



## Briefing Paper on HM Government's

### Draft EU Withdrawal Agreement

15th November 2018

#### Introduction

The current draft of the agreement "on Withdrawal of the UK from the EU and EURATOM" (the "Agreement") can be found here... [https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018\\_en](https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en)

Mrs May's long-awaited Withdrawal Agreement is a complete betrayal of the Referendum decision. It is exactly what I have said would happen for the last two years - we have been presented with a 'Not Really Leaving the EU Withdrawal Agreement.' It will not satisfy Leavers or Remainers. Its intention is to make it possible to reverse the Referendum decision or, if it is implemented, to pave the way for a re-entry to the EU in a few years' time.

**UKIP is the only political party that stands for a complete and unencumbered exit from the European Union. Anyone who wishes to achieve that must join, support and vote for UKIP. UKIP is the only real opposition to rule from the European Union.**

#### Summary

The major development to bear in mind since the previous draft in March 2018 is provisions that originally looked palatable to some for a transition must now be regarded as permanent since the transition no longer has a fixed end date - making them much less acceptable.

The EU has structured the Northern Ireland arrangements so that the transition either:

- a) Continues indefinitely (the most likely scenario),
- b) Ends (presumably after extension) but without a comprehensive trade deal, thus bringing the Northern Ireland Protocol automatically into force and dividing the UK, or
- c) Is replaced by a different deal which (pursuant to Art2 of the Protocol) somehow achieves the same ends of avoiding a "hard" border (as determined by ECJ/arbitration).

#### Conclusion

Can the UK continue to claim to be an independent state given that the transition is likely to:

- a) Be permanent;
- b) Deny the UK the ability to take independent action in international organisations;
- c) Impose taxes (Customs Union tariffs and VAT);
- d) Remove democratic representation or influence in respect of goods and services legislation;

- e) Place the UK under the jurisdiction of a foreign court, which not only determines rights of residency but also overrides UK Statute;
- f) Place some of the armed forces under the control of foreign powers? What are the implications of loss of statehood for our membership of international organisations, such as the UN, WTO, G7, or NATO?

## Provisions of the Agreement

### PART ONE - Common Provisions (Scope)

- Territorial scope covers Gibraltar, the Channel Islands, the Isle of Man, the British Overseas Territories and the sovereign bases on Cyprus (Art3).
- **The Agreement binds future Parliaments - direct effect of provisions of the Agreement (both during and after transition) means ECJ judgments will continue to apply and individuals and the Commission will be able to use them to override Acts of Parliament (Art4(2), 87 and 131). In this way, Section 2 of the 1972 European Communities Act is effectively replaced by Article 4 of the Agreement. UK Courts will continue to request rulings from ECJ during the never-ending transition (Art86).**
- Impacts on all international relationships with the EU and third parties: "Sincere cooperation" continues and is now augmented by "mutual respect and cooperation" (Art5), although there is an express statement that the UK can negotiate trade deals (Art129 (4)), the UK must nevertheless tow the EU line in all other international fora during the transition (Art129 (3)).

### PART TWO - Citizens Rights

- **EU laws (the ECJ) will decide the rights of EU citizens** who are already resident in the UK at the end of the transition, in particular their ability to enter, exit, reside and work in the UK (and the rights of their non-UK resident family too, including grown-up children). (Art13-18)
- ECJ oversight for Citizens Rights will continue for 8 years after the end of transition (Art 158).
- The right to work will extend to family members (Art22).
- **No "British jobs for British workers"** - EU citizens with residency rights must not be discriminated against (Art23) and will have rights and remedies in the UK enforced by the ECJ that are not available to UK resident UK citizens (Art24).
- The ability to remove (deport) an EU citizen for public security reasons will be determined by the ECJ (Art21) in accordance with Directive 2004/38/EC Art15 and Chapter VI.
- Regulations on Social Security including (EC) No883/2004 and (EC) No987/2009 will continue to apply (reciprocally) as amended from time to time. The "Joint Committee" will ensure UK legislation remains up to date (Art 36). NB - this may include rights to UK child benefit in respect of children resident in the EU.
- Art30 (1) (f) could grant "refugees" and "stateless persons" permanent right to reside in UK if they arrive before the end of the transition.
- Uncertain whether the above "Citizens Rights" are matters of Member State competence and therefore turn the Withdrawal Agreement into a "mixed agreement" requiring approval of national parliaments etc. (NB a Dutch referendum was required because the Ukraine FTA included immigration).

## PART THREE - Separate Provisions (EU Agencies)

- Public Procurement rules continue during transition (Title VIII), greatly benefiting the EU's infrastructure construction firms that tender for UK projects.
- **Euratom** - the UK will keep the assets located in the UK (Annex V identifies these as including: the **Sellafield** nuclear fuel reprocessing plant, **Dounreay**, Sizewell A and B, **Capenhurst** uranium enrichment plant, and Springfields) but the UK must reimburse the EU for them and accept their related liabilities (Art84). UK also retains liability for spent fuel located in Member States (Art85) (Title IX).
- EU "institutions, bodies, officers and agencies" continue to have authority for "administrative procedures" during transition (Art92) (Title X) including decisions on State Aid (Art93) (NB this means the EU will also control Competition Law) (NB it was by these means that the EU challenged Ireland's tax deal with Apple).
- HMRC will collect taxes for the EU-27 during the transition and for 5 years thereafter (Art100).
- Privileges and immunities of officers and servants of the EU continue (Title XII), including: ECB (Art116, 117, 123) and "professional" secrecy (permanent even after transition) (Art121).
- Access to EU related information may be difficult even if documents are located in UK as Art339 TFEU will continue to apply (Art120, 122).
- These same privileges and immunities, as well as others, will also benefit the EIB (Art116, 118, 124).
- Art119 terminates the host agreement for, inter alia, the European Medicines Agency (NB Query whether this absolves them of the break clause worth several hundred million).

## PART FOUR - Transition

- The temporary nature of the transition (which ostensibly finishes at the end of 2020 but which can be extended at the request of the UK with at least six months' notice) is a legal fiction, designed:
  - a) To avoid any legal challenge it establishes permanent trade relations that would otherwise need approval under Art218 TFEU rather than Art50 TFEU; and
  - b) To prevent exit from the Agreement into anything other than another agreement which facilitates frictionless trade across the Northern Ireland / Irish border (i.e. one which leaves at least Northern Ireland within the Customs Union and large parts of the Single Market). In this regard the Recitals to the Northern Ireland Protocol remind the UK of Theresa May's December 2017 commitment "to protect North-South cooperation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls, and bearing in mind that any future arrangements must be compatible with these overarching requirements".
- In order to extend the transition beyond 2020 the UK will have to **pay massive annual contributions to the EU** calculated in accordance with Art132 (3) **without the benefit of the rebate**. If the Joint Committee cannot decide the amount the Arbitration Panel will - there is no scope for the traditional political horse-trading.
- **Most EU law will continue to apply to the whole UK during the transition, particularly the Customs Union and the Single Market (Art127)** but notably not the vaguely democratic parts of the Council, Parliament, elections, attendance at committee meetings or with agencies etc.(Art7(1)).
- **There will be no lead role for the UK in EU battle groups (Art129 (7))** - some have expressed concern we may lose control of parts of the armed forces.
- **UK will be merely "consulted" on fishing during the transition (Art130)** and the "relative stability keys for the allocation of fishing opportunities" will be maintained (Art130 (4)).

## PART FIVE - Financial Contributions

- Payments under the Agreement will be in Euros (Art133)
- Financial Commitments to EU including contingent liabilities are complex and outside of the scope of this initial review of the Agreement.
- The UK will get its share of the European Coal and Steel Community (Art145) and European Investment Fund (Art146) in five annual instalments from 2021.
- The ECB paid-in capital will be re-paid (Art149) (approximately €50m).
- The UK will continue to have contingent liabilities relating to EIB operations (Art150 (1)). The UK's joint and several contingent liabilities are in the order of €500bn for loan notes issued by the EIB.
- The EIB will repay €3.5bn to UK of the EIB share capital over 12 years from 2019 (Art150 (4)) – but no repayment of any profits or interest and the UK's obligation to pay-in uncalled share capital into the EIB will continue (Art150 (3)(5)).
- NB - the EIB's gross assets are worth **€573bn**, the UK's **16.1%** share would exceed **€90bn** (less related liabilities the net amount is said to be in the order of **€9bn** but will not be recovered). The UK's uncalled share capital is in excess of €30bn. Projects in UK will not be eligible for new EIB funding post March 2019 (Art151).
- European Development Fund, UK participation in the 11th round continues (Art152-154).

## PART SIX - Institutional and Final Provisions (Enforcement)

- A **Joint Committee** (possibly better described as a latter-day Star Chamber) will be established to oversee the implementation and application of the Agreement (Art164) with the power to make decisions that bind the UK Parliament (Art166).
- The UK abandons its right to use the International Court of Justice at The Hague and agrees instead to litigate the Withdrawal Agreement exclusively through an arbitration procedure set up in Article 168. A dispute must first be raised in the Joint Committee and, if unresolved, then goes to an arbitration panel of five persons (drawn from a pool comprising ten appointees from each of UK and EU respectively and five chairpersons proposed jointly by them), dissenting opinions will not be published (Art180(1)).
- **Matters requiring the interpretation of EU law, or whether the UK has complied with the Agreement, must be referred to the ECJ (Art174) and those ECJ judgments are binding on the UK (Art89).**
- Failure to comply will entitle the EU to suspend its obligations to the UK (Art178 (2)) and one of the arbitration panels will decide if the sanction is “proportionate”.
- The parties will use “best endeavours” to negotiate and conclude agreements as described in the Political Declaration - a meaningless promise (Art184) to maintain the fiction of the temporary nature of the transition.

## PROTOCOL - Northern Ireland

Of the 585 pages of the Withdrawal Agreement a considerable portion (174 pages) are taken up with the Northern Ireland Protocol, most of which only comes into force at the end of the transition (Art185) (i.e. never). However, a small number of odd provisions will come into force at the end of March 2019 and represent an immediate regulatory divergence between Northern Ireland and the rest of the United Kingdom, including:

- Mandatory use of: Movement Certificates (second sentence of Article 4(1) of Annex 3) and Postal Certificates (first sentence of second sub-paragraph of Article 13 of Annex 3); and
- Maximum Agricultural Subsidies (last sentence of Article 7(2), first sub-paragraph of Article 8 of Annex 4 and first sub-paragraph of Annex 9).

## **PROTOCOL - Gibraltar**

- HMG and the Spanish Government have apparently drafted:
  - a) A Memorandum of Understanding on citizens' rights, tobacco smuggling, environment, police and customs matters; and
  - b) An agreement on taxation (to apply, inter alia, the OECD's Base Erosion and Profit Shifting (BEPS) inclusive framework).
- **Gibraltar's airport will only be recognised by EU law once Spain and the UK agree on the use of the airport.**

## **ANNEXES I-IX**

Lists references to EU legislation as applicable to provisions in the body of the Agreement.

## **POLITICAL DECLARATION - framework of future relationship**

The framework for the future relationship (i.e. potential trade deal to follow the transition) is in a separate document that UKIP has not yet seen, rumour suggests it is between 5 and 15 pages long and, being all things to all men, could be read as either Chequers or Canada plus.

**END**



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