

The EU Withdrawal Bill

Background

It was always going to be the case that when the UK voted to leave the EU, the lengthy process of disentangling the UK from its EU obligations would have to take place at both the EU and the UK level. Article 50 provides the bare bones of a process to leave at the EU level (**see Article 50 fact sheet**). At the UK level, it was clear that the European Communities Act (ECA) 1972, which took the UK into the EU, would have to be repealed. But that would be the easy bit. The trickier question concerned the fate of the thousands of EU rules which had been incorporated into UK law. Would they all be jettisoned at the time of Brexit – causing legal chaos and uncertainty – or retained? At the Conservative Party conference of October 2016, the prime minister, provided an answer:

As we repeal the European Communities Act, we will convert the ‘acquis’ ... into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free – subject to international agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses. But by converting the acquis into British law, we will give businesses and workers maximum certainty as we leave the European Union. The same rules and laws will apply to them after Brexit as they did before. Any changes in the law will have to be subject to full scrutiny and proper Parliamentary debate.

Thus, she proposed what was known at the time as the Great Repeal Bill (GRB), later the Repeal Bill and now the EU (Withdrawal) Bill which would: repeal the ECA, convert all EU law into national law, and correct EU law once it is part of UK law.

What is the current situation?

EU law can be divided into three groups: primary, secondary and tertiary.

- **Primary** law includes the two main EU Treaties (the TFEU and the TEU) and the Charter of Fundamental Rights;
- **Secondary** law fleshes out the detail of EU law in the main policy areas e.g. environmental law, social policy, financial services. It includes regulations, directives, and decisions;
- **Tertiary** law provides further detail of secondary law and is largely the responsibility of the European Commission.

Currently, EU law has precedence over UK law (‘supremacy’). Much EU law is also directly effective. This means that individuals can rely directly on EU rights before the domestic courts. Section 2(1) of the ECA introduced the principles of supremacy and direct effect into UK law.

What has the British government indicated it wants?

The aim of the EU (Withdrawal) Bill is to ensure a functioning statute book on Brexit day, while also ensuring consistency between the pre-Brexit and post-Brexit position. In fact, the bill does three main things:

Repeal: First and foremost, the bill repeals the ECA 1972. At a minimum, this has the effect of removing the supremacy of EU law over UK law and removing the principle of direct effect.

Convert: Second, the bill aims to take a snapshot of all EU law on Brexit day and convert that whole body of EU law (in so far as it is relevant to the UK) into UK law. That’s the headline. In fact, the reality is more complicated:

- Many directives are already part of UK law. Those incorporated via powers in S.2(2) ECA will be preserved by the EU(W)B. Those incorporated into UK law by primary legislation, for example, the Equality Act, will also be preserved. Certain ‘directly effective’ treaty provisions will also be converted into UK law, as will all relevant EU regulations and decisions which are legislative in style.

- The Charter of Fundamental Rights will not be converted but the underlying ‘general principles’ on which the Charter rights are based (e.g. the principle of equality) will be converted into EU law.
- Together, the preserved and the converted legislation are described as ‘EU-retained law’.

As far as the case law of the European Court of Justice is concerned, the bill makes a distinction between case law handed down before and after Brexit day:

- Pre-Brexit day case law will continue to be binding on the UK courts. It will have the same binding or precedent status as decisions of the Supreme Court (and the High Court of Justiciary (HCJ) in Scotland).
- Domestic courts will ‘be able to consider’ post-Brexit decision by the ECJ.

Correct: The third element of the bill gives the UK government the power to amend, repeal or replace EU retained law with British rules. After Brexit day it will be free to do this, since it will no longer be constrained by the principle of the supremacy of EU law. However, in order to ‘correct’ the statute book, the bill gives the government (in reality the civil service) very wide ‘Henry VIII’ powers. These allow the executive to amend or repeal not only UK secondary legislation (such as statutory instruments), but also UK primary legislation (Acts of Parliament) with little or no scrutiny from Parliament itself.

Further reading

Key texts:

- Great Repeal Bill White Paper
- The Bill (as introduced on 13 July 2017)
- Explanatory Notes (13 July 2017)
- Delegated Powers Memorandum (13 July 2017)

Information published by UK and devolved governments:

- Fact sheets on the Bill published by DExEU (13 July 2017)
- Statement by First Ministers of Scotland and Wales (13 July 2017)

Parliamentary publications:

- House of Lords Constitution Committee, “The ‘Great Repeal Bill’ and delegated powers” (7 March 2017)
- House of Commons library paper

Websites:

- <https://publiclawforeveryone.com/2017/07/18/resources-the-eu-withdrawal-bill/>

By Catherine Barnard

The Article 50 Process

Background

Since the Lisbon Treaty came into force in 2009, the EU has had a formal procedure for allowing a member state to leave the club. That procedure is laid out in the now famous Article 50 of that treaty.

What is the current situation?

On March 29 2017, Theresa May wrote to Donald Tusk, Chair of the European Council, notifying him of Britain's decision to withdraw from the European Union, thereby triggering the Article 50 process. Under the text of Article 50, the EU treaties will cease to apply to the withdrawing state from the date the withdrawal agreement enters into force, or two years after the notification has been sent. As things stand, therefore, Britain will leave the European Union at 23h GMT on 29 March 2019.

The European Union has stipulated that the negotiations should proceed in three phases. First, the major 'Article 50' issues connected with leaving the EU should be addressed. The key issues here are the status and rights of EU citizens in the UK and UK citizens in the EU; the budgetary settlement to terminate British membership; and the status and nature of the intra-Irish border. At a meeting on 19-20 October 2017, the European Council will decide whether 'sufficient progress' has been made on these issues, in which case, it will authorise the start of negotiations over a transitional arrangement (phase two) and a trade deal between the UK and the EU (phase three).

What has the British government indicated it wants?

The British government has been slow to spell out precisely what it wants to achieve from the Brexit process. In the months following the Article 50 notification, this was justified in terms of the need to preserve the confidentiality of the government's negotiating position. Prior to the general election of June 2017, the only clues were provided by the prime minister in speeches at the Conservative Party conference in October and Lancaster House in January 2017.

Since the general election, there have been open disagreements between members of the government over the optimal outcome of the negotiations. These have focussed on whether the UK should attempt to remain within the single market and customs union, and whether there should be some kind of transitional period to tide things over in the period between the end of the formal Article 50 process and the signing of a trade deal (which most experts believe will take much longer than the allotted time).

The British government is in the process of clarifying its position by releasing a series of position papers on issues including the Irish border, the customs union and trade in goods. Implicit in the release of these documents was a desire to cajole the European Union into discussing future trading relations before the October summit. For example, the release of the papers on the customs union and Ireland was intended to illustrate the fact that the situation in the latter cannot be resolved unless future trading relations are clarified.

Whilst the priority of the EU is to sort out the Article 50 issues, the priority of the British government is the trade deal. Details are starting to emerge that underline that the government wants to maintain close trade ties with the EU while leaving the single market and the customs union. The government has also maintained its insistence that the UK should no longer fall under the direct authority of the European Court of Justice. There seems to be growing acceptance in the government that a transitional deal will be necessary.

What are the possible outcomes?

There are four possible outcomes from these talks. A 'smooth Brexit', would see Britain have both the Article 50 and the trade deal signed, sealed and delivered by March 2019. Under a 'transitional Brexit', the Article 50 deal would be agreed, along with transitional arrangements to bridge the gap to a full deal. A 'cliff-edge Brexit', is one in which an Article 50 deal is agreed, but trade discussions either break down or fail to make real progress. The UK would then become a 'third country', with no special relationship of any kind with the EU. WTO rules would apply to its trade with the EU. Finally - and the ultimate 'no deal scenario' – a 'chaotic Brexit' (see factsheet on no deal) means that the UK would leave the EU with no deal – divorce or trade – whatsoever. The UK would then cease to be a member state. But all the outstanding issues – the rights of citizens, the size of any exit bill and so on - remain unresolved. As in the case of a 'cliff-edge' Brexit, the UK would then become a third country with respect to the rest of the EU, with WTO rules applying to trade.

What are the potential consequences of these outcomes?

The implications of each kind of outcome vary. The absence of an Article 50 deal might embroil the UK and EU in protracted legal action and could equally sour political relations between the two sides for a considerable period. The other possible outcomes involve the distinction between 'hard Brexit' (leaving the single market and the customs union) and 'soft Brexit' (staying within both). Simply put, the fundamental differences will concern volumes of trade between the UK and the EU – the greater the barriers to trade become, the lower trade can be expected to be. Economists estimate the cost of a hard Brexit to be a decrease of 40% in trade with the EU. Those in favour of Brexit argue that this can be compensated for by increasing trade with non-EU states.

What is the potential timeline for this?

A breakdown in the talks could occur at any time. However, the most likely pinch points are either towards the end of this year, when the EU will decide if 'sufficient progress' has been made on Article 50, or towards the end of next year when both the UK Parliament and, subsequently, the European Parliament will have to approve whatever deal is reached. If talks progress relatively smoothly, the Article 50 deal must be signed before the end of March 2019, unless all 27 member states vote in favour of an extension. This has not been widely discussed as yet, but remains a possibility. Assuming a deal is struck by that time, there will still be a need for more time to negotiate a comprehensive trade deal. This could be achieved via an extension of the Article 50 process, but in this case the UK would remain a member state. Alternatively, the UK and EU could agree some kind of 'transitional arrangement', to tide relations over until a trade deal can be signed and ratified.

Further reading

- Full text of Article 50: <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-European-union-and-comments/title-6-final-provisions/137-article-50.html>

By Catherine Barnard

Citizens' Rights

Background

Free movement, one of the pillars of the EU, was a key issue in the EU referendum. However, Leave campaigners promised that nothing would change for EU27/European Economic Area (EEA) citizens living in the UK, or Britons living elsewhere in the EU. Their rights and legal status are one issue here, but Brexit will also impact on people's identities and sense of belonging.

What is the current situation?

The migration and settlement of EU (and EEA) citizens within the EEA is guaranteed by the EU's freedom of movement directive—the right to reside and work in another EU member state—and supported by reciprocal access to social entitlements. Currently this makes European citizens an exception to the broader systems of managed migration across the EU.

However, Brexit means that the rights and future status of EU nationals resident in the United Kingdom, and British nationals living and working in the EU27, need to be renegotiated. The EU has made the status of EU citizens one of the three issues on which 'sufficient progress' needs to be made before the European Council will authorise the start of talks on a trade deal. While there is agreement that the legal status of these populations needs to be resolved, the two sides diverge on several issues. While the EU is keen to preserve the status quo for EU nationals residing in Britain and Britons in the EU27, the UK is more inclined to adopt a system resembling that used for regulating the movement and settlement of third country nationals, as confirmed in a leaked Home Office report recently.

What has the British government indicated it wants?

The British government's latest position paper introduces the notion of 'settled status', a transitional measure intended to help secure continuity for EU nationals settled in the UK. For the vast majority, this would provide a clear path to permanent residence, with most but not all existing rights preserved. However, there remain questions about who would be eligible for this and whether the most vulnerable, such as those out of work or retired, will be excluded. Such citizens look likely to lose some current rights, for example to be joined in the UK by other family members in future. By contrast, the EU proposes that those who have moved should have all existing rights relating to free movement guaranteed in perpetuity.

It is also necessary to determine how these rights and entitlements will be administered and how potential disagreements will be resolved, with the EU seeking, and the UK rejecting, a continuing role for the European Court of Justice (ECJ). Both sides expect that whatever arrangements are agreed will be reciprocal.

What are the possible outcomes?

Despite the Home Office mistakenly sending up to 100 letters to EU citizens telling them to leave the UK or face removal, mass deportations seem improbable. However, if the Article 50 talks break down entirely, those affected might find themselves in a prolonged legal limbo. More likely is that an agreement will be reached under which they will be granted rights of residence and most, but not all, accompanying rights. The terms under which such rights would be granted, while more generous than those currently accorded to resident third country nationals, may vary significantly depending on an individual's access to resources, income, and ability to provide evidence in respect to their residence and other requirements. This would mean a shift from a system which guarantees equal rights and entitlements for EU citizens living in the UK and Britons in the EU27, on a quasi-universal basis and with a very low level of bureaucratic burden, to one that will require individuals to prove proactively their rights and entitlements to reside, a system inevitably much more bureaucratically burdensome. In such a scenario, those most vulnerable are often those most likely to fall short of the requirements demanded for legal residence.

What are the potential consequences of these outcomes?

At the level of the individual migrant, this is likely to have immediate consequences for their ability and desire to remain in the country of residence. In the case of British populations living in the EU27, there is some evidence of return migration brought on by Brexit. Similarly, recent quarterly data from the Office for National Statistics (ONS) suggests that fewer EU nationals are moving to the UK (19,000), and that some of those living and working in the UK have decided to return to their country of origin or to move elsewhere in the EU (33,000). These trends are likely to continue; whether they accelerate depends very much on the progress and outcome of the talks. Early findings from our research show that people are weighing the options and looking closely to the daily reports on the talks. We have also witnessed a significant rise in the number of EU nationals in the UK and British nationals in the EU27 applying for residency permits and for citizenship. In the first quarter of 2017, applications for British citizenship grew steadily, particularly among EU14 (e.g. Germany, Italy, France) nationals. Applications for dual nationality, in EU27 countries that permit it, are also rising; for example, according to figures from the National Institute of Statistics and Economic Studies (INSEE), in France applications for 2016 were at 254% on the previous year. However, such applications are often costly and bureaucratically complex, and not always successful.

The longer-term consequences will depend upon the eventual agreement. However, the protracted period of uncertainty on their legal status, is already forcing people to rethink their plans and creating high levels of anxiety among those affected. 40 years of EU membership means that families stretch over borders and children are born in mixed-nationality households; for them, a rapid and drastic change in the mobility regimes inevitably will produce consequences on a practical, personal and emotional level.

What is the potential timeline for this?

The hope for an agreement being reached within the next round of negotiations is getting thinner. Even if this is the case, any agreement will not come into effect until withdrawal. However, migration decisions will not wait that long and people will make decisions on the basis not just of the terms of the agreement, but the general political climate around the Brexit process. The implementation of a new system will be expensive and time consuming, and given the size of the populations involved, will require considerable administrative resources. With some 3 million EU nationals resident in the United Kingdom, this will place a considerable burden on an already over-stretched Home Office.

Further reading

- Joint technical statement comparing the [UK and EU's positions on Citizens' Rights](#)
- Jonathan Portes on the government's proposals re: [free movement](#)
- Professor Tamara Hervey and Sarah McCloskey on the [legal status of Britons living in the EU27](#)

Brexit Brits Abroad Podcast

- Episode 5 – on the [legal position of British national resident in the EU27](#)
- Episode 7 – on the [impact of Brexit on EU nationals living in the UK](#)

Websites

- [Diary of an EU Citizen in the UK](#)
- [EU families and Eurochildren](#)
- [BrExpats](#)

By Michaela Benson and Nando Sigona

Scotland & Wales

Background

UK ministers have promised that the EU (Withdrawal) Bill will lead to a 'powers bonanza' for the devolved institutions, but the Scottish and Welsh governments fear a Westminster 'power grab'. Because the bill affects devolved matters, the devolved legislatures will be asked to give it their consent. Without significant changes to the bill, there is a very real chance that such consent will be refused by the Scottish Parliament and the National Assembly for Wales.

What is the current situation?

The European Union (Withdrawal) Bill was introduced to the Commons on 13th July 2017, with second reading on 7th and 11th September. One of its primary functions is to convert the expansive body of EU law into domestic law. There is considerable ambiguity in the bill about the status and scope of 'retained EU law', adding to the uncertainty about its effect on the devolution settlements. One possible outcome is a change in the balance of power between Westminster and the devolved institutions, in favour of the former.

What has the British government indicated it wants?

The legislation which created the Scottish Parliament and the National Assembly for Wales required devolved laws to be compatible with EU law. In the absence of any other change, this requirement would be removed after Brexit, leaving these legislatures free to pass laws in devolved areas like agriculture that have hitherto been governed by EU law. However, the EU (Withdrawal) Bill would represent a significant change. Clause 11 substitutes 'EU constraints' on devolved legislation with a new one: devolved law must be compatible with 'retained EU law'.

The explanatory notes accompanying the bill suggest that these new restrictions on devolved competence are *'intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed'*. The government has initiated informal bilateral discussions with the devolved governments *'to rapidly identify... areas that do not need a common framework and which could therefore be released from the transitional arrangement by this power'*. The implication is that, where common UK frameworks are deemed necessary to replace common EU frameworks, powers to determine them will be retained by Westminster. The bill also creates a new default position; it suggests that failure to reach intergovernmental agreement would result in the powers remaining at Westminster.

What are the possible outcomes?

In an unprecedented degree of coordinated action, both the Scottish and Welsh governments have denounced the Withdrawal Bill in its current form. In one of several joint statements, the first ministers charged that the UK government's approach to withdrawal since the referendum has been *'a rejection of the principle of devolution'*, calling the bill *'an unashamed move to centralise decision making power in Westminster, cutting directly across current devolved powers and responsibilities'*. They do not reject the need for some common UK frameworks, but argue that these should be based upon negotiation and agreement between the four administrations.

There are three avenues open to the devolved governments to try to influence the bill. The first is via direct discussion and cooperation with the UK government, relying on persuasion and soft power diplomacy. The UK government is keen to conduct discussions separately with the Scottish and Welsh governments, but the latter have agreed to work together, including on the preparation of amendments to the bill. The recent experience of the Joint Ministerial Committee set up to agree a UK approach to Article 50 negotiations left the devolved governments deeply frustrated at the lack of discussion of, and their lack

of influence over, the UK government's Brexit priorities. The result has been a loss of trust between the UK government and the devolved governments, and a lack of confidence on the part of the latter in the capacity of intergovernmental relations to provide more than very limited opportunities for influence.

The second avenue is to seek to amend the bill directly, working with allies in the Westminster Parliament. There are 35 SNP MPs who can be relied upon to pursue the Scottish government's agenda in the House of Commons, while Ruth Davidson's 13 Tory MPs will come under pressure to challenge provisions within the bill if these are widely perceived as a threat to devolution. Carwyn Jones may be able to persuade his Labour colleagues in Westminster to seek changes to the bill in line with Welsh government preferences. The UK government's minority status makes it vulnerable to defeat in Commons votes. The Welsh government will also look to work with the Lords, building on recent successes in improving Welsh devolution legislation.

The third avenue is via the devolved legislatures. The UK government has already conceded that the Withdrawal Bill invokes the Sewel Convention. This provides that the Westminster Parliament will not normally legislate on devolved matters, nor alter devolved competence, without the consent of the devolved legislatures concerned. Cross-party committees within the Scottish Parliament and the National Assembly for Wales are undertaking their own inquiries on the bill's effect on their respective devolution settlements. Their reports will highlight perceived flaws, suggest improvements and ultimately recommend whether to grant or withhold consent. The cross-party Constitutional and Legislative Affairs Committee in the national assembly has already expressed concern that the bill could undermine devolution in Wales.

What are the potential consequences of these outcomes?

One or more of these avenues may produce some modifications to the bill. More substantial changes will depend upon the political will of the UK government to reach compromise with the devolved institutions. For their part, the devolved governments and legislatures have an opportunity to make the case for alternative ways forward that would avoid imposing new restrictions on their legislative competence. This includes proposing practicable and sustainable ways to agree and govern UK common frameworks, where these are deemed necessary.

Without significant changes, there is a realistic prospect that the devolved legislatures will refuse consent for the bill. That would not amount to a veto. As the Supreme Court made clear when ruling on the devolution issues raised in the Brexit appeal, the Sewel Convention acts as 'a political constraint on the activity of the UK Parliament', but it has no legal effect. Were the devolved legislatures to refuse consent, politics, not law, would determine the response. It would be for both the UK government and the UK Parliament, after strategic evaluations of the political costs and benefits, to consider whether and how to heed the will of the devolved legislatures. Decisions made in the short-term could have long-term effects on the vitality of the devolution settlements and the stability of the Union.

By Nicola McEwen

Northern Ireland

Background

Common membership of the EU has been a background assumption of the peace process in Northern Ireland. While it is correct to note that special arrangements such as the Common Travel Area (CTA) pre-date EU membership, Brexit creates new and distinctive challenges for Northern Ireland/Ireland. For the first time, the relationship between the UK and Ireland will diverge on EU membership. Northern Ireland is the only part of the UK (bar Gibraltar) with a land border with an EU member state, giving rise to a widely recognised set of unique circumstances. The intra-Ireland border will become an external border of the EU.

What is the current situation?

Brexit has contributed to the current instability in Northern Ireland. To understand this, the political context must be noted. Northern Ireland voted to remain in the EU and the two major political parties are divided on this issue. The Democratic Unionist Party (DUP) supported 'Leave' and Sinn Féin endorsed 'Remain'. Since the Brexit vote, the Northern Ireland Executive has collapsed and negotiations are ongoing to address this. The Westminster election in June 2017 confirmed the DUP and Sinn Féin as the two largest parties. It is notable that the nationalist Social Democratic and Labour Party (SDLP) lost its three seats at this election and thus the position of Irish nationalism/republicanism in Northern Ireland is now one of abstentionism from the Westminster Parliament. The DUP has reached a 'confidence and supply' agreement with the Conservative government. The Northern Ireland Assembly election of March 2017 saw the gap close between the two major Northern Ireland parties to just one seat, and unionist parties lost their overall majority (in terms of seat share) for the first time.

The situation of Northern Ireland and Ireland has attracted considerable attention and a measure of commonality. As is evident from the European Council negotiating guidelines and the European Commission negotiating directives, the situation is regarded as a priority issue for the EU (Ireland is part of the EU27 in these discussions). The Irish and British governments, in their statements on priorities, have also consistently underlined the fundamental significance arising from the special position of Northern Ireland and Ireland. Before the Northern Ireland Executive fell apart, the former first and deputy first ministers did agree a joint letter.

What has the British government indicated it wants?

The British government has produced a position paper on Northern Ireland and Ireland. In this work, the government makes proposals across four broad areas: the centrality of the Belfast/Good Friday Agreement (GFA); the protection of the CTA; the importance of avoiding a hard border; and the need for continuing North-South and East-West co-operation. Several suggestions are contained in this paper about how to ensure that the unique relationships that exist are respected and addressed.

At a relatively high level of abstraction there appears to be a measure of agreement in the EU, Ireland and the UK about generally desired outcomes. For example, all aim to avoid a hard border, all remain supportive of the GFA and all continue to underline the role of the CTA. However, things are more complicated when it comes to the detail, and particularly how to reconcile the desires of the British government regarding the type of Brexit it wants (see further the paper on Article 50), with the expressed aims around Northern Ireland/Ireland. This is evident in the responses to suggestions made by the British government, for example, on future customs arrangements, which have also raised sequencing problems (in terms of the EU's negotiating timetable).

What are the possible outcomes?

The possible overall outcomes are well known and much discussed. There might be a failure to reach agreement, with the UK crashing out of the EU on the harshest terms. Alternatively, a 'softer' form of Brexit may emerge that incorporates transitional arrangements, smoothing a pathway towards eventual withdrawal on reasonable terms (including a close ongoing association with the EU).

What are the potential consequences of these outcomes?

It would be helpful if all existing negotiating parties remain mindful of the principles of the GFA in their own approaches to these discussions. There is a real risk that the Northern Ireland peace process becomes collateral damage in this high-level dialogue. Unless things deteriorate quite dramatically, it is possible that there will be formal recognition of the GFA, even to the point of explicit inclusion in any withdrawal agreement. Taking this step will raise additional questions about the implementation and enforcement of that agreement. One of the points of ongoing contention in Northern Ireland is the suggestion that the GFA is not being respected now. This is particularly evident in, for example, comments from Sinn Féin and the SDLP around issues of equality and respect for Irish identity. In addition, the notion of equality of treatment and parity of esteem between British and Irish citizens will raise difficult questions. For example, the impact that this might have on British citizens in Northern Ireland and their rights.

As in the past, it is also possible and likely that the EU will be willing to accommodate the CTA, in recognition of the special relationship between the UK and Ireland. There are, however, questions over how the CTA functions now and in the future, that will require much more detailed thought, including in relation to human rights and equality. A relatively hard Brexit (that takes the UK out of the single market and the customs union) will pose questions about the expressed commitment to avoid a hard border. This is a point of genuine tension. The British government position at present seems likely to lead eventually to the forming of a border on the island of Ireland, that no one appears to want.

Further reading

- [Colin Harvey and Daniel Holder, The Great Repeal Bill and the Good Friday Agreement – Cementing a Stalemate or Constitutional Collision Course? UK Const L Blog \(6th Jun 2017\)](#)
- [Colin Harvey, Northern Ireland's Transition and the Constitution of the UK, UK Const L Blog \(12th Dec 2016\)](#)
- [Colin Harvey, Brexit, Borders and Human Rights](#)
- [HM Government, Northern Ireland and Ireland: Position Paper](#)
- [Seanad Committee on the Withdrawal of the UK from the EU, Brexit: Implications and Potential Solutions](#)

By Colin Harvey

Immigration

What is the current situation?

The UK currently treats citizens of the European Economic Area (EEA) (plus Switzerland) and those from outside the EEA entirely differently for immigration purposes. Free movement of persons means that EEA citizens have the right to enter, live, study and work in the UK. These rights are not unqualified - entry can be denied on certain limited grounds relating to public protection (public policy, public security and public health) and those who have no realistic prospect of finding work can in principle be removed. However, in practice EU citizens are treated very much like UK citizens. Non-EEA nationals who wish to migrate to the UK to live, work or study generally require permission to do so and may well need a visa for which substantial fees are charged. There are four main routes: work, family, study and refugee or asylum, with many different sub-categories for each. In the year immediately prior to the referendum, about 300,000 people from the EU, and about the same number from outside the EU, migrated to the UK (that is moved to the UK with the intention of staying for at least a year). Net immigration – the figure which also takes into account those emigrating – was about half that.

Entry to the UK is controlled separately from the entitlement to seek and take up employment. Nationals from some countries (e.g. India or Nigeria) require a visa to enter the UK, which may be for a short-term visit (tourism, family, business) or longer-term (study or work). However, nationals of other countries (e.g. Brazil or the US) do not require a visa for a short-term visit.

What has the British government indicated it wants?

The government has stated that free movement of people “as it is now” will end in March 2019. However it has also stated that it will seek to avoid a “cliff edge” at this date and to negotiate a “transitional period” of two to three years, during which very little will change. If so, then free movement will end in a legal sense, but in practice will continue more or less as now, except that new arrivals will have to register. Since most EU nationals coming here to work already register for a National Insurance number (at least) and any new system would likely be an extension of this, the practical impacts are likely to be limited. Those already living and working in the UK are likely to be protected by a special system based on giving those with five years residence the chance to apply for ‘settled status’.

In parallel with the negotiations, the UK government will also be taking steps towards introducing a new immigration system. At present, the likely timeline is as follows:

- The UK government has published a white paper setting out its proposals for the ‘Great Repeal Bill’ (now EU (Withdrawal) Bill), which will incorporate EU legislation into UK law, so that there is, as far as possible, no step change on the date of Brexit;
- The bill will allow the UK government to make some changes through secondary legislation. However, the white paper commits the UK government to implement any new system through a separate immigration bill;
- The government will publish a white paper on immigration later in 2017. Regardless, the timing of any subsequent legislation, and its implementation, remains unclear; it is also currently unclear whether the new system will be part of the negotiations with the EU-27.

What are the possible outcomes?

The main route for non-EEA migrants at present for work purposes is known as ‘Tier 2’; this is open to those who have a job offer and fulfil various other criteria (relating to skills, occupations, salaries, etc.). Significant visa costs are imposed. There is a cap on overall numbers (currently set at 20,700 per year). For family migrants (in particular spouses) there is an income threshold. Students have to show some knowledge of English and prove they have sufficient funds to cover study and living expenses. The basic

structure of this system could be extended to EEA migrants. However, this still leaves a number of key questions:

i) European preference.

Will the new system give a considerable degree of preference to EEA citizens, even if not full free movement, compared to those outside the EEA, or will it treat all non-UK citizens equally¹; and how will this be operationalized?

ii) Individual versus sector based system.

The current system for non-EU workers is primarily based on individual and job-related characteristics (salary, qualifications, skill level for the job in question) although there are a number of 'shortage occupations', which are largely sector-specific. However, there has been considerable speculation that the UK government is considering sector-specific schemes, such as for agriculture;

iii) Targets, quotas and caps.

Currently, although the UK government has an overall target to reduce net migration to the tens of thousands, most immigration categories have no actual overall limits (caps), except for Tier 2 skilled. If the objective of a new system is to take the opportunity of Brexit to exert greater control over numbers, will it incorporate more such caps, in particular for any sector-specific schemes? If so, how will they be set?

iv) Regionalisation.

There has been considerable interest from London and Scotland in the possibility of some degree of regionalisation of the immigration system. This would not involve any regionalisation of border controls, either external or internal, but rather would relate to the conditions required for a migrant worker to obtain a work permit, which would be differentiated by the geographical location of the workplace;

v) Administrative and enforcement aspects.

It does not seem likely or feasible that we would restrict EEA nationals' right to enter the UK without a visa, given that we do not do so for most other developed countries. This means that control over how many and which EEA nationals are allowed to work in the UK will not, in practice, be applied at the border in the vast majority of cases. As with other non-visa nationals, like Americans, it will be applied in the workplace. Employers will have to verify that EEA nationals are entitled to work in the UK, just as they currently do for non-EEA nationals (similarly, landlords and administrators of public services will have to perform similar checks).

Beyond all these specific questions, perhaps the most important issue from a broad economic perspective is the overall objective. Will the new system be relatively liberal, prioritising the UK's economic needs, and accepting perhaps an increase in skilled migration from outside the EEA at the same time as reducing EU migration? Or will it be restrictive, with the overarching objective still being to hit the target, set out in the Conservative manifestos of 2010 and 2015, to reduce net migration to the tens of thousands, accepting that some economic damage is inevitable? The tone of the leaked Home Office paper on immigration suggests the latter.

By Jonathan Portes

¹ With the possible exception of Irish citizens, not discussed here, who have a special status in the UK which predates the UK's membership of the EU.

No Deal: A 'Chaotic' Brexit

Background

Prior to the general election, the prime minister asserted on several occasions that 'no deal' would be better than a 'bad deal' in the forthcoming Brexit negotiations. The phrase even found its way into the Conservative Party manifesto before the June 2017 general election. By no deal, we understand a situation in which the United Kingdom secures neither an Article 50 (or 'divorce') agreement, nor a deal to regulate future relations with the EU.

What is the current situation?

The UK government is currently negotiating the Article 50 ('divorce') deal with the EU (see factsheet on the Article 50 process). Assuming the EU feels 'sufficient progress' has been made in these talks, it will open talks on a deal regulating relations with the EU after Brexit. There is no guarantee that either set of talks will be successful, or that either deal will be ratified. With regard to the latter, the UK Parliament, the European Council (by qualified majority) and the European Parliament (by simple majority) must approve the Article 50 deal.

What has the British government indicated it wants?

Since the general election, the government has not used the rhetoric about no deal being better than a bad deal. There has also been a growing recognition that the 2 year Article 50 deadline might imply the need for a transitional period, to allow time to negotiate a trade deal. This being said, some figures in government still seem unwilling to see the UK accede to the EU's terms on the Article 50 deal; the foreign secretary has said that the EU can 'go whistle' if it wants the UK to pay any kind of 'Brexit bill'.

What are the possible outcomes?

As things stand, all outcomes are still technically possible. It is conceivable that the government may fail to negotiate an Article 50 deal with the EU, in which case there will be no trade deal. All three issues under discussion in the Article 50 talks - the Irish border, the rights of UK citizens in the EU and EU citizens in the UK, and the 'Brexit bill' - are contentious, and solving each of them will require a willingness to compromise and row back on earlier hardline rhetoric. Should no deal, which we have termed a 'chaotic Brexit' occur, it could do so in one of two ways. A 'premature Brexit' would see talks break down acrimoniously and the UK decide unilaterally to stop paying its EU contribution; ending the supremacy of EU law in the UK with immediate effect. While unlikely, it is possible to see political dynamics conspiring to bring about this kind of outcome. The alternative would be a 'timed out Brexit', where the talks don't completely break down, but no agreement is reached within the two year period, and there is no extension.

What are the potential consequences of these outcomes?

The implications of 'no deal' would be far reaching and would impact on political, legal, and economic relations between the UK and the EU. Politically, it seems likely that a chaotic Brexit would provoke much ill will and mutual recriminations between the two sides, as each sought to blame the other for the outcome. This would impact on cooperation across a range of issues, including on security where the UK has worked closely with its partners, and would make future cooperation far more difficult.

Legally, If the UK gets to the end of the two year period with no deal, Article 50 stipulates that the treaties will cease to apply: the UK will no longer be a member state. This scenario will give rise to huge uncertainty, particularly for UK firms exporting to other EU countries or trading elsewhere in the EU. Consider, for example, contracts for the long-term supply of goods between the UK and an EU country. The EU has already made suggestions for transitional rules to govern this situation. But if there is no deal, then these transitional rules will not apply. For example, UK producers exporting into Europe will

be subject to whatever tariffs EU law provides. Currently, no duty is paid on those goods crossing an EU border. Following a timed out Brexit, if goods are shipped from Kent to Hamburg in Germany, duty will be payable. The question of who bears the risk of this increase in cost depends on the terms of the contract. The legal enforcement of all forms of contractual and commercial arrangements will also become significantly more complex.

Economically, all sectors of the economy – from agriculture, to airlines, to the pharmaceutical industry – will be affected, albeit in different ways. Imported food will probably cost more in the UK and trade across borders will become more difficult – a particular problem for Northern Ireland and the Republic of Ireland. It may be that, outside the framework of EU rules, airlines are unable to fly immediately after Brexit. In the area of pharmaceuticals, the UK would fall outside the EU systems recognising new drugs. The estimated economic costs of any plausible scenario are large. For example, the Centre for Economic Performance estimates that a move to WTO rules, with the UK applying the same external tariff as the EU, would lead to a large reduction of about 40% in trade with the EU over the next ten years.

Without any agreement, EU citizens in the UK would be in a form of legal and political limbo; not illegal, but with their status at best anomalous. This would particularly be the case for those who have no documentation certifying their permanent residency – the vast majority – and for the very large minority who could not, as of Brexit Day, qualify for permanent residency under the current rules, since they lack five years of residence. The status of UK nationals elsewhere in the EU would be considerably more complex and potentially much more problematic. It is up to individual member states to decide how they are to implement EU legislation in domestic law. There is much variation in how EU27 countries treat UK nationals now, and this divergence would be likely to widen considerably after Brexit.

What is the potential timeline for this?

The talks could break down at any time or over any issue. It seems probable that this is most likely to happen – should it do so – in the autumn, as the EU decides whether ‘sufficient progress’ has been made, and attempts are made to settle some of the outstanding Article 50 issues. Alternatively, breakdown could occur at the end of the negotiations in autumn 2018, when the final details of the deal in all areas will be put in place.

Further reading

- UK in A Changing Europe, ‘Cost of No Deal’ <http://ukandeu.ac.uk/research-papers/cost-of-no-deal/>

By Catherine Barnard, Anand Menon and Jonathan Portes

No Deal: The WTO Option

What is the current situation?

The World Trade Organisation (WTO) is the global body governing international trade. Member countries that do not have a free trade agreement with each other trade under “WTO rules”. If the UK does not reach an agreement with the EU on a future trading relationship after Brexit, then the default position is that WTO rules would apply on trade between the UK and the EU, and between the UK and third countries (including countries with which the EU has trade deals).

What has the British government indicated it wants?

The UK government has indicated that it wishes to negotiate a time-limited transition period after Brexit, during which the UK remains, effectively, part of the single market and the EU customs union. After that, it wishes to see a “deep and comprehensive free trade agreement” between the EU and the UK. The EU has not ruled out a time-limited transitional period, and is prepared to negotiate on the future trading relationship, but has stated that such negotiations cannot begin until the terms of withdrawal are settled under Article 50. Moreover, there are a number of substantive obstacles to a future trade agreement.

What are the possible outcomes?

If no agreement is reached by March 2019 – or there is agreement on a transition period, but none on a future relationship – then, by default, the UK will need to move to trading under the WTO regime, either in March 2019 or on the expiry of the transition period. Both the UK government and EU representatives have made statements implying that this outcome is a significant possibility.

The UK is a member of the WTO in its own right. But various procedures are needed to re-establish our autonomy from the rest of the EU. In particular, we have to agree on “schedules” for tariffs on goods. The government has stated that in the short term it would simply replicate the schedules of the EU to smooth our transition. There are some more problematic areas, such as agreeing on the division of quotas for goods where the EU currently has agreed quotas at EU level. Yet with enough goodwill and time, it should be relatively easy for the UK government to get agreement from WTO members to operate under WTO rules. It would also be necessary for the UK to negotiate with other countries with which the EU has free trade agreements; this might be more problematic.

Under WTO rules, each member must grant the same ‘most favoured nation’ (MFN) market access, to all other WTO members.¹ This means that exports to the EU would be subject to the same customs checks, tariffs and regulatory barriers that the UK and EU currently charge on trade with countries such as the US. The UK’s exports to the EU and other WTO members would also be subject to the importing countries’ most favoured nation tariffs.

What are the potential consequences of these outcomes?

The imposition of tariffs on trade with the EU would increase costs for both UK importers (and hence consumers) and exporters. The average EU tariff rate is low - around 1.5%. However, at a sectoral level, the impacts would be much larger: for example, for cars and car parts the tariff rate is 10%. Since most UK-based car production is exported, and uses imported parts, the impacts would be magnified. The impacts would also be large on agriculture, where EU tariffs and quotas remain high; this would result in significant food price inflation for British consumers.

¹ The only exceptions to this principle are that countries can choose to enter into free trade agreements and they can give preferential market access to developing countries.

The UK could alleviate the impact on consumers by reducing or eliminating tariffs unilaterally – as long as this is done in a non-discriminatory way, this would be permitted under WTO rules. However, this would have significant impacts on domestic producers, especially in agriculture. In any case, increased tariff barriers would not be the most important impact. The bulk of the cost of doing business across borders comes from non-tariff barriers such as border checks, custom controls and compliance with different product standards and regulations across countries. These barriers cannot be removed unilaterally because they require trade partners to agree on a set of rules and regulations which they can both accept. While the UK is in the EU, its businesses do not have to go through border checks because they already qualify as being compliant with EU rules and regulations.

Under a hard Brexit/“WTO rules” scenario, without mutual recognition agreements for product standards, it is unlikely that UK products could enter the EU without further checks at the border. Over time, if there is divergence between UK and EU standards, UK businesses would need to produce two different product lines - one for the UK and one for the EU - which would increase costs and reduce competitiveness.

The impacts of non-tariff barriers would be larger for the service sector, which makes up 80% of the UK economy. Access to the single EU aviation market requires headquarters and majority shareholdings to be located within the EU so that it can have regulatory oversight on safety. UK service exporters would also suffer from the loss of ‘passporting’ rights for financial services, as well as reduced access for other service providers like legal and accountancy services.

The Centre for Economic Performance estimates that a “No Deal WTO rules only” scenario would reduce the UK’s trade with the EU by 40% over ten years. This reduced trade would mean a fall in income per head of 2.6% per year (net of the savings from no membership fees). There would also be longer-term negative effects from lower investment and slower productivity growth, which are estimated to be another 3.5% of GDP. Adopting a policy of unilateral free trade would mitigate part of these costs. But the savings from unilateral tariff cuts are estimated to be just 0.35% of GDP. The short-term disruption resulting from the sudden imposition of these WTO rules could exacerbate these negative effects.

Further Reading

- Swati Dhingra and Nikhil Datta (2017), London Review of Books

By Swati Dhingra

A UK-EU Trade Deal

What is the current situation?

The prime minister is committed to securing a ‘deep and special’ partnership with the EU in negotiations over a future trade deal. This deal is not part of the Article 50 process, although the ‘divorce’ will take ‘account of the framework for [the UK’s] future relationship with the Union’. The future trade deal will need to be adopted under separate legal regimes (either Article 207 of the Treaty on the Functioning of the European Union (TFEU), which was the legal basis for the EU-Canada Comprehensive Economic and Trade Agreement (CETA), or Article 217 TFEU, the legal basis for the deal between the EU and Ukraine).

The procedure for negotiating the new trade deal - or possibly deals, for there may be more than one - is laid down in Article 218 TFEU. The more comprehensive the deal, the more likely it is that it will require unanimous approval in Council, probably after obtaining the consent of the European Parliament. If it is a ‘mixed agreement’, covering areas where both the EU and the member states have competence (power), it will have to be agreed by 27 national parliaments, as well as the regional parliaments in certain countries. Negotiating a trade deal will take time, despite UK law already being compliant with EU law. Navigating any future deal through the national and regional parliaments will also take time. The period may be protracted if there is a challenge to the legality of any future trade deal before the European Court of Justice (ECJ). For this reason, many think there will have to be a transitional deal which bridges the period between the divorce and the future trade deal.

What are the possible outcomes?

There are a number of possibilities, varying in degrees of intensity:

- 1. Tariff free access for UK goods to the EU’s single market and vice versa.** This would be the simplest deal to negotiate and the easiest to adopt. From a Brexiter’s perspective, it would enable the UK to negotiate trade deals with other states. However, it would not address the many issues faced by the financial services industry. Nor would it consider how to manage free movement of persons going forward. A deeper version of this option would be for a comprehensive trade deal not just on tariff-free access, but also some non-tariff barriers. This would follow the model of other trade deals the EU has with countries such as Canada.
- 2. Staying in the customs union.** This would ensure tariff-free access to the EU market; enabling the UK to have access to the EU’s free trade deals, but not to negotiate its own. The UK would be subject to the Common Customs Tariff – the UK would have to apply the tariffs agreed by the EU on third country goods, such as those coming from the Philippines. Staying in the customs union would help to resolve some of the problems with the Northern Ireland border (albeit there would be some checking for, for example, sanitary and phytosanitary issues). The UK has talked about a customs arrangement which is similar to the customs union.
- 3. Participating in the single market.** All states can sell their goods or services in the single market (‘access’). However, they will not benefit from the advantageous terms enjoyed by its members. So, for example, they will not enjoy the principle of ‘passporting’ in respect of financial services. Only EU states can be members of the single market and have the right to vote on its terms. This option is therefore ruled out by the decision to leave the EU. However, the UK could continue to participate in the single market in a similar way to European Economic Area (EEA) states like Norway. The advantage of this model is that the UK would not suffer the estimated £66billion p.a hit of a hard Brexit. The disadvantage is that the UK would continue to pay for that access (Norway is the tenth largest contributor to the EU’s budget), but will have no say over adopting its rules (‘pay but no say’). It would also not resolve the Northern Ireland border issue - the EEA states are not in the customs union – nor would it address public concerns about free movement of persons (although there is greater scope for restricting free movement of persons than under the existing EU law).

- 4. Staying in the customs union and the single market** and other programmes such as the research framework programmes, as well as cooperating in the fields of security and defence. This is the closest to the situation we have at present. This may prove unacceptable to Brexiters, and would come with a significant financial cost attached. So, a permutation of this would be that the UK stays in a 'customs arrangement', negotiates special access to the single market (through participating in, for example, the Open Skies Agreement) and adopts the relationship the Norwegians and Icelanders have in respect of, say, the European Arrest Warrant.

What is the potential timeline for this?

Whichever agreement is reached there is not a lot of time for negotiating it. It is by no means clear that 'sufficient progress' will have been made on the terms of the divorce 'Article 50' deal by the October European Council to enable a move on phase two (transition) and phase three (future trade deal negotiations). Moreover, many issues will need to be discussed alongside the basic structure of the agreement; not least the machinery for governing the ongoing relationships between the UK and the EU, as well as the role that any court or other dispute settlement body might play. It may be that this proves just too difficult to negotiate, making a 'no deal' option increasingly likely (**see factsheet 'no deal'**).

By Catherine Barnard

Trade deals with third countries

What is the current situation?

The EU is a customs union: EU members have a common trade policy, a common external tariff, and no internal border controls for goods. The EU is therefore represented by the EU Commission in all international trade negotiations and member states cannot negotiate their own trade deals with third countries. The EU has trade deals with a large number of countries, including Canada, South Korea, and Mexico, although not with the US, India, China, or Australia. However, membership of the single market does not in itself preclude making trade deals with third countries: the non-EU members of the EEA and Switzerland do so, which in turn means border controls are required between those countries and the EU.

What has the British government indicated it wants?

The May government has repeatedly stated that after Brexit, the UK should become an independent player, free to seek its own trade deals with the rest of the world. It follows that the UK will have to leave the EU customs union. However, the government has also said that it wishes to negotiate a time-limited transition during which customs arrangements would continue as now. During this period, the UK would be free to negotiate trade agreements with third countries, but such agreements would not be implemented until after the transition.

A long list of countries have been mooted as possible candidates for free trade deals with the UK, in particular the US, China, India, and the rest of the CANZUK countries (Canada, Australia, and New Zealand). The size of the US economy and the “special” ties that exist between the US and the UK mean that the US is likely to be the first priority.

What are the possible outcomes?

Although there have been preliminary discussions with a number of the countries listed above, it is close to impossible for substantive talks to begin. It is as yet unclear when the UK will have the legal authority to begin negotiations; when the UK will leave the EU customs union; and what the trade arrangements between the UK and the EU will be after that point. It is difficult to see how third countries could engage seriously with the UK until these decisions have been taken. In addition, there are significant obstacles to meaningful trade deals with most of the countries listed above:

- The shape of US trade policy under Trump remains unclear, but may be significantly more protectionist. In any case, the US is likely to seek concessions which may be politically unpalatable in the UK (e.g. “chlorinated chicken”);
- India has made clear it will not engage in substantive discussions until the UK is prepared to liberalise policy on visas for students and skilled workers;
- China is unlikely to give the UK significant concessions on market access;
- The EU already has a deal with Canada – the priority is likely to be simply ensuring that the benefits of this are mirrored in a future UK-Canada deal;
- Deals with Australia and New Zealand are more likely (although even here there will be obstacles), but both are very minor trading partners with the UK.

Nevertheless, the freedom to determine its own negotiating position should mean that the UK can be faster and more flexible than the EU as a whole, particularly since it would no longer be constrained by protectionist interests in other EU countries. Whether this will outweigh the loss of leverage from no longer being part of a very large negotiating bloc is very difficult to predict ex ante.

A further uncertainty is what will happen to the 34 trade agreements among 60 countries that the EU has negotiated on behalf of the UK. After Brexit, the UK would cease to be a part of these trade agreements, reducing trade and raising prices. Avoiding this will require the consent of these trade partners and the resolution of some tricky issues, such as re-defining local content requirements that are specified at the EU level.

What are the potential consequences of these outcomes?

Free trade agreements (FTAs) are associated with increases in bilateral trade: so, while it would obviously depend on the terms of specific deals, it is probable that UK trade deals with third countries would increase UK trade. However, since tariff rates are already low, there is limited potential for tariff reductions to increase trade flows – tariffs between the US and the EU average about 1.6%. Non-tariff barriers (NTBs), such as regulatory differences, are much more important. The estimated cost of NTBs on goods is 12.9% to 13.7% between the EU and the US, and on services (which make up 80% of the UK economy), sectors such as business services and financial services face NTBs worth on average around 30% in trade costs.

There are some simple solutions to reducing these costs, such as through mutual recognition of technical standards and expanded labelling for food products. However, many of these costs reflect regulations arising from differences in preferences. For example, if UK citizens do not wish to have chlorinated chicken or genetically modified food in the country, then there is not much expansion in trade that can be expected without seriously undermining the wishes of the public.

But even the most ambitious set of FTAs is unlikely to replace the trade lost as a result of leaving the EU. For example, the National Institute of Economic and Social Research (NIESR) estimate that concluding FTAs with all of the above countries, and more, would only boost UK total trade by about 5%, while Brexit will reduce it by more than 20%.

What is the potential timeline for this?

The UK government has neither the administrative capacity, nor the legal authority to begin negotiating third country FTAs now. It is possible that such negotiations could begin during the “transition” period after Brexit (March 2019), but it is uncertain how much progress could be made before the UK has resolved the terms of its subsequent relationship with the EU. Negotiating substantive FTAs will take a long time – the EU-Canada one took seven years – although the UK might be able to make faster progress on its own, particularly with “easier” countries like Australia and New Zealand. However, it is difficult to see any new FTAs being implemented before the early 2020s at the earliest.

Further readings:

- Datta and Dhingra (2017), What next for US-Europe Trade Policy, in *Economics and Policy in the Age of Trump*, ed. Chad Bown. <http://voxeu.org/article/what-next-us-europe-trade-policy>
- Dhingra and Datta (2017), *London Review of Books* (forthcoming).

By Swati Dhingra