

# The Withdrawal Agreement

## Implications for Wales

November 2018

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### The Withdrawal Agreement

On 14 November 2018, the negotiators for the United Kingdom and the European Union reached an agreement on the text of a Withdrawal Agreement – a document that sets out the terms of the United Kingdom’s departure from the European Union.

In the short time available since its publication, we have made an initial assessment of the implications for Wales arising from the Withdrawal Agreement, with a view to informing forthcoming votes on the Withdrawal Agreement in the National Assembly for Wales and the UK Parliament.



# 1. Background

## The Article 50 negotiations

1. Since the triggering of Article 50 of the Treaty on European Union in March 2017, the United Kingdom Government and the European Union have been negotiating the terms of the United Kingdom's withdrawal from the European Union.
2. On the EU-side, the European Council has issued guidelines for the negotiations (effectively providing the negotiating mandate), whilst the European Commission has conducted the negotiations with the UK Government.
3. The European Parliament will have a decisive role at the end of the negotiations and it has played an important role in expressing its position on a range of issues relating to the withdrawal process.
4. The UK Government's side of the negotiations has been led by the Department for Exiting the European Union and, ultimately, the Prime Minister.
5. The negotiators have now reached a point where they have an agreed text of a Withdrawal Agreement.
6. This draft text has been endorsed by the UK Government, through its Cabinet.
7. The European Council agreed the text, at a governmental level, with the UK Government at a special summit on 25 November 2018.
8. The Withdrawal Agreement is now subject to ratification by the UK Parliament and the European Parliament.
9. Whilst there is no formal role for the Assembly in terms of ratifying the Withdrawal Agreement, the First Minister for Wales has committed to holding an advisory vote in the Assembly of the terms of the Withdrawal Agreement.
10. This vote is expected on 4 December 2018, ahead of the UK Parliament's first 'meaningful vote' on the Withdrawal Agreement on 11 December 2018.

## The Committee's work

11. We have been considering the implications for Wales of exiting the European Union since our establishment as a committee in July 2016.

- 12.** Our first report summarised the implications for Wales of leaving the European Union.<sup>1</sup> Subsequently, we have published a range of reports that further consider the implications for Wales in legal, constitutional, economic and policy terms.<sup>2</sup>
- 13.** Alongside this work, we have monitored the progress of the Article 50 negotiations. We have done this through holding regular scrutiny sessions with the First Minister of Wales and the Cabinet Secretary for Finance (the Welsh Government lead representative in terms of the negotiations).<sup>3</sup>
- 14.** UK Ministers have engaged with us, through oral evidence sessions and correspondence. Most of our engagement has been with the Parliamentary Under Secretary of State for Exiting the EU, Mr Robin Walker MP.<sup>4</sup>
- 15.** We sought the European Union's perspective by maintaining a regular dialogue with its institutions. This has included meetings with the European Commission's chief negotiator, Mr Michel Barnier, and the European Parliament's Brexit Co-ordinator, Mr Guy Verhofstadt MEP.<sup>5</sup>
- 16.** Throughout the course of the negotiations, we have sought to highlight the issues of importance to Wales and to ensure that the implications of Brexit for our country have been understood by both the UK and the EU.

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<sup>1</sup> External Affairs and Additional Legislation Committee, Implications for Wales of leaving the European Union, January 2017

<sup>2</sup> See the Committees webpages for further details of its work

<sup>3</sup> Transcripts of these sessions are available from the Committees website and archived video recordings are viewable on Senedd.tv

<sup>4</sup> Mr Walker MP attended meetings on 6 November 2017, 30 April 2018, 11 October 2018.

<sup>5</sup> The Committee met Mr Barnier on 16 October 2017 and Mr Verhofstadt on 27 June 2017. Both meetings were held in Brussels.

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## 2. The implications for Wales

Building on our previous work, and augmented by external expertise, we have compiled an initial assessment of the implications for Wales arising from the Withdrawal Agreement and accompanying Political Declaration on the EU-UK future relationship. This assessment addresses three phases of the post-Brexit period: the transition period; the customs backstop (should it be activated); and the outline future EU-UK relationship.

### Sectoral analysis

**17.** We have faced a challenging timeframe within which to respond to the publication of the Withdrawal Agreement, and the period within which we have been considering our response has been especially dynamic.

**18.** To enable a response, we have focused our analysis on seven areas:

- The economy and trade with the EU;
- Ports and Transport;
- Agriculture, Food and Fisheries;
- Energy and Environment;
- Healthcare;
- Equality and Human Rights; and
- Institutions.

**19.** [Annex A](#) to this report provides details of this analysis under each of these headings.

**20.** It is important to note that this analysis builds on our previous body of work, which has been published.

## External expertise

- 21.** Alongside the analysis provided at Annex A, we commissioned Dr Tobias Lock from Edinburgh University to provide an initial assessment of the Withdrawal Agreement and its possible implications for Wales.
- 22.** We have provided Dr Lock's analysis in full as Annex B to this report.

### 3. Our view

The Welsh and UK Governments need to provide details of what a Brexit on Withdrawal Agreement terms means for the people of Wales.

#### Further information to help inform a vote and the public

- 23.** In our view, there remains a lack of information on the political and economic impact of a Brexit on the terms of the Withdrawal Agreement.
- 24.** We believe that the UK Government, working with the Welsh Government insofar as their assessment relates to Wales, should publish a full impact assessment of a Brexit on the terms of the Withdrawal Agreement.
- 25.** This assessment should compare the impact of a Brexit on the terms of the Withdrawal Agreement with the impact of a 'no deal' Brexit and the status quo i.e. continued membership of the European Union.
- 26.** We will write to the Secretary of State for Exiting the European Union to suggest this approach, should this information not be available at the time of reporting.
- 27.** At our meeting on 26 November 2018, the Cabinet Secretary for Finance, Professor Mark Drakeford AM, committed to publishing an analysis of the Withdrawal Agreement and its implications for Wales. He said that he intended to publish this before the Assembly debated the Withdrawal Agreement.

#### RECOMMENDATION

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**Recommendation 1.** We recommend that the Welsh Government's analysis should include an assessment of the political, economic and legal implications for Wales of a Brexit on Withdrawal Agreement terms. In providing this analysis, the Welsh Government should offer a comparison with a 'no deal' Brexit and continued membership of the European Union. This assessment should be published before any debate in the Assembly on the Withdrawal Agreement.

## The Assembly's vote

- 28.** The Assembly will debate the Withdrawal Agreement and hold an advisory vote on the Withdrawal Agreement.
- 29.** As a Committee, we have compiled this report to assist Assembly Members as they decide whether or not to support the Withdrawal Agreement.
- 30.** Whilst not a binding vote, the view of the Assembly is significant. It will carry weight in the debates to come in both the UK Parliament and the European Parliament.
- 31.** We hope that this report, and the analysis contained within it, helps inform this important vote in the Assembly.
- 32.** Each of the possible types of Brexit ahead have substantial risks and opportunities attached to them. The prospect of no Brexit at all has also re-emerged as a possible, if unlikely, option, following comments made by the Prime Minister.<sup>6</sup>
- 33.** We will continue to assess these risks and opportunities to inform the ongoing debate and to do what we can to ensure that Wales is ready for whichever of these scenarios comes to pass.

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<sup>6</sup> [The Prime Minister's statement on Brexit: 14 November 2018](#)

## Annex A: Our analysis

### Draft Agreement on the withdrawal of the United Kingdom from the European Union – the extent to which it addresses issues raised by the Committee

This annex sets out the extent to which the Withdrawal Agreement addresses key issues raised by the Committee in its previous reports. It sets out the issues raised; what the Withdrawal Agreement says about them; what will happen during the transition period; and what will happen during the future relationship or the backstop.

The paper is separated out into seven areas, as follows:

- The economy and trade with the EU;
- Ports and Transport;
- Agriculture, Food and Fisheries;
- Energy and Environment;
- Healthcare;
- Equality and Human Rights; and
- Institutional arrangements

## 1. The economy and trade with the EU

### 1.1. Issues raised by the Committee prior to the publication of the draft Withdrawal Agreement

**The implications for Wales of leaving the European Union**, published by the Committee in January 2017, set out a number of issues of concern to the Committee in respect of the Welsh economy and trade with the EU:

The vast majority of the evidence received showed that ensuring frictionless access to the Single Market (i.e. no tariffs and no non-tariff barriers) is of crucial importance to the Welsh economy.

Manufacturing plays a greater part in the Welsh economy than elsewhere in the UK and the principal market for Welsh manufacturers is the EU. The imposition of tariffs would pose significant risks for this sector, especially for manufacturers that exist within global value chains.

The Committee recognised that perceptions of EU migration were a factor in determining the outcome of the EU referendum. Restricting the ability of EU citizens to work in the UK after Brexit will have adverse consequences for many public services, some businesses and future infrastructure projects in Wales. Careful consideration must be given to mitigating these consequences as a future immigration policy for the UK is developed.

## 1. 2. How the draft Withdrawal Agreement responds to these issues

Many of the issues around the economy and trade are covered in the sections below on the transition period, the future relationship, and the 'backstop' set out in the protocol on Ireland-Northern Ireland. However, the draft Withdrawal Agreement covers goods placed on the market (articles 40 to 46 of the draft agreement) and ongoing customs procedures (articles 47 to 50 of the draft agreement). These highlight that goods placed on the EU market before the end of the transition period (also known as the transition period) will be able to continue to circulate freely between the UK and EU, however the onus will be on businesses to prove that the good was placed on the market before 31 December 2020. In relation to ongoing customs procedures, goods that are under a customs movement at the end of the transition period will continue to be treated under EU law.

In relation to the ability of EU citizens to live and work in the UK after Brexit, Part Two of the draft Withdrawal Agreement covers citizens' rights. Articles 13 to 23 of the draft agreement cover the rights of EU citizens to live in the UK, while articles 24 to 29 cover employment rights and professional qualifications.

It states that all EU citizens lawfully residing in the UK at the end of the transition period will be able to stay in the UK. If they have already lived in the UK continuously and lawfully for five years by 31 December 2020, EU citizens will have the right to live in the UK permanently. EU citizens who have lived in the UK for less than five years as at 31 December 2020 will be able to stay until they have

lived in the UK for five years, and then will gain the right to reside permanently in the UK. Close family members will be able to join EU citizens who have the right to permanently reside in the UK if the relationship existed on 31 December 2020, and still exists when the family member wishes to come to the UK. Children born to EU citizens who have the right to reside permanently in the UK are also covered by the draft agreement.

EU citizens who work or are self-employed in the UK will be guaranteed broadly the same rights as they currently have. These include the right not to be discriminated against on grounds of nationality, and the right to equal treatment with UK nationals in areas such as the right to work (in employment or as self-employed); the right to help from Job Centres; conditions of employment and work; the right to social advantages (such as welfare benefits) and tax advantages; rights related to trade union membership; access to housing; and the right for their children to receive an education and to access training and apprenticeships. EU citizens with professional or trade qualifications covered by EU law who live or work in the UK will continue to have their qualifications recognised if they obtained or applied for recognition before 31 December 2020. This includes the recognition of a vast number of academic qualifications and periods training or experience across many disciplines, including doctors, nurses, dentists and vets, teachers, architects, estate agents, carpenters, hairdressers and beauticians. It also specifically covers lawyers, auditors and people working in the trade and distribution of toxic products.

### **1. 3. What will happen during the transition period if the draft Withdrawal Agreement is approved**

During the transition period until 31 December 2020, which is covered in Part Four of the draft Withdrawal Agreement, UK and EU businesses will trade on the same terms as they do now. Article 127 of the draft agreement highlights that the UK will be subject to EU law in the transition period, except where the agreement sets out exceptions. This means that there will be no tariffs or other non-tariff barriers to trade between the UK and EU during this period, and that the UK will continue to be in the single market and customs union. There will also be freedom of movement throughout this period.

### **1. 4. What does the political declaration say about the future relationship between the UK and EU**

The political declaration, published by the UK Government and EU on 25 November 2018, highlights that the UK Government and EU will work towards

comprehensive arrangements creating a free trade area combining deep regulatory and customs co-operation, underpinned by provisions ensuring a level playing field for open and fair competition. This aims to deliver no tariffs, charges or quantitative restrictions (overt or disguised quotas or other restrictions) across all goods sectors.

In relation to services, the political declaration states that the future relationship will seek to develop a level of liberalisation in trade in services well beyond the commitments of World Trade Organisation (WTO) membership with substantial sectoral coverage. Host state rules will apply to market access and national treatment (i.e., mutual recognition is not envisaged), but with a guarantee of non-discrimination. With regard to professional qualifications, the outline political agreement says merely that “appropriate arrangements” are envisaged.

In respect of financial services, the UK and EU will work towards agreeing that each other’s regulatory standards are equivalent by June 2020. As set out in the UK Government’s White Paper, **The future relationship between the United Kingdom and the European Union**, the UK and the EU will not have current levels of access to each other’s markets.

In addition, the political declaration notes that “competition must be open and fair”. It states that this would require provisions covering state aid, competition, social and employment standards, environmental standards, climate change and relevant tax matters. These would lead to provisions affecting UK policy, as the EU27 will continue to apply EU internal market law.

## 1. 5. What would happen if the ‘backstop solution’ in the protocol on Ireland-Northern Ireland came into force

The ‘backstop solution’ contained in the protocol on Ireland-Northern Ireland will establish a single EU-UK customs territory until a trade agreement is in place if there is not an agreement on a future trade relationship by 31 December 2020, or if the UK Government opts not to extend the transition period by 1 July 2020. Details of this are set out in Article 6 of the protocol. This would mean that there would be no tariffs, quotas or checks on rules of origin between the UK and the EU, with the exception of fisheries and aquaculture products.

Annex 4 to the protocol also commits the UK to a number of regulatory measures to create a level playing field if the ‘backstop’ is triggered. These include measures in relation to taxation, environmental protection, labour and social standards, state aid, and competition. For environmental and labour/social standards, the UK is required not to “regress” from levels of protection under international and EU

standards at the end of the transition period. In the case of state aid and competition, however, EU law would effectively continue to apply in the UK during any ‘backstop’.

## 2. Ports and transport

### 2.1. Issues raised by the Committee prior to the publication of the draft Withdrawal Agreement

The Committee’s report on **the implications of Brexit for Welsh ports**, published in August 2017, raises a number of issues relating to ports. The key issues highlighted by the Committee in its August 2017 report were:

- The Committee was concerned that a soft border between Northern Ireland and the Republic, and a hard maritime border between Wales and the Republic of Ireland, could severely disadvantage Welsh ports and result in a loss of competitiveness leading to a displacement of traffic from Welsh ports – principally Holyhead – to ports in England and Scotland, via Northern Ireland.
- Customs delays at ports could have an unwelcome impact on Welsh Ro-Ro ports, particularly Holyhead, Pembroke Dock and Fishguard, which have developed and grown since the completion of the Single Market in 1993 and which are predicated on seamless travel from one side of the Irish Sea to the other.
- The Committee was concerned that a suitable technological solution to the problem of processing customs checks will not be ready and in place at the point of the UK’s anticipated departure from the EU in March 2019.

Its recent report on the preparedness of Welsh ports, published on 26 November, reiterates these conclusions. It also states that:

The majority of the evidence seemed to support the UK Government’s proposals for a Facilitated Customs Arrangement after Brexit. However, it is clear to us that the sector will need time to prepare for the transition to this new proposed customs arrangement. Furthermore, we note the concerns of those involved in “Rest of World trade” about the added complication of operating under two separate customs regimes...

We are concerned by the potential implications of a “no deal” Brexit for the allocation of road haulage permits in the UK and note the concerns expressed to us that this could have serious UK-wide implications for movement of freight and goods...

We agree that mutual recognition of civil aviation certification must be secured after Brexit to ensure the continued smooth operation of air travel in the UK and the EU before Brexit and note that the EU (Withdrawal) Act 2018 contains provisions to facilitate this.

## 2. 2. How the draft Withdrawal Agreement responds to these issues

Many of the issues around ports and transport are covered in sections 2.3 to 2.5 of this paper - on the transition period, the future relationship, and the ‘backstop’ set out in the protocol on Ireland-Northern Ireland. However, as set out in section 1.2, the draft Withdrawal Agreement covers goods placed on the market (articles 40 to 46 of the draft agreement) and ongoing customs procedures (articles 47 to 50 of the draft agreement). Additionally, Annex IV to the draft agreement sets out a number of EU customs and excise databases that the UK will continue to have at least partial access to beyond leaving the EU. These include import and export control systems and tariff databases. This is an exception from Article 8 of the draft Withdrawal Agreement, which sets out that the UK will not have access to EU networks, information systems or databases after the end of the transition period, unless they are included in the agreement.

## 2. 3. What will happen during the transition period if the draft Withdrawal Agreement is approved

The UK will remain in the single market and customs union throughout the transition period, **meaning that current customs arrangements will continue to apply until 31 December 2020.**

During the transition period, **current arrangements for road haulage will continue.** **Currently**, UK hauliers carrying out international journeys must hold a Standard International Operator’s Licence along with a Community Licence for journeys to, from or through the EU. A Community Licence allows UK hauliers unlimited access to international journeys for operations in the EU including trade between EU countries and transit across the EU. It also allows for limited cabotage (the haulage of goods within a country by a foreign haulier) within the EU.

There is a wider European Conference of Ministers of Transport (ECMT) permit scheme that allows UK hauliers to carry goods to or through 43 countries (including all EU countries except Cyprus) with a limited number of permits available to the UK.

In terms of aviation, **the UK will continue to be part of the single European aviation market**, the European Common Aviation Area, during the transition period. However, under Article 128 of the draft Withdrawal Agreement, **it is not clear whether the UK will be able to continue participating in the European Aviation Safety Agency, and if so to what extent**. The effect of Article 7 of the draft Withdrawal Agreement is that, after withdrawal, the UK will not be entitled to participate in the decision-making and governance of the bodies, offices and agencies of the EU. This loss of participation rights will, accordingly, apply in the transition period. Therefore, the UK Government's [explainer to the Withdrawal Agreement](#) highlights that participation will be on a case-by-case basis. This is set out in Article 128 of the draft Withdrawal Agreement, which notes that there are cases where the UK can be invited to attend certain meetings of the EU and meetings of EU bodies, offices and agencies, provided that at least one of two conditions is met:

- Where the discussion concerns “acts” (i.e. EU decisions) addressed to the UK or individuals or companies there (e.g. decisions that a UK company has breached EU rules); or
- Where the presence of the UK is necessary and is in the interests of the EU.

However, participations in the meetings will not include a right to vote.

## **2. 4. What does the political declaration say about the future relationship between the UK and EU**

Customs arrangements are covered in the political declaration setting out the framework for the future relationship between the UK and the EU. This **aims to work towards comprehensive arrangements creating a free trade area combining deep regulatory and customs co-operation**. It also aims to deliver ‘ambitious customs arrangements’ that **build on the UK forming a single customs territory with the EU in the backstop** set out as part of the protocol on Ireland - Northern Ireland in the draft Withdrawal Agreement.

While the EU and UK will have regulatory autonomy, they will put in place provisions to ensure that regulatory arrangements are transparent, efficient, avoid

unnecessary barriers to trade in goods, and are compatible to the extent possible. When looking at the application of checks and controls at the border, the agreement highlights that **the extent of the UK's commitments on customs and regulatory co-operation, including alignment of rules, will be taken into account.** In other words, it would appear that the closer the alignment of rules and standards (and therefore the less regulatory autonomy for the UK), the fewer checks and controls would be required. The UK Government's **explainer to the political declaration** highlights that the UK will consider aligning with EU rules in relevant areas.

The political declaration will look to **secure comparable market access for freight and passenger road transport operators**, which will be based on relevant existing international obligations to ensure fair and open competition.

**In relation to aviation**, the political declaration states that the UK and EU will seek to deliver a comprehensive Air Transport Agreement, covering market access and investment, aviation safety and security, air traffic management and provisions to ensure fair and open competition. The UK and EU will seek to make further arrangements to enable co-operation with a view to high standards of aviation safety and security, including close co-operation between the European Aviation Safety Agency and the UK Civil Aviation Authority.

## 2. 5. What would happen if the 'backstop solution' in the protocol on Ireland-Northern Ireland came into force

Under the 'backstop solution' set out in Article 6 of the protocol on Ireland-Northern Ireland, a single EU-UK customs territory would be established until a trade agreement is in place if there is not an agreement on a future trade relationship by 31 December 2020, or if the UK Government opts not to extend the transition period by 1 July 2020.

Under the single customs territory, Northern Ireland will be in the same customs territory as Great Britain, however it will remain aligned to a number of EU rules on trade to avoid a hard border between Ireland and Northern Ireland. These include:

- The EU's Customs Code;
- Legislation on VAT and excise in respect of goods;
- Legislation on goods standards;
- Sanitary rules for veterinary controls;

- Rules on agricultural production and marketing; and
- State Aid rules

If the 'backstop solution' comes into operation, Northern Irish businesses will be able to place products on the EU's internal market without restriction to avoid a 'hard border' between Ireland and Northern Ireland. This will mean that there will be no new checks or controls on goods crossing the border between Ireland and Northern Ireland. There will also be no requirement for new checks on goods entering Great Britain from Northern Ireland. However, there will be checks on goods entering Northern Ireland from the rest of the UK. For agricultural goods, current checks at ports and airports will continue, but will be increased in scale. For industrial goods, checks will always be carried out by UK authorities, and can mostly take place in the market or at traders' premises.

## 3. Agriculture, Food and Fisheries

### 3.1. Issues raised by the Committee prior to the publication of the draft Withdrawal Agreement

In its **January 2017 report**, the committee noted that **agriculture** plays a greater part in the Welsh economy than it does for the UK as a whole, and concluded that **Brexit poses significant risks to the trade in agricultural products**, particularly if the UK has to rely on WTO rules for a period of time. The committee agreed that it is important that agricultural produce from all parts of the UK is able to access the single market on the same terms, and noted that Welsh farmers do not want to see agriculture traded off in favour of broader UK objectives such as access to service markets.

In its March 2018 report, **Wales's future relationship with Europe, Part one: a view from Wales**, the committee noted that it **recognises the challenges posed to trade in agricultural goods by the creation of new non-tariff barriers after Brexit**. Its view was that new non-tariff barriers such as plant and animal health checks would pose a threat to the continued export of Welsh agricultural, fishing and food products to the EU. The Committee concluded that it was vital for Wales that preferential market access, free of tariff and non-tariff barriers, is secured after Brexit.

**Specifically in terms of fisheries**, the Committee acknowledged that the majority of the Welsh fleet fishes for shellfish, which are non-quota species and, consequently, under Member State control. Therefore, Welsh fisheries are not as

affected by EU policy, such as quota allocation under the Common Fisheries Policy, as the UK as a whole. In terms of trade, the **majority of shellfish landed in Wales are exported to the EU**, and so this is another area where continued ‘unfettered’ access to the Single Market was seen as important by the Committee. **The Committee agreed that non-tariff barriers could have a significant impact on fisheries**, as even marginal delays for live shellfish exporters could have a large impact on businesses.

### 3. 2. How the draft Withdrawal Agreement responds to these issues

On agricultural trade, the draft Withdrawal Agreement provides that goods lawfully placed on the market in the EU or the UK before the end of the transition period may continue to freely circulate in and between these two markets, until they reach their end users, without any need for product modifications or re-labelling. This means that goods still in the distribution chain after the end of the transition period will be able to reach their end users in the EU or the UK without having to comply with any additional product requirements.

The exception to this is Article 41 of the draft Withdrawal Agreement. This states that, during the transition period, the movement of live animals and animal products from the UK to the EU will not only be subject to “normal” EU law (in common with other “goods”), but will also be subject to additional checks under EU rules for third countries on imports and sanitary controls at the border. Imports from the EU to the UK will be subject only to EU-law rules, as EU law will apply generally to the UK during this period. Once the transition period comes to an end, trade in animals and animal products may be governed by a new trade agreement between the UK and the EU, or will be affected by the backstop arrangements described below. Apart from those considerations, imports to the EU will be governed by EU law and imports to the UK will be governed by UK law. According to the agreement, this is necessary in view of the high sanitary risks associated with such products, and the need for effective veterinary controls when these products enter the EU market or the UK market.

In terms of fisheries, Article 6 of the protocol on Ireland-Northern Ireland states that a separate agreement will need to be reached on access to waters and fishing opportunities. The document says that ‘in accordance with Article 184 of the Withdrawal Agreement, the Union and the United Kingdom shall use their best endeavours to conclude and ratify such an agreement before 1 July 2020.’

Article 54 of the draft agreement includes provision for geographical indications on foods such as Welsh lamb. These foods will automatically obtain both

equivalent protection within the UK and maintain the existing protection in the EU. Plant variety rights will be granted the same protection.

### 3. 3. What will happen during the transition period if the draft Withdrawal Agreement is approved

As noted in the trade section above, during this period, **current rules will continue to apply as if the UK were a Member State**, and the UK will continue to participate in the EU customs union and the single market. During the transition period, the UK will have to comply with the EU's external trade policy and so will not be able to enter into trade agreements with other countries, although it will be able to negotiate their terms. If the transition period is extended, the UK would cease to participate in the EU budget as if a Member State at the end of 2020, **and the UK would not be part of the Common Agricultural Policy during the extension**. The UK would be free to introduce **new agricultural policies**, providing the payments remain within certain agreed limits (outlined in Article 132 of the draft Withdrawal Agreement).

On fisheries, Article 130 of the draft Withdrawal Agreement states that **the Common Fisheries Policy will continue to apply to the UK throughout the transition**, so the UK will be bound by the decisions on fishing opportunities until the end of the transition period, but will not be able to vote on those decisions. However, it will be consulted. During the last year of the transition period, the UK will be able to negotiate its own fishing opportunities for the following year. **The UK and the EU intend to conclude a new fisheries agreement in time to determine fishing opportunities for the first year after the transition period.**

### 3. 4. What does the political declaration say about the future relationship between the UK and EU

As mentioned in section 1.4 above, Part II of the political declaration, on the economic partnership, will be important for the agricultural industry. This section outlines the intention to create a new Free Trade Area (FTA) with **no tariffs, charges or quantitative restrictions across all goods**, with 'deep regulatory and customs co-operation' to ensure a level-playing field within the FTA. There will be some customs checks and controls on trade at the border, but the extent of these checks is not outlined and will depend on the degree of regulatory and customs co-operation with regard to the alignment of rules.

In terms of **fishing**, the political agreement aims for **co-operation bilaterally and internationally** between the UK and the EU to ensure fishing at sustainable levels, to promote resource conservation, and to foster a clean, healthy and productive

marine environment, noting that the United Kingdom will be an independent coastal state which can preserve regulatory autonomy whilst no longer being part of the Common Fisheries Policy.

As noted above, the UK and the EU intend to conclude a new fisheries agreement covering access to waters and quotas in time to determine fishing opportunities for the first year after the transition period.

### 3. 5. What would happen if the ‘backstop solution’ in the protocol on Northern Ireland came into force?

In a backstop scenario, the UK and the EU would form a single customs territory, with the result that there would be **no tariffs, quotas or checks on rules of origin for agri-food trade between the UK and the EU**. The UK would also be unable to raise or reduce tariffs on agricultural goods from countries outside the EU. Northern Ireland (but not the rest of the UK) would remain aligned to EU rules on agricultural products and food, and EU sanitary rules for veterinary controls. **This would mean no new checks at the Northern Ireland-Irish border**. Northern Ireland will also continue to be subject to EU rules on agricultural production and marketing.

However, there would be additional checks on goods entering Northern Ireland from the rest of the UK. For agricultural goods, current checks at ports and airports would continue, but would be increased in scale. Whether any checks are imposed on agricultural goods entering the rest of the UK from Northern Ireland would be a matter for UK policy.

## 4. Energy and environment

### 4. 1. Issues raised by the Committee prior to the publication of the draft Withdrawal Agreement

**In its 2017 report**, the committee expressed concerns that environmental protection could be lessened on leaving the EU and that environmental protection measures could become fragmented. Its view was that carbon budgets set by the UK should be at least as challenging as the EU’s commitments to tackle climate change and that they must continue to be met after the UK has left the EU.

Much of the Assembly’s work in this area has been done by the Climate Change, Environment and Rural Affairs Committee. In its June 2018 report on

**Environmental governance arrangements and environmental principles post Brexit**, that committee noted the considerable concern across the environment sector that there could be less of an emphasis after Brexit on environmental governance functions currently exercised by EU bodies, which risks creating an environmental governance gap.

#### 4. 2. How the draft Withdrawal Agreement responds to these issues

Issues around the environment are covered in sections 4.3 to 4.5 of the paper, on the transition period, the future relationship, and the protocol on Ireland and Northern Ireland. In terms of energy, the draft Withdrawal Agreement contains provisions relating to the **UK's withdrawal from the European Atomic Energy Community (Euratom)**, including agreement that ultimate responsibility for spent fuel and radioactive waste remains with the State where it was generated, in line with international conventions and Euratom legislation.

#### 4. 3. What will happen during the transition period if the draft Withdrawal Agreement is approved

During the transition period, EU environmental law will continue to apply in full in the UK, including the governance functions currently exercised by EU bodies such as the European Commission and the Court of Justice of the European Union.

#### 4. 4. What does the outline political agreement say about the future relationship between the UK and EU

On energy, the political declaration states that the UK and the EU have agreed to put in place mechanisms to enable electricity and gas to be traded in a cost-effective and timely way. It states that they should consider co-operation on carbon pricing by **linking a UK national greenhouse gas emissions trading system with the EU's emissions trading systems**. In addition, it includes a statement that the future relationship should include **wide-ranging nuclear co-operation between the UK and the EU Atomic Energy Community**, to ensure 'existing high standards of nuclear safety'.

In terms of the environment, the updated declaration document includes key areas for environmental co-operation in the areas of **climate change, sustainable development and cross-border pollution**. Specifically on climate change, it states that the future relationship should reaffirm the commitments that the EU and the UK have made to **international climate change pledges** such as the Paris Agreement. However, while the UK and EU will continue to co-operate on

environmental issues, the declaration states that their ‘decision-making autonomy’ will be preserved.

#### 4. 5. What would happen if the ‘backstop solution’ in the protocol on Ireland-Northern Ireland came into force

In this scenario, the UK as a whole would become subject to **a large number of specific environmental commitments**, designed to support the functioning of the single customs territory that the backstop would introduce. These commitments often mirror the aims set out in the outline political declaration on the framework for the future EU-UK relationship, but take much more specific form in the protocol, given that the protocol will be legally binding if the backstop comes into existence.

Firstly, the protocol provides that the UK will **not lower EU environmental rules**, as they exist at the end of the transition period, in a number of areas including industrial emissions, air quality and biodiversity protection, **to ensure a ‘level playing field’ for competition**. Annex 4 to the protocol on Ireland-Northern Ireland involves a commitment to non-regression, namely to ensuring that the level of environmental protection provided by law, regulations and practices is not reduced below the level provided by the common standards applicable within the EU and the UK at the end of the transition period. This is in relation to a list of areas that cover all the main topics of EU environmental law, including pollution control, nature conservation, climate change and public participation. Annex 4 also **includes a commitment to continue to respect environmental principles**: the precautionary principle, the preventive principle, rectifying environmental damage at source and the ‘polluter pays’ principle. In addition, Annex 5 contains a lengthy list of specific EU legislation which will continue to apply to Northern Ireland under the backstop, including legislation on the environment and energy-efficiency.

The protocol also enables the Joint Committee—which will deal with EU-UK relations during the transition period—to lay down minimum commitments that will apply to the UK after the end of the transition period for **reducing national emissions of certain atmospheric pollutants**, for the maximum sulphur content of marine fuels, and for best available techniques and emission levels for industrial emissions. The UK also commits to introducing a carbon pricing system ‘**of at least the same effectiveness and scope**’ as the EU Emissions Trading System if the backstop comes into effect.

On climate change, the protocol says: “The Union and the United Kingdom shall take the necessary measures to meet their respective commitments to

international agreements to address climate change, including those which implement the United Nations Framework Conventions on Climate Change, such as the Paris Agreement of 2015”.

The UK also agrees to implement a transparent system for monitoring and enforcement related to environmental protection by an independent and adequately resourced body. This body will have powers to conduct own-initiative inquiries into alleged breaches of environmental protection commitments by public bodies and authorities of the UK, and will be able to bring legal action before a competent UK court or tribunal.

## 5. Healthcare

### 5.1. Issues raised by the Committee prior to the publication of the draft Withdrawal Agreement

The Committee’s **January 2017 report set out a number of key issues in relation to healthcare and Brexit:**

- There are concerns about the impact on workforce planning if restrictions on free movement are introduced
- The future of reciprocal healthcare arrangements is unclear and will need to be addressed in negotiations
- The importance of EU agencies such as the European Medicines Agency were emphasised

The Committee’s **follow-up inquiry** into the preparedness of the healthcare sector for Brexit identified the supply and availability of medicines as an issue.

### 5.2. How the draft Withdrawal Agreement responds to these issues

In terms of the ability of EU citizens to work in the UK after Brexit, as set out in section 1.2, the draft Withdrawal Agreement provides that all EU citizens lawfully residing in the UK at the end of the transition period will be able to stay in the UK. In addition, the EU citizens who work or are self-employed in the UK will be guaranteed broadly the same rights as they currently have.

In relation to the continued recognition of medical qualifications, Article 27 of the draft Withdrawal Agreement states that EU citizens with professional

qualifications covered by EU law who live or work in the UK will continue to have their qualifications recognised if they obtained or applied for a recognition decision before the end of the transition period. The professions falling under EU law (Directive 2005/36/EC) include nurses, midwives, doctors (general practitioners and specialists), dental practitioners and pharmacists.

The draft Withdrawal Agreement also provides that EU Regulations on social security coordination will continue to apply to EU citizens living in the UK and UK nationals living in the EU at the end of the transition period. This means that citizens who have moved between the UK and the EU before the end of the transition period will have continued access to healthcare cover. In addition, the draft Withdrawal Agreement provides that where the UK or a Member State is responsible for the healthcare of these citizens, they will be entitled to reciprocal healthcare cover from their competent country.

Furthermore, in terms of reciprocal healthcare, the rights of UK nationals who are not living in the EU at the end of the transition period but have paid social security contributions in a Member State in the past will be protected. The draft Withdrawal Agreement will also protect the rights of individuals who are in a cross-border situation at the end of transition period, and who are entitled to a UK European Health Insurance Card (EHIC), so that they will still be able to benefit from that scheme for as long as they are in that cross-border situation. This applies to UK nationals who are studying in or visiting the EU.

Finally, the draft Withdrawal Agreement will protect the rights of people visiting the UK or the EU for planned medical treatment, where authorisation was requested before the end of the transition period, so they are able to commence or complete their treatment.

In terms of continued involvement in EU bodies and agencies, the Withdrawal Agreement states that participation will be on a case-by-case basis.

With regards to the continued availability of medicines and medical devices, Article 41 of the Withdrawal Agreement states that goods placed on the EU market before the end of the transition period will be able to continue to circulate freely between the UK and EU, with the onus on businesses to prove that the good was placed on the market before the end of the transition period. This means that medicines and medical devices placed on the market before 31 December 2020 will continue to circulate freely between the UK and the EU and they will not require product modifications or relabelling and any compliance activity already undertaken for these goods, such as conformity assessments, will continue to be recognised in both the UK and the EU. However, the draft

Withdrawal agreement requires the UK to transfer files or documents relating to certain ongoing product assessments to the EU, and vice versa. This applies to assessments of medicines and chemicals being carried out by the Medicines and Healthcare products Regulatory Agency (MHRA).

With regards to patent protection for medicines, article 54 of the draft Withdrawal Agreement guarantees continuity of process in application for patent extension and provides that where the owners of a medicines or agrochemical patent have applied to UK authorities for a period of additional protection before the end of the transition period, that application will be considered in line with the current procedure and the level of protection provided will be the same as prescribed under EU law.

### **5. 3. What will happen during the transition period if the draft Withdrawal Agreement is approved**

As set out in section 1.3, there will be freedom of movement throughout the transition period. This means that EU citizens will continue to be able to come to the UK to work in the health and social care sector and enjoy the same rights as they currently have. Similarly, there will be continued recognition of medical qualifications between the UK and the EU.

As set out in section 1.3, there will be no tariffs or other non-tariff barriers to trade between the UK and the EU during the transition period and the UK will continue to be in the single market and customs union. This means that medicines and medical devices will continue to circulate freely between the UK and EU during the transition period.

Citizens' rights to healthcare cover including reciprocal healthcare and planned medical treatment will stay the same during the transition period.

The UK's involvement in EU institutions during the transition period will reflect the fact that it is no longer a Member State. However, the draft Withdrawal Agreement states that continued involvement in EU bodies and agencies will be on a case-by-case basis and the UK and the EU have agreed that representatives or experts from the UK will be able to continue to attend certain EU meetings if invited, although they will not be able to vote.

### **5. 4. What does the political declaration say about the future relationship between the UK and EU**

With regard to the recognition of professional qualifications, the political declaration says only that “appropriate arrangements” are envisaged.

As set out in section 1.4, the political declaration highlights that the UK Government and EU will work towards **comprehensive arrangements creating a free trade area combining deep regulatory and customs co-operation, underpinned by provisions ensuring a level playing field for open and fair competition.** These arrangements will apply to medicines and medical devices.

In terms of future cooperation in the area of health, the political declaration states that the UK and EU should co-operate in the same way that the EU does in its existing arrangements with third countries. This would involve co-operation in international fora on prevention, detection, preparation for and response to established and emerging threats to health security.

The UK and EU will also explore co-operation of UK authorities with the European Medicines Agency.

## **5. 5. What would happen if the ‘backstop solution’ in the protocol on Ireland-Northern Ireland came into force**

As set out in section 1.5, the ‘backstop solution’ will establish a single EU-UK customs territory. This would mean that there would be no tariffs, quotas or checks on rules of origin on medicines and medical devices travelling between the UK and the EU.

With regard to health and social care workforce, the UK would be required not to “regress” from levels of protection relating to labour/social standards under international and EU standards at the end of the transition period.

With regard to reciprocal healthcare, Article 5 of the protocol guarantees that the UK can continue to make arrangements with Ireland relating to the Common Travel Area. This means that the UK and Ireland will be able to continue to guarantee the reciprocal rights of British and Irish citizens to access health services in the other state.

Article 15 of the protocol states that full or partial access by the UK to EU networks, information systems or databases may be agreed, if such access is considered ‘strictly necessary’ to enable the UK to comply with its obligations under the protocol.

## 6. Equality and Human Rights

### 6.1. Issues raised by the Committee prior to the publication of the draft Withdrawal Agreement

The Committee's report [The implications for Wales of leaving the European Union](#) highlighted that the Welsh Government and Assembly must be alert to any weakening of standards on equalities legislation.

The Committee's recent **joint report** with the Equalities, Local Government and Communities Committee, published in October 2018, raised further concerns that relate to the draft Withdrawal Agreement:

- **The EU Charter of Fundamental Rights:** how will Charter Rights continue to apply in Wales.
- **Non-regression of existing equality and human rights obligations:** whether existing rights and obligations would be eroded or removed as a result of Brexit.

### 6.2. How the draft Withdrawal Agreement responds to these issues

Many of the issues described in section 6.1 are covered in the forthcoming sections on the transition period, the future relationship, and the 'backstop solution' set out in the protocol on Ireland-Northern Ireland. The main equality and human rights aspect potentially extending beyond the end of the transition period relates to Northern Ireland.

Article 4 of the protocol on Ireland-Northern Ireland states that **the UK commits to ensuring no diminution of the rights protected in the Rights, Safeguards and Equality of Opportunity chapter of [Belfast Agreement 1998 \(the Good Friday Agreement\)](#)**. The UK Government [has stated in its explainer](#) that it will implement the commitment through oversight from the Northern Ireland Human Rights Commission (NIHRC), the Equality Commission for Northern Ireland (ECNI), and on issues covering the whole of the island of Ireland the Joint Committee for transition and application of the draft agreement will also have oversight. The UK Government will confer new powers on the NIHRC and ECNI to monitor, enforce, advise and report on the commitment.

### 6. 3. What will happen during the transition period if the draft Withdrawal Agreement is approved

During the transition period, the UK will need to continue to interpret EU law in a manner consistent with the Charter of Fundamental Rights. Chapter 3 of this covers equality. However, there are two exceptions in relation to this. Article 127 of the draft Withdrawal Agreement highlights that articles 39 and 40 of the Charter of Fundamental Rights will not be applicable to the UK either during the transition period, or after this. Article 39 relates to the right to vote and stand as a candidate in elections to the EU Parliament, and clearly the UK will no longer be electing MEPs after withdrawal. Article 40 enshrines the rights of EU citizens to stand and vote in municipal (local) elections in the EU Member State in which they live, on the same basis as nationals of that State. The UK will be free to continue to allow EU nationals to do so after withdrawal but will no longer be required to do so.

Additionally, four European Council Directives on equality will continue to apply to the UK during the transition period. These protect against discrimination on the same grounds as the Equality Act 2010: racial or ethnic origin, gender, pregnancy and maternity, marriage/civil partnership status, sexual orientation, gender reassignment, disability, age and religion or belief.

As stated, the content of the Equality Act 2010 mirrors and incorporates the provisions of these directives (although as the Equality and Human Rights Commission recognises some significant anti-discrimination laws on race, gender and disability were passed by the UK independently of EU law; these have since been incorporated into the Equality Act 2010). This is UK law, so will remain in place after the end of the end of the transition period unless it is repealed or amended (and much of the content existed in UK law before being passed into EU law, while other aspects are derived from EU law). However, during the transition period, any adverse effect on that law would need to be measured against the European Convention on Human Rights. If the UK remains a signatory to the Convention after the transition period, this would also continue to be the case, although it is not clear whether this will happen.

### 6. 4. What does the political declaration say about the future relationship between the UK and EU

The outline political agreement states that an essential prerequisite to any future relationship will be that it is underpinned by long-standing commitments to the fundamental rights of individuals, **including continued adherence to the**

European Convention on Human Rights and its system of enforcement, i.e. respecting judgements of the European Court of Human Rights.

As set out in section 1.4, the outline political declaration highlights the need for a level playing field for open and fair competition. In relation to equality and human rights, the employment and social provisions mentioned in the outline political declaration will be of particular importance. The outline political declaration also notes that level playing field arrangements will build on those set out in the ‘backstop solution’ in the protocol on Ireland-Northern Ireland which are provided below.

## 6. 5. What would happen if the ‘backstop solution’ in the protocol on Ireland-Northern Ireland came into force

As stated in section 1.5, Annex 4 to the protocol commits the UK to a number of regulatory measures to create a level playing field if the ‘backstop’ is triggered. For labour and social standards, the UK is required not to “regress” from levels of protection under international and EU standards at the end of the transition period. The UK is required to maintain an effective system of labour inspections, ensure that administrative and judicial proceedings are available to permit effective action to be taken against breaches of the law, and to provide for effective remedies and sanctions which are effective, proportionate and have a deterrent effect. Some commentators, such as the [Institute for Public Policy Research](#) and [Thompsons Solicitors](#), have expressed concerns about individuals’ ability to enforce these non-regression obligations post-Brexit.

## 7. Institutional arrangements

### 7. 1. Issues raised by the Committee prior to the publication of the draft Withdrawal Agreement

In its [report](#) on Wales’ future relationship with Europe, the Committee recommended that the Welsh Government “explores the opportunities for both governmental and non-governmental organisations in Wales to effectively engage with the EU and its institutions after Brexit.”

The second part of the Committee’s work on Wales’ Future Relationship with Europe has included some exploration of how non-EU countries and regions engage with the EU.

In addition to its work on Wales' Future relationship with Europe, the Committee has been considering its relationship with the European Union's institutions during the transition period as part of its inquiry into [EU Law in Wales: What happens during the Brexit transition?](#)

The Chair of the Committee has also opened a dialogue with the European Parliament and the Committee of Regions on the possible shape of future structures to facilitate inter-institutional relations.

## 7. 2. How the draft Withdrawal Agreement responds to these issues

The draft Withdrawal Agreement makes provision about institutional arrangements to manage, implement and enforce the agreement, including dispute settlement mechanisms. Article 164 provides that a **Joint Committee**, including representatives of the EU and the UK will be established and that it will be **co-chaired by the EU and the UK**. It states that it will meet at the request of the parties but will meet at least once a year in any event. Six specialised Committees will also be established to assist in implementing and applying the Agreement.

In the event of a **dispute relating to the interpretation of the Withdrawal Agreement**, an initial political consultation would take place in a **Joint Committee**. If no solution is found between the UK and the EU, either party can request the establishment of an arbitration panel for a binding assessment (although either party can ask the panel to review its assessment). If the dispute involves a question of EU law it must be referred to the CJEU for a binding ruling, and other appropriate questions can also be referred to the CJEU at the request of either party. If the UK or the EU does not comply with the panel's decision, the panel can impose a lump sum or penalty payment to be paid to the other party, and, if non-compliance continues, the aggrieved part can suspend the application of relevant parts of the Withdrawal Agreement, or other UK-EU agreements, so long as this is proportionate to the breach originally complained about, and does not affect the citizens' rights terms of the Agreement.

The Joint Committee would also be responsible for deciding whether there should be an extension to the transition period and if so, whether this is for up to one or two years). As outlined above, the transition period can only be extended once and the request must be made before 1 July 2020.

## 7. 3. What will happen during the transition period if the draft Withdrawal Agreement is approved

During the transition period, the UK will no longer be part of EU-decision making. This means that **the UK will not be represented in EU institutions, agencies and bodies after exit day on 29 March 2019**. As a result, Wales' representation on the Committee of the Regions, the European Economic and Social Committee and the European Parliament will come to an end on. Likewise, the UK will not be able to act as a "rapporteur" for European authorities or for Member States during the transition period.

However, Article 128 of the draft Withdrawal Agreement states that during the transition period, representatives or experts of the UK may be invited to attend certain EU meetings, and meetings of EU entities where representatives or experts of Member States take part, where the UK's presence is necessary and in the interests of the EU, or where discussions relate to individual "acts" (legally-binding decisions) addressed to the UK or a UK citizen or company (e.g. a decision that a UK company has breached EU competition law during the transition period). However, the UK representatives will not have voting rights at such meetings.

The draft Withdrawal Agreement also states in Article 129 that the UK will not be able to participate in the work of any bodies set up by the international agreements concluded by the EU, although the EU may consult it.

#### **7. 4. What does the political declaration say about the future relationship between the UK and EU**

While noting that the agreements relating to the future relationship still need to be formally negotiated between the UK and EU, the political declaration highlights that both parties will work towards 'an overarching institutional framework covering chapters and linked agreements relating to specific areas of cooperation.' It notes that this could take the form of an **Association Agreement** and that it will be **possible to review the future relationship**.

To ensure the functioning of the future relationship, arrangements will be made for its **management, supervision, implementation and development over time** as well as for the **resolution of disputes and enforcement**. In addition the UK and EU will seek to ensure 'regular dialogue' between the UK and EU at summit, ministerial, technical, parliamentary and civil society level. With regard to summit and ministerial level dialogue, the draft political declaration states that this should, amongst other things, discuss **opportunities for cooperation** in areas of mutual interest, including on **regional issues**. The UK and EU also support a **dialogue between the European Parliament and the UK Parliament**. According to the draft political declaration this should enable the sharing of views and expertise on issues relating to the future relationship.

As part of the future relationship, the UK and EU have agreed that a **Joint Committee** should be established which composes of EU and UK representatives. The Joint Committee would be responsible for:

- managing and supervising the implementation and operation of the future relationship;
- facilitating the resolution of disputes; and
- making recommendations relating to the evolution of the future relationship.

As noted in the political declaration, the arrangements for dispute settlement and enforcement would be based on those set out in the draft Withdrawal Agreement. This means that an arbitration panel mechanism would be adopted in cases where disputes cannot be settled by the Joint Committee and any disputes involving the interpretation of EU law would be referred to the CJEU.

## 7. 5. What would happen if the ‘backstop solution’ in the protocol on Ireland-Northern Ireland came into force

Article 165 of the draft Withdrawal Agreement provides for the establishment of a **Committee on issues related to the transition of the Protocol on Ireland/Northern Ireland**. According to Article 16 of the protocol, this committee would facilitate the transition and application of the backstop solution if there is not an agreement on the future relationship by 31 December 2020 or if there’s no extension to the transition period. The committee would comprise representatives of the EU and the UK.

The protocol (Article 17) also provides for the establishment of a joint consultative working group to serve ‘as a forum for the exchange of information and mutual consultation.’ The working group would include representatives of the UK and the EU but would not have power to make any binding decisions.

The dispute resolution mechanism agreed as part of the Withdrawal Agreement will continue to apply in the event of the ‘backstop’ solution coming into force.

# Annex B: Paper on the implications for Wales arising from the Withdrawal Agreement, by Dr Tobias Lock

## Assessment and summary of the implications for Wales of the draft Withdrawal Agreement

Briefing paper prepared for the External Affairs and Additional Legislation Committee of the National Assembly for Wales

Dr Tobias Lock, Edinburgh Law School

23 November 2018

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## 1. Introduction

This paper provides an initial impartial assessment and summary of the implications for Wales of the draft Article 50 Withdrawal Agreement (as published on 14 November 2018), primarily in legal terms. Its purpose is to inform the EAAL Committee's response to the draft Withdrawal Agreement and to inform any Assembly debate on the Withdrawal Agreement.

The paper provides an overview over the next key steps in the Brexit process and the implications of the entry into force of the draft Withdrawal Agreement in the UK and in particular in Wales. A focus in that regard is on the domestic implementation and how this might affect the devolution settlement.

At the outset, it is imperative to recall that the Withdrawal Agreement primarily deals with the terms of the UK's withdrawal from the EU. It is not intended to determine the future relationship between the UK and the EU. That relationship is subject to further negotiations, which will not start until the UK has formally left.

The main features of the Withdrawal Agreement to note relate to the transition period – during which the UK will be subject to EU law like an EU Member State – and the Protocol on Ireland/Northern Ireland, which contains the so-called backstop. That backstop would – if it entered into force – see the EU and the UK belong to a single customs territory and it would see the UK commit to compliance with a number of EU rules to guarantee a 'level playing field'. As part of the UK's customs territory, Northern Ireland would be in the single customs territory, but it would be subject to greater regulatory alignment with EU rules than the rest of the UK.

The exact contours of the future relationship are still largely unclear, however; the draft political declaration only sketches them out. It seems clear that both sides want to achieve an ambitious relationship on trade and on security, but that they do not wish for the UK to remain part of the EU single market. This means that in trade terms, the future relationship is likely to look similar to that with Canada or Ukraine, rather than to that with Norway. The political declaration also envisages a security partnership covering both internal security – judicial cooperation in particular – and external security.

This report is based on the material published on 22 November 2018. Any changes to the Withdrawal Agreement or the political declaration that occurred after this date could not be considered.

Edinburgh, 23 November 2018

## 2. Timeline

The following timeline sets out the next steps in the Brexit process. It is premised on the assumption that the period for negotiating the UK's withdrawal from the EU is not extended and will therefore end on 29 March 2019.<sup>1</sup> It further assumes that the Withdrawal Agreement (WA) is ratified and that it enters into force as envisaged on 29 March 2019, 11pm UK time.

<p><b>Ratification process</b> - before 29 March 2019 -</p>	<p><b>EU-side</b></p> <ul style="list-style-type: none"> <li>- Qualified majority vote in the Council.</li> <li>- Approval by the EU Parliament.</li> </ul> <p><b>UK-side</b></p> <ul style="list-style-type: none"> <li>- House of Commons resolution approving WA and political declaration on the framework for a future relationship.</li> <li>- House of Lords to 'take note'.</li> <li>- EU (Withdrawal Agreement) Bill to be passed.</li> <li>- Compliance with procedure in Constitutional Reform and Governance Act 2010.<sup>2</sup></li> </ul>
<p><b>Transition period</b> - from 11pm on 29 March 2019 until 31 December 2020 (unless extended) -</p>	<p><b>Effects</b></p> <ul style="list-style-type: none"> <li>- A standstill transition period: this means that – with very few exceptions – EU law continues to apply in the UK as before, but the UK will no longer be represented in EU institutions or take part in EU decision-making processes.</li> <li>- Most substantive provisions of the WA (e.g. on citizens' rights, intellectual property etc) remain on hold until the end of the transition period.</li> </ul> <p><b>Negotiations on a future relationship take place</b></p> <p><b>Future relationship treaty to be ratified</b></p> <p>UK-side:</p> <ul style="list-style-type: none"> <li>- according to Constitutional Reform and Governance Act 2010.</li> <li>- probably: implementing legislation.</li> </ul> <p>EU-side:</p> <ul style="list-style-type: none"> <li>- probably unanimity in the Council and approval by the EU Parliament.</li> <li>- probably: ratification by 27 Member States according to their own constitutional requirements.</li> </ul>

<sup>1</sup> Midnight Brussels time; 11pm UK time; an extension would be possible according to Article 50 (3) TEU if both the UK and the EU Council (by unanimity) agree.

<sup>2</sup> This is mentioned by the UK Government in its White Paper 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union', Cm 9674, paras 15-153, and will result in a period of 21 sitting days during which either House can pass a resolution that the treaty should not be ratified (section 20 of the Constitutional Reform and Governance Act 2010).

<p><b>Future relationship and/or backstop</b> - (probably) from 1 January 2021 -</p>	<p><b>Substantive provisions of the WA become fully operational.</b></p> <p><b>Future relationship treaty</b></p> <ul style="list-style-type: none"> <li>– If it supersedes the backstop, EU-UK relations governed by it and WA.</li> <li>– If it does not entirely supersede backstop, backstop will (partly) operate.</li> </ul> <p><b>Backstop (may not be needed)</b></p> <ul style="list-style-type: none"> <li>– EU and UK would form one single customs territory unless and until a subsequent agreement supersedes it <i>or</i> if Joint Committee decides that the backstop is no longer necessary.</li> <li>– Legislation needed at UK-level (and possibly in Wales) to give effect to the backstop internally.</li> <li>– Possibly continued negotiations between EU and UK to come to an agreement that replaces backstop.</li> </ul>
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### 3. Key features of the Withdrawal Agreement

The WA is divided into the main agreement, three protocols (on Ireland/Northern Ireland, including the UK-wide ‘backstop’; UK Sovereign Base Areas in Cyprus; and Gibraltar), as well as nine Annexes. The main agreement is itself subdivided into six parts: common provisions; citizens’ rights; separation provisions; transition; financial provisions; and institutional and final provisions.

#### 3.1 Separation and financial provisions

The separation provisions and – to a large extent – the financial provisions deal with the legacy of UK membership. Their main concern is with ongoing matters (goods on the market, ongoing administrative or judicial procedures, etc) at the time the UK leaves the EU. The financial provisions deal with the UK’s liabilities – both the UK’s financial contribution during the transition period and outstanding commitments of the UK, in particular pensions and other liabilities.

From a Welsh perspective a provision to note in this regard concerns the continued protection of geographical indications, designations of origin, and traditional specialties within the UK and the EU. As far as these were protected on 29 March 2019 they will continue to be protected, unless they are superseded by the future relationship agreement.<sup>3</sup> This means that products such as ‘Welsh lamb’ or ‘Welsh Caerphilly’ continue

<sup>3</sup> See Article 54 (2) WA.

to enjoy protection in the EU;<sup>4</sup> and vice-versa products such as ‘Parma ham’ continue to be protected in the UK.

### 3.2 Citizens’ rights

The preservation of the rights of EU citizens living in the UK and of UK citizens living in the EU was a priority in the negotiations for both the EU and the UK. There had been an early consensus on most of the provisions now found in the WA,<sup>5</sup> the main features of which are briefly outlined in what follows.<sup>6</sup>

The citizens’ rights part applies to all EU citizens who had exercised their right to reside by the end of the transition period and who continue to reside in the UK thereafter.<sup>7</sup> Broadly speaking, the WA guarantees their rights under the EU Citizenship Directive 2004/38 in perpetuity.

After five years of continued residence, EU citizens as well as their family members acquire the right to permanent residence in the UK. They will lose this right only if they are absent from the UK for a continuous period of more than five years.<sup>8</sup>

EU citizens settling in the UK in exercise of Treaty rights during the transition period can still qualify for the full panoply of rights contained in the WA. Once they have completed five years of residence – even if parts of that period are after Brexit – they acquire permanent residence. Also covered are family members (mainly spouses and children).<sup>9</sup> The rights will also apply to citizens of Norway, Iceland, Liechtenstein, and Switzerland provided that these countries conclude corresponding agreements with the UK and the EU.<sup>10</sup>

By contrast to the situation before Brexit, EU citizens will be required to register under the proposed EU Settlement Scheme.<sup>11</sup>

The rights guaranteed in the citizenship part of the WA are enjoyed for the entirety of the citizens’ lifetime.<sup>12</sup> Given that some of the persons entitled under this part of the WA are

<sup>4</sup> To the author’s best knowledge, the following Welsh geographic indications are currently protected: Welsh Caerphilly; Welsh cider; Welsh perry; Welsh pork; Welsh beef; Welsh lamb; Welsh wine; Welsh laverbread; Anglesey Salt; Carmarthen Ham; Pembrokeshire earlies; Conwy Mussels.

<sup>5</sup> See the draft withdrawal agreement published in March 2018:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691366/20180319\\_DRAFT\\_WITHDRAWAL\\_AGREEMENT.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf).

<sup>6</sup> As the particular focus of this briefing is on Wales and the people living in Wales, reference is made to EU citizens; it should be reiterated that the same rights are enjoyed by UK citizens currently living in the EU-27; the only remaining open question for UK citizens in the EU-27 is whether these will enjoy a right of onward movement, i.e. whether a UK citizen living in of EU-27 state may after transition move to another EU-27 state. This question will only be answered by the treaty on the future relationship.

<sup>7</sup> Article 10 WA; also covered are frontier workers, i.e. persons commuting to and from the UK for work.

<sup>8</sup> Article 15 WA.

<sup>9</sup> See Article 2 Citizenship Directive 2004/38/EC.

<sup>10</sup> Article 33 WA.

<sup>11</sup> <https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>.

<sup>12</sup> Article 39 WA.

not yet born, this means that the WA will have effects in the law of the UK for many decades to come.

The substantive content of EU citizens' rights is almost identical to their rights enjoyed currently under EU law. This includes first and foremost the overarching right to non-discrimination on the basis of nationality. This means for instance that tuition fees at Welsh universities for EU nationals living in Wales qualifying under the WA must not be higher than for Welsh students.<sup>13</sup>

It also includes the rights of workers as guaranteed by the EU Treaties; the rights of self-employed persons; mutual recognition of professional qualifications (e.g. medical qualifications); and a continued application of EU rules on the coordination of social security systems.

In order to monitor the correct implementation of the citizens' rights part of the WA, the UK will create a new independent authority. This authority will have powers equivalent to those of the European Commission, which will monitor the correct implementation of the WA in the EU. This will include powers to bring an action before a UK court or tribunal where the Home Office (or other UK body) fails to comply with the citizens' rights part of the WA.

### 3.3 Legal effects of the Withdrawal Agreement and role of the ECJ

#### 3.3.1 Direct effect and primacy of the WA and EU law

The WA defines its legal effects in the UK legal order in s. 4 WA. It says there that the provisions of the WA 'shall produce in respect of an in the United Kingdom the same legal effects as those which they produce within the Union and its Member States'.

This means that the provisions of the WA – so far as they are clear, precise and unconditional<sup>14</sup> – must be given direct effect in the UK. This means that even if the UK has failed to fully implement certain provisions in the WA – e.g. because the implementing legislation is deficient – individuals can invoke the WA directly before UK courts. In practice this is most likely to be relevant to citizens' rights and parts of the Protocol on Ireland/Northern Ireland.

In addition, the WA (and the provisions of EU law that it makes applicable post-Brexit) will benefit from the doctrine of primacy (or supremacy) of EU law. This means that if there is a conflict between domestic law in the UK (e.g. an Act of the Westminster Parliament) and an EU regulation which the WA says is applicable, EU law prevails. Just like direct effect, primacy is an established concept of EU law which will continue to have effect in the UK after Brexit as far as the WA is concerned.

Implementing legislation will need to reflect these effects. Hence, the EU (Withdrawal Agreement) Bill will need to contain a provision providing for these effects, which could be

<sup>13</sup> Article 12 WA.

<sup>14</sup> These are the conditions for direct effect in EU law, see e.g. Case 41/74 *van Duyn* ECLI:EU:C:1974:133.

modelled on s. 2 (1) of the European Communities Act 1972. That provision is the current domestic legal basis for EU law to become operational in the UK.<sup>15</sup>

From a Welsh perspective, the question arises whether the primacy of EU law will continue to be given effect through the Government of Wales Act. At present, all devolution statutes give robust effect to the primacy of EU law. In the case of Wales, s. 108A (2) (e) of the Government of Wales Act 2006 decrees that a provision is outside the Assembly's legislative competence if 'it is incompatible with [...] EU law'. In a similar vein, s. 80 (8) of the same Act restricts the powers of Welsh Ministers to act contrary to EU law.

It will be the legislative choice of the Westminster Government and Parliament whether to amend the Government of Wales Act in accordance with the restrictions placed on the Assembly and on Welsh Ministers by the WA. If such an amendment to the Government of Wales Act is proposed, it would in all likelihood trigger a legislative consent motion.

### 3.3.2 The role of the Court of Justice in the UK legal order

The European Court of Justice (ECJ) will continue to play a role in the law of the UK after Brexit.

First, its case law up until the end of the transition period will remain binding as far as the interpretation of EU law referred to by the WA is concerned. By contrast, the UK will only need to have 'due regard' to its post-transition case law.<sup>16</sup> For instance, in a case brought by an EU citizen living in the UK before the end of the transition period, where she wishes for her spouse to be allowed to live with her, the ECJ's case law on the definition of 'spouse' would be binding on a UK court before which this case would be heard.<sup>17</sup>

Apart from the continued jurisdiction of the ECJ during transition and a more limited jurisdiction should the backstop become operational (see below), the ECJ will have jurisdiction over cases pending before it when the transition period ends (Article 86 WA). Furthermore, the European Commission will remain competent to bring new enforcement actions against the UK for four years after the end of transition for violations of EU law that occurred before then (Article 87 WA). Additionally, there will be some residual jurisdiction concerning the financial settlement (Article 160 WA).

As far as the citizens' rights part of the WA is concerned, UK courts will continue to be in a position to refer cases to the ECJ over the interpretation of that part of the agreement for eight years following the end of transition (Article 158 WA). By contrast to the situation now and during transition, they will not be obliged to do so.

<sup>15</sup> S. 2 (1) European Communities Act 1972 reads: 'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies'.

<sup>16</sup> Sections 4 (4) and (5) WA.

<sup>17</sup> See e.g. Case C-673/16 *Coman* ECLI:EU:C:2018:385, according to which a same-sex spouse is covered by this.

### 3.4 Governance of the Withdrawal Agreement and dispute settlement

The WA accords a central governance role to the Joint Committee. The Joint Committee is comprised of representatives from the EU and the UK and decides unanimously. This means in practice that the EU and the UK can each veto Joint Committee decisions.<sup>18</sup>

The Joint Committee – assisted by a number of specialised committees<sup>19</sup> – is tasked with supervising and facilitating the implementation and application of the WA. The WA gives it decision-making powers in a number of areas. Importantly, its decisions are binding on the parties to the WA and have the same effects (i.e. direct effect and primacy, see above) as the WA itself.<sup>20</sup>

The Joint Committee is also the central body for the settlement of disputes between the UK and the EU.<sup>21</sup> Only where the Joint Committee cannot resolve a dispute, will this dispute go to arbitration. The arbitration panel will be independent and established under the auspices of the Permanent Court of Arbitration in the Hague. It should be noted that this had not been part of the earlier (Commission) draft of the WA, which had envisaged third party dispute settlement before the ECJ alone.

However, in order to preserve the ECJ's exclusive jurisdiction to interpret the meaning of Union law, the arbitration panel must refer any question on EU law to the ECJ for a binding ruling.<sup>22</sup> This is very similar to the preliminary ruling procedure which allows national courts of EU Member States to ask the ECJ for an interpretation of EU law so far as relevant for the case before them.<sup>23</sup>

In practical terms, this mechanism may never be used. There is a likelihood that the UK and the EU will not disagree fundamentally on the implementation and application of the WA and that any dispute may be resolved amicably in the Joint Committee. For instance, the EEA Agreement contains a similar possibility to refer a dispute between the parties to the ECJ, which in over twenty-five years has never been used.<sup>24</sup>

### 3.5 Ratification process

The ratification process in the European Union is laid down in Article 50 TEU. The WA must be approved by a qualified majority of the EU-27 in the Council and by the European Parliament.

<sup>18</sup> The Joint Committee's rules of procedure are found in Annex VIII to the WA.

<sup>19</sup> Article 165 WA: on citizens' rights; on other separation provisions; on Ireland/Northern Ireland; on the Sovereign Base Areas in Cyprus; on Gibraltar; and on the financial provisions.

<sup>20</sup> Article 166 (2) WA.

<sup>21</sup> Article 169 WA.

<sup>22</sup> Article 174 WA.

<sup>23</sup> Article 267 TFEU.

<sup>24</sup> Article 112 (3) EEA Agreement.

The ratification process in the UK is slightly more complex. Under section 13 of the European Union (Withdrawal) Act 2018, the UK Government may only ratify the WA if the WA and the political declaration on the framework for the future relationship have been approved by a resolution of the House of Commons; if a motion to take note has been tabled in the House of Lords; and if an Act of Parliament implementing the WA has been passed.

According to a HM Government white paper,<sup>25</sup> the EU (Withdrawal Agreement) Bill will be introduced after Parliament has approved the WA and the political declaration in a first step.

Finally, the WA will need to be laid before Parliament under s. 20 of the Constitutional Reform and Governance Act 2010 for 21 sitting days. Unless one of the Houses objects during that 21-day period, the Government is free to ratify the WA.

## 4. Transition period

Under the WA, the UK will cease to be an EU Member State on 30 March 2019.<sup>26</sup> At that moment, the WA envisages the commencement of a transition period that will last until 31 December 2020.<sup>27</sup>

### 4.1 Effects of transition

The transition period is best conceived of as a standstill period, during which the UK is no longer a Member State of the EU and thus no longer takes part in its institutions and decision-making processes,<sup>28</sup> but EU law continues to apply in the UK and to the UK as if the UK were still a member.<sup>29</sup> Many of the substantive provisions in the WA – especially those on citizens' rights – will therefore not enter into force until the transition period has ended.<sup>30</sup>

The purpose of the transition period is simple: as the treaty on a future relationship has not yet been negotiated, it will allow the EU and the UK additional time for negotiation and ratification of that treaty. Transition therefore prevents the EU-UK relationship from falling off the metaphorical 'cliff-edge' where it would be subject to the rules of general international law for the time during which a new relationship would be negotiated.

<sup>25</sup> HM Government, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*, Cm9674.

<sup>26</sup> Or 29 March 2019, 11pm UK time.

<sup>27</sup> Article 126 WA; note that the UK Government prefers the term 'implementation period'. As the WA uses the term 'transition period' (except in Article 126 where it uses both in the alternative), this report will also refer to the period as the 'transition period' without implying a political preference either way.

<sup>28</sup> See Articles 128 and 7 WA.

<sup>29</sup> See Article 127 WA; there are some minor exceptions to this, which relate mainly to the European Parliament election; the UK's opt-in in the Area of Freedom, Security and Justice; and the so-called enhanced cooperation.

<sup>30</sup> See Article 185 WA.

This means that during transition, the UK will be part of the customs union and the single market (including all four freedoms). It will take part in EU policies, especially the Common Agricultural Policy and Fisheries Policy. The UK will also remain under an obligation to give effect to new EU legislation passed during the transition period. EU law will retain the same effects it has now, that is direct effect and supremacy.<sup>31</sup> This means that UK courts will remain competent to apply EU law and give full effect to it, which in rare cases involves their disapplying a provision in an Act of Parliament if it clashes with EU law. Further, UK courts will remain competent to ask the ECJ for a preliminary ruling on matters of interpretation and validity of EU law; and the EU Commission will retain its powers of enforcement.

During the transition period, the UK will continue to pay into the EU budget as if it were still a Member State.<sup>32</sup> At the same time, all EU projects and programmes will continue to be financed as if the UK were still a Member State.

#### 4.2 Extension of the transition period

As the 21-month transition period may turn out to be too short for the negotiation and ratification of a treaty on the future relationship, Article 132 WA offers a one-off possibility to extend it. The draft agreement available at the time of writing does not specify a concrete end-date yet but refers to '31 December 20XX'. According to press reports, the final WA will stipulate that the transition period can be extended 'for up to one or two years', i.e. until 31 December 2022 at the very latest.<sup>33</sup> It should be noted that if the period were any longer, there would be serious doubts as to whether such a long transition would be compatible with EU law, in particular the use of Article 50 TEU as the legal basis for transition.

Procedurally, the draft foresees that a request to extend the transition period must be made before 1 July 2020. The decision would be taken by the Joint Committee. This would mean that the decision would require the approval of both the UK and the EU. In other words, neither side could be forced into an extension.

If the transition period were extended, the UK would have to pay contributions to the EU budget for the duration of the extended period. The precise amount would be determined by the Joint Committee. In practice, this would mean that the EU and the UK would negotiate the precise amount given that the Joint Committee decides unanimously.

It should be noted that during the extended period (i.e. from 1 January 2021 onwards), the UK would not participate in the EU budget. This means in particular that it would not form part of the Common Agricultural Policy but would instead have to introduce its own policy.<sup>34</sup> This would have implications for Wales as agriculture is a devolved competence. It is therefore almost certain that from 1 January 2021 the UK will need to organise its own

<sup>31</sup> Briefly explained above.

<sup>32</sup> Article 135 WA.

<sup>33</sup> The Independent, 22 November 2018, <https://www.independent.co.uk/news/uk/politics/brexit-transition-period-extended-theresa-may-deal-eu-withdrawal-agreement-a8646846.html>.

<sup>34</sup> There would, however, be an agreed cap on the amount the UK can spend on the CAP annually, see Article 132 (2) (c) WA.

agricultural policy, which the Agriculture Bill that is currently before the UK Parliament envisages. Welsh Ministers will be given specific powers under Schedule 3 of the Agriculture Bill.

This also means that the UK's participation in EU programmes (Erasmus, Horizon and the like) is not a given. It would be open for the UK to participate in these programmes as a third country should it choose to do so.

#### 4.3 Domestic implementation

The EU (Withdrawal Agreement) Bill will need to make provision for the transition period, so that EU law will have the desired effects in the UK. It will thus need to contain provisions similar to those in the European Communities Act 1972,<sup>35</sup> which will by then have been repealed by the European Union (Withdrawal) Act 2018. In addition, the EU (Withdrawal Agreement) Bill will need to contain a provision empowering ministers to implement EU directives. A current set of provisions to that effect is found in s. 2 (2) and (4) of the European Communities Act 1972.

According to the UK Government's white paper 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union', the European Union (Withdrawal Agreement) Bill will stipulate that – while the European Communities Act 1972 is repealed – the effects of section 2<sup>36</sup> will be saved.<sup>37</sup>

During the transition period the UK must ensure that it remains compliant with EU law. This means that the EU (Withdrawal) Act 2018 will be amended so that the conversion of EU law to domestic 'retained EU law' will not happen until the end of the transition period.<sup>38</sup>

The background is that the European Union (Withdrawal) Act 2018 *inter alia* has the purpose of retaining (almost) all EU law currently applicable in the UK. Its section 8 allows Ministers to 'make such provision as the Minister considers appropriate to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law.' These correcting powers conferred on ministers by section 8 of the European Union (Withdrawal) Act 2018 may need to be modified. This is because they are currently due to expire two years after 29 March 2019, which may well be before an extended transition period ends. Hence the two-year sunset period will be changed to commence at the end of the transition period.<sup>39</sup> The same applies to the equivalent powers for Welsh Ministers.

<sup>35</sup> See fn. 15.

<sup>36</sup> With the exception of section 2 (3).

<sup>37</sup> HM Government, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*, Cm9674, paras 60-62.

<sup>38</sup> *Ibid*, para 69; there is a certain confusion apparent from the white paper, however: on the one side, the white paper seems to assume that retained EU law will not be created as a category of law until the end of transition; at the same time it seems to assume that the correcting powers for Ministers will already be available during transition even though the current version of the EU (Withdrawal) Act only provides for those correcting powers as far as 'retained EU law' is concerned.

<sup>39</sup> *Ibid*, para 74.

As far as Wales is concerned, it is likely that the Government of Wales Act 2006 will be amended to reflect the requirements of the transition period. In particular, s. 108A (2) (e) and s. 80 (8)<sup>40</sup> will probably be amended to make it unlawful for the Assembly and for the Government to act contrary to EU law as it applies during transition. The changes will be necessary as the current definition of EU law under the Government of Wales Act 2006 contained in section 157 (1) refers to the EU Treaties, to which the UK will no longer be a party. Instead, the UK will be bound by EU law in a slightly modified manner via the Withdrawal Agreement. Hence this change will need to be reflected in the Government of Wales Act 2006, be it through amendments of sections 108A and 80 or through an amended definition in section 157 (1).

Furthermore, the UK Government's white paper notes that domestic law provisions referring to EU institutions and EU law may need to be amended to reflect the fact that the UK is no longer in the EU. It goes on to say that the Government would 'discuss with the devolved administrations how to make sure that EU-related legislation made by the devolved institutions likewise continues to function for the duration of the implementation period'.<sup>41</sup>

Furthermore, Welsh Ministers will in all likelihood retain their powers to implement EU directives during transition under s. 58B and 59 of the Government of Wales Act 2006.

## 5. Protocol on Ireland/Northern Ireland: the backstop

### 5.1 Background

The avoidance of a hard border between Ireland and Northern Ireland had been a key EU negotiating objective right from the start of the Brexit process.<sup>42</sup> The UK committed to the same aim and reaffirmed its ambition to avoid 'a hard border, including any physical infrastructure or related checks and controls' in a UK-EU Joint Report of 8 December 2017.<sup>43</sup> This commitment was made in recognition of the achievements of the peace process in Northern Ireland and in order to protect the 1998 Good Friday (Belfast) Agreement.

The Joint Report further contained a commitment to a backstop to keep the Ireland-Northern Ireland border open. While both sides expressed a desire to resolve the border issue through the overall EU-UK relationship, the UK nonetheless agreed that 'in the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement'.<sup>44</sup>

<sup>40</sup> Briefly reflected on above.

<sup>41</sup> HM Government, fn. 37, para 67.

<sup>42</sup> European Council guidelines for the Brexit negotiations of 29 April 2017 EUCO XT 20004/17, para 11.

<sup>43</sup> Joint Report of 8 December 2017 TF50 (2017) 19.

<sup>44</sup> *Ibid*, para 49.

At the same time, the Joint Report noted the UK's desire to 'ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market'.<sup>45</sup> In this connection it should be highlighted that under UK domestic law it would be 'unlawful for Her Majesty's Government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain'.<sup>46</sup>

Border checks<sup>47</sup> – be they spot checks or conducted at permanent border posts – would become necessary if Ireland and Northern Ireland were in different customs territories.<sup>48</sup> In addition, if there were regulatory differences relating to goods crossing the border – such as product safety standards or food standards – regulatory checks on goods crossing the border would also become necessary.

## 5.2 Overview of the backstop in the Protocol on Ireland/Northern Ireland

The Protocol on Ireland/Northern Ireland ('the Protocol') with its ten annexes lays down the parameters of the backstop. Its key features – some of which are discussed in more detail below – are as follows.

First, the preamble to the Protocol expresses the desire of both parties that the Protocol should be replaced by the future relationship agreement and that it is not meant to be a permanent solution.<sup>49</sup> However, if there is no replacement in force when the transition period expires (i.e. by 1 January 2021), the Protocol will become operational. The Protocol does contain an exit mechanism should a solution be found after the backstop has begun to operate.

Second, instead of agreeing to Northern Ireland to remain in the EU's customs union – which would not have been possible without amending the Taxation (Cross-border Trade) Act 2018 – the UK and EU agreed that there should be a 'single customs territory' comprising the customs territories of the UK (including Northern Ireland) and of the EU. The consequence is that the UK will have to align its tariffs on imports with EU tariffs and must not charge lower tariffs.<sup>50</sup> It is further under an obligation to harmonise its commercial policy with that of the EU.<sup>51</sup>

<sup>45</sup> Ibid, para 50.

<sup>46</sup> Section 55 Taxation (Cross-border Trade) Act 2018.

<sup>47</sup> Note that there are currently no checks on persons crossing the border due to the Common Travel Area between the UK and Ireland. The Protocol allows the UK and Ireland to maintain the Common Travel Area in Article 4.

<sup>48</sup> These would be customs checks; even if there were zero customs tariffs between the EU and the UK due to a free trade agreement, this would not obviate checks completely as checks regarding rules of origin declarations might still be necessary.

<sup>49</sup> See also Article 184 WA, which says that the EU and the UK 'shall use their best endeavours' to negotiate the future relationship 'with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.'

<sup>50</sup> Article 3 of Annex 2 to the Protocol.

<sup>51</sup> Article 4 of Annex 2 to the Protocol.

Third, the UK agreed to certain UK-wide 'level playing field' obligations contained in Annex 4 to the Protocol. These require the UK to follow certain EU taxation rules and state aid rules and to maintain equivalent competition law rules. They also contain non-regression commitments in the fields of environmental protection and labour and social standards.

Fourth, the Protocol makes a number of Northern Ireland specific commitments, which align Northern Ireland to a large degree with the EU's single market for goods (Articles 6(2) and 8-12 of the Protocol and Annexes 5-9).

### 5.3 Application of the protocol and exit

The Protocol is meant to only apply if there is no agreement in force between the EU and the UK, which would avoid a hard border between Ireland and Northern Ireland. This follows from Article 1 (3) and Article 2. That provision states expressly that the EU and the UK 'shall use their best endeavours to conclude, by 31 December 2020 [i.e. the end of the transition period], an agreement which supersedes this Protocol in whole or in part'.

Should such an agreement – probably as part of the agreement on the future relationship – be ready by that date, the agreement itself will determine which parts of the Protocol it supersedes.

Should no such agreement be in place by the end of the transition period, the Protocol will become applicable.<sup>52</sup>

In that case Article 20 sets out a review mechanism which can result in the Protocol ceasing to apply. The decision is taken by the Joint Committee – i.e. the EU and the UK together, with each side having a veto – and is based on an assessment as to whether the objectives of the Protocol as set out in Article 1 (3) are met. Possible scenarios include technological advances which would make border checks unnecessary in practice.<sup>53</sup>

### 5.4 Single customs territory

The Protocol provides that the customs territories of the UK – which includes Northern Ireland – and of the EU should form a single customs territory. The only type of products excluded at the moment are fishery and aquaculture products until an agreement on access to each other's waters is applicable.<sup>54</sup>

The consequences are that there must not be any customs tariffs or charges having equivalent effect between the UK and the EU. This applies not only to goods produced in the customs territories of the EU and the UK, but also to imported goods provided they are in

<sup>52</sup> See Article 185 WA.

<sup>53</sup> See Political Declaration, para 27.

<sup>54</sup> Article 6 (1) of the Protocol; however, special rules for Northern Ireland exist, see Article 6 (2).

free circulation. This means that the import formalities have been complied with and any customs duties paid.<sup>55</sup>

It follows from this that the EU and the UK must apply the same external tariffs as otherwise an importer could circumvent higher tariffs in one customs territory by importing goods through the other customs territory. For this reason, the UK has agreed to apply the EU's external tariff, the EU's rules on the origin of goods and the EU's rules on the value of goods for customs purposes.<sup>56</sup>

Furthermore, the UK must align its commercial policy with the commercial policy of the Union, which means in particular that it cannot conclude free trade agreements with third countries that would undercut the EU's customs tariffs.<sup>57</sup> In addition, the EU's trade defences regime will cover both parts of the single customs territory.<sup>58</sup> This means that in the event of a 'trade war', the EU would apply retaliatory tariffs on behalf of both the EU and the UK.

### 5.5 Level playing field provisions

The EU was originally opposed to granting a UK-wide customs union but wanted to see it restricted to Northern Ireland. There were two main reasons for this: first, the legal basis of Article 50 TEU was regarded as not suitable for a UK-wide solution such as this that might apply long-term; and second, the EU-side feared that conceding a customs union to the UK without additional safeguards would have the potential of undermining the EU's single market.

For the latter reason, the WA contains a number of level playing field provisions, the purpose of which is to ensure that the UK cannot use its preferential position in the single customs territory to undercut EU standards on taxation; environmental protection; labour and social standards; as well as state aid and competition.

These level playing field provisions are found in Annex 4 to the Protocol. They can be amended by the Joint Committee, but only to lay down higher standards. As with all Joint Committee decisions, the UK would have a veto.

On **taxation**,<sup>59</sup> the UK committed to continue to apply the domestic law provisions implementing EU directives on administrative cooperation in the field of taxation;<sup>60</sup> on rules against tax avoidance practices;<sup>61</sup> and a provision requiring credit institutions to disclose their turnover, profits etc in each country in which they are active.<sup>62</sup>

<sup>55</sup> Article 1 (2) of Annex 2 to the Protocol.

<sup>56</sup> Article 3 of Annex 2 to the Protocol.

<sup>57</sup> Article 4 (1) of Annex 2 to the Protocol.

<sup>58</sup> Article 4 (3) of Annex 2 to the Protocol.

<sup>59</sup> Article 1 of Annex 4 to the Protocol.

<sup>60</sup> Directive 2011/16/EU.

<sup>61</sup> Directive 2016/1164.

<sup>62</sup> Article 89 of Directive 2013/36/EU.

The UK further committed to applying EU **state aid** rules as far as trade within the single customs territory is concerned.<sup>63</sup> This is clearly driven by a desire to avoid market distortion through subsidies by the UK. Notably, however, agricultural subsidies are exempted. This is because the UK will no longer form part of the Common Agricultural Policy. The Joint Committee is tasked with determining the maximum overall annual level of agricultural support the UK may grant.

The EU's state aid rules would therefore apply as they apply now, i.e. as Treaty provisions and EU Regulations (and not as 'retained EU law' under the EU Withdrawal Act 2018). They would enjoy direct effect and primacy over conflicting domestic law.<sup>64</sup> Furthermore the UK has agreed to set up an independent authority with powers equivalent to those of the EU Commission, which would monitor compliance with state aid rules and enforce these rules.<sup>65</sup> Where these rules are amended or replaced by the EU in the future, they must be read as amended or replaced.<sup>66</sup> Where the EU adopts entirely new rules without amending or replacing legislation found in the Annex, the Joint Committee may adopt a decision to add the relevant new provision to the Annex.<sup>67</sup> There is thus a dynamism built into the Protocol.

In addition, Part five of Annex 4 to the Protocol contains competition law rules (anti-trust rules), which mirror those laid down in EU law. These will be directly effective in the UK.

As far as **environmental protection** and **labour and social standards** are concerned, the Protocol uses a different regulatory technique. It does not oblige the UK to apply Union law, but instead requires it to 'ensure that the level of environmental protection [or labour and social standards] is not reduced below the level provided by common standards applicable within the Union and the UK at the end of the transition period.'<sup>68</sup>

These non-regression obligations mean that for as long as the backstop operates the UK cannot reduce these standards. If it does, by virtue of Article 4 WA and the principle of primacy made applicable by it, domestic courts may disapply contravening legislation.

One difference to provisions in the Protocol referring to EU law is that the UK can comply with these standards with its own domestic rules. This means that 'retained EU law' under the EU (Withdrawal) Act 2018 – unless amended in a way that would lower the standards – suffices. Another difference is that these rules are not dynamic – they are frozen as they stood at the end of transition – whereas references to EU rules such as in Article 12 WA on state aid are dynamic.

## 5.6 Trade between Great Britain and Northern Ireland

<sup>63</sup> Article 7 of Annex 4 to the Protocol.

<sup>64</sup> See above and Article 4 WA.

<sup>65</sup> Article 9 of Annex 4 to the Protocol.

<sup>66</sup> See Article 15 (4) of the Protocol.

<sup>67</sup> Article 15 (5) of the Protocol. If the Joint Committee fails to do so – notably because the UK blocks a decision the EU is entitled to take remedial measures.

<sup>68</sup> See Article 2 of Annex 4 to the Protocol.

The Protocol envisages a stronger regulatory alignment of Northern Ireland to the EU's single market in goods. Article 8 of the Protocol makes this clear when it says that the lawfulness of goods imported to Northern Ireland from the EU is judged by EU law on the free movement of goods.<sup>69</sup> In addition, Article 6 (2) of the Protocol prohibits discriminatory taxes in Northern Ireland and quantitative restrictions on exports and imports of goods between the EU and Northern Ireland.

Annex 5 to the Protocol – made applicable by Articles 6 (2) and 10 – makes numerous instruments of EU secondary law (directives and regulations) relating to trade with third countries and to trade within the EU applicable to Northern Ireland. These include rules harmonising product standards, but also on agricultural standards and intellectual property.

Article 9 and Annex 6 to the Protocol decree that a number of EU law provision on VAT and on excise duty will be applicable in Northern Ireland. Article 11 and Annex 7 list EU rules relevant to the single electricity market on the island of Ireland.

While trade in goods in Northern Ireland will therefore remain subject to EU rules, Article 7 of the Protocol makes it clear that products originating in Northern Ireland shall have unfettered access to the UK's internal market. The consequence is that it is unlikely that there will be controls at ports in Great Britain of goods coming from Northern Ireland. The same cannot automatically be said of goods originating in Ireland. Depending on the divergence in regulatory standards developing between the UK (excluding Northern Ireland) and the rest of the EU, more regulatory checks in Welsh ports may become necessary in the long run.

The main point to note from a Welsh perspective is that the backstop would lead to even more pronounced asymmetry between the three devolution arrangements even though it is yet unclear whether the Northern Ireland Assembly and the Northern Ireland Executive would be given additional powers or whether this further differentiation would be managed centrally from Westminster.

## 5.7 Domestic implementation

In order to operate in the UK, the Protocol will need to be implemented by way of domestic legislation.

It can be assumed that as long as it seems a likely prospect that the backstop will be superseded by the end of the transition period, HM Government will not introduce legislation to make it effective. It is therefore unlikely that the European Union (Withdrawal Agreement) Bill will make provision to that effect.

<sup>69</sup> Article 8 (1) of the Protocol declares Articles 34 and 36 TFEU applicable. These are the main Treaty provisions on the free movement of goods.

Should such legislation be introduced, however, it would need to enable the direct effect and primacy of the provisions mentioned above. A clause akin to s. 2 of the European Communities Act 1972 might therefore feature in the legislation.<sup>70</sup>

Furthermore, the legislation would need to ensure that the level playing field provisions are complied with. Where state aid is concerned, the Protocol requires the UK to apply Union law, which would need to be given direct effect and primacy. The legislation would also need to set up the new authority required by the Protocol; alternatively, it could confer new functions on an existing authority, such as the Competition and Markets Authority. The legislation would also need to ensure application of the competition rules laid down in Part five of the Protocol.<sup>71</sup>

Other level playing field provisions, in particular on the environment and labour standards merely require non-regression, but there is no obligation to make Union law as such applicable in the UK. This could e.g. be achieved by continuing the limitations on the powers of ministers – which would be in place during transition anyhow – under the EU (Withdrawal) Act 2018 to amend ‘retained EU law’.

Environmental law and state aid are not reserved under Schedule 7A of the Government of Wales Act 2018. Any legislation introduced by the UK Government to implement the provisions of the Protocol will therefore take into account the devolution settlement. There are various routes open ranging from a Westminster Act dealing with these issues centrally – which would trigger a legislative consent motion – or a common approach using the common frameworks established by then; or indeed the option of leaving the implementation of the devolved aspects of the Protocol entirely to the devolved legislatures.

## 6. Future relationship

It is the stated intention of both the UK and the EU that the backstop should never become operational but that the future relationship treaty would substitute it.

Negotiations on the future relationship are set to take place after Brexit is completed and during the transition period. A draft political declaration setting out the framework for the future relationship between the EU and the UK was published on 22 November 2018.<sup>72</sup>

According to the draft, the future relationship will rest on two substantive pillars: an economic partnership and a security partnership.

<sup>70</sup> See fn. 15.

<sup>71</sup> Note that even though these provisions reflect EU law concepts and must be interpreted in accordance with it, the Protocol does not foresee the jurisdiction of the ECJ, but merely of domestic courts.

<sup>72</sup> Available here: <https://www.gov.uk/government/publications/progress-on-the-uks-exit-from-and-future-relationship-with-the-european-union>.

The economic partnership will cover tariff-free trade in goods and trade in services and will include level playing field provisions building on those in the Protocol to the WA.<sup>73</sup> As far as tariffs are concerned, trade in goods will build and improve on the single customs territory contained in the Protocol to the WA. Further aspects covered are financial services, digital, capital movements and payments, intellectual property, public procurement, transport, etc.

Notably, the draft political declaration is clear that free movement of persons will no longer apply. Instead, the draft refers to movement of persons concerns temporary entry for business purposes and visa-free travel for short-term visits, but no free movement.

Of importance from a Welsh perspective is a willingness to enable the UK to participate in Union programmes on science and innovation, youth, culture and education. That would for instance mean that Universities might still be able to participate in EU funding programmes and the Erasmus exchange.

No mention is made of a continued application of the Common Agricultural Policy. On fishing, the draft political declaration notes that the UK will be an independent coastal state, but also the expectation that the 'parties should establish a new fisheries agreement on, *inter alia*, access to waters and quota shares' and that this should be ratified by 1 July 2020.<sup>74</sup>

The other pillar – the security partnership – relates to internal security (law enforcement and cooperation in criminal matters) and to external security. In this context, the UK has re-affirmed its commitment to adhere to and give effect to the European Convention on Human Rights.<sup>75</sup>

In terms of governance and dispute settlement, the political declaration envisages a similar approach as in the WA: a joint committee as the main body responsible for management and supervision. The joint committee would also be the first port of call for the settlement of disputes. Only if settlement in the joint committee proved impossible, would there be arbitration with an option of referring questions on the interpretation of EU law to the ECJ. There seems to be no role envisaged for the ECJ in proceedings brought by individuals in the UK's domestic courts.<sup>76</sup>

The detail of the future relationship remains – for as long as it has not been negotiated – however unpredictable. It seems, however, clear that both sides want an ambitious relationship on trade and on security, but that they do not wish for the UK to remain part of the EU single market. This means that in trade terms, the future relationship is likely to look similar to that between the EU and Canada or Ukraine, rather than to that between the EU and Norway under the EEA agreement.

What is predictable, however, is the ratification process once a treaty has been negotiated.

<sup>73</sup> Draft Political Declaration, para 79.

<sup>74</sup> Draft political declaration, paras. 73-76.

<sup>75</sup> Draft political declaration, para 83.

<sup>76</sup> See draft political declaration, paras. 129-135

On the UK-side the ratification of treaties is dealt with by sections 20-25 of the Constitutional Reform and Governance Act 2010. According to that Act the Government would have to lay a draft treaty on the future relationship before Parliament for 21 sitting days. If within those 21 days neither House resolves that the treaty should not be ratified, the Government may proceed with ratification.

So far, there are no special requirements akin to those in section 13 of the European Union (Withdrawal) Act in place for the treaty on the future relationship, but such requirements might still be included in a forthcoming Act of Parliament. But even if this does not happen, legislation will need to be passed – possibly both in Westminster and in the devolved legislatures – to give effect to the future relationship domestically.<sup>77</sup>

The ratification process on the EU side would depend on which competence base the EU decides to conclude the future relationship treaty. The most likely basis at this moment is Article 217 TFEU giving the EU competence to conclude association agreements.<sup>78</sup> These can only be concluded by the EU after a unanimous vote in the Council (i.e. unanimity of all Member States) and approval by the European Parliament.<sup>79</sup>

Furthermore, there is a likelihood that the agreement will be a mixed agreement. This is an agreement to which not only the EU is a party, but also all EU Member States. The main reason why mixed agreements are concluded is that the EU does not have sufficient powers to conclude the agreement by itself. Given the envisaged foreign policy, security and defence cooperation, the Member States will in all likelihood insist on their inclusion as parties to the agreement. Were this to happen, all Member States must ratify the agreement according to their own constitutional requirements, which may involve referendums (e.g. the Netherlands held a referendum on the EU-Ukraine association agreement) or the involvement of regional legislatures (e.g. the Walloon parliament refused to give its consent to the EU-Canada trade agreement CETA). It follows that sufficient time will need to be allocated between the final negotiations and the entry into force of the agreement (which should ideally happen at the end of the transition period).

<sup>77</sup> HM Government certainly expects this to be the case, see ‘The future relationship between the United Kingdom and the European Union’, Cm 9593, para 53.

<sup>78</sup> See para 122 of the draft Political Declaration (released on 22 November 2018).

<sup>79</sup> Article 218 (6) and (8) TFEU.