the payment of the Financial Settlement is contingent on the agreement of the Future Partnership. However, the treaty establishing the Future Trade Agreement part of the Future partnership will probably not be ratified until after the UK has already made a substantial portion of these payments.**

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

110 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, Article 145

111 Q813

112 Q805

113 Q805

114 Q414

3 Transition/implementation period

Introduction

75. Negotiations on the transition/implementation period have started and it is expected that its terms will be agreed at the next European Council on 22–23 March. It is vitally important that this deadline is achieved. On 29 January, the European Council published Supplementary Directives for the negotiations on the transition/implementation period and on 7 February the Commission published a more detailed position paper that outlined in "legal terms" how such arrangements should be given effect in the Withdrawal Agreement.[115] This position paper has been incorporated (with some amendments) into its draft Withdrawal Agreement that was published on 28 February 2018. Since the Prime Minister's Florence Speech in September 2017, which was the first time that the Government formally requested a transition/implementation period, the Government has published a 'Technical Note on International Agreements', 'Draft Text for Discussion: Implementation Period', and a paper on 'EU citizens arriving in the UK during the implementation period'.[116]

Purpose

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

- It will allow the UK time to build new infrastructure, and set up new systems, to support the Future Partnership and allow for as free and frictionless trade as possible and will allow European governments to do the same;
- It will ensure business is ready and business will only have to adjust to one set of changes;
- The EU is not legally able to conclude an agreement with the UK as an external partner while it is a Member State. It is only possible for the UK to sign this agreement when it is outside the EU; and
- An agreement on the Future Partnership will require the appropriate legal ratification, which would itself take time. This will need to happen during the implementation period.[117]

115 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018, and Commission, Position paper "Transitional Arrangements in the Withdrawal Agreement", 7 February 2018

116 Department for Exiting the European Union, Technical Note on International Agreements, 8 February 2018; Draft Text for Discussion: Implementation Period, 21 February 2018; Policy paper: EU citizens arriving in the UK during the implementation period, 28 February 2018

117 Department for Exiting the European Union, David Davis' Teesport Speech: Implementation Period – A bridge to the Future Partnership between the UK & EU, 26 January 2018

Duration

77. On 29 January, the European Council said that the transition/implementation period will start on the day that the Withdrawal Agreement comes into force and "should not last beyond 31 December 2020." This suggests a period of 21 months.[118] The Commission's position paper said the same.[119] The EU selected this date because it coincides with the end of the current Multiannual Financial Framework (MFF—the European Union's seven-year budgetary cycle); the last one to which the UK has agreed to contribute.[120] However, the Government's 'Draft Text for Discussion: Implementation Period' does not commit to this timeframe. It said:

> The UK believes the period's duration should be determined simply by how long it will take to prepare and implement the new processes and new systems that will underpin the Future Partnership. The UK agrees this points to a period of around two years, but wishes to discuss with the EU the assessment that supports its proposed end date.[121]

Extension

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

79. The Commission intends to set out the details of the Future Partnership in a Political Declaration that will accompany the Withdrawal Agreement. We heard in Brussels that the Commission and the European Parliament would like the Political Declaration to be detailed. Negotiators plan to reach this point in October 2018. Once the Political Declaration has been agreed, negotiations will begin on the treaties and agreements that will establish the Future Partnership. Michel Barnier said that the Future Partnership would be established by several agreements, some of which will be treaties.[122] The following graphic shows the Commission's schedule for UK withdrawal:

118 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018, para 22

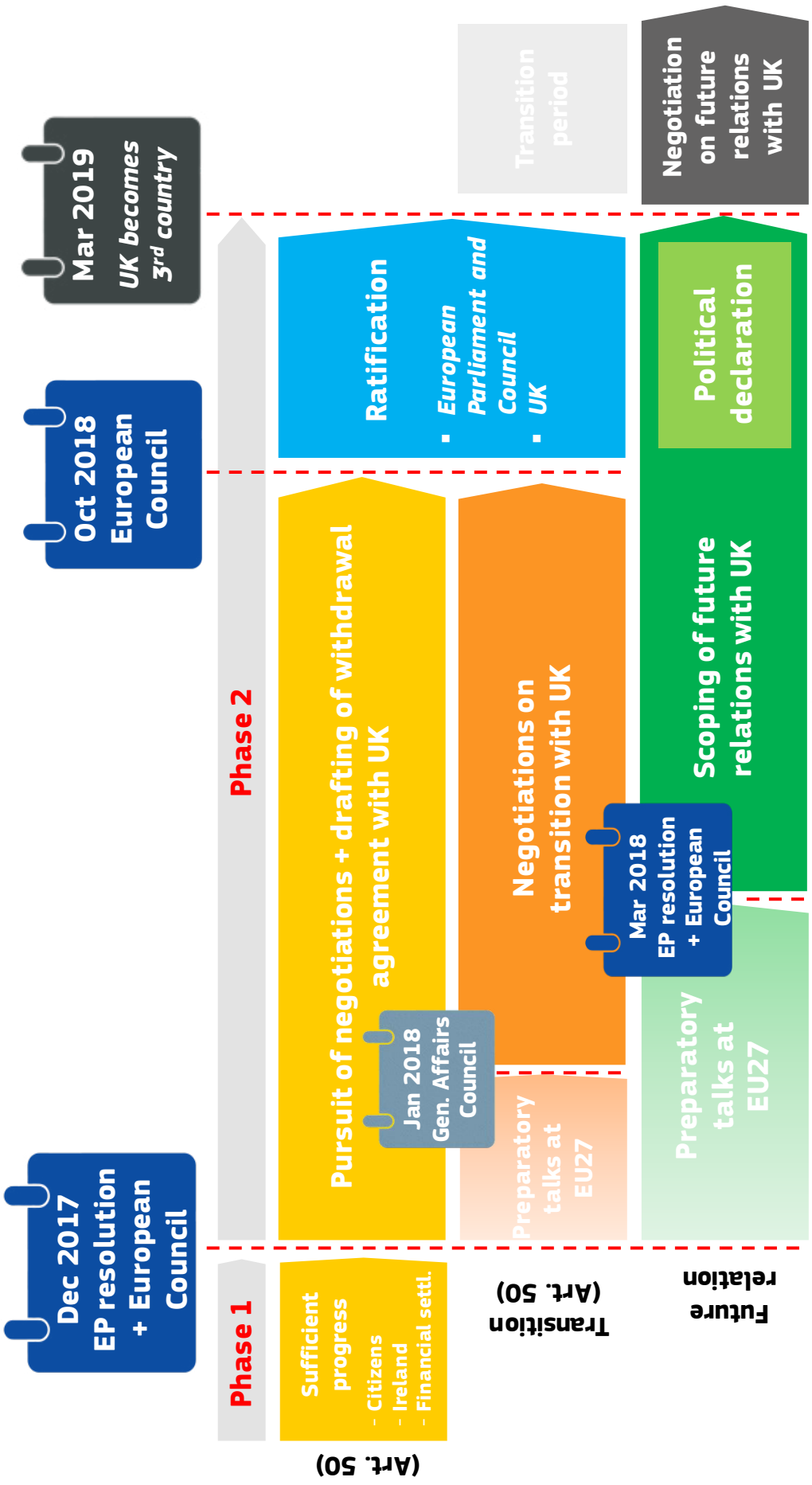
119 Commission, Position paper "Transitional Arrangements in the Withdrawal Agreement", 7 February 2018

120 Politico, Michel Barnier: Post-Brexit transition to end December 2020, 20 December 2017

121 Department for Exiting the European Union, Draft Text for Discussion: Implementation Period, 21 February 2018

122 Northern Ireland Affairs Committee, Oral evidence: Brexit and Northern Ireland, HC 329, Oral evidence: Brexit and Northern Ireland, HC 329, Opening statement [Michel Barnier]

Figure 3: The Commission's schedule for UK withdrawal



80. The Government is confident that a substantial amount of the Future Partnership will have been agreed before the start of the transition/implementation period. In evidence to us, the Secretary of State said that the "substance" of an EU-UK trade agreement will have been agreed before UK withdrawal.[123] He also said that it was important that material aspects of the Future Partnership are not negotiated during the transition/implementation period. He said:

> It would be unwise, in my view, apart from that it practically does not meet the requirements of a transition period, to get sucked into doing a negotiation that is substantive or major during the transition period itself. Why? The balance of power in the negotiation alters and the aim then, on the part of the Commission, will be to spin out the negotiation.[124]

In her Munich Speech, the Prime Minister said that "key aspects of our Future Partnership in [foreign affairs and defence] would already be effective from 2019."[125] However, Michel Barnier suggested that it was possible that not all aspects of the Future EU-UK Partnership will have been agreed before UK withdrawal. He said:

> I can say that within a short period of time we cannot do absolutely everything. We do have to set priorities, but we will be in a position to conclude at least the Free Trade Agreement, if not more. I will work with that in mind, because we want to ensure good trade co-operation. That is a very important condition in the interests of your country as well as the European Union.[126]

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

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

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

123 Q707
124 Q707
125 Prime Minister, PM speech at Munich Security Conference: 17 February 2018
126 Northern Ireland Affairs Committee, Oral evidence: Brexit and Northern Ireland, HC 329, Oral evidence: Brexit and Northern Ireland, HC 329, Q285

84. **The Government believes it can agree the "substance" of its Future Partnership with the EU before October 2018. In the short time that remains, it is difficult to see how it will be possible to negotiate a full, bespoke trade and market access agreement, along with a range of other agreements, including on foreign affairs and defence cooperation. The UK Parliament will need absolute clarity on the Future EU-UK Partnership, including the arrangements for the Northern Ireland/Republic of Ireland border. We look forward to monitoring progress over the coming months.**

85. **The Secretary of State has said that the "substance" of an EU-UK trade agreement will have been agreed before UK withdrawal in March 2019. The Prime Minister has said that key aspects of our Future Partnership in foreign affairs and defence will be effective by the same date. Yet, the Government has also given October 2018 as the date by which it expects to have agreed the "substance" of its Future Partnership with the EU. The Government should give regular updates to Parliament on progress.**

86. **If substantial aspects of the Future Partnership remain to be agreed in October, the Government should seek a limited extension to the Article 50 time to ensure that a Political Declaration on the Future Partnership that is sufficiently detailed and comprehensive can be concluded. It would meet the Government's objective that negotiations on substantive aspects of the Future Partnership should not take place in the transition/implementation period. That time should be used to finalise details and implement administrative measures and infrastructure that is necessary for the Future Partnership.**

87. **If a 21-month transition/implementation period is insufficient time to conclude and ratify the treaties/agreements that will establish the Future Partnership or to implement the necessary technical and administrative measures along with any necessary infrastructure at the UK border, the only prudent action would be for the Government to seek a limited prolongation to avoid unnecessary disruption. It would, for example, be unacceptable for business to have to adapt their import and export processes twice. We therefore recommend that the Withdrawal Agreement include a provision to allow for the extension of the transition/implementation period, if necessary, and with the approval of Parliament. However, we note that there is a risk that a transition/implementation period that lasts much more than two years might exceed the vires of Article 50 and be subject to a legal challenge in the CJEU.**

88. **During a prolonged transition/implementation period, the UK would be bound by the full acquis, with no say in the Union's decision-making bodies. It would also be bound by the CJEU without a UK Judge on the Court. Furthermore, it would have to make financial contributions to the EU's new seven-year budget, with no say on how it is to be spent. The UK would also be subject to new EU laws over which it had not had voting rights.**

Citizens' rights

89. It is the Government's view that the Specified Date, or 'cut-off' point, for when the citizens' rights provisions in the Withdrawal Agreement come into force should be the 29 March 2019. However, the Commission's view, as set out in the draft Withdrawal Agreement, is that the Specified Date should be the end of the transition/implementation period. The timing of the Specified Date has consequences for several aspects of the

citizens' rights part of the Withdrawal Agreement. For example, the Joint Report stated that concepts of EU law in the citizens' rights chapter of the Withdrawal Agreement are to be interpreted in line with the case law of the CJEU by the Specified date. In addition, UK courts will be able to make referrals to the CJEU for "litigation brought within 8 years from the date of application of the citizens' rights Part". It will only be possible to know when this period will start once the Specified Date has been agreed.

90. In a recent policy paper on EU citizens arriving during the transition/implementation period, the Government said:

> The expectations of EU citizens arriving in the UK after our exit will not be the same as those who moved here before our withdrawal, and the same will be true of UK nationals moving to an EU Member State. It should therefore be for the UK and for Member States to determine the rights and pathways to settlement that new arrivals will have if they wish to remain beyond the implementation period.[127]

However, the Government also said that during the transition/implementation period EU citizens will be offered "eligibility after the accumulation of five years' continuous and lawful residence to apply for indefinite leave to remain"; "a temporary status in UK law that will enable them to stay after the implementation period has concluded—this means that they will be able to remain lawfully in the UK working, studying or being self-sufficient for the five years needed to obtain settlement"; and "an opportunity to secure this temporary status during the implementation period, with an additional three month window for applications after the period, ensuring that there is no cliff-edge." The Government's offer to permit applications for indefinite leave to remain will be based on existing UK immigration law, not on the Withdrawal Agreement, which means that EU citizens who arrive during the transition/implementation period would not have the same rights as those that arrive before the start of the transition/implementation period; for example, the right to seek rulings from the CJEU for an eight-year period. Furthermore, the Government has offered the ability for EU citizens to be joined by family members after the transition/implementation period. However, this right will be "on a par with British citizens" which is more restrictive than what those EU citizens will have who will be covered by the Withdrawal Agreement,[128]

91. In Brussels, we heard that the European Parliament would not accept a situation whereby EU citizens who arrive during the transition/implementation period are treated differently to those that are already living in the UK. On 31 January, Guy Verhofstadt MEP, the EP's Chief Brexit Coordinator said, "The maintenance of EU Citizens' rights during the transition is not negotiable. We will not accept that there are two sets of rights for EU citizens. For the transition to work, it must mean a continuation of the existing acquis, with no exceptions."[129]

127 Department for Exiting the European Union, Policy paper: EU citizens arriving in the UK during the implementation period, 28 February 2018

128 Department for Exiting the European Union, Policy paper: EU citizens arriving in the UK during the implementation period, 28 February 2018.

129 European Parliament, Brexit: EP to keep fighting to fully protect rights of EU-UK citizens, 31 January 2018

92. **We note the Government's view that the Specified Date for the citizens' rights chapter of the Withdrawal Agreement should be the 29 March 2019 but that it has also made a unilateral offer to provide EU citizens arriving during the transition/implementation period with the opportunity to apply for indefinite leave to remain in the UK. However, under this proposal EU citizens that arrive in the UK will have different rights to those that are living in the UK before the transition/implementation period. We believe that this is not consistent with full acceptance of the acquis which is fundamental to the transition/implementation period.**

Participation in EU decision-making

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

> The United Kingdom will cease to be a member of the European Union on 29th March 2019. We will no longer sit at the European Council table or in the Council of Ministers, and we will no longer have Members of the European Parliament.[130]

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

95. Where the Supplementary Directives do allow for consultation with the UK, the terms are ambiguous. They state that the UK should be consulted on the "fixing of fishing opportunities (total allowable catches) during the transition period."[131] The Supplementary Directives also give two scenarios in which the UK could be invited to attend meetings in which Member States are represented but only on a case-by-case basis and without voting rights:

- the discussion concerns individual acts to be addressed to the United Kingdom or to United Kingdom natural or legal persons; or
- the presence of the United Kingdom is necessary and in the interest of the Union, in particular for the effective implementation of the Union acquis during the transition period.[132]

130 Prime Minister, PM's Florence speech: a new era of cooperation and relationship between the UK and the EU, 22 September 2017

131 Commission, Position paper "Transitional Arrangements in the Withdrawal Agreement", 7 February 2018

132 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018

These exceptions are drafted broadly and therefore the exact scope of potential UK participation in meetings is not clear. The Supplementary Directives state that the "Withdrawal Agreement should define the precise conditions and the clear framework under which such exceptional attendance should be allowed."[133]

New EU rules and regulations

96. The Commission said that during any transition/implementation period, the UK will be required to adopt new EU laws. Michel Barnier said, "It is a question of maintaining the status quo, as Theresa May has said, and this will only be possible if the dynamic nature of this acquis can be accepted."[134] The European Council's Supplementary Directives stated, "Any changes to the Union acquis should automatically apply to and in the United Kingdom during the transition period."[135] The Government has said that most new EU rules and regulations that will come into force during the transition/implementation period will have been formulated while the UK was a Member of the EU's institutions. When asked whether the UK would accept new EU rules during the transition/implementation period, the Secretary of State said:

> The average time to put a regulation into effect in the European Union is 22 months. The proposal we have with the European Union at the moment is that we leave over 21 months. In other words, there will be nothing that we did not have a say in. As to what happens where that is not exactly right and it does not work out quite that way, we will see when we come to it, but at the moment no.[136]

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

> there is tertiary legislation as well and that primarily comes through agencies and bodies, and that is why, as the Minister has said, we need to have a Joint Committee: so that we can resolve concerns, if we have concerns, about actions in [the transition/implementation period]."[137]

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

133 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018

134 Northern Ireland Affairs Committee, Oral evidence: Brexit and Northern Ireland, HC 329, Oral evidence: Brexit and Northern Ireland, HC 329, Opening statement [Michel Barnier]

135 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018

136 Department for Exiting the European Union, David Davis' Teesport Speech: Implementation Period – A bridge to the Future Partnership between the UK & EU, 26 January 2018

137 European Scrutiny Committee, Oral evidence: EU Withdrawal, HC 763, Thursday 22 February 2018, Q158

98. On 26 January, the Secretary of State said that the Government will seek a mechanism that will enable it to influence new EU rules and regulations that are formulated after the UK has left EU institutions but that are scheduled to come into force during the transition/implementation period. He said, "we will have to agree a way of resolving concerns if laws are deemed to run contrary to our interests and we have not had our say and we will agree an appropriate process for this temporary period" and "It's very, very important. If there are new laws that affect us, we have the means to resolve any issues during that period."[138] The Government's Draft Text for Discussion for the Implementation Period proposed a Joint Committee for this purpose. The Joint Committee would have:

> specific functions in relation to the implementation period, including resolving any issues which might arise concerning the proper functioning of the Agreement, having regard to the duty of mutual good faith which should apply between the UK and the EU, for example, in relation to acts of Union law adopted during the implementation period. Arrangements will need to protect the rights and interests of both parties.[139]

99. **The UK will be a 'rule-taker' with few formal rights to consultation under the current proposals for the transition/implementation period. We agree that the Withdrawal Agreement should establish a mechanism under which the UK can have a say on new EU laws that will apply to the UK during the period but which are devised after it has left the European Union's institutions and call on the Government to come forward with proposals for such a mechanism as soon as possible.**

EU-third country agreements

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

101. The Supplementary Directives state:

> During the transition period … the United Kingdom should remain bound by the obligations stemming from the agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly, while the United Kingdom should however no longer participate in any bodies set up by those agreements.[140]

138 Department for Exiting the European Union, David Davis' Teesport Speech: Implementation Period – A bridge to the Future Partnership between the UK & EU, 26 January 2018

139 Department for Exiting the European Union, Draft Text for Discussion: Implementation Period, 7 February 2018, para 4

140 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018

102. In our last report, we called upon the Government to "set out its plans for the UK's continuing participation in these agreements, its approach to how it is prioritising agreements, and what can be achieved during the Article 50 timeframe."[141] On 8 February 2018, the Government published a 'Technical Note on International Agreements'.[142] The Note set out that the UK will seek to obtain the agreement of the EU and the third countries concerned to interpret the existing agreements as still applicable to the UK. The Government appears to envisage some system of collective informal agreement to continuing the international agreements during the transition/implementation period. It said:

> It would not be necessary … to deal individually with each EU Treaty. The key requirement would be the clear agreement of the parties that the underlying treaty continued to apply to the UK during the implementation period.[143]

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

104. The International Trade Committee has concluded that the Government should "produce a 'risk register', identifying clearly the agreements to be rolled over, with an assessment of how important each agreement is to UK trade. If resources allow within the time given, this should be compiled in consultation with Parliament, businesses and civil society. If resources do not allow for this, the Government should reassure us that this register exists internally."[144]

105. **The EU has a number of bilateral international agreements with non-EU third countries to which the UK wishes to remain party during the transition/implementation period. The UK has asked the EU to seek agreement with those third countries to continue with these agreements during that time. These third countries and the UK may have a mutual interest in continuing these agreements on current terms. However, the Government's approach to reaching agreement on the continuation of these agreements after the transition period is over is not clear and the progress that the Government have made to date is unknown.**

106. **Failure to reach a timely deal on continuing these agreements during the transition/implementation phase could lead to UK exporters no longer being able to take advantage of the EU's existing free trade agreements, while exporters located in countries with EU FTAs would continue to benefit from preferential access to the UK market on the same terms as now. This would be unacceptable.**

141 Exiting the European Union Committee, The progress of the UK's negotiations on EU withdrawal, Second Report of Session 2017–19, HC 372, 1 December 2017, para 105

142 Department for Exiting the European Union, Technical Note on International Agreements, 8 February 2018. The Technical note only applies to 'bilateral agreements' and not 'multilateral agreements' which it states, "raise different considerations."

143 Department for Exiting the European Union, Detail on the UK's position on international agreements, 8 February 2018

144 International Trade Committee, Continuing application of EU trade agreements after Brexit, First Report of Session 2017–19, HC 520, para 35

New free trade deals

107. The UK intends to negotiate—and, where possible, sign—new trade agreements during the transition/implementation period, although they would not enter into force until after the period had ended.[145]

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

> [New trade deals] matter enormously. If we do it this way, the way we are doing it, they will come into effect very soon after conclusion in 2020–21. If we extend our membership, we will not be in a position to do that. Those two years are going to be extremely important for inward investment, for establishing trade arrangements and for bolstering the economy.[146]

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

109. The Commission's draft Withdrawal Agreement said that the UK will still be the subject of a duty of sincere cooperation towards the EU.[147] It said, "during the transition period, the United Kingdom may not become bound by international agreements entered into in its own capacity in the areas of exclusive competence of the Union, unless authorised to do so by the Union."[148] This is less extensive than the Supplementary Directives as the word "exclusive" has been added. However, it still leaves uncertainty whether the UK can negotiate or sign an agreement with a third country even if it does not come into binding effect until after the transition/implementation period. We heard in Brussels that the Commission recognises that the UK should be able to negotiate agreements with third countries during the transition/implementation period.

Financial Settlement

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

145 Department for Exiting the European Union, David Davis' Teesport Speech: Implementation Period – A bridge to the Future Partnership between the UK & EU, 26 January 2018

146 Q806

147 Q736

148 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, Article 124(4)

Negotiations on the transition/implementation period

111. In our last report, we called on the Government to publish a White Paper on the implementation period as soon as possible after the European Council had met in December 2017.[149] On 24 January 2018, the Secretary of State for Exiting the European Union said that he did not believe that a White Paper was required. However, he did not rule out the prospect that one would be published at some point:

> … [the implementation period] will not of itself require a White Paper, unless it is a White Paper preceding the withdrawal and implementation Bill … It is possible there, but it depends on whether it justifies it. It may well be that this is a relatively straightforward negotiation.[150]

112. While the Government has not decided on whether it is necessary to publish a White Paper, the Secretary of State said that the Government would "almost certainly" publish "some papers on elements of [the transition/implementation period]."[151] In January and February 2018, the Government published three short papers on aspects of the transition/implementation period, including papers on international agreements and citizens' rights. The EU has published negotiation papers on its objectives for a transition/implementation period. Most recently, the European Council published specific Supplementary Directives for the negotiations on the transition/implementation period and the Commission published a more detailed position paper that outlined in "legal terms" how such arrangements should be given effect. This was then included in the Commission's draft Withdrawal Agreement.[152]

113. In January 2018, the Commission published two documents on the governance of the Withdrawal Agreement. These documents referred to a requirement for "Special governance in case of a transition period" comprising the existing jurisdiction of the Court of Justice. More generally it envisaged a Joint Political Committee to oversee the ongoing management and supervision of the Agreement. The document also envisaged a combination of political and judicial mechanisms for dispute settlement after transition and "enforcement after dispute resolution".[153] These ideas were translated into the Commission's legal text of 28 February. We look forward to the Government's response to these proposals.

114. **In our last report, we recommended that the Government publish a detailed White Paper on the transitional/implementation period setting out the Government's objectives in detail. This would provide much needed clarity for citizens, business, institutions and our partners in the EU27, as well as providing Parliament with an opportunity to scrutinise and potentially improve the Government's plans. However, just days before the transition/implementation deal is expected to be agreed, the Government has still not published a substantial policy paper that sets out what it wants in precise terms. This is regrettable. By contrast, the EU has set out its objectives for the transition/implementation period in clear terms.**

149 Exiting the European Union Committee, The progress of the UK's negotiations on EU withdrawal, Second Report of Session 2017–19, HC 372, 1 December 2017, para 106

150 Q781

151 Q781

152 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018, and Commission, Position paper "Transitional Arrangements in the Withdrawal Agreement", 7 February 2018

153 Commission, Slides on governance, 19 January 2018

4 Future Partnership

Introduction

115. The Prime Minister has said consistently that the Government does not favour the adoption of any existing model for its Future Partnership with the European Union.[154] The Secretary of State said that the Government would seek a "Canada Plus-Plus-Plus" agreement, signalling a preference for an agreement that was more comprehensive than the EU-Canada trade and security agreement (CETA) and inclusive of financial services.[155] Donald Tusk has said that the only option would be an off the shelf Free Trade Agreement.[156] Michel Barnier said that the future economic relationship will "have to work on a model that is closer to the agreement signed with Canada", based on the UK Government's red lines, as outlined in Figure 4.[157]

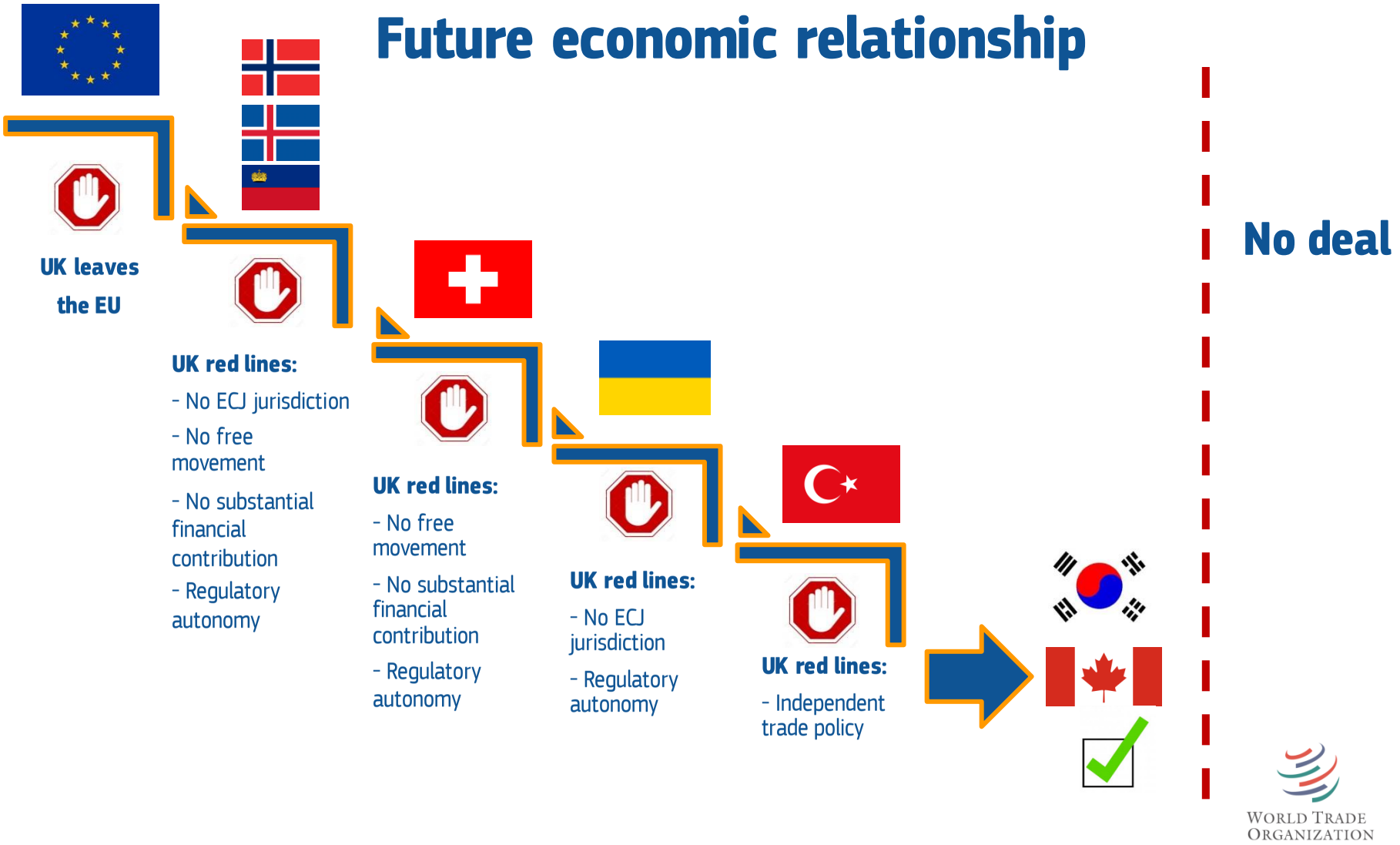
'EU Exit Analysis—Cross Whitehall Briefing'

116. HM Treasury has modelled the economic implications of three "off the shelf" options for the UK's future trade relationship with the European Union—an "average" Free Trade Agreement (FTA) with the EU,[158] membership of the European Economic Area (EEA) and World Trade Organization (WTO) Most Favoured Nation rules (a 'no deal' scenario). HM Treasury did not model the effects of a bespoke 'deep and comprehensive' Free Trade Agreement with the EU—the Government's end state objective—presumably because it has not set out in precise terms what this would entail. However, during the Commons debate on the Exit Analysis, the Government committed to "provide Parliament with the appropriate analysis it needs to make a decision on the final deal at the time that we vote."[159]

117. The high-level results of the modelling, entitled 'EU Exit Analysis—Cross Whitehall Briefing' ('EU Exit Analysis'), was leaked to Buzzfeed, an online news website, which published a report on the contents on 29 January 2018.[160] Other media outlets reported extracts subsequently.[161]

154 Prime Minister, PM's Florence speech: a new era of cooperation and partnership between the UK and the EU, 22 September 2017
155 Andrew Marr Show, Interview with the Rt Hon. David Davis MP [transcript], 10 December 2017
156 City AM, Brexit latest: Donald Tusk rejects managed divergence as he reveals EU27's draft negotiating guidelines, 7 March 2018
157 Guardian, Brexit: UK likely to end up with Canadian-style deal, warns Barnier, 24 October 2017
158 HC Deb 31 January 2018, Vol. 635, Col. 835
159 HC Deb 31 January 2018, Vol 635, Col. 876
160 Buzzfeed, This Leaked Government Brexit Analysis Says The UK Will Be Worse Off In Every Options, 29 January 2018. Buzzfeed published a second report, This Is How Cutting EU Immigration Will Hit The UK Economy, According To The Government's Leaked Analysis, on 31 January 2018
161 Sky News, Hit to North East England and Northern Ireland GDP revealed in new Brexit impact papers leak, 7 February 2018

Figure 4: The future economic relationship between the UK and the EU



118. On 31 January 2018, the House of Commons passed a binding motion for the EU Exit Analysis to be "provided to the Exiting the European Union Committee and made available to all Members on a confidential basis as a matter of urgency."[162] The Government complied and provided the Committee with the EU Exit Analysis on 6 February 2018. In his letter to the Committee that accompanied the EU Exit Analysis, the Secretary of State said that it should not be placed in the public domain.[163] The Government said that parts of the analysis were "negotiation-sensitive", that the "document is preliminary, unfinished and has only very recently been presented to Ministers in any form at all", contains a large number of caveats, and sets out on every single page that this is "draft analytical thinking with preliminary results", and that it does "not yet reflect this Government's policy approaches and does not represent an accurate reflection of the expected outcome of the negotiations."[164]

119. Ministers said on 31 January 2018 that the EU Exit Analysis would be provided to the Devolved Administrations at the same time as the Exiting the EU Select Committee. Robin Walker MP, Parliamentary Under Secretary of State for the Department of Exiting the European Union, said

> We do intend to make this information available to the devolved Administrations, as we did with the previous reports that we made available to this House. It is then a matter for the devolved Administrations to ensure that such documents are handled with appropriate confidentiality; we have no objection in principle to their being shared with Members of the devolved legislatures on the same basis of confidentiality.[165]

However, the Scottish Government's position is that the EU Exit Analysis should be made public. On 31 January, Michael Russell MSP, the Scottish Government's Minister for UK Negotiations on Scotland's Place in Europe, wrote to the Secretary of State for Exiting the European Union and said:

> As you are aware the Scottish Government considers that the public have a right to know the impact on jobs and living standards of the UK Government's decision to pursue the UK's exit from the EU and therefore that this analysis should be made publicly available. Further, this is not our analysis and we do not see it as our responsibility to make arrangements on confidential handling. I want to be clear that if you send the analysis to us we will make it public.[166]

The Government has not yet shared the EU Exit Analysis with the Devolved Administrations.

120. On 21 February, we considered the EU Exit Analysis provided subsequent to the Humble Address of 31 January. We agreed to write to the Secretary of State to inform him that the Committee was minded to publish the Analysis but noting that we would consider any request that he made to redact specific details on the basis that they were

162 HC Deb 31 January 2018, Vol. 635, Col. 876
163 Exiting the European Union Committee, Letter to the Chair from the Secretary of State regarding the Cross Whitehall Briefing, 6 February 2018, 8 March 2018
164 HC Deb 31 January 2018, Vol. 635, Col. 834
165 HC Deb 31 January 2018, Vol. 635, Col. 834 and Col. 875
166 Scottish Government, Call for Brexit analysis to be made public, 1 February 2018

either sensitive to the negotiations, market sensitive or commercially confidential.[167] The Chair also explained that the Committee had considered that "most of the substantive information in the document was already in the public domain and the public interest was better served by allowing this information to be considered in its full context rather than selectively quoted".[168] Following discussions with the Department, on 8 March, the Committee published the Exit Analysis with the exception of Annex B.[169]

121. The preliminary modelling contained in the Exit Analysis indicates the cumulative effect of each of the three models considered on UK economic growth over a period of 15 years as follows:

a) EEA-Type scenario: GDP minus 1.6%;

b) FTA-Type scenario: GDP minus 4.8%; and

c) WTO scenario: GDP minus 7.7%.

The Analysis also modelled likely effects on different sectors of each of these scenarios and the likely effect on each region and nation of the UK. The Scottish Government published its own economic assessment of the impact of Brexit on 15 January 2018.[170]

122. **The Government's EU Exit Analysis modelled the economic impact of three scenarios for the UK's Future Partnership with the European Union—an "average" Free Trade Agreement with the EU, membership of the European Economic Area and World Trade Organization Most Favoured Nation rules (a 'no deal' scenario). The Government is only now starting to measure the economic consequences of different EU-UK trade models. It is therefore concerning that the Government drew red lines on the Future EU-UK trade relationship without having conducted any assessment of the possible impact of these red lines on the UK economy. Moreover, there is no evidence that the Government has modelled the impact of its preferred end state relationship with the European Union.**

Future Partnership UK negotiation objectives

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

124. On 17 February 2018, the Prime Minister gave a speech on future EU-UK security cooperation. She said that the UK was " unconditionally committed to maintaining" European security. Furthermore, the Government would seek continued involvement in pan-European crime fighting agencies such as Europol and Eurojust, as well as the European Arrest Warrant. The Prime Minister acknowledged that continued involvement in these agencies and programmes would entail a recognition of the remit of the CJEU. She said, "When participating in EU agencies the UK will respect the remit of the European Court of Justice". She added that it would also be necessary for the EU "to respect our unique status as a third country with our own sovereign legal order". On defence, the

167 Exiting the European Union Committee, letter to the Secretary of State from the Chair regarding redaction, 21 February 2018

168 Exiting the European Union Committee, letter to the Secretary of State from the Chair regarding redaction, 21 February 2018

169 EU Exit Analysis, Cross-Whitehall briefing

170 Scottish Government, Scotland's Place in Europe: People, Jobs and Investment, 15 January 2018

Prime Minister said that the Government wanted "a future relationship with the European Defence Fund and the European Defence Agency". The Prime Minister said that the Government would also be "open" to contributing to "EU development programmes and instruments" to deliver mutual interests. The Prime Minister said that "aspects" of the future security partnership could "already be effective" in 2019.[171]

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

126. On Fisheries, she said 'We are also leaving the Common Fisheries Policy. The UK will regain control over our domestic fisheries management rules and access to our waters. But as part of our economic partnership we will want to continue to work together to manage shared stocks in a sustainable way and to agree reciprocal access to waters and a fairer allocation of fishing opportunities for the UK fishing industry. And we will also want to ensure open markets for each other's products.

127. The Prime Minister was clear that only a bespoke Future Partnership would be in the interests of the European Union and the UK. She said there should be no introduction of tariffs or quotas and that goods should need only be subjected to one approval process which would require "a comprehensive system of mutual recognition." Furthermore, for goods and services, the UK would commit to maintaining regulatory standards that were at least as high as those of the European Union. The Government will seek to match the same regulatory outcomes as the EU in many areas that relate to trade in goods and services. However, if Parliament decided it wished to achieve different outcomes, "it would be in the knowledge that there may be consequences for our market access." The Prime Minister said that there will need to be an "independent mechanism" to oversee these arrangements. She called for the Future EU-UK Partnership to include provisions on broadcasting and financial services. However, for financial services, she said that there should be a regulatory framework that is "reciprocal, mutually agreed, and permanent". The Prime Minister also set out objectives for other areas where the UK and EU economies are closely integrated, including energy, transport, digital, law, science and innovation, and education and culture.[172]

128. Stefaan De Rynck, Member of the EU Brexit Negotiation Team and Senior Adviser to Michel Barnier, has said:

> Each free trade agreement is tailor made to the party with whom the EU negotiates.
>
> The Canada one is not a replica of the South Korea one. The Japan FTA, which will hopefully enter into force in early 2019, has a chapter on corporate governance and cooperate transparency which you do not find in other free

171 Prime Minister, PM speech at Munich Security Conference, 17 February 2018
172 Prime Minister, PM speech on our future economic partnership with the European Union, 2 March 2018

> trade agreements. It has a very ambitious Chapter on free movement of professionals, so called Mode 4 in trade talks, and family rights to move with the professionals.
>
> So it's just an example of what is there in Japan which is not always there in other trade agreements. And also with the UK, if indeed, based on the UK's choices we go to a free trade agreement, that free trade agreement will be typical in view of the respective economies and the negotiated outcome.[173]
>
> But to come back to the mathematics of [Canada] pluses and [Norway] minuses, what you cannot do is square an FTA circle into a Single Market.[174]

129. The Prime Minister acknowledged in her Munich and Mansion House speeches and confirmed in Parliament that the UK would seek to remain associated with a number of EU agencies, including those pertaining to security cooperation and regulatory bodies including those governing chemicals, medicines and aviation safety, after exit. However, the draft guidelines prepared for the March European Council state that:

> The European Council further reiterates that the Union will preserve its autonomy as regards its decision-making, which excludes participation of the United Kingdom as a third-country to EU Institutions, agencies or bodies. The role of the Court of Justice of the European Union will also be fully respected.

130. The EU27 is expected to agree its negotiation guidelines on 22–23 March, after which Phase 2 negotiations on the Future EU-UK Partnership can begin. As we have noted, the UK and EU agree that the Future Partnership should be set out in a detailed Political Declaration that will accompany the Withdrawal Agreement in October.[175] From October, the EU expects to begin negotiations on the treaties/agreements that will establish the Future Partnership. Michel Barnier said there would be several agreements, some of which will be treaties.[176] We heard in Brussels that the Commission is working on the basis that the Future Partnership will be separated into four pillars, which are trade, 'areas of thematic cooperation', justice and home affairs, and Common Security and Defence Policy and foreign affairs. We heard that these agreements/treaties would be negotiated in parallel and could be agreed separately.

131. **We welcome the Prime Minister's recent speech on the Future EU-UK Partnership because it provided more details on the Government's approach and acknowledged the inevitable trade-offs that will result from the UK leaving the Single Market and Customs Union. Furthermore, it acknowledged that the EU's standards, regulations and enforcement structures would continue to have a significant effect on the UK. However, the speech failed to outline which EU standards and rules the Government expects the UK to continue to abide by and which it wants to diverge from or the economic case for either approach.**

173 Chatham House [Stefaan De Rynck], Inside the Brexit Negotiations [video], 18 December 2017 [17.18]
174 Chatham House [Stefaan De Rynck], Inside the Brexit Negotiations [video], 18 December 2017 [17.18]
175 [Government response]
176 Northern Ireland Affairs Committee, Oral evidence: Brexit and Northern Ireland, HC 329, Oral evidence: Brexit and Northern Ireland, HC 329, Opening statement [Michel Barnier]

132. **We welcome the Prime Minister's statement that the UK will wish to remain associated with certain EU agencies after exit. However, some EU agencies do not currently permit third country participation and the UK's contribution to decision-making would not be guaranteed. It is acknowledged that the UK has great expertise to contribute in a number of fields that is valued within a number of EU agencies. However, the UK needs to make specific proposals for how it envisages continuing to make an important contribution after exit. Clarity must also be provided on what the UK's role will be in EU agencies during the transition period.**

133. **The Commission has suggested that the negotiations on the treaties/agreements will be divided into four pillars to be negotiated in parallel and agreed separately. This structure seems sensible, as it will avoid the rigid, obstructive phasing that has characterised the Article 50 negotiations. However, the Government has not yet set out to Parliament its own view on how this process should be organised or acknowledged that the negotiations on a new partnership will in practice occupy a significant part of the transition/implementation period. It should now outline exactly how the process should be structured and then seek agreement with the European Union. This must be done well in advance of October.**

134. **We are currently examining different types of trade and partnership agreements into which the EU has entered with third countries. These include CETA, the EFTA and the EEA agreements, the Ukraine Association Agreement, the EU-Turkey Customs Union and TTIP, which was a proposed trade agreement between the United States and the EU which was halted after the 2016 US presidential election. We will present our findings in our next report together with our views on the structure of the future negotiations.**

Formal minutes

Wednesday 14 March 2018

Members present:

Hilary Benn, in the Chair

Mr Peter Bone	Jeremy Lefroy
Joanna Cherry	Mr Pat McFadden
Sir Christopher Chope	Craig Mackinlay
Stephen Crabb	Seema Malhotra
Mr Jonathan Djanogly	Mr Jacob Rees-Mogg
Richard Graham	Emma Reynolds
Peter Grant	Stephen Timms
Wera Hobhouse	Mr John Whittingdale
Andrea Jenkyns	Hywel Williams
Stephen Kinnock	Sammy Wilson

Draft Report (*The progress of the UK's negotiations on EU withdrawal: December 2017 to March 2018*), proposed by the Chair, brought up and read.

Draft Report (*The progress of the UK's negotiations on EU withdrawal*), proposed by Mr Jacob Rees-Mogg, brought up and read, as follows:

The progress of the UK's negotiations on EU withdrawal

Introduction

The Article 50 negotiations

1. The Article 50 negotiations are at a critical stage. If they are to be completed by October 2018, which is the deadline that has been set by the UK and the EU, there are only eight months left to reach agreement on a host of highly complex issues that will determine the UK's future for decades to come.

2. Since the Committee's last report, the European Council has said that 'sufficient progress' had been made on Phase 1 of the Article 50 negotiations which enabled Phase 2 discussions to begin on the UK's Future Partnership with the European Union.[177] On 28 February 2018, the Commission published a draft Withdrawal Agreement,[178] which was based on the Joint Report that was agreed in December 2017.[179] The draft Withdrawal Agreement has been circulated to the EU27 and to the European Parliament's Brexit Steering Group for revision and agreement before being subjected to intense negotiations over the coming months.

3. An enormous amount of work remains to be completed in the limited time that remains under Article 50. Negotiations on citizens' rights, issues relating to the Northern Ireland/Republic of Ireland border, and a wide range of other separation issues are ongoing. Talks on the agreement of a transition/implementation period started in January and are expected to be signed off by the European Council in late March, although there remain significant points of disagreement to work through first. From late March onwards, Phase 2 negotiations are expected to begin. The UK and the European Union want to reach agreement on all these issues by October, to allow time for the texts to be ratified by the European Parliament (EP) and the UK Parliament.

4. The EU said that it was unable to start Phase 2 negotiations until after the March European Council—a gap of over four months since the Phase 1 agreement. On the UK side, the Prime Minister and Cabinet Ministers have set out aspects of the Future Partnership in a series of speeches, and have agreed that the it should be based on a model of 'managed divergence'. However, it remains to be seen what this will mean in practice and the extent to which the UK will diverge from the rules and standards of the European Union after the transition/implementation period.

This report

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

6. We have drawn upon evidence provided by the Rt. Hon David Davis MP, the Secretary of State for Exiting the European Union, along with evidence from HM Revenue and Customs, the Police Service of Northern Ireland, organisations that specialise in exports and logistics, stakeholders in EU Agencies, and academics and think tank representatives specialising in EU law and politics as well as evidence from the economists Roger Bootle, Dr Gerard Lyons, Julian Jessop and Professor Patrick Minford and the European Parliament's report into 'Smart Borders 2.0'.

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

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

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

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

Draft Withdrawal Agreement

Introduction

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

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

Citizens' rights

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

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

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

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

182 Article 9.

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

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

12. The right of residence becomes permanent after five years and citizens can apply for a Permanent Residence document that confirms their rights, although this is not a legal requirement as Permanent Residence is acquired automatically after individuals have exercised treaty rights for 5 years, without an absence for more than six months.[185]

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

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

Unresolved issues

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

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

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

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

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

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

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

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

189 Q401 [Professor Dougan]

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

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

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

19. Individuals will lose not just the right to move freely to another EU country, but also the right to provide cross-border services in any country, to have their professional or academic qualification recognised in any country where it is not specifically recognised in the Joint Technical Note, and lawyers would lose their ability to practice in another Member State based on a qualification obtained in their home state.[193]

20. On 20 December 2017, the Prime Minister published an open letter to UK nationals living in the European Union to update them on the publication of the Joint Report. The Prime Minister said:

> I know there are a few important issues that have yet to be concluded. We raised these concerns, including the ability of UK nationals living in the EU to retain certain rights if they move within the EU, but the EU was not ready to discuss them in this phase of the negotiations. We will continue to raise these issues with the EU in the New Year.[194]

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

Matter resolved in the Joint Report

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

- To ensure legal certainty and consistent interpretation of the Withdrawal Agreement, UK courts shall "have due regard to relevant case law of the Court of Justice of the

190 Q761
191 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 23, Article 32
192 Q763
193 British in Europe and The3million, Securing Citizens' Rights under Article 50, 23 January 2018
194 Prime Minister, A letter from the Prime Minister to UK nationals living in Europe, 20 December 2017

European Union handed down" after the end of the transition/implementation period.[195] In addition, on questions of interpretation of the citizens' rights part of the Withdrawal Agreement, UK courts may be able to request the CJEU "to give a preliminary ruling on that question… The legal effects in the United Kingdom of such preliminary rulings shall be the same as the legal effects of preliminary rulings given pursuant to Article 267 TFEU in the Union and its Member States."[196] This voluntary referral mechanism would be available for eight years from the end of the transition/implementation period.

- EU citizens in the UK, and UK citizens in the EU will be able to be joined by family members, who are such at the end of the transition period, including non-resident spouses, civil partners, children and grandchildren, and dependent parents and grandparents. There is a specific reference in the Joint Report and the draft Withdrawal Agreement to giving a right of family reunification to children and adopted children who will be born after the transition/implementation period.[197] However, the draft Withdrawal Agreement, departs from the Joint Report in setting out the Commission's position that future spouses and future civil partners should be covered by the Withdrawal Agreement. The Government disagrees with this proposal.[198] The draft Withdrawal Agreement also said that the UK and EU27 shall "facilitate entry and residence" of non-resident partners who are in a durable relationship with an EU citizen before the end of the transition/implementation period.[199]
- EU citizens in the UK and UK citizens in the EU will have continued access to healthcare and pensions. For example, UK citizens living in Member States before the Specified Date will be able to continue their current healthcare arrangements and take advantage of the EHIC scheme[200] but those who visit or are resident after the specified date will not.
- Those who by the end of the transition/implementation period are working as frontier workers, as defined under EU law, will fall within the scope of the Withdrawal Agreement.[201]
- Professional qualifications that fall under the Free Movement Directive on the Specified Date will be recognised. However, the recognition of other qualifications is a matter for Phase 2.[202]
- Rights derived from EU citizenship will be enshrined in the Withdrawal Agreement and given effect through primary legislation in the UK. This will be the Withdrawal Agreement and Implementation Act.[203]

195 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 5, Chapter 1, Article 4(5)

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

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

198 See also Q422

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

200 Article 28.

201 Article 26

202 Article 9(1)

203 Article 4

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

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

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

Settled Status

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

27. The requirements for Settled Status will largely replicate those for Permanent Residence[205]—five years continuous and lawful residence in the UK as a worker, self-employed person, student, self-sufficient person or family member of an EU citizen; and without absence from the UK for more than six months.[206] EU citizens in the UK that hold a Permanent Residence document will be able to exchange it for a Settled Status document, free of charge.[207]

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

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

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

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

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

208 Article 17(c).

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

30. The draft Withdrawal Agreement states that the application process must be "smooth, transparent and simple" and the application forms "short, simple and user-friendly".[211]

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

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

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

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

Settled Status and those not included in the Withdrawal Agreement

35. The definition of 'residence' for establishing Settled Status is based on the Free Movement Directive. Dr Charlotte O'Brien, Senior Lecturer at York Law School in the University of York, and British in Europe and the3million have outlined categories of vulnerable people who are not covered by the Free Movement Directive, and are therefore not currently in the UK as a result of exercising rights under EU law:

- Children are unable to acquire Permanent Residence in their own right under the Free Movement Directive as their rights are dependent upon those of their parents. Children who have become estranged from their parent(s) or whose parent(s) are not able to fulfil the criteria in the Free Movement Directive, "for reasons related to care, disability, or evidential problems attendant upon having a series of short term, casual and/or zero hours jobs" are particularly vulnerable.[212]
- Women with work histories that are punctuated with interruptions relating to domestic violence or because they have been caring for others might find it difficult to meet the Free Movement Directive's criteria for residence. Women providing care "have

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

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

211 Article 17(f).

212 NEG0008 Dr Charlotte O'Brien

had their five-year clock not only stopped, but restarted several times over, because care does not count as a reason to bridge gaps between employment under [the Free Movement Directive], and so there is discontinuous lawful residence."[213]

- It is likely that there will be many people who will not understand the need for registration. Examples might include long-term residents, people who have been born in the UK without acquiring UK citizenship, elderly EU citizens, and relatives of migrant workers who do not speak English.
- Some part-time workers have been reclassified as not-workers since the introduction of the minimum earning threshold in 2014. Dr Charlotte O'Brien said that "It is not clear what the future effects of those past re-classifications and negations will be."[214]
- Zambrano carers who benefit from rights deriving from Article 20 of the TFEU (on citizenship) do not feature in the agreement at all. As a result, third country nationals who rely on rights as primary carers of British/EU/EEA children will be at risk of removal if they do not meet the requirements of UK or EU27 immigration rules. This would put the welfare of these children at risk.[215] It is also not clear what the policy will be towards other third-country nationals who live in the UK under EU rights-based legal judgments.[216]

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

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

UK citizens in the European Union

38. The draft Withdrawal Agreement provides flexibility for other Member States to introduce their version of Settled Status for UK citizens, who are resident in their territory. This provision might be relevant as the current draft Withdrawal Agreement does not allow for continued onward free movement of UK citizens currently resident in the EU27 after the Specified Date.

213 NEG0008 Dr Charlotte O'Brien

214 NEG0008 Dr Charlotte O'Brien

215 British in Europe & the3million, Securing Citizens' Rights under Article 50: Reflections on Phase 1 & Considerations for Phase 2 of the negotiations, 23 January 2018

216 Third country EU-derived rights include those from the Zambrano, Metock and Surinder Singh cases. Zambrano allows a non-EU national to reside in the UK if they are a carer of an EU national who is dependent upon them to exercise their Treaty rights. Metock allows a non-EU national in the UK illegally to remain if they form a genuine relationship with an EU citizen. Surinder Singh allows non-EU national partners who have been exercising Treaty rights in another Member State to become resident in the UK under EU, rather than UK, rules.

217 Department for Exiting the European Union, Plans outlined to extend 'Settled Status' deal to citizens from Iceland, Liechtenstein and Norway, 16 February 2018. EEA EFTA citizens are covered by free movement provisions through the EEA Agreement. This allows them to move to the UK and other EU states, and UK citizens can move to the EEA EFTA states.

Member States could then initiate a process to identify the UK population in their territories so that they could be identified distinctly from those eligible for free movement across the other EU27 countries. British in Europe and the3million said:

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

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

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

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

Independent Authority

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

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

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

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

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

219 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 91, Article 152

220 Q766

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

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

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

Northern Ireland/Republic of Ireland

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

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

49. The Commission's draft Withdrawal Agreement included a rewrite of Option C that proposed a "common regulatory area" which constitutes "an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected".[224] Under this proposal, Northern Ireland would be considered "part of the customs territory" of the European Union[225] and would require Northern Ireland to follow European Union law on goods, agriculture and fisheries, the Single Electricity Market, certain environmental standards and state aid.[226] Michel Barnier described this as "the backstop solution" and that it was "the only way to guarantee that [the EU and UK] joint commitments will be upheld in all circumstances, as the Joint Report requires."[227]

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221 Oral evidence on 24 January 2018, Q766

222 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 43

223 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 49

224 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 100, Article 3

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

226 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 101–102, Articles 4–9 The draft Withdrawal Agreement states that with regards to State Aid, "only measures that affect trade between the territory of Northern Ireland and the Union shall be considered as aid within the meaning of Article 107(1) TFEU."

227 Commission, Press statement by Michel Barnier following the publication of the draft Withdrawal Agreement between the EU and the UK, 28 February 2018

50. Option C was rewritten despite the commitment given in para 56 of the Joint Report that:

> given the specific nature of issues related to Ireland and Northern Ireland, and on the basis of the principles and commitments set out above both parties agree that in the next phase work will continue in a distinct strand of negotiations on detailed arrangements to give them effect.

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

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

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

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

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

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

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228 Q717

229 HC Deb 28 February 2018, Vol. 636, Col. 823. The Prime Minister repeated the Government's commitment to there being no "customs and regulatory border down the Irish Sea". See, Prime Minister, PM speech on our future economic partnership with the European Union, 2 March 2018

230 HC Deb 28 February 2018, Vol. 636, Col. 823

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

232 Q380

233 Q773

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

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

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

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

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

> Second, we will need an arbitration mechanism that is completely independent–something which, again, is common to Free Trade Agreements.[239]

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

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

234 Andrew Marr Show, Interview with the Rt Hon. David Davis MP [transcript], 10 December 2017, page 7
235 Q380
236 The 'mapping exercise was also referred to in the Joint Report. See, Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 47
237 Q719
238 Q378
239 PM's speech of 2 March 2018: https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union

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

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

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

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

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

Government's proposed solutions

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

240 Liaison Committee, Oral evidence: The Prime Minister, HC 637, 20 December 2017, Q3

241 Commission, Press statement by Michel Barnier following this week's round of Article 50 negotiations (6th-9th February), 9 February 2018

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

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

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

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

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

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

> First of all, the assumption is that what is adopted in the future is a negotiated settlement with the EU, in which the highly streamlined customs arrangement is adopted. That is a basket of changes that essentially keeps all of the good features of trading with the European Union: for example, you stay in the Common Transit Convention and there is mutual recognition of the Authorised Economic Operator scheme and so on and so forth.
>
> Because of the unique situation of Ireland and Northern Ireland, however, you need to add on three additional things, which are set out in the "Northern Ireland and Ireland" [position] paper. First of all, that is to maximise the Authorised Economic Operator scheme, which you were asking about. Secondly, it is to seek a derogation for small traders, because there needs to be a recognition that the Ireland-Northern Ireland border is very much a local economy in which traders cross the border on a regular basis. We are seeking a derogation for small traders, with the definition of small to be negotiated. Thirdly, we want to move to a system of self-assessment, which is set out in the Union Customs Code and is the direction of travel for the European Union.

242 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 105, Article 15

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

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

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

> I am really unclear about this five years. I do not like the new customs partnership. I think it is a ridiculous suggestion. It seems to be based partly on the IPR [Inward Processing Relief] regime, which is probably the single largest regime within HMRC that has fiscal anomalies and non-compliance. It seems to be coupled with the enhanced end-use process, which again tracks goods. That was very unpopular with the trade when the UCC added some bells and whistles to it. I am very sceptical that that solution would ever work, but even if it were to be deployed I cannot see what HMRC is building. This is all based on trade systems, so I am not sure where he got five years from.[245]

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

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

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

243 Department for Exiting the European Union, Northern Ireland and Ireland: position paper, 16 August 2017 & Q191 [Jon Thompson]

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

245 Treasury Committee: Oral evidence: The UK's economic relationship with European Union, HC 473, Wednesday 7 March 2018 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/the-uks-economic-relationship-with-the-european-union/oral/80035.html

246 Guardian, Brexit: Varadkar and May to work on plan for frictionless Irish border, 12 February 2018

247 MerrionStreet, Tánaiste welcomes publication of draft EU-UK Withdrawal Agreement, 28 February 2018

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

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

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

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

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

248 Q393 [Professor Dougan]

249 Andorra Customs: https://www.holidaysandorra.org/customs-work-in-andorra

250 FT, February 16, 2017 "Turkey border gridlock hints at pain to come for Brexit Britain" https://www.ft.com/content/b4458652-f42d-11e6-8758–6876151821a6

251 Lars Karlsson is also President of KGH Border Services, a consultancy

252 European Parliament AFCO Committee [Lars Karsson], Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons, November 2017

78. On 5 March 2018, the Prime Minister told the House of Commons that the report "does give some very good proposals for solutions."[253]

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

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

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

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

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

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

253 HC Deb 5 March 2018
254 Q191 [John Bourne]
255 Q193
256 Institute for Government, Implementing Brexit: Customs, 11 September 2017

Belfast Agreement

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

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

Financial Settlement

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

> failed to find a credible legal argument either for a liability on the UK to contribute to the EU's unfunded pension fund deficit, or for any liability to contribute to the EU's ongoing programmes after Brexit day on 29 March 2019, with the possible exception of an obligation to carry on contributing overseas aid of €1.3bn up to the end of 2020 via the European Development Fund (EDF)."[259]

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

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

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

90. The UK has also agreed to settle its share of the Reste à Liquider (RAL), which is the difference between the EU's expenditure commitments undertaken and the actual payments made, as at 31

257 Commission & Department for Exiting the European Union, Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, 8 December 2017, para 42

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

259 Lawyers for Britain

260 HC Deb 11 December 2017, Vol. 633 Col. 44

261 Q814

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

December 2020. These commitments would have been made under the Multiannual Financial Framework (MFF) which was agreed by the UK.[263] By the end of 2020, the RAL is expected to amount to €254 billion (£223 billion). The UK's share is apparently 12.7 per cent, based on the UK's average share of contributions in the current budgetary cycle.

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

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

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

Financial Settlement and the Future Partnership

94. The Secretary of State said that the Financial Settlement was "conditional" on the UK securing a Free Trade Agreement[266]and that was one reason a trade deal needed to be concluded by October.[267] He said that he expected the UK "to make the payment during the course of the transition or the implementation period." However, he also said that the Future Partnership will "take some time to conclude, as the Canadian one did… and that time will happen during the implementation period."[268] This means that the UK will have already paid a proportion of the Financial Settlement before the Future Partnership is ratified. Professor Anand Menon, Director of UK in a Changing Europe, said:

> For the European Union, ["nothing is agreed until everything is agreed"] is a reference to Phase 1 … From the EU's perspective, there is no link between the Financial Settlement and any future trade talks, for a very practical reason … We are not going to be in a position to sign off a trade deal until several years after we

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

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

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

266 Q813

267 Q805

268 Q805

> have been paying the money we have already agreed to pay anyway, because this agreement has to be signed and sealed in October next year. The timing is simply wrong.[269]

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

96. The Government continue to explain that if there is no realistic prospect of a future trade agreement by October2018 it will not be making any further financial contributions.

Transition/implementation period

Introduction

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

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

Purpose

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

- It will allow the UK time to build new infrastructure, and set up new systems, to support the Future Partnership and allow for as free and frictionless trade as possible and will allow European governments to do the same;
- It will ensure business is ready and business will only have to adjust to one set of changes;
- The EU maintains it is not legally able to conclude an agreement with the UK as an external partner while it is a Member State. It is only possible for the UK to sign this agreement when it is outside the EU; and

269 Q414

270 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018, and Commission, Position paper "Transitional Arrangements in the Withdrawal Agreement", 7 February 2018

271 Department for Exiting the European Union, Technical Note on International Agreements, 8 February 2018; Draft Text for Discussion: Implementation Period, 21 February 2018; Policy paper: EU citizens arriving in the UK during the implementation period, 28 February 2018

- An agreement on the Future Partnership will require the appropriate legal ratification, which would itself take time. This will need to happen during the implementation period.[272]

Duration

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

101. The UK believes the period's duration should be determined simply by how long it will take to prepare and implement the new processes and new systems that will underpin the Future Partnership. The UK agrees this points to a period of around two years, but wishes to discuss with the EU the assessment that supports its proposed end date.[276]

Extension

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

103. The Commission intends to set out the details of the Future Partnership in a Political Declaration that will accompany the Withdrawal Agreement. We heard in Brussels that the Commission and the European Parliament would like the Political Declaration to be detailed. Negotiators plan to reach this point in October 2018. Once the Political Declaration has been agreed, negotiations will begin on the treaties and agreements that will establish the Future Partnership. Michel Barnier said that the Future Partnership would be established by several agreements, some of which will be treaties.[277]

104. The Government is confident that a substantial amount of the Future Partnership will have been agreed before the start of the transition/implementation period. In evidence to us, the Secretary of State said that the "substance" of an EU-UK trade agreement will have been agreed before UK withdrawal.[278] He also said that it was important that material aspects of the Future Partnership are not negotiated during the transition/implementation period. He said:

> It would be unwise, in my view, apart from that it practically does not meet the requirements of a transition period, to get sucked into doing a negotiation that is substantive or major during the transition period itself. Why? The balance of power in the negotiation alters and the aim then, on the part of the Commission, will be to spin out the negotiation.[279]

272 Department for Exiting the European Union, David Davis' Teesport Speech: Implementation Period – A bridge to the Future Partnership between the UK & EU, 26 January 2018

273 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018, para 22

274 Commission, Position paper "Transitional Arrangements in the Withdrawal Agreement", 7 February 2018

275 Politico, Michel Barnier: Post-Brexit transition to end December 2020, 20 December 2017

276 Department for Exiting the European Union, Draft Text for Discussion: Implementation Period, 21 February 2018

277 Northern Ireland Affairs Committee, Oral evidence: Brexit and Northern Ireland, HC 329, Oral evidence: Brexit and Northern Ireland, HC 329, Opening statement [Michel Barnier]

278 Q707

279 Q707

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

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

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

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

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

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

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

Example of the EU acting swiftly:

Ukraine trade agreement "autonomous trade preferences"

- 11 March 2014 – EU proposal to reduce Ukraine Tariffs[283]
- 2–3 April European Parliament approves the tariff cut.
- 14 April 2014 EU foreign Affairs Council Approves measures
- End of April 2014, cut is put into force[284]

280 Prime Minister, PM speech at Munich Security Conference: 17 February 2018

281 Northern Ireland Affairs Committee, Oral evidence: Brexit and Northern Ireland, HC 329, Oral evidence: Brexit and Northern Ireland, HC 329, Q285

282 PIIE: https://piie.com/blogs/trade-investment-policy-watch/how-long-does-it-take-conclude-trade-agreement-us

283 http://europa.eu/rapid/press-release_IP-14-250_en.htm

284 http://europa.eu/rapid/press-release_STATEMENT-14-118_en.htm

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

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

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

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

Citizens' rights

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

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

115. However, the Government also said that during the transition/implementation period EU citizens will be offered "eligibility after the accumulation of five years' continuous and lawful residence to apply for indefinite leave to remain"; "a temporary status in UK law that will enable

116. them to stay after the implementation period has concluded—this means that they will be able to remain lawfully in the UK working, studying or being self-sufficient for the five years needed to obtain settlement"; and "an opportunity to secure this temporary status during the implementation period, with an additional three month window for applications after the period, ensuring that there is no cliff-edge."

285 Guardian 22 February: https://www.theguardian.com/politics/2018/feb/22/brexit-transition-extension-could-cost-britain-5bn-mps-say

286 Department for Exiting the European Union, Policy paper: EU citizens arriving in the UK during the implementation period, 28 February 2018

117. The Government's offer to permit applications for indefinite leave to remain will be based on UK immigration law, not on the Withdrawal Agreement, which means that EU citizens who arrive during the transition/implementation period would not have the same rights as those that arrive before the start of the transition/implementation period; for example, the right to seek rulings from the CJEU for an eight-year period. Furthermore, the Government has offered the ability for EU citizens to be joined by family members after the transition/implementation period. However, this right will be "on a par with British citizens" which is more restrictive than what those EU citizens will have who will be covered by the Withdrawal Agreement,[287]

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

119. On 31 January, Guy Verhofstadt MEP, the EP's Chief Brexit Coordinator said,

> The maintenance of EU Citizens' rights during the transition is not negotiable. We will not accept that there are two sets of rights for EU citizens. For the transition to work, it must mean a continuation of the existing acquis, with no exceptions.[288]

120. He has since said that "I think it is possible in the coming days and coming weeks … (to) make progress on this and (that) we can conclude on this."[289]

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

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

Participation in EU decision-making

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

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

124. The EU's Supplementary Directives suggest that the UK will have limited opportunities to influence decisions during the transition/implementation period. They said that while the UK will be subject to the "full competences of the Union institutions", the UK will "no longer participate in or nominate or elect members of the Union institutions, nor participate in the decision-making

287 Department for Exiting the European Union, Policy paper: EU citizens arriving in the UK during the implementation period, 28 February 2018.

288 European Parliament, Brexit: EP to keep fighting to fully protect rights of EU-UK citizens, 31 January 2018,

289 Reuters 6 March: https://www.reuters.com/article/us-britain-eu-verhofstadt/brexit-deal-on-citizens-rights-close-eus-verhofstadt-idUSKCN1GI29S

290 Prime Minister, PM's Florence speech: a new era of cooperation and relationship between the UK and the EU, 22 September 2017

or the governance of the Union bodies, offices and agencies." Furthermore, the Supplementary Directives state that as a general rule, the UK will not attend "Commission expert groups and other similar entities or of the agencies, offices or bodies where Member States are represented."

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

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

New EU rules and regulations

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

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

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

291 Commission, Position paper "Transitional Arrangements in the Withdrawal Agreement", 7 February 2018

292 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018

293 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018

294 Northern Ireland Affairs Committee, Oral evidence: Brexit and Northern Ireland, HC 329, Oral evidence: Brexit and Northern Ireland, HC 329, Opening statement [Michel Barnier]

295 118 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018

296 Department for Exiting the European Union, David Davis' Teesport Speech: Implementation Period – A bridge to the Future Partnership between the UK & EU, 26 January 2018

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

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

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

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

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

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

Example: Financial Transaction Tax

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

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

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

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

297 European Scrutiny Committee, Oral evidence: EU Withdrawal, HC 763, Thursday 22 February 2018, Q158

298 Department for Exiting the European Union, David Davis' Teesport Speech: Implementation Period – A bridge to the Future Partnership between the UK & EU, 26 January 2018

299 City of London https://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/research-2012/Financial%20Transaction%20Tax_Report.pdf

EU-third country agreements

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

135. The Supplementary Directives state:

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

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

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

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

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

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

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

300 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018

301 Exiting the European Union Committee, The progress of the UK's negotiations on EU withdrawal, Second Report of Session 2017–19, HC 372, 1 December 2017, para 105

302 Department for Exiting the European Union, Technical Note on International Agreements, 8 February 2018. The Technical note only applies to 'bilateral agreements' and not 'multilateral agreements' which it states, "raise different considerations."

303 Department for Exiting the European Union, Detail on the UK's position on international agreements, 8 February 2018

304 FT November 2 2017: https://www.ft.com/content/243152f0-bfc8-11e7-b8a3-38a6e068f464

New free trade deals

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

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

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

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

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

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

Financial Settlement

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

Negotiations on the transition/implementation period

147. In our last report, we called on the Government to publish a White Paper on the implementation period as soon as possible after the European Council had met in December

305 Department for Exiting the European Union, David Davis' Teesport Speech: Implementation Period – A bridge to the Future Partnership between the UK & EU, 26 January 2018

306 Q806

307 Q736

308 Commission, Draft Withdrawal Agreement, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, page 70, Article 124(4)

2017.[309] The Prime Minister did not set out detailed objectives for the period in her Lancaster House and Florence Speeches, and the Government has not made its views any clearer in answers to questions in the House of Commons and its Select Committees.[310] On 24 January 2018, the Secretary of State for Exiting the European Union said that he did not believe that a White Paper was required. However, he did not rule out the prospect that one would be published at some point:

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

148. While the Government has not decided on whether it is necessary to publish a White Paper, the Secretary of State said that the Government would "almost certainly" publish "some papers on elements of [the transition/implementation period]."[312] In January and February 2018, the Government published three short papers on aspects of the transition/implementation period, including papers on international agreements and citizens' rights. The EU has published negotiation papers on its objectives for a transition/implementation period. Most recently, the European Council published specific Supplementary Directives for the negotiations on the transition/implementation period and the Commission published a more detailed position paper that outlined in "legal terms" how such arrangements should be given effect. This was then included in the Commission's draft Withdrawal Agreement.[313]

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

Future Partnership

Introduction

150. The Prime Minister has said consistently that the Government does not favour the adoption of any existing model for its Future Partnership with the European Union.[314] The Secretary of State said that the Government would seek a "Canada Plus-Plus-Plus" agreement, signalling a preference for an agreement that was more comprehensive than the EU-Canada trade and

309 Exiting the European Union Committee, The progress of the UK's negotiations on EU withdrawal, Second Report of Session 2017–19, HC 372, 1 December 2017, para 106

310 The Government's White Paper, The United Kingdom's exit from, and new Relationship with, the European Union, published in February 2017, referred to "a phased process of implementation" but did not draw conclusions on what it might contain. See para. 12.2

311 Q781

312 Q781

313 European Council, Supplementary Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018, and Commission, Position paper "Transitional Arrangements in the Withdrawal Agreement", 7 February 2018

314 Prime Minister, PM's Florence speech: a new era of cooperation and partnership between the UK and the EU, 22 September 2017

security agreement (CETA) and inclusive of financial services.[315]Michel Barnier said that the future economic relationship will "have to work on a model that is closer to the agreement signed with Canada", based on the UK 10 Government's red lines, as outlined in the slide below:[316]

'EU Exit Analysis—Cross Whitehall Briefing'

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

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

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

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

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

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

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

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

Future Partnership UK negotiation objectives

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

315 Andrew Marr Show, Interview with the Rt Hon. David Davis MP [transcript], 10 December 2017
316 Guardian, Brexit: UK likely to end up with Canadian-style deal, warns Barnier, 24 October 2017
317 HC Deb 31 January 2018, Vol. 635, Col. 835
318 Buzzfeed, This Leaked Government Brexit Analysis Says The UK Will Be Worse Off In Every Options, 29 January 2018. Buzzfeed published a second report, This Is How Cutting EU Immigration Will Hit The UK Economy, According To The Government's Leaked Analysis, on 31 January 2018

160. On 17 February 2018, the Prime Minister gave a speech on future EU-UK security cooperation. She said that the UK was " unconditionally committed to maintaining" European security. Furthermore, the Government would seek continued involvement in pan-European crime fighting agencies such as Europol and Eurojust, as well as the European Arrest Warrant. The Prime Minister acknowledged that continued involvement in these agencies and programmes would entail a recognition of the remit of the CJEU. She said, "When participating in EU agencies the UK will respect the remit of the European Court of Justice". She added that it would also be necessary for the EU "to respect our unique status as a third country with our own sovereign legal order". On defence, the Prime Minister said that the Government wanted "a future relationship with the European Defence Fund and the European Defence Agency". The Prime Minister said that the Government would also be "open" to contributing to "EU development programmes and instruments" to deliver mutual interests. The Prime Minister said that "aspects" of the future security partnership could "already be effective" in 2019.[319]

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

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

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

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

319 Prime Minister, PM speech at Munich Security Conference, 17 February 2018

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

321 [Government response]

322 Northern Ireland Affairs Committee, Oral evidence: Brexit and Northern Ireland, HC 329, Oral evidence: Brexit and Northern Ireland, HC 329, Opening statement [Michel Barnier]

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

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

167. **We welcome to the Prime Minister's desire to cooperate with the EU on issues such as security and fighting crime. We hope that the EU can see the benefit of co-operating with the UK in these matters and does not let its institutional inflexibility get in the way of the safety of UK and EU citizens.**

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

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

Annex: Northern Ireland Border

The UK/Ireland border

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

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

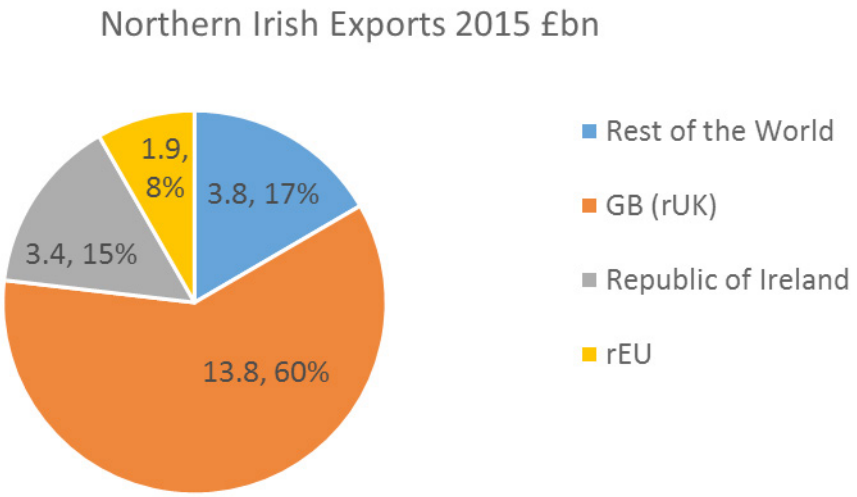
The RoI PM Varadkar and the UK PM have stated that they aim for "a comprehensive free trade agreement and customs arrangement that allows us to avoid not just a hard border north and south but also new barriers to trade east and west."[323]

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

323 Irish News, 13 February 2018: https://www.irishnews.com/news/brexit/2018/02/13/news/leo-varadkar-uk-eu-trade-deal-best-way-to-avoid-hard-border-1254698/

UK Single Market

The UK market is the major market for Northern Irish accounting for 60% of Northern Irish exports.[324,325]



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

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

Minimising friction with the EU.

The UK will leave the EU in March 2019 and remain in an 'implementation" period during which (it is assumed) the status of the border will remain the same. At the end of this period the border may be governed by the terms of "a comprehensive free trade agreement and customs arrangement", a limited agreement or potentially no agreement. The provisions of the WTO will apply in all these scenarios.

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

A Smart Border: Potential areas for co-operation.

- **Behind the border.** The border should, as far as possible, be actioned at a business's premises, with forms filed electronically before transit. The more that is done away from the border in advanced, the less that needs to be done at the border.
- **Trusted Trader Programmes.** This should allow regular traders to continue with little supervision. This should be backed up by risk assessment measures (and exchange of risk data) so effort is focused on potentially irregular traffic.

324 Likewise in 2015 it accounted for 63% of Scottish exports.

325 Northern Ireland Broad Economy Sales and Exports Statistics 2015: https://www.economy-ni.gov.uk/sites/default/files/publications/economy/BESES-Publication-2015-Headline-results-pdf_1.pdf

- **Authorised Economic Operators (AEO).** The mutual recognition of AEOs would help minimise disruption for high frequency trade. This could be linked to a fast track at any busy crossings. These programmes already exist in the RoI and UK under EU law (Article 39 of the Union Customs Code). The UK has only 604 AEOs compared to 6,000 in Germany. This should be expanded pre Brexit.
- **Joint customs checks.** Norway and Sweden (via a Norway/EU agreement) have agreed to have one set of Customs clearances for the two states minimising the administration. This is compatible with the WTO's multilateral Trade facilitation Agreement. This should allow for the transfer of export and import data to prevent duplication.
- **Self-Assessment for AEOs.** Under a US/Canada agreement their equivalent of AEOs (The Free And Secure Trade Programme FAST) allows for the completion of eManifests online one hour before transit. This is linked to a pre-arrival processing system.
- **De Minimi.** There is already an approximate 6000 Euro de minimis threshold below which customs checks do not apply anyway included in the EU Union Customs Code.[326]
- **Use of the Transports Internationaux Routier (TIR) Convention of 1975 and the Common and Union Transit Proceedure for RoI transit goods.** TIR enables goods to move under customs control across international borders without the payment of the duties and taxes that would normally be due at importation.[327,328,329]
- **WTO Trade Facilitation Agreement.** The WTO has recently agreed the Trade Facilitation Agreement that sets out basic standards aimed at cutting the costs of cross-border trade.[330]
- **Unilateral UK reductions in administration.** For instance recognising RoI AEOs and EU SPS standards.

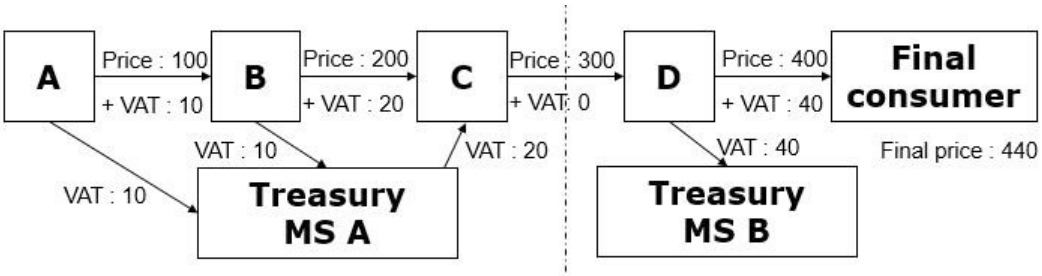
VAT on cross border trade:

The UK is currently in the single EU VAT. This requires harmonization of VAT rules, the ECJ and restrictions on the rates charged. Since 1992 the UK's external border is a VAT frontier for goods coming in from outside of the EU this will be extended to those coming in from the EU.[331]

The Taxation (Cross-Border Trade) Bill (s 42–43) currently before Parliament repeals (or rather does not retain) most EU laws relating to VAT and reasserts the UK frontier as the external UK border for tax purposes.

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

326 EU, Customs Code: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2446&from=EN
327 UN, Transports Internationaux Routier http://www.unece.org/tir/system/history/tir-history.html
328 EU Transports Internationaux Routier https://ec.europa.eu/taxation_customs/business/customs-procedures/what-is-customs-transit/tir-transports-internationaux-routiers-international-road-transport_en
329 Common and Union transit: https://ec.europa.eu/taxation_customs/business/customs-procedures/what-is-customs-transit/common-union-transit_en
330 WTO Trade Facilitation Agreement 2017: https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm
331 VAT Order 1992 'Explanatory memorandum': http://www.legislation.gov.uk/uksi/1992/3222/note/made



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

- **Imports from non EU states.** VAT registered businesses are charged VAT on imports at the same rate as if they had been supplied in the UK. This then becomes the input tax.[333]

Goods coming in or going to the EU are treated differently on the basis of whether the sales are Business to Business, Business to final consumer or digital. This will determine what rate of VAT is chargeable - the UK rate or the rate in the EU state of sale.

The main difference on Brexit will be that import tax will become payable as the goods cross the border rather than on sale to the end customer. This would entail a cash flow cost for businesses that import from the EU, in the way that businesses that import from outside the EU do.

Mitigation

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

Technology to aid the above:

- **Automated Number Plate Recognition (ANPR) and CCTV.** Northern Ireland has DVLA APNR on a number of border points.

332 European Commission Staff paper: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0457&from=EN

333 HMG VAT guidance: https://www.gov.uk/guidance/vat-imports-acquisitions-and-purchases-from-abroad

334 BCC: http://www.britishchambers.org.uk/press-office/press-releases/bcc-slash-tax-admin-costs,-say-businesses.html

335 BCC: http://www.parliament.uk/documents/commons-committees/work-and-pensions/Correspondence/Briefing-VAT-Import-Duties-clauses-in-Taxation-Bill.pdf

- **Radio Frequency Identification (RFID).** The US/Canadian border
- **A single online portal.** A simplified 100% electronic customs declaration system that re-uses export data for imports. This should also take advantage of barcode scanning technology.

Problem sectors?

1. Cross border Agricultural exports.

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

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

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

2. Electricity

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

People / Services

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

336 WTO SPS Agreement: https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

The Common Travel Area

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

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

However, if this is not possible to extend the MoU to EU/EEA nationals it need not cause concern. The UK is highly unlikely to enforce migration controls against EU nationals at its own external border. EU/EEA citizens will either travel to the UK visa free, under a visa waiver programme (A UK ESTA) or be entitled to a tourist visa. Either way there would be no incentive for an EU/EEA to travel to the RoI to cross to the UK in order to work illegally in the UK. Those who did enter the UK via NI would do so illegally and be in the same position as someone who had overstayed their visa.

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

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

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

In the event of 'no deal'

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

- **Extend the status quo for a limited period.** Under GATT Articl2 24 (7) (b) the UK and EU could extend the status quo as long as a Free Trade Agreement remains 'in contemplation'. This could potentially last for up to 10 years.

337 BBC News, 3 October 2016: http://www.bbc.co.uk/news/uk-northern-ireland-37545897

- **Unilaterally reduce tariffs.** The UK could gradually and unilaterally reduce its own import tariffs and thus remove the burden on importers and consumers and companies that require components from outside the UK to remain competitive.
- **WTO.** Use the WTO's Trade Facilitation Agreement and other multilateral and plurilateral agreements to reduce the prospect of new barriers to trade.
- **Mutual recognition under MFN.** Try to take advantage of the EU's mutual recognition agreements with other non EU states. There is a legal argument that the EU has to extend its MR agreements to other WTO states on a MFN basis. A recent example is in the area of Insurance.[338]

Further reading:

Legatum Institute: "Mutual Interest How the UK and EU can resolve the Irish border issue" by Shanker Singham et al, 2017[339]

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

Christopher Howarth, Conservative Home, "How to manage the Northern Ireland Border (November 2016)[341]

Appendix: Alternative Brexit Economic Analysis

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

338 https://www.insurancejournal.com/news/national/2017/01/13/438820.htm
339 https://www.li.com/activities/publications/mutual-interest-how-the-uk-and-eu-can-resolve-the-irish-border-issue-after-brexit
340 European parliament: Constitutional Affairs Committee November 2017: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU(2017)596828_EN.pdf
341 Christopher Howarth, Conservative Home, How to manage the Northern Irish border Dec 2016: https://www.conservativehome.com/thecolumnists/2016/12/christopher-howarths-guide-to-brexit-how-to-manage-the-northern-irish-border-after-we-leave-the-eu.html

Motion made, and Question put, That the Chair's draft Report be read a second time, paragraph by paragraph.—(*The Chair*)

Amendment proposed, to leave out "Chair's draft Report" and insert "draft Report proposed by Mr Jacob Rees-Mogg"—(*Mr Jacob Rees-Mogg*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 7	**Noes, 12**
Mr Peter Bone	Joanna Cherry
Sir Christopher Chope	Stephen Crabb
Andrea Jenkyns	Richard Graham
Craig Mackinlay	Peter Grant
Mr Jacob Rees-Mogg	Wera Hobhouse
Mr John Whittingdale	Stephen Kinnock
Sammy Wilson	Jeremy Lefroy
	Mr Pat McFadden
	Seema Malhotra
	Emma Reynolds
	Stephen Timms
	Hywel Williams

Question accordingly negatived.

Main Question, put and agreed to.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 and 2 agreed to.

Paragraph 3 read.

Amendment proposed, after "(EP)", to insert the words ", by national and / or regional parliaments in other EU countries where required by their respective constitutions,"—(*Peter Grant*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 4	**Noes, 15**
Joanna Cherry	Mr Peter Bone
Peter Grant	Sir Christopher Chope
Wera Hobhouse	Stephen Crabb
Hywel Williams	Richard Graham
	Andrea Jenkyns
	Stephen Kinnock
	Jeremy Lefroy
	Mr Pat McFadden
	Craig Mackinlay
	Seema Malhotra
	Mr Jacob Rees-Mogg
	Emma Reynolds
	Stephen Timms
	Mr John Whittingdale
	Sammy Wilson

Question accordingly negatived.

Paragraph agreed to.

Paragraphs 4 to 41 agreed to.

Paragraph 42 read.

Amendment proposed, at end, to add

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

Question put, That the amendment be made.

The Committee divided.

Ayes, 8	**Noes, 11**
Mr Peter Bone	Joanna Cherry
Sir Christopher Chope	Stephen Crabb
Richard Graham	Peter Grant
Andrea Jenkyns	Wera Hobhouse
Craig Mackinlay	Stephen Kinnock
Mr Jacob Rees-Mogg	Jeremy Lefroy
Mr John Whittingdale	Mr Pat McFadden
Sammy Wilson	Seema Malhotra
	Emma Reynolds
	Stephen Timms
	Hywel Williams

Question accordingly negatived.

Paragraph agreed to.

Paragraph 43 read.

Amendment proposed, before "This paragraph", to insert

"Despite the commitment given in paragraph 56 of the Joint Report that "given the specific nature of issues related to Ireland and Northern Ireland, and on the basis of the principles and commitments set out above, both parties agree that in the next phase work will continue in a distinct strand of negotiations on detailed arrangements to give them effect" it is surprising that"—(*Sammy Wilson*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 8	**Noes, 11**
Mr Peter Bone	Joanna Cherry
Sir Christopher Chope	Stephen Crabb
Richard Graham	Peter Grant
Andrea Jenkyns	Wera Hobhouse
Craig Mackinlay	Stephen Kinnock
Mr Jacob Rees-Mogg	Jeremy Lefroy
Mr John Whittingdale	Mr Pat McFadden
Sammy Wilson	Seema Malhotra
	Emma Reynolds
	Stephen Timms
	Hywel Williams

Question accordingly negatived.

Paragraph agreed to.

Paragraphs 44 and 45 agreed to.

Paragraph 46 read.

Amendment proposed, to leave out from "legislation" to the end of the paragraph and insert the words "However, this would expand the scope of the agreed areas of cooperation within the Belfast Agreement which would be contrary to the Joint Report, the commitment to uphold the Agreement and would only be possible with the consent of all the parties in Northern Ireland as well as the UK and Irish Governments."—(*Sammy Wilson*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 8	**Noes, 11**
Mr Peter Bone	Joanna Cherry
Sir Christopher Chope	Stephen Crabb
Richard Graham	Peter Grant
Andrea Jenkyns	Wera Hobhouse
Craig Mackinlay	Stephen Kinnock
Mr Jacob Rees-Mogg	Jeremy Lefroy
Mr John Whittingdale	Mr Pat McFadden
Sammy Wilson	Seema Malhotra
	Emma Reynolds
	Stephen Timms
	Hywel Williams

Question accordingly negatived.

Paragraph agreed to.

Paragraphs 47 to 49 agreed to.

Paragraph 50 read.

Amendment proposed, to leave out "support" in line 2 and insert the word "note".—(*Mr Pat McFadden*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 9	**Noes, 10**
Joanna Cherry	Mr Peter Bone
Peter Grant	Sir Christopher Chope
Wera Hobhouse	Stephen Crabb
Stephen Kinnock	Richard Graham
Mr Pat McFadden	Andrea Jenkyns
Seema Malhotra	Jeremy Lefroy
Emma Reynolds	Craig Mackinlay
Stephen Timms	Mr Jacob Rees-Mogg
Hywel Williams	Mr John Whittingdale
	Sammy Wilson

Question accordingly negatived.

Paragraph agreed to.

Paragraphs 51 to 60 agreed to.

Paragraph 61 read.

Amendment proposed, to leave out from "Ireland border." in line 3 to the end of the paragraph and add

"Whilst all the borders we have studied have involved some checking of movements of goods across the frontier, use of existing technology, electronic pre-clearance of traded goods, Authorised Economic Operators, mutually recognised accreditation of trusted traders, importer self-assessments, inspection zones away from the border for high risk assignments, smart and secure lanes and randomised audits have created a situation where, at present, delays and need for border checks have been considerably reduced and, according to the Permanent Secretary of HMRC, 96% of customs applications are cleared within seconds. Further development of these trade facilitation methods, application of latest in-vehicle technology along with exemptions from customs checks for local trade contained in the UK Government's paper of last August, should all be explored to deliver a truly frictionless border between the Republic of Ireland and the UK."—(*Sammy Wilson*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 9	**Noes, 11**
Mr Peter Bone	Joanna Cherry
Sir Christopher Chope	Stephen Crabb
Mr Jonathan Djanogly	Peter Grant
Richard Graham	Wera Hobhouse
Andrea Jenkyns	Stephen Kinnock
Craig Mackinlay	Jeremy Lefroy
Mr Jacob Rees-Mogg	Mr Pat McFadden
Mr John Whittingdale	Seema Malhotra
Sammy Wilson	Emma Reynolds
	Stephen Timms
	Hywel Williams

Question accordingly negatived.

Paragraph agreed to.

Paragraph 62 read.

Amendment proposed, to leave out from "presented." to the end of the paragraph.—(*Sammy Wilson*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 8	**Noes, 12**
Mr Peter Bone	Joanna Cherry
Sir Christopher Chope	Stephen Crabb
Richard Graham	Mr Jonathan Djanogly
Andrea Jenkyns	Peter Grant
Craig Mackinlay	Wera Hobhouse
Mr Jacob Rees-Mogg	Stephen Kinnock
Mr John Whittingdale	Jeremy Lefroy
Sammy Wilson	Mr Pat McFadden
	Seema Malhotra
	Emma Reynolds
	Stephen Timms
	Hywel Williams

Question accordingly negatived.

Paragraph agreed to.

Paragraphs 63 to 83 agreed to.

Paragraph 84 read.

Amendment proposed, to leave out from "October 2018." to "The UK Parliament"—(*Mr Jacob Rees-Mogg*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 9	**Noes, 11**
Mr Peter Bone	Joanna Cherry
Sir Christopher Chope	Stephen Crabb
Mr Jonathan Djanogly	Peter Grant
Richard Graham	Wera Hobhouse
Andrea Jenkyns	Stephen Kinnock
Craig Mackinlay	Jeremy Lefroy
Mr Jacob Rees-Mogg	Mr Pat McFadden
Mr John Whittingdale	Seema Malhotra
Sammy Wilson	Emma Reynolds
	Stephen Timms
	Hywel Williams

Question accordingly negatived.

Paragraph agreed to.

Paragraph 85 agreed to.

Paragraph 86 read.

Motion made, and Question put, That the paragraph stand part of the Report.

The Committee divided.

Ayes, 12	**Noes, 8**
Joanna Cherry	Mr Peter Bone
Stephen Crabb	Sir Christopher Chope
Mr Jonathan Djanogly	Richard Graham
Peter Grant	Andrea Jenkyns
Wera Hobhouse	Craig Mackinlay
Stephen Kinnock	Mr Jacob Rees-Mogg
Jeremy Lefroy	Mr John Whittingdale
Mr Pat McFadden	Sammy Wilson
Seema Malhotra	
Emma Reynolds	
Stephen Timms	
Hywel Williams	

Paragraph accordingly agreed to.

Paragraph 87 read.

Motion made, and Question put, That the paragraph stand part of the Report.

The Committee divided.

Ayes, 12	**Noes, 8**
Joanna Cherry	Mr Peter Bone
Stephen Crabb	Sir Christopher Chope
Mr Jonathan Djanogly	Richard Graham
Peter Grant	Andrea Jenkyns
Wera Hobhouse	Craig Mackinlay
Stephen Kinnock	Mr Jacob Rees-Mogg
Jeremy Lefroy	Mr John Whittingdale
Mr Pat McFadden	Sammy Wilson
Seema Malhotra	
Emma Reynolds	
Stephen Timms	
Hywel Williams	

Paragraph accordingly agreed to.

Paragraphs 88 to 121 agreed to.

Paragraph 122 read.

Motion made, and Question put, That the paragraph stand part of the Report.

The Committee divided.

Ayes, 13	**Noes, 7**
Joanna Cherry	Mr Peter Bone
Stephen Crabb	Sir Christopher Chope
Mr Jonathan Djanogly	Andrea Jenkyns
Richard Graham	Craig Mackinlay
Peter Grant	Mr Jacob Rees-Mogg
Wera Hobhouse	Mr John Whittingdale
Stephen Kinnock	Sammy Wilson
Jeremy Lefroy	
Mr Pat McFadden	
Seema Malhotra	
Emma Reynolds	
Stephen Timms	
Hywel Williams	

Paragraph accordingly agreed to.

Paragraphs 123 to 134 agreed to.

Question put, That the Report be the Third Report of the Committee to the House.

The Committee divided.

Ayes, 13	**Noes, 7**
Joanna Cherry	Mr Peter Bone
Stephen Crabb	Sir Christopher Chope
Mr Jonathan Djanogly	Andrea Jenkyns
Richard Graham	Craig Mackinlay
Peter Grant	Mr Jacob Rees-Mogg
Wera Hobhouse	Mr John Whittingdale
Stephen Kinnock	Sammy Wilson
Jeremy Lefroy	
Mr Pat McFadden	
Seema Malhotra	
Emma Reynolds	
Stephen Timms	
Hywel Williams	

Question accordingly agreed to.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available (Standing Order No. 134).

[Adjourned till Tuesday 20 March at 9.15am

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Wednesday 25 October 2017	*Question number*
Rt Hon David Davis MP, Secretary of State, Department for Exiting the European Union	Q1–153

Wednesday 29 November 2017	
Peter Hardwick, Head of Exports, Agriculture and Horticulture Development Board; **James Hookham**, Deputy Chief Executive, Freight Transport Association; **Sian Thomas**, Communications Manager, Fresh Produce Consortium; **Duncan Brock**, CIPS Group Director, Chartered Institute of Procurement and Supply	Q154–188
Jon Thompson, Chief Executive and Permanent Secretary, HM Revenue and Customs; **John Bourne**, Policy Director of Animal and Plant Health, Department for Environment, Food and Rural Affairs; **Richard Everitt**, Chairman, Port of Dover; **Richard Ballantyne**, Chief Executive, British Ports Association	Q189–251

Wednesday 7 December 2017	
Simon York, Director, HMRC Fraud Investigation Service; **Mike O'Grady**, Deputy Head, Organised Crime Operations North, HMRC Fraud Investigation Service; **Deputy Chief Constable Drew Harris**, PSNI; and **Assistant Chief Constable Stephen Martin**, Head of Crime Operations, PSNI	Q252–301

Wednesday 13 December 2017	
Professor Alexander Türk, Professor of Law, King's College London; **John Cassels**, Partner, Competition, Regulatory and Trade Law, Fieldfisher LLP; and **Dr Scott Steedman**, Director of Standards, BSI and Vice President (policy), International Standards Organisation	Q302–324
Katherine Bennett, Senior Vice President, Airbus UK; **Rod Ainsworth**, Director of Regulatory and Legal Strategy, Food Standards Agency; **Angela Hepworth**, Director of Corporate Policy and Regulation, EDF UK; and **Dr Ian Hudson**, Chief Executive, Medicines and Healthcare Products Regulatory Agency	Q325–375

Wednesday 20 December 2017	
Professor Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law, University of Liverpool; **Professor Anand Menon**, Director, UK in a Changing Europe; **Stephen Booth**, Director of Policy and Research, Open Europe	Q376–454

Wednesday 10 January 2018

Professor Richard Whitman, Head of School, Professor Politics and International Relations, University of Kent; **Fredrik Erixon**, Director, European Centre for International Political Economy; **Dr Stephen Woolcock**, Associate Professor in International Relations, London School of Economics — Q455–545

Wednesday 17 January 2018

Christophe Bondy, Public International Lawyer at Cooley (UK) LLP and former senior counsel to Canada on the CETA negotiations; **Dr Lorand Bartels**, University of Cambridge and Senior Counsel, Linklaters; **William Swords**, President, UK-Canada Chamber of Commerce — Q546–633

Wednesday 18 January 2017

Professor Greg Hannon, Director, Cancer Research UK Cambridge Institute; **Professor Eilís Ferran**, Pro-Vice Chancellor for Institutional International Relations, Cambridge University; **Dr Andy Williams**, Vice President Cambridge Strategy & Operations, AstraZeneca; and **Michael Lawrence**, Business Development Director, Deimos Space UK — Q634–690

Wednesday 24 January 2017

Rt Hon David Davis MP, Secretary of State, Department for Exiting the European Union — Q691–835

Wednesday 31 January 2018

Dmytro Tupchiienko, Data Protection Lawyer, EY, London; **Michael Emerson**, Associate Senior Research Fellow, Centre for European Policy Studies, Brussels; **Dr Tamara Kovziridze**, Co-founder, Reformatics, Tbilisi — Q836–905

Wednesday 6 February 2018

John Springford, Deputy Director, Centre for European Reform; **Professor Clive Church**, Emeritus Professor of European Studies, University of Kent; and **Professor René Schwok**, University of Geneva — Q906–964

Wednesday 7 February 2018

Professor George Yarrow, Chair of the Regulatory Policy Institute, Emeritus Fellow, Hertford College, Oxford, and visiting professor; **Ulf Sverdrup**, Director, Norwegian Institute of International Affairs; and **Professor Alla Pozdnakova**, Law Faculty, University of Oslo — Q965–1022

Professor Carl Baudenbacher, Judge of the EFTA Court — Q1023–1048

Wednesday 21 February 2018

Emanuel Adam, Director of Policy and Trade, BritishAmerican Business; **Dr Peter Holmes**, Reader in Economics, University of Sussex; **Dr Pinar Artiran**, Assistant Professor, Bilgi University, Istanbul; **Sam Lowe**, Research Fellow, Centre for European Reforma — Q1049–1100

Wednesday 27 February 2018

Pascal Lamy, former Director-General, World Trade Organization — Q1101–1162

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

NEG numbers are generated by the evidence processing system and so may not be complete

1 Association of British Insurers (NEG0007)

2 British Retail Consortium (NEG0010)

3 Dr Charlotte O'Brien (NEG0008)

4 Freight Transport Association (NEG0004)

5 Investment Association (NEG0009)

6 London First (NEG0001)

7 Michael Emerson Centre for European Policy Studies (CEPS) (NEG0012)

8 Port of Dover (NEG0005)

9 Professor Dr. iur. Dr. rer. pol. h.c. Carl Baudenbacher (NEG0014)

10 Professor Graham Virgo Pro-Vice-Chancellor University of Cambridge (NEG0017)

11 Professor René Schwok Global Studies Institute University of Geneva (NEG0016)

12 Rail Delivery Group (NEG0003)

13 Rob Dickinson (NEG0013)

14 Stephen Woolcock LSE (NEG0011)

15 TheCityUK (NEG0002)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	European Union (Withdrawal) Bill	HC 373 (HC 771)
Second Report	The progress of the UK's negotiations on EU withdrawal	HC 372 (HC 862)
First Special Report	European Union (Withdrawal) Bill: Government Response to the Committee's First Report	HC 771
Second Special Report	The progress of the UK's negotiations on EU withdrawal: Government response to the Committee's Second Report	HC 862