

BREXIT AND BEYOND

HOW THE UNITED KINGDOM MIGHT
LEAVE THE EUROPEAN UNION

A report by

The UK in a Changing Europe for
Political Studies Association of the UK



The **UK** in a
Changing Europe



Political Studies
Association

FOREWORD

Despite Michael Gove's claims during the EU Referendum campaign that the public has 'had enough of experts', post-referendum uncertainty highlighted the need for experts to respond to the question of "what happens next?"

The party political drama that ensued throughout the summer of 2016 made this question ever more pressing. As an organisation committed not only to studying but also to informing political decision-making, the Political Studies Association (PSA) identified the need for a comprehensive, but easily comprehensible, overview of the Brexit process, which would provide a framework for all stakeholders in this momentous political development to think about its implications and the challenges ahead.

The PSA is delighted to have teamed up with the UK in a Changing Europe team to produce this report. In what follows, Professor Anand Menon and his colleagues shed light on all key aspects of the Brexit negotiation process and answer all those questions you hadn't even identified or were afraid to ask. Through the dissemination of this illuminating publication, we hope that we can provide a guide to help you understand the complexities of how the United Kingdom will withdraw from and, eventually, coexist with the European Union.



Helena Djurkovic
CEO, Political Studies Association

FOREWORD

We live, as the saying goes, in interesting times. Our parties and party system are mutating before our eyes, our constitutional settlement is in flux, and the fate of our economy is highly uncertain. Intimately related to each of these was the decision taken by the British people on 23 June to leave the European Union (EU).

Yet, as some had pointed out during the campaign itself, the apparently simple binary choice presented to the British people on that day was nothing of the sort. When Theresa May declared that 'Brexit means Brexit,' she had hit upon a pithy and effective way of stymying debate in the short term as the political class headed off for their summer. It quickly became widely apparent, however, that tautology was not a clear guide to future policy.

This short report is intended for all those who are interested in how the relationship between the UK and the EU might evolve following the referendum. It attempts to unpack and explain the process by which the UK will leave the Union. It investigates the modalities of triggering the now infamous Article 50 – under which a state announces its intention to leave the EU. It goes on to discuss how the Article 50 process might unfold, what actors might be involved in this process and how, and what any longer term deal between the UK and its European partners might look like. Our intention was to provide an analysis of what might transpire and how, given the nature of British and European politics, the structure of the British state, and the legal frameworks within which both sides must operate.

The report has been put together by a team from the ESRC-funded UK in a Changing Europe initiative (www.ukandeu.ac.uk). Our remit is to deploy high quality social science research to inform public and political debates about the UK's relationship with the EU. I hope that this document contributes towards that aim. This relationship will be central to our politics, and the politics of the continent for some time to come, and it is hard to overstate the importance of a clear understanding of the legal, political and economic issues at stake.

Finally, I would like to thank Catherine Barnard, Iain Begg, Damian Chalmers, Sara Hagemann, Joanne Hunt, Michael Keating, Martin Lodge, Simon Usherwood and Richard Whitman for both their excellent contributions to this report and their patience and forbearance in dealing with my repeated queries and questions, often at short notice.



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CHAPTER ONE: INTRODUCTION

Theresa May has nailed her colours to the mast by stating that 'Brexit means Brexit', but what this will mean in practice is far from certain. It will encompass a combination of extracting the UK from the rights and obligations of EU membership, establishing a new relationship with our erstwhile partners, and seeking new trading arrangements with the rest of the world. In addition, tricky decisions will need to be made when it comes to adapting domestic policies over which the EU currently exercises a strong influence.

The first stage is for the UK to invoke Article 50 of the Treaty on European Union (TEU), setting in motion the separation from the EU.¹ To the dismay of many on the other side of the English Channel, the UK Government does not intend to pull the trigger until early 2017, knowing that once it does, the Treaty prescribes a two-year deadline for concluding the negotiation. At the end of those two years, the default position is that the EU Treaties and all the rights and obligations that flow from them cease to apply to the UK and its citizens. Despite provisions for the rest of the EU (rEU) to prolong the negotiations by unanimous agreement, most commentators consider it unlikely that they would be willing to do so.

The intention to withdraw has to be addressed to the European Council, comprising the leaders of all EU Member States, which then has to agree guidelines for rEU to follow during the process. The detailed negotiations are expected to be conducted by the European Commission and the secretariat of the Council (both of which have already designated lead negotiators), with the involvement of the European Parliament. Once a withdrawal settlement is agreed, it has to be concluded on behalf of the Union by the Council, acting by a qualified majority (that is, 55% of Member States must vote in favour and the proposal must be supported by Member States representing at least 65% of the total EU population), after obtaining the consent of the European Parliament (Article 50(2)). In plain English, either a sufficiently large minority of rEU Member States or a majority of members of the European Parliament who vote can block a deal.

The withdrawal negotiations will have to cover a wide range of policy areas, given the reach of the EU into areas as diverse as judicial co-operation, scientific research and local economic development. Will multi-annual infrastructure projects part-financed by the EU's Structural Funds be allowed to continue, or will their sponsors have to choose between raising funding from alternative sources or being curtailed? What should happen to existing projects bringing together partners from UK and other EU universities, and funded from the European Research Council, bearing in mind that UK involvement is enabled by UK payments into the EU budget? A big question concerns what happens both to citizens of other EU countries living and working in the UK, and to UK citizens in other EU countries. Vague promises have been made, but they will need to be turned into firm commitments, including about what they mean for access to health care and other social policies.

And of course there remains profound uncertainty about the kind of relationship the UK will ultimately enjoy with the EU. There is currently much debate about the respective costs and benefits of what are commonly referred to as 'soft' and 'hard' Brexit. These are defined primarily in terms of the UK's relationship with the EU Single Market.² A 'soft Brexit' is commonly taken to mean continued Single Market membership, including free movement of not only goods but also services, capital and labour, as the non-EU states Norway, Iceland and Liechtenstein have. The hardest 'hard Brexit' is usually understood to mean the UK having no preferential relationship with the Single Market and relying only on World Trade Organisation (WTO) rules. This implies not merely non membership of the Single Market (meaning the potential for non tariff barriers to be adopted, hindering trade) but also the imposition of tariffs on at least some trade in goods between the UK and the EU. At the time of writing, it is unclear which outcome the Government prefers, or what our partners might be willing to give us.

1) See Annex 1 for the full text of Article 50

2) Strikingly, just as with pre-referendum debates about the EU, the argument focuses on the economic relationship, and continues to portray the Union primarily as an economic phenomenon. Discussion of the UK's position in EU institutions, and of institutional formats for the post-Brexit UK-EU political relationship, was lacking before and has been largely absent since the referendum

There are also fundamental questions about the consequences of Brexit for the UK's constitutional future. Devolution and the Northern Ireland peace settlement were designed and implemented during the UK's membership of the European Union, and the EU provides an important framework for both. Key competences are shared between the EU and the devolved governments, with no UK-wide departments, but with institutional structures, such as the Joint Ministerial Committee (JMC), which are supposed to provide a forum for intergovernmental discussion within the UK. Meeting through the year in different formats, including a specific Europe format, it potentially provides the structure for a UK position on the EU to be arrived at.³ With EU law setting the outer limits of what can be done with devolved powers, a more permissive and asymmetrical devolution settlement than might otherwise have been possible has emerged. With two of the nations of the UK voting to remain in the EU, the process of seeking a result that can hold the UK together outside the EU will be full of challenges.

On these and many other matters, there is still little clarity. In what follows, we offer our analysis of some of the most pressing issues around the various processes.

1.1 Does the referendum give a legally binding mandate for the UK to leave the EU?

The conventional starting point with any question of UK constitutional law is to remark that under the UK's uncoded constitutional order, the Westminster Parliament is sovereign, has supreme legal authority, and can make and unmake any law it sees fit. Typically, and ironically, membership of the EU has been one of the issues that has been highlighted as rendering the conventional view more complex and nuanced today. It is unquestionable, though, that in legal terms, the sovereign UK state can terminate its membership of the EU, and become independent of it and of the reach of EU law. What is more difficult to determine is who does – and who does not – have the authority to make that decision for the UK. Does Parliament need to endorse the referendum result, or has it implicitly done this through the legislation it passed providing for the EU Referendum?

There is no general rule under UK law that the results of referenda should be given effect. The referendum held on 23 June 2016 was run in accordance with the rules on referenda set out in the Political Parties, Elections and Referendums Act 2000, along with the specific rules of conduct agreed by Parliament in the European Union Referendum Act 2015. That Act, which provides for 'a referendum to be held on whether the UK should remain a member of the EU', would be the place to include special threshold requirements, such as requiring a super-majority rather than a bare majority of those voting, or the need for support from a majority in each of the four parts of the UK. Whilst there were discussions around some of these (the 'devolution locks') they ultimately did not appear in the final act, and nor was there any explicit mention of the consequences of the outcome of the vote. This can be contrasted with the last UK-wide referendum, which was on the Alternative Vote (AV) system for parliamentary elections. The legislation governing that referendum required the Government to bring into force the provisions governing AV in the event of a majority vote in support (Parliamentary Voting System and Constituencies Act 2011, s 8). The 2016 referendum can be seen as advisory only, creating no legal mandate for either the Government or Parliament to act on it. However, the language and politics of the campaigns make it difficult to see how the result could be ignored. The next question thus arises – who should take this decision? Can the Government do this alone, or must explicit support come from Parliament – and should the devolved administrations have a say?

3) Underpinned by the Memorandum of Understanding of the Joint Ministerial Committee, supplemented *inter alia* by the Concordat on Coordination of EU Policy Issues <https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>

CHAPTER TWO: INVOKING ARTICLE 50 TEU

2.1 Who gets to decide (whether) to trigger Article 50 TEU?

Under Article 50 TEU, the act of notification by the withdrawing Member State of its decision to leave the EU sets the clock running for negotiations to take place. The UK Government appears to argue that the decision to leave has been taken (by the referendum vote), which it will act on by notifying the European Council under Article 50(2) TEU, in exercise of its prerogative powers to conclude and withdraw from international treaties. The Government has indicated that it will not formally serve notice of the withdrawal decision until early 2017, and is seeking to determine a 'UK-wide approach' to its position before doing so.

A number of challenges have been made against the Government's position that it can, through notification, trigger Article 50 negotiations without parliamentary assent on the basis that treaty negotiations fall within the Crown prerogative. Beyond general constitutional law doctrines about the relationship between Parliament and the executive,⁴ much – at the time of writing – rests on the outcomes of these challenges, which have been brought together in an action to be heard by the High Court in October, with a possible leapfrog to the Supreme Court in December.⁵ If they are successful and parliamentary assent is required at the outset, Parliament may be able to tie the Government's hands in the negotiations – requiring it to commit to certain legal arrangements or instruments and demanding powers of oversight for parliamentary committees during the negotiations. If the challenge is unsuccessful, none of this will happen. Beyond Government reporting on what it thinks fit, significant involvement of Parliament will be confined, it would appear, to repealing the European Communities Act 1972, under the Government's plan for a 'Great Repeal Bill'.

The style of negotiation and the substance of the agreement is likely to be heavily dependent on what is decided by the courts. The heart of the decision will revolve around whether simply opening negotiations under Article 50 alters existing statutory obligations and responsibilities or compromises individual rights granted by statute.⁶ If it does, parliamentary assent will be required. Otherwise, it will not. Advocates of parliamentary assent are, inter alia, likely to argue that rights are affected because the triggering of Article 50 TEU poses an imminent threat to these. The challenge with this argument is its contingency. Triggering Article 50 does not in itself have an impact on the legislation which brings EU law into effect within the legal orders of the UK – the European Communities Act 1972. Nor does it necessarily follow that EU-derived rights currently available in this UK legislation will be removed by Brexit. In other words, it is not membership *per se* that grants individual rights in the UK but legislation, notably the European Communities Act, and this is untouched by Article 50. The time for parliamentary approval is, therefore, at the moment of amending that legislation. A slightly stronger argument is that even without legislation, exit will result in British citizens losing certain rights granted by the European Communities Act. These include the right to vote and stand for the European Parliament, to secure grants from EU institutions and to apply to work in EU institutions. This is true, but it remains to be seen whether this will be sufficiently persuasive.

All of the devolved administrations are seeking some involvement in the determination of the UK Government's role – after all, foreign policy may fall under the reserved competence of Her Majesty's Government, but its exercise will have significant consequences for policy areas which have been devolved. Possibly most persuasive may be the arguments raised by litigants from Northern Ireland, where there was a majority vote to remain from 55.8% of the electorate. In the Northern Ireland case there is an additional set of constitutional concerns, specific to the island of Ireland, which may support the need not just for the UK Parliament's approval, but also that of the Stormont Assembly. Common EU membership of the UK and Ireland is argued to be of key importance to the operation of the Good Friday Agreement and the Northern Irish devolution settlement. At the time of writing, these cases are yet to be heard.

4) Arguments against the use of the prerogative have been put forward in these terms, notably, by the House of Lords Constitutional Affairs Committee, <http://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/44/44.pdf>

5) *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union*. The government has published its argument as to why triggering article 50 does not require an act of parliament here: https://jolyonmaugham.files.wordpress.com/2016/09/defendant_s-detailed-grounds-of-resistance-for-publication.pdf?fbclid=IwAR1nbeBrusselsBrief/product

6) For an argument that it does, but also an excellent statement of the law see <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>

2.2 Article 50 TEU: Many negotiations or one?

Article 50 provides only that any secession agreement must set out the arrangements for a Member State's withdrawal, taking account of the framework for its future relationship with the Union. Some authors, including the Institute for Government, have argued, consequently, that there will have to be at least two negotiations as Article 50 talks only of 'arrangements surrounding withdrawal'.⁷ According to this view, Article 50 goes only to those matters which would, otherwise, lead to a legal limbo on exit, and separate negotiations will be needed, possibly in parallel, for the UK's future arrangements with the EU on matters such as trade, security, protection of the environment and transport. An alternative view is that these can be rolled into one. The legal argument for this is that any Article 50 arrangement is required to take account of the UK's future relationship within the EU, and this is simply not possible if any exit agreement is confined to legal limbo issues.

The scope of Article 50 negotiations will, therefore, be one of the first issues to be formally engaged with after the handing in of the Article 50 notification by the UK Government. Those favouring a 'hard Brexit' will favour the 'multiple negotiations' interpretation. It allows quick secession without having to engage with the mutual dependencies which may subsequently arise. This might be attractive for those who want no shadow of EU governance over the UK and want to begin negotiating trade agreements with non-EU states as soon as possible. It might also be attractive for those in the EU who want no appearance of reward for the UK for leaving the EU.

Recent research has clearly illustrated that the UK has a weak hand in the forthcoming negotiations.⁸ Multiple agreements and negotiations, however, imply further risks. First, an Article 50 agreement only requires a qualified majority in the Council. Trade and security agreements of the sort sought by the UK outside the Article 50 framework will almost certainly require a unanimous vote.⁹ This will increase the number of veto players and interests in the EU that have to be accommodated in any agreement between the UK and the EU. It is at least conceivable that this might lead to a congruence of interests behind the 'multiple negotiations' option between the EU and the UK's 'quick Brexiters.'

Second, the timetables between the negotiations could become misaligned. Article 50 negotiations have to be concluded within two years, unless the unanimous agreement of the other Member States can be secured to extend the negotiations. There is no timetable on other agreements, and there is a likelihood that these could take longer than two years. There would not only be a period of uncertainty, but, once the UK had left the EU, there could be less incentive for the latter to conclude any arrangement and legally no mechanism for the UK to oblige the rEU to do so.¹⁰ This period would be governed by WTO rules. However, if one considers both the scale of trade between the UK and the EU and the EU's share of overall UK international trade, it is clear that no relationship of such significance is governed merely by such an arrangement. Consequently, some observers have been moved to suggest that the solution lies in adopting a new arrangement to govern relations between the end of Article 50 negotiations and the signing of a longer term deal.¹¹

7) <http://www.instituteforgovernment.org.uk/sites/default/files/publications/5040%20IFG%20-%20Negotiating%20Brexit%20v4.pdf>

8) Chris Hanretty, 'Spatial politics and Brexit negotiations,' <https://medium.com/@chrisanretty/spatial-politics-and-brexit-negotiationsfc078bb709e7?ftcamp=crrm%2Femail%2F%2Fnbe%2FBrusselsBrief%2Fproduct%3Fhdsfy1r7>

9) There is currently an important test case on the extent of exclusive EU competence on trade and investment agreements and when mixed agreements involving ratification by all the Member States as well are required, *Opinion 2/15 EU Singapore Agreement*, lodged at Court 16 October 2015.

10) While the EU is obliged under A50 to conclude a withdrawal agreement, external agreements with third countries are launched by mutual consent.

11) See, for instance, Damian Chalmers and Anand Menon 'How we can leave the EU without causing chaos in the process,' <http://ukandeu.ac.uk/how-we-can-leave-the-eu-without-causing-chaos-in-the-process/> which followed a longer paper published by Open Europe.

2.3 The minimum Article 50 TEU items of negotiation

If it is assumed that Article 50 only resolves legal limbo issues or, alternately, that the UK wants a hard Brexit with no significant treaty governing future relations, what are the minimum issues which need to be resolved?

These fall under four headings:

ACQUIRED RIGHTS:

The Vienna Convention on the Law of Treaties, which binds both the EU and the UK, requires that when a treaty is dissolved, any rights acquired by virtue of it and which now have an independent existence continue to be protected.¹² The difficulty is that there is uncertainty about what these may comprise. Property rights, contracts and pension rights (for instance of British nationals working in EU institutions) are almost certainly protected. Similarly, employment or transnational contracts for the supply of goods and services would almost certainly have to be honoured. There is a belief that those granted permanent residence in another EU Member State would retain that status.¹³ However, there is uncertainty beyond that. Vote Leave went so far as to claim that existing entitlements granted by EU law (e.g. the right to look for work or the right to reside in another Member State if one has sufficient resources) would continue to be protected. This is almost certainly not the case, but both the EU and the UK will have a shared interest in clarifying what is protected, and this indeed happened when Greenland left the EU.

TRANSITIONAL REGIME:

Both the EU and the UK are bound by the principle of legitimate expectations. If parties are given reason to believe that their legal situation will not change, then a failure to observe this breaches the law.¹⁴ Whilst the principle has been held not to give private actors a right, in the absence of commitments, to believe the law will not change, both the UK and the EU will want to make sure that they are legally protected as the courts will look at what a prudent trader could have anticipated. Regimes will have to be agreed to deal with fields which are particularly susceptible to possible legal challenges. These include receipt of EU funds, pending applications for EU authorisations for products and processes, and protection of existing contracts to supply goods or services into the UK from outside the EU.

SHARED LIABILITIES AND ENTITLEMENTS:

Alongside this, agreements will have to be made on who is responsible for existing liabilities and who receives unallocated funds for projects or actors in the UK. Technically, the EU has its own resources, and so the liabilities and entitlements belong to it. However, there may be an expectation that the UK as a contributor and beneficiary of the EU Budget should incur some share of both.

TRANSFER OF REGULATORY AND POLICING RESPONSIBILITIES:

EU institutions have regulatory and policing functions over the UK, whether this be in the form of Europol files, or Commission authorisations in fields as diverse as competition law, genetically modified food or pharmaceuticals. There will have to be agreements about how cases are handed over and how sensitive information, be it for reasons of confidentiality or public security, is handled.

¹² Vienna Convention on the Law of the Treaties, article 70(1)(b). For analysis see <https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-theevent-of-a-brexite>

¹³ House of Commons, Leaving the EU (2013, Research Paper 13/42) 70.

¹⁴ In EU law see 74/74 C.N.T.A v Commission, EU:C:1976:84. In English law see *Niaz v Secretary of State for the Home Department* [2008] EWCA Civ 755.

2.4 Parliamentary Consent(s) and a second referendum at the end of Article 50 negotiations?

A statute will be needed at the end of the Article 50 negotiations - agreement or not – if only to stop EU law generating new rights, obligations and responsibilities after secession by virtue of the European Communities Act 1972. The latter will, therefore, have to be amended or repealed. The Government's proposed Great Repeal Bill would potentially address this. Given its implications for the powers held by the devolved administrations, their consent may be required, in line with the Sewel Convention, which now has statutory standing in Scotland. This convention provides that the Westminster Parliament will not normally legislate on devolved matters without the devolved parliaments' consent, and does not amount to a blanket prohibition. The political fall-out from any of the devolved assemblies not endorsing the UK line may, however, prove considerable, and provide a further stimulus to a redefinition of the relations between the nations of the UK.

Separate from devolution concerns is the question of whether a second referendum would be necessary to consent to any treaty resulting from the Article 50 negotiations. The European Union Act 2011 requires any treaty amending or replacing the EU Treaties to be subject to a referendum if it is extending EU competencies or powers over the UK. Any secession treaty would be the opposite of that. However, one small provision - section 4(1)(i) of the Act - will be causing government lawyers some headaches. This states that a referendum must be held if the new treaty confers any power on any EU institution to impose a requirement or obligation on the UK. This may happen, for example, if any new treaty provided for British authorities to carry out any instructions from EU institutions in relation to the financial services industry (or any other industry, for that matter) as a price for continued access to the Single Market. Legislation could of course be passed repealing that provision. However, it would be ironic if a process instigated to give citizens popular voice about EU matters finished with a provision that removed their existing rights to such voice. It should also be noted that such a referendum would technically, unless something else was negotiated between the British Government and the EU, involve a choice between hard Brexit and that treaty. For if the UK could not ratify the treaty, it would simply leave without any treaty after two years.

2.5 Can the triggering of Article 50 be revoked?

One issue that has been much less considered in the debate around Article 50 is the question of whether its triggering can be revoked. The issue matters for a number of reasons. Most obviously, given that the process is likely to take an extended period of time, the situation – internally in the UK and/or rEU as well as externally in the wider world – might well change, necessitating a breaking off of the process before it can be concluded. A non-exhaustive list of potential reasons would include: changes in government, major economic shocks, major diplomatic shocks and military aggression. In addition, the issue of revocation also has implications for the relative bargaining power of the various parties to Article 50. If there is scope for terminating matters, and for Britain to remain within the EU having triggered negotiations under Article 50, this might alter the nature of the negotiations that take place.

Revocation comes in various different forms, which we can consider as follows:

MUTUAL CONSENT:

If all parties in Article 50 – the rEU and the UK – agree that the process should be stopped before its conclusion, then this is clearly unproblematic in political terms, albeit less so in legal ones. While Article 50 does not provide for revocation, since the Member States are masters of the EU's constituent treaties then they can make the necessary adjustments that legal counsel might require, even if this does not need to extend beyond a formal declaration of the European Council. This would be the most likely form of revocation, since there has been little evident appetite for the UK's departure in other Member States. Hence if the UK were to indicate that it was changing its mind, then it should find a broadly positive response from the rEU. Unless specific conditions were applied – which might be problematic, as discussed below – the working assumption would be that the UK would continue as a Member State on the terms of the status quo ante. In particular, the deal concluded by David Cameron in spring 2016 would not come into effect, as the European Council has now agreed that this has lapsed: specific re-approval would be needed for it enter into force.

The only substantive issue with this option would be any legal challenges for compensation by private individuals or companies for the impact on their rights as a result of the previous invocation of Article 50. Any such claims would play out in the courts. However, as long as the UK retained its pre-invocation status as an EU Member State, such claims would likely be small and defensible as part of the dynamic nature of public policy.

UNILATERAL REVOCATION BY THE REU:

Under both Article 50 and customary international law, this is not an option. Any Member State has the right to leave the EU under the former, and cannot be bound to international commitments under duress under the latter.

UNILATERAL REVOCATION BY THE UK:

The more interesting – and potentially more relevant – situation is one where the UK decides to abort Article 50 without seeking the approval of the rEU. If this is possible, then it changes the balance of bargaining power within the Article, since it offers a third option to a British Government faced with a take-it-or-leave-it offer from the rEU and a ticking clock to the end of the negotiating period. Instead of choosing between taking a deal that might contain much that is unfavourable and leaving with no deal at all, the UK might be able to terminate Article 50 and revert to the prior terms of membership. Such a scenario contains the obvious problem that the UK will still be a Member State – in direct contravention of the referendum result.

Even in a more benign scenario, where the British Government has had a change of heart, but has been unable to convince the rEU to accept it, then the basic question remains whether it can make this decision by itself.

Unfortunately, the legal position on this is not as clear as on the other options listed above. Article 50 itself makes no provision for this situation, although it does note that a Member State that has left the EU can only be readmitted via the Article 49 procedure, as used for more normal accessions. On a broad reading, this might be taken to imply that, prior to this point, a departing Member State might have access to a different set of options, but this is very unclear.

The 1969 Vienna Convention on the Law of Treaties offers some guidance on the matter. Articles 65-8 establish that a Member State is not only free to leave a treaty if it no longer wishes to be subject to it, but that until it finally leaves, it is also free to change its mind on the matter and retain its membership. While instances of this being effected are rare, they have occurred, working from the general concept that until one is not a member, one is a member.

The complications inherent in this, however, are various. First, not all Member States of the EU are signatories to the Vienna Convention, so are not bound by it: the EU itself is not a signatory, so would have to decide whether it had to respect the rights of those Member States that are signatories. However, the Vienna Convention itself is essentially a codification of customary international law – and an open and flexible codification at that – so a case would have to be made that the UK's unilateral rights did not apply here.

This leads to a second objection, namely that the Convention is intended for cases where no exit mechanism exists (something that is not the case for the EU treaties). Article 54 of the Vienna Convention states that once a Member State has made its notification to withdraw, it effectively cedes its rights to change its mind, especially since its initial decision will have been made in accordance with some domestic decision-making procedure – such as a referendum. While this potentially holds true, if the UK did change its mind that would not block the revocation by mutual consent scenario outlined above, since the legal order of the EU can be amended by the European Council to accommodate political realities.

The critical problem comes should the UK be felt to be making a vexatious use of unilateral revocation. The obvious case would be if the British Government revoked Article 50 in the face of a bad deal, and then shortly afterwards submitted a new Article 50 notification, in the hope of securing a better deal from the rEU with the clock reset. Such an approach would not only be highly politically damaging, with substantial reputational costs, but would open the door to use of both the EU treaties and the Vienna Convention to eject the UK for noncompliance with the treaties. This could potentially lead to the United Nations playing a role in settling the dispute.

In summary, Article 50 can be revoked, certainly by mutual consent, and probably unilaterally by the UK. However, in the latter case the UK would find itself having to defend a very uncertain legal and a very troubling political position.

CHAPTER THREE: BEYOND ARTICLE 50: SHAPING THE FUTURE RELATIONSHIP

The triggering of Article 50 is only the beginning of a longer process: actual withdrawal will require several steps, and a current dilemma for the Government is how specific the Article 50 notification should be regarding subsequent negotiations. It is suggested that the Article 50 notification should set out two categories of negotiating items: those to be included in the withdrawal agreement, and the proposed framework for future UK-EU relations, to be set out in a separate document underpinning both the withdrawal agreement and any eventual UK-EU treaty governing their relations in the longer term. These will set out the overall plan for negotiations, which can be divided into various 'negotiation chapters' according to policy area and priority and may or may not be specified in the framework agreement. Following this logic, it is perhaps relevant to draw parallels between the Brexit process and the EU's experience with negotiations over EU accession, albeit in reverse.

An important distinction should be highlighted between the agreement on the future framework for relations between the UK and the EU and the withdrawal agreement: a framework may not be legally binding, while the withdrawal agreement will be. The framework agreement will be a political undertaking. This is not to understate its significance, as it will affect what is included in the withdrawal agreement, and future binding agreements on UK-EU relations and collaboration. Nevertheless, it is of a different status and may require some adjustments along the way.

As the Article 50 agreement must take account of the future relationship between the UK and the EU, it must consider that a new relationship with rEU will have a number of dimensions. Much of the debate, both before and (more so) since the referendum, has been about whether the UK can somehow retain its access to the EU Single Market after Brexit, while curbing the freedom of movement of workers from other EU countries and drastically cutting (or eliminating) its EU 'membership fee'. The dilemma here is that curbing the inflow of migrant workers from other EU countries was the second most compelling reason for the Leave vote (after 'taking back control'), yet it appears incompatible with preserving UK membership of the Single Market. The UK will, consequently, have to work out what future economic relationship with the EU it wants.

Trade and investment linkages will be a big component of this, but by no means the only ones, because the right to do business with other EU countries is about more than formal trade barriers such as tariffs. For the City of London, for example, authorisation to operate in rEU (known as 'passporting') will be crucial, because unless UK rules are deemed to be equivalent, any financial intermediary wanting access to the EU market will require separate regulatory consent.

There has been discussion of a whole range of 'models' for a post-Brexit relationship (see Annex 2 for a summary). Probably the least risky economically would be for the UK to have a status similar to Norway, participating in much of the Single Market, perhaps with some new curbs on free movement of labour. However, another prominent claim in the referendum campaign was that the UK would gain from no longer having to contribute to the EU budget, yet Norway continues to pay a membership fee. The pure 'Norway model' seems, already, to have been ruled out.

At the other extreme, the UK might, as we have seen, simply be treated on standard WTO terms, with the same access to the EU market as China. However, this is by no means straightforward. The UK, a founding WTO member, but currently a member via EU membership, may need to reapply to join the WTO, and some WTO states may insist on driving a hard bargain. There is a further, fundamental problem about dividing up the EU's tariff quotas which allow a certain amount of produce to enter at lower duties. The UK would probably have to negotiate to take over a portion of the EU quota, or add a new quota itself. The same is true of the EU's allowances for farm subsidies, for which the UK would have to try to negotiate a share.

There has also been discussion of a 'Canada model' in which a new free trade arrangement would give the UK privileged access to the EU for exports of goods, but would likely mean limits on market access for UK services. Moreover, the difficulties the EU is experiencing in ratifying the deal with Canada point to potential problems ahead if this route is chosen.

The future relationship in other policy domains has been given much less attention but is nevertheless important. The UK has been a leading actor in EU security policy and in international relations, and has been influential in setting EU positions. Some new arrangement will be reached in due course, but it will not be easy because the Brexit process is likely to have eroded trust between the UK and its current EU partners. However, other EU states value the UK's diplomatic, intelligence and security capabilities; and the finding of a new format could be eased by the fact that EU foreign and security policy is made largely on an inter-governmental basis, and ad hoc groups of international partners working on particular issues are common in international affairs.

3.1 What does Brexit mean for laws in the UK?

EXISTING LAWS

Delivering 'Brexit' means repealing the European Communities Act (ECA) 1972, the UK Act that gave legal effect to EU law in the UK, and provides for its primacy in cases of conflict. But it is not as simple as that. Many EU laws have been transposed into UK law under the European Communities Act by the Westminster Parliament (for example, various employment laws). In addition, where they have competence to do so, the devolved Parliaments will have legislated to bring EU laws into their legal orders (as seen with aspects of the environmental law regime). Whilst these Acts of Parliament would survive any immediate repeal of the ECA 1972, much more EU law has entered into the UK order through ministerial statutory instruments, and the fate of these is less clear. The repeal of their 'parent' act could see these measures themselves wiped out. To avoid legal uncertainty, these cannot be repealed overnight. So any 'Brexit Act' repealing the ECA 1972 will have to contain a clause ensuring those measures remain in force pending a decision to amend or repeal them at a later date. The Act would also have to enact into UK law EU Regulations which currently automatically enter UK law without any further action at national/subnational level, due to their 'direct applicability'. It appears that the Government's plans for its 'Great Repeal Bill' include these measures.

In addition, the Act will have to say something about the fate of decisions of the European Court of Justice (ECJ) in Luxembourg. Given the arguments about 'control' that dominated the referendum campaign, there will be strong opposition to the ECJ continuing to have a long term role of direct influence on UK jurisprudence. However, given the extent of the task of unpicking existing EU-influenced law, the UK courts are likely to continue to have regard to the rulings of the ECJ, as its decisions have influenced many areas of English case law. So for an interim period interpretation of EU law will play some role in English jurisprudence.

As Articles 2-6 of the Treaty on the Functioning of the European Union (TFEU) set out, the EU has a role to play in almost every area of public policy. This includes an exclusive role for customs union, the functioning of the internal market, monetary policy within the Eurozone, conserving fish stocks and common commercial policy, followed by a long list of shared and supporting competences with Member States in other areas. In brief, there is no area of state action that is not affected in one way or another by EU membership.

There is a particularly acute devolution dimension to the return of legal powers to the UK from the EU. If nothing else is done, a range of competences currently shared between the devolved legislatures and the EU will revert to the former, unless Westminster legislates to take them back to itself. These include agriculture, some of fisheries, environment and higher education and research. Any effort to bring them back to Westminster would meet strong political objections. If they are left to the devolved administrations, there would be a need for coordination mechanisms within the UK and provisions to maintain the single UK market.

There are also financial implications, as the monies previously coming from the EU to finance these policies in Scotland, Wales and Northern Ireland will have to be diverted to the devolved administrations. The principal items are agricultural support, cohesion funds, and research funds. They could be paid from Westminster as earmarked grants, again implying more centralisation, or put into the block grant. In the case of the latter, it will be necessary to decide the basis on which they will be allocated. The transfer could be based on the amounts for recent years, and then linked to the Barnett Formula, but this would freeze the relative amounts and that could be difficult to agree.

FUTURE EU LEGISLATION

Any new deal that the UK signs with the rEU will have to develop a position on the extent to which the former continues to apply the latter's rules and regulations (collectively known as the 'acquis communautaire'). This includes all primary and secondary legal instruments, case law of the Court of Justice, and the more informal practices and procedures that have ensued from many decades of working together on a broad range of public policy issues. Conceptually speaking, there are four basic options that the UK and rEU can take with respect to any given block of *acquis* during their negotiations:

FULL AND ON-GOING LEGAL COMPLIANCE:

As a Member State, the UK is obliged to implement and enforce EU legislation and decisions. Outside the EU, it might be decided that it continues to do this, committing within the final agreement on the new relationship to continue implementing certain areas of the EU's work. This would imply that Parliament would continue to transpose relevant EU legislation into domestic law, and that British courts would continue to ensure that UK citizens could rely on relevant provisions in any cases they might bring. This model is found in third countries with close relations with the EU, including the European Economic Area (EEA) states, which take on the legislation necessary to be part of the EU's internal market. The *quid pro quo* here is that the EU commits to consulting with EEA states as it formulates this legislation, although evidence suggests that this does not produce much actual modification, and it certainly does not amount to any voting rights. Given that the UK is already fully compliant with the *acquis*, this model involves the least change and would ensure minimal restriction on the UK's access to such areas. However, it would turn the UK into a rule-taker and would have some complications in terms of areas of the *acquis* being linked to budgetary contribution costs.

EFFECTIVE, BUT NON-LEGAL COMPLIANCE:

Rather than making a full commitment to ongoing implementation, the UK could instead make an informal statement to the effect that it chooses freely to adapt its legislation in line with the changing EU system. Again this would require Parliament to make the necessary legal changes, but courts would only be bound by domestic law, rather than any international instrument. In its hard form, this is not a common option in international law, because states typically will only pursue such a course of action if it is matched by preferential access to the state/area that they wish to join. However, in a softer, more flexible form we do find that states choose to mimic those with whom they wish to improve relations: imitation as flattery, in essence. The benefit of this would be that the UK retains the capacity for a high level of access to the EU (including the internal market), while keeping more formal independence and the freedom to choose not to apply certain provisions if it felt they were unacceptable. The flipside of this is, obviously, that it does not provide a legally-reliable framework for application, especially when the UK's trajectory is away from the EU, rather than towards it. Should selective dis-/non-application occur, then there would be much potential for legal and political confusion about where the UK lies, with consequent impacts on business and trade activity. This could be exacerbated with separate regimes developing in the devolved jurisdictions, in line with the legitimate exercise of their devolved competences.

PARALLEL COMPLIANCE:

Several areas of EU activity do, in effect, insert another layer of governance between the national and international. In fields such as public health, the EU is little more than a conduit for World Health Organisation (WHO) decisions, for example. While the UK might be leaving the former, it is not planning to leave the latter, so any commitment to WHO rules would, in effect, mean compliance with EU rules, since these are the same. Practically, the only change to current practice in the UK would be that the source of rules and regulations would be the relevant international organisation, rather than the EU. This model will have very limited application, since it can only apply to those areas of public policy where a relevant and active international organisation exists. Thus, the main areas will relate to technical and health standards, with security policy also falling roughly in this area too, given the close interlinkage between the EU and NATO. This highlights the density of international interconnection that exists in the world today: the EU is not

the only game in town, and the UK will need to make more of its other international commitments if it is to minimise any negative impacts of leaving the EU. The challenge will be that other organisations are much less transparent and accountable than the EU, and popular dissatisfaction with such models might increase.

EXPLICIT NON-COMPLIANCE:

Finally, the UK might decide to take itself out of a set of the *acquis* and introduce its own rules and regulations. As a sovereign state, it would be well within its rights so to do, assuming it met its other international obligations, and there is no *a priori* need for the UK to accept any particular area of the *acquis* once it leaves. This is very much the vision that was sold by the Leave campaign during the referendum: a UK unburdened by EU obligations, free to set its own course. This can be (and was) taken both as a harking back to previous freedom of action and as a strategy for prospering in a globalising political economy: the EU, slowed down by the need for collective decision-making and with many veto players, is not suited to the kind of rapid and agile action needed to make the most of the new economic and technological opportunities available. In its maximalist form, clearly such a model could apply to all areas of public policy. If adaptability and UK-specific regulation are the advantages, then it is necessary to recall once more that the EU is not the only source of international governance, so the UK would not be operating in a completely free way, and that plotting a different course could have likely repercussions on access to the EU internal market. Moreover, in order for the UK to create its own policy, it would also need to have the political and administrative capacity so to do. Rejection of existing policies and laws which derive from EU sources at a UK level may find resistance in devolved jurisdictions, where the political complexion of the incumbent government may place a higher value on, for example, environmental or social rights. This may generate pressures for greater devolution of competence in currently centralised areas (e.g. employment rights).

CHAPTER FOUR: HANDLING THE NEGOTIATIONS

Preparing for and negotiating Brexit in whatever shape or form is going to expose Whitehall to a set of considerable challenges. Some of these challenges relate to problems in dealing with a fragmented but highly interdependent set of portfolios and organisations, while others relate to basic understandings of civil service loyalty, competence and reward. Responding to the legitimate claims made by devolved administrations for involvement will add further layers of complexity. The Prime Minister has promised a UK-wide approach to Brexit but it is not clear what this means. In David Cameron's pre-referendum negotiations, the three devolved administrations asked for a place at the table but were given only a consultative role. It seems likely that this will be true for Brexit, especially given that even the UK Parliament will be marginalised. This will provoke another intergovernmental argument. On the other hand, if the devolved governments were involved in the negotiation, even at the civil service level and on technical matters, this might commit them to accept the outcome. Involvement could be through bilateral contacts, as well as through existing mechanisms for multilateral intergovernmental cooperation, such as the British and Irish Council, and the Joint Ministerial Committee (created to facilitate coordination between Westminster and the Scottish Government).

4.1 Who controls Brexit in the British Government?

The short answer to this question is: Theresa May. The longer answer is a bit more complex, not least because May has created a structure that obscures this fundamental fact. This complexity arises from a combination of factors. First, the short order in which May came to Number 10 meant that there was an abbreviated process of allocating roles, with an underlying tension between keeping Leave campaigners within the party on board and administrative efficiency. Second, by creating a tier of ministers with nominal responsibility for Brexit, May has provided both for some flexibility in her position, and a first line of defence as and when things become more difficult. Finally, the necessary complexity of Brexit means that no one minister can have the overview and authority required to reach a final agreement, so May is ensuring that, ultimately, matters will have to come to her for both negotiation and approval.

Of course, Theresa May does not look likely to let matters escape her oversight in the first place. Even as her ministers have ventured to make their initial positions and views known, her office has been quick to remind all involved that she will take the decisions on when to trigger Article 50, what the UK's negotiating stance might be and – finally – what might be an acceptable conclusion. Mrs May reportedly announced her end-March 2017 deadline for triggering Article 50 without informing, or consulting with, the Cabinet. This reflects not only her generally cautious nature but also her recognition that her entire premiership will be defined by how she handles Brexit (her forays into other policy briefs notwithstanding).

Being Prime Minister is something of a gamble for May. If she can pull off an exit from the EU that retains most of what she sees as valuable from the current relationship, while also reassuring her party that she has taken back effective control over policy, then she will have a very strong base on which to build a remodelled British state with a strong Conservative flavour. However, the length, complexity and huge potential for problems that Brexit contains means that there is very substantial downside risk for her. Her party could turn on her if she does not seem to be fighting Britain's corner hard enough.

A key management device will be the chance for high office: witness the liberal use of this during the formation of her Cabinet, with Leavers placed in key roles. Partly this ties their hands – they cannot now denounce the Government's work, and if they make a mess of things then it is their fault – and partly it sends a signal that other dissenters might be brought in close. The danger lies in collective action by these figures: if they can marshal their actions then they could force May to change position. For May, the hope has to be that the reality check of the referendum and the chaos that ensued will be enough to make any rebels think twice before embarking on this course of action. Coordination is also a key task of

the Brexit Cabinet Committee, which is chaired by the Prime Minister, and which is equally balanced between ministers who campaigned for the UK to remain within the EU and those who supported Brexit.

If there is a central reference point in the Government on Brexit apart from May, it is David Davis, the Secretary of State for the newly-formed Department for Exiting the European Union (DExEU). The DExEU is the department responsible for overseeing the negotiations both leading to the exit of the UK from the EU and establishing a new post-Brexit EU-UK relationship. The staffing for the new Department was provided by a combination of staff from the Cabinet Office's Europe Unit, the Europe Directorate of the Foreign and Commonwealth Office (FCO), and staff of the UK's Permanent Representation to the EU (UKREP). The Department replicates normal Whitehall department structures in being headed by a Permanent Secretary with Directors General under him, organised into functional directorates.¹⁵ At the time of writing the new Department has approximately 200 London-based staff – half of the final planned headcount. Before Article 50 is triggered, the Department is to launch a series of policy reviews to provide clarity as to the main lines for negotiation by the UK once that step has been taken. The start-up phase of preparing for Brexit has been marked by media coverage of turf wars between Davis, Liam Fox, appointed to a new Cabinet role of Secretary for International Trade, heading a Department for International Trade (DIT), and Foreign Secretary Boris Johnson. These highlight that the creation of the Whitehall arrangements to negotiate Brexit have simultaneously disrupted the existing arrangements for managing the UK's relationship with the EU and distributed responsibilities for the UK's future relationship with the EU, its Member States and third parties across three departments. The brief of the Department for International Trade is especially complicated by uncertainty as to the intended future economic and trade relationship with the EU, and the extent to which the UK will have latitude to pursue all aspects of trade policy, including the freedom to make trade agreements with third countries.

It is therefore clear that dealing with Brexit is likely to cause multiple problems of ministerial and bureaucratic overlap, and competition between ministerial departments is the perfect recipe for heated fights over territory and approach. It is also the perfect setting for the proverbial underlap on so-called 'poisoned chalice' issues for which any blame-averse politician worth his or her salt wishes to deny responsibility.

Even if ministers and their departments agree on what Brexit might mean, it is much less likely that different departments will easily come to an agreement as to who should lead on particular issues and when. An arrangement where the FCO is dealing with foreign affairs in general and DIT exploring trade deals for a post-Brexit age (of whatever shape), while the Department for Brexit is struggling to handle Brexit conversations, is likely to be unstable. It is even less likely to be stable in view of wider coordination demands that affect governmental business, regardless of whether they are shaped by EU-related questions. Prime ministerial interests and coordination issues involving the Cabinet Office and ministerial departments, including the Scotland, Wales and Northern Ireland Offices, executive agencies and regulatory authorities will all need to be accommodated. As has been evident already, the Treasury will be concerned about the future arrangements involving the City; Education will be concerned about the future competitiveness of higher education, and the newly created Department for Business, Energy and Industrial Strategy will not appreciate its industrial strategy being negotiated away by a different department. Such rival agendas and priorities stand in the way of any 'whole of government' coordination; centralising such processes at the heart of government, with the Prime Minister's office, is likely to clog up the machine; decentralising such processes encourages continued squabbling that requires repeated disciplining from the centre.

15) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/545007/Department_for_Exiting_the_EU_-_Senior_Management_Team.pdf

4.2 Civil Service: Stretched to breaking point?

Whitehall faces a number of challenges that will stretch its capacities. The impact of Brexit on the civil service will hinge partly on the kind of option chosen for post-Brexit relations with the EU. It would be less of a challenge to Whitehall if the basic arrangement for the post-Brexit world were the simple adoption of existing arrangements and their transference into a Norway-style arrangement. As members of the European Free Trade Association (EFTA) which participate in the European Economic Area (EEA), Norway, Iceland and Liechtenstein apply EU Single Market law. While they do not vote on this legislation, they implement it almost as if they were Member States. Under such a regime, not much for the UK would change bureaucratically. The main issue would be to organise for the future 'flow' of provisions that would apply to the UK. Some of the work conducted by the European Commission in terms of compliance monitoring would fall under the scope of the EFTA Surveillance Authority, which performs a similar function for the non-EU states within the EEA, enabling their participation in the Single Market. This would also, of course, provide some employment opportunities for Brussels-based UK civil servants. Otherwise, most of the compliance activity would be done domestically, with a prominent role for the courts, if Norway provides any kind of indication.

In this Norwegian scenario, Whitehall would have to prepare for a world in which decisions were usually taken by others behind closed doors, with British officials left with little to do other than lobby decision makers in Brussels. British officials would also have to work within the EFTA committee structure and negotiate, in particular, over which EU provisions were relevant to the EEA. Ironically, it is likely that the UK preference would be for the most expansive understanding of the EEA (so as to reduce the costs to UK business from regulatory divergence), whereas EU parties might press for a more restrictive understanding. Of course, such an arrangement would have political implications: not least, the fact that the UK would still be bound by much EU law, but now as an EEA member, means it would have no formal say over these rules. In general, though, such battles would be part of a not altogether different landscape for Whitehall: even if this scenario is unlikely to be palatable politically, at an official level much would remain familiar. Whilst the UK would not have a seat at the decision-making table, the administrative processes via which the resulting rules are brought into effect would remain largely unchanged from those in place now. As in the case of Norway and Switzerland, most rules would be automatically adopted even if the myth existed that HM Government was sovereign in deciding to do so.

Whitehall would have to prepare for a very different arrangement under a less close relationship. One possibility is that relations with the EU would have to be negotiated on a bilateral basis and issue-by-issue, and permanently updated. Such a 'Swiss-style' arrangement is unlikely to be popular with the EU. But regardless of the feasibility of this option, such an arrangement would be highly problematic for Whitehall – as would any looser option. Even if a successful recruitment drive for hard-nosed British Brexit negotiators were to be achieved, it is unlikely that these novice negotiators would be in possession of sufficient policy memory to carry out their role especially effectively.

The lack of sufficient knowledge about policy content will be compounded by the difficulties of attempting to develop a sufficiently comprehensive overview of EU-related 'policy stock'. Any debate about the EU policies with which the UK will continue to comply is going to be shaped by economic and political pressures, and will be further aggravated by interdependencies across different government agencies which might have very different perspectives as to optimal levels of regulatory standard, for example. Whether under pressure ministers and top civil servants will have time to explore how 'deep' EU provisions reach into the extensive Whitehall garden of regulatory agencies, executive agencies and nondepartmental bodies is debatable.

Meanwhile, Whitehall will also require the growth of new competencies. Beyond the much hailed recruitment drive of highly-rewarded trade negotiators, the disengagement from EU regimes will place pressure on existing systems – a 'reformed' immigration regime seeking to keep tabs on all non-UK citizens being the primary example. Other examples might include food inspections in third countries, new – or expanded – national regulatory bodies, a possible need for customs inspectors, and a strengthened competition policy if the UK were no longer bound by EU competition law. Such new regimes are likely to require further resources; again, a demand that is unlikely to be particularly palatable in the current climate of ongoing pressure on Whitehall numbers.

Finally, there is the issue of life after Brexit. Domestic arrangements would need to continue to ensure that EU agreements are not breached. However, potential EU sanctions against non-Member States for breaching rules can be worse than for Member States.. Any breach on one particular issue could lead to the automatic suspension and cessation of much wider agreements. Such inevitable conflicts will require constant intergovernmental negotiation.

Brexit thus exposes Whitehall to multiple cross-cutting pressures. In addition, a depleted Whitehall will also be expected to deal with domestic policy agendas. Inevitable crises will emerge. Whether a machinery that will be focused on Brexit-related matters will be sufficiently agile to develop comprehensive policies to address purely domestic agendas is questionable. Tensions will emerge about the lack of initiatives that will place ministers in the limelight of the media, especially as Brexit-related negotiations get bogged down in the kind of details that political masters find unappealing.

Another much wider challenge is that Brexit directly affects the Public Service Bargains that underpin relationships between civil servants and the wider political system. The lack of a 'plan B' following Brexit resulted from both political calculation and the incoherence of the Brexit campaign (with views ranging from ultra-libertarians to national protectionists). Nevertheless, it might also raise issues about competence and loyalty. In terms of loyalty, it is questionable whether those civil servants that have devoted their careers to 'make the EU work' will enthusiastically engage in dissolving the very regimes they helped to create. More broadly, it raises considerable issues as to whether it is possible to loyally serve a government of the day when such far-reaching constitutional changes are at stake. Brexit also raises questions about competence: Brexit requires, in the short term, an extensive knowledge of policy detail, sage-type nous about what is politically feasible and negotiable, and delivery capacity to adjust regimes to new specifications. In the long term, depending on the form Brexit might take, demands on Whitehall competence could range from lobbying the EU and ensuring domestic compliance (under a Norway-EFTA type deal) to the simple business advice services as to how to trade with the EU (under a deal that did not place any obligations on the UK).

But it is not just understandings of loyalty and competence that have come under pressure. There will be questions regarding 'reward' in a number of ways. First, there are questions as to how to reward 'success' in Brexit negotiations. Second, there will be tensions if there is any further bifurcation of salaries in Whitehall - for example, providing newly recruited trade negotiators (whose loyalty might be limited by the terms of their contract) with high rewards, leaving other Whitehall civil servants further behind after a near-decade of salary stagnation.

One of the perennial questions for public administration watchers has been to enquire whether there has been an 'end of Whitehall' in light of public sector reforms, the rise of spin doctors, and the breakdown in particular relationships between politicians and civil servants. Brexit constitutes a very different kind of challenge for Whitehall - it forces a fragmented and depleted machinery to develop a synoptic understanding of preferable options where political, economic and societal interests are likely to fundamentally disagree.

4.3 The role of Parliament in negotiations

The important question of what role Parliament should play in overseeing negotiations once Article 50 has been triggered is also still to be determined. Ministers, including David Davis, have made clear that Parliament will be consulted and engaged with the negotiation. Yet, the nature of that process and the degree to which Parliament will be involved pre- or post-fact is a matter of current dispute. The House of Lords EU Committee has taken a more expansive view of what parliamentary oversight might mean in a report published in July, and is currently engaged in a follow-up inquiry.¹⁶ There is very little precedent on which Parliament can base its role in scrutinising the UK-EU negotiations, as the two Houses of Parliament do not normally play a role in scrutinising treaty negotiations and are usually just involved in the ratification of treaties. Lack of timely access to negotiating texts has been a perennial parliamentary complaint in previous EU treaty renegotiation episodes.

Yet, the argument for including Parliament at an early stage seems to be gaining increasing support, in particular as a decision has been made on the EU side regarding the European Parliament's role in scrutinising the Brexit negotiations handled by the European Commission and the EU Council. Nevertheless, a decision on this matter will require some nuance: parliamentary involvement can come in several forms and degrees depending on the issue – whether on specific negotiation points or the principle of drawing up a framework agreement for future relations, or in negotiations of 'policy chapters' with EU partners in Brussels.

While preparations for the establishment of a 'Brexit Committee' are still ongoing, changes are already noticeable in the work carried out within the existing House of Lords EU Committee and House of Commons European Scrutiny Committee, responsible in the two Houses for scrutinising all documents produced by the EU as part of its normal ongoing policy business. Going forward, policy documents and the Government's explanatory memorandums will come from David Davis's department, as it will be Parliament's key point of contact with Government on EU affairs. Also, while the chairmen of both committees will continue to receive documents and to supply these to their committee members, engaging in activities as usual until membership ends, the objective has nevertheless shifted subtly to getting the best possible outcome for the longer run, rather than focus on gains in immediate policy terms. In the Commons, the relative roles of the existing European Scrutiny Committee and any new Brexit committee could become a source of tension or overlap. Importantly, Brexit-related documents are not covered by existing committee mandates and processes, and an immediate question to solve is the passing of scrutiny resolutions which will specify the prerogative of House of Commons and House of Lords committees in the oversight of negotiations following the formal Article 50 notification.

4.4 How will Parliament manage the volume of work required to amend legislation?

Parliament's role in the Brexit process will have two elements: legislative and scrutiny. The legislative role will further break down into the high-level overarching measures needed to achieve Brexit, and the changes to domestic legislation in particular policy areas which are required or enabled by it.

In terms of volume, the overarching Parliamentary measures are likely to be relatively few: passage of the 'Great Repeal Bill' to repeal the 1972 European Communities Act; ratification of the UK-EU withdrawal agreement required by Article 50 of the Treaty on European Union; and ratification of whatever UK-EU agreement or agreements may be reached to govern post-Brexit relations. As we discuss above, whether Parliament must pass a further measure at the start of the process, allowing the Government to trigger Article 50, is currently subject to legal action.

Compared to these overarching measures, by far the bigger task will be transposing into domestic law all the EU law which currently has direct effect in the UK, and amending the thus-augmented body of UK legislation which gives effect to EU law so that it can stand independently. The planned 'Great Repeal Bill' may give only blanket authority for these tasks. Legislative amendments will also be required if there are to be policy changes made possible because the

¹⁶ <http://www.publications.parliament.uk/pa/ld201617/ldselect/ldaucom/33/33.pdf>

relevant policy area has been repatriated to the UK, although legally these changes could not be made before Brexit occurs. Taken together, this body of work is widely regarded as the largest legislative task the UK Parliament has ever undertaken.

Because of its size, the task is likely to be carried out to a significant extent through secondary legislation – two years is not enough time for Parliament to pass all the primary legislation that would be required. Parliament already has fewer powers and less time to engage with secondary than primary legislation. The prospect that the legislative ‘heavy lifting’ of Brexit will be done through huge volumes of hastily-drafted and poorly-scrutinised secondary legislation has raised concerns about the democratic legitimacy of the project, and of the opening-up of legal ‘black holes’. It is also not clear that all of the job could be completed until the terms of the UK’s future – or at least transitional – relations with the EU are settled, which may not be until only shortly before Brexit occurs. Brexit will thus impose a major legislative burden well into the post-2020 Parliament. Since all this work will take place under the Great Repeal Act, the exact terms of that legislation could become controversial.

The two Houses of Parliament exercise their scrutiny function primarily through select committees. In the House of Commons, each government department has a shadowing committee; and there is also the European Scrutiny Committee (ESC), which scrutinises EU documents and undertakes work on the Government’s EU policy more generally. The House of Lords has an EU Select Committee with six subject-based sub-committees. The Lords EU Committee scrutinises both EU documents and Government policy.

The referendum prompted discussion of whether Brexit merited some special scrutiny arrangements, perhaps spanning the two Houses. However, with the Commons hampered more than the Lords by political upheavals and party conferences and appearing somewhat slow off the mark, the Lords EU Committee has proceeded to elaborate an initial Brexit-related work programme of its own. The Commons is sticking largely with its established practice, and is set to create two new select committees during October to shadow the two new Government departments (DExEU and DIT). However, the Committee on Exiting the European Union is to be larger than normal, with 21 members (rather than 11). It is to be chaired by a Labour MP, while the new International Trade Committee will have an SNP chair. ‘Silo-dom’ and poor cooperation are already recognised as weaknesses of the House of Commons select committee system. With the ESC likely to regard itself as having an overarching role, and many departmental select committees already launching inquiries into the implications of Brexit for their own policy areas, there is significant potential for duplication of work.

4.5 What information will be available to the public about the negotiations?

There is a good chance that the British Government will try to reject freedom of information requests on the grounds that it can do so if disclosure would prejudice relations with another state or with the devolved administrations.¹⁷ Such a position will allow us only to know what is formally disclosed (likely to be bland) or selectively leaked (likely to be self-serving).

However, as the EU institutions will have access to many British documents, the matter will also be governed by EU Freedom of Information law. The only possibly relevant ground for refusing disclosure under this law would be if it undermines protection of the financial, monetary or economic policy of the Union or any Member State, including the UK.¹⁸ The EU institutions and the UK might argue that this is the case here. This will be difficult as transparent information on the state of play is less likely to unsettle financial markets than random leaks and hearsay. Furthermore, this heading cannot be invoked to justify non-disclosure of a whole document, but only redaction of the offending parts.¹⁹

Any refusal to disclose is likely to be challenged before the EU courts and one of the more delicious moments of the next couple of years might be the reaction of the British press if the General Court, the relevant EU court, orders disclosure of the British negotiating positions.

¹⁷ Freedom of Information Act 2000, sections 27 and 28.

¹⁸ The right to know is provided in Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145/43, article 2. The relevant exceptions are in article 4(1) which lists, *inter alia*, public security, international relations and ‘the financial, monetary or economic policy of the Community or a Member State’. Most activities of the EU do not fall within the public security heading so it is impossible to see how negotiations about them could. Equally, international relations concerns relations with a non EU State, not a Member State of the European Union.

¹⁹ Regulation 1049/2001, *supra*, article 4(6).

CHAPTER FIVE: HOW MIGHT BREXIT AFFECT THE FUTURE SHAPE OF THE UK?

5.1 Brexit and the devolved nations

As pointed out above, devolution was designed and implemented during the UK's membership of the EU. Europe also provides a discursive framework for nationality demands to express themselves in a transnational context and for the elaboration of post-sovereign visions of self-determination that do not involve a complete rupture with the UK. Brexit will therefore remove an important external support system for the UK constitution.

The least constitutionally disruptive means by which the divergent policy interests of the devolved nations could be accommodated within the current state structure would be for Scotland, Northern Ireland and Wales to take advantage of the repatriation of competences, along with existing powers, and to shadow EU, rather than UK policies in some fields. They might align with European environmental policies and participate in future initiatives within a revived social pillar using non-legislative mechanisms (the 'Open Method of Coordination'). Agricultural policy might be more difficult, given the reliance on UK funding and the need to maintain a single UK market without advantaging farmers in one part of the UK.

A step on from this is the possibility that Scotland and Northern Ireland might remain part of the EU, at least for some purposes, while remaining within the UK. All sides are agreed that closing the Irish border would be a serious mistake and that some accommodation will have to be made. This could take the form of keeping the historic common travel area and some crossborder institutions. It is difficult, however, to envisage Northern Ireland being within the Single Market and the rest of the UK being outside it without controls on trade in goods and services between Northern Ireland and Great Britain. In Scotland, there has been talk of a 'reverse Greenland' under which EU law would not apply in England and Wales (as it does not in Greenland) but would apply in Scotland and Northern Ireland. However, the Greenland analogy is hard to make, since Greenland is a sparsely populated island remote from Denmark, not the core of the state containing 80 per cent of the population. Nor is it possible to see how Scotland and Northern Ireland could exercise full Member State competences, including in reserved areas (which extend to foreign and security policy). Even if this were technically possible, it would be politically unacceptable both to the UK and the EU. There would also be all the internal market and border issues discussed above.

The most radical option, permitting those nations which voted for remain to do so, whilst the rest of the UK leaves, is secession from the UK. Scotland would become independent, and perhaps either continue as a successor state to the UK, or more likely join as a new member. Northern Ireland could retain membership through unification with the Republic. Scotland's First Minister has floated the option of a second independence referendum but this faces huge difficulties. The idea of independence-in-Europe which the Scottish National Party has pursued for some thirty years is based on the logic that with both Scotland and the UK in the EU, trade and border issues between the two would be unproblematic. But with Scotland in and the UK out of the EU, there would be a hard border between the two. Polls do not suggest that Scottish voters would be ready to abandon the UK market in order to remain within the European one. If the UK were to negotiate access to the Single Market, however, that would make Scottish independence more viable. Irish unification would keep open the border between the two parts of Ireland, but leave a hard border with the UK, which would not be acceptable to unionist opinion. In any case, there is little prospect of a referendum on reunification succeeding.

There is no clear resolution to any of these issues but Brexit will have a big impact on devolution. It may lead to a recentralisation as the UK reconstitutes itself as a sovereign polity; or to further decentralisation with the devolution of EU competences. In either case, the process will be difficult and controversial.

CHAPTER SIX: CONCLUSION

In voting to leave the EU, the British people have unleashed a process potentially as complex as it is unpredictable. Because the impact of EU law was so large, and because the British state itself had adapted its structures and procedures to cope with membership, ending membership implies unpicking much that is embedded in the UK legal, political and administrative systems. The implications, as we have illustrated, range from the obvious reshaping of relations between the UK and the EU, to changes in the structure of the British state, to potentially profound alterations in the relations between the nations that make it up.

At the time of writing it is not clear if Parliament will have a say on whether Article 50 will be triggered, let alone how politics will shape the Article 50 process, at the end of which Parliament will have to be consulted. This is a process that will run and run, and, because of its significance, do so on the front pages of our newspapers (or across our timelines) for the foreseeable future.

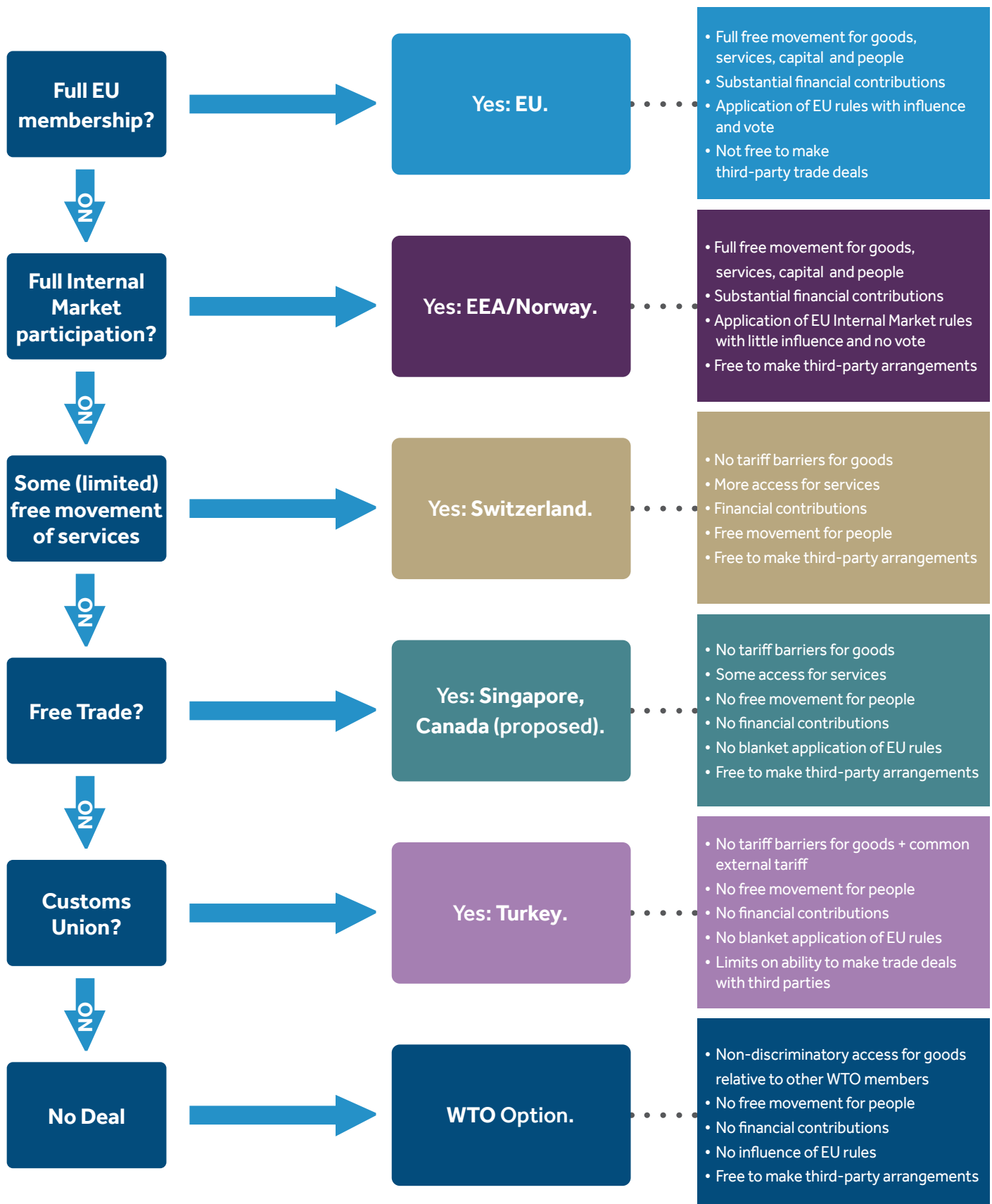
The Brexit process will test the UK's constitutional and legal frameworks and bureaucratic capacities to their limits - and possibly beyond. As our institutions are tested, so too our politics are being reshaped. Not all these changes are directly attributable to the referendum or the EU issue. However, the rise of UKIP, divisions within the Labour and Conservative Parties, and the popularity of the SNP north of the border are all related in some way to the politics of British EU membership.

Ultimately, Brexit will be driven by politics and the preferences of powerful political actors in both the UK and the remaining EU Member States. That process will be profoundly shaped, however, by the legal constraints upon all sides, and the far-reaching implications of the need to unpick such an embedded and complex relationship. If this document has helped to clarify the breadth and variety of the issues involved, we will have accomplished our task.

ANNEX 1: ARTICLE 50 OF THE TREATY ON EUROPEAN UNION

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

ANNEX 2: OPTIONS FOR THE UK



ANNEX 3: TIMELINE OF SCHEDULED EVENTS: UK AND EU, 2016-2020

| 2016 | UK | EU Member State elections & other events | EU institutions & policies | Brexit-related |
|-------|---|---|--|--|
| Oct | A50 legal challenges in courts 27: ONS Q3 GDP first estimate | 2: Hungary migrant quota referendum 9: Lithuania parl. election 31: Spain deadline to form gov. | 20-21: European Council | |
| Nov | 23: Autumn Statement | 8: US Presidential election 20 & 27: France Republicans primary | | |
| Dec | 1: ONS Q2 migration 31: Date by which BoE Governor Mark Carney due to announce post-2018 plans | 4: Italy constitutional referendum 4: Austria repeat Pres. election 11: Romania parl. election 25: Possible Spain parl. election | 15-16: European Council | |
| 2017 | | | | |
| Jan | 26: ONS Q4 GDP first estimate | 20: New US President | EP President Martin Schultz's term expires 1: Malta Council Presidency 31: EU economic sanctions vs. Russia due to expire | |
| Feb | 23: ONS Q3 migration | Switzerland: Deadline set by 2014 referendum to restrict free movement | 3 (tbc): EU27 summit, Malta | |
| March | | 15: Netherlands parl. election | 9-10: European Council 25: 60th anniversary of Treaty of Rome | 31: Deadline by which Theresa May has said UK will trigger A50 |
| April | 28: ONS Q1 GDP first estimate | 23: France Pres. election R1 | | |
| May | 4: Local elections 25: ONS Q4 migration | 7: France Pres. election R2 | 31: European Council President Donald Tusk's term expires (renewable) | |
| June | | 11 & 18: France parl. elections | 22-23: European Council | |
| July | 26: ONS Q2 GDP first estimate | | 1: Estonia Council Presidency | |
| Aug | 24: ONS Q1 migration | | | |
| Sep | Party conferences | Germany parl. election | | |
| Oct | 25: ONS Q3 GDP first estimate | | 19-20: European Council | |
| Nov | | | | |
| Dec | | | 14-15: European Council 31: Date by which 2011 'fiscal compact' treaty says 'steps should be taken' to incorporate it into EU law | |

ANNEX 3: TIMELINE OF SCHEDULED EVENTS: UK AND EU, 2016-2020

| 2018 | | | | |
|-------|---|--|---|--|
| Jan | | | 1: Bulgaria Council Presidency | |
| Feb | | Italy parl. election due | | |
| Mar | | Malta parl. election due | European Council | |
| April | | Hungary parl. election due | | |
| May | Local elections | | | |
| June | 30: Date to which BoE Governor Mark Carney is currently committed to post | | European Council | |
| July | | Slovenia parl. election due | 1: Austria Council Presidency | |
| Aug | | | Current Eurozone Greek bailout programme ends | |
| Sep | Party conferences | Austria, Sweden parl. elections due | | |
| Oct | | Bulgaria, Latvia, Luxembourg parl. elections due | European Council | |
| Nov | | | | |
| Dec | | | European Council | |
| 2019 | | | | |
| Jan | | | | Negotiation of EU post-2020 budget likely to start in 2019 |
| Feb | | | | |
| March | | Estonia parl. election due | European Council | Brexit by default, if UK triggers A50 in March 2017 and no other agreement |
| April | | Finland parl. election due | | |

ANNEX 3: TIMELINE OF SCHEDULED EVENTS: UK AND EU, 2016-2020

| | | | | |
|-------|-------------------------|--------------------------------------|---|--|
| May | Local elections | Belgium parl. election due | European Parliament elections | |
| June | | Denmark parl. election due | European Council | |
| July | | | 1: Finland Council Presidency | |
| Aug | | | | |
| Sep | Party conferences | Greece parl. election due | | |
| Oct | | Poland, Portugal parl. elections due | European Council 31: Current European Commission's term ends | |
| Nov | | | | |
| Dec | | | European Council | |
| 2020 | | | | |
| Jan | | | 1: Croatia Council Presidency | |
| Feb | | | | |
| March | | Slovakia parl. election due | European Council | |
| April | | | | |
| May | 7: General Election due | | | |
| June | | | European Council | |
| July | | | 1: Germany Council Presidency | |
| Aug | | | | |
| Sep | Party conferences | Croatia parl. election due | | |
| Oct | | Lithuania parl. election due | European Council | |
| Nov | | | | |
| Dec | | | European Council 31: EU current 7-yr budget period ends | |

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