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## The Withdrawal Agreement: Legal and Governance Aspects

### Part One: Overview

The [Withdrawal Agreement](#) (WA) can only come into force if it is concluded (ratified) by the EU and ratified by the UK before 29 March 2019. EU ratification requires the agreement of a super qualified majority<sup>1</sup> in the Council and the consent of the European Parliament. No individual Member State has a veto. However, Member States are very likely to have a veto over any Future Arrangements Agreement (FAA), creating the possibility that a Member State disgruntled at the WA could decide, in the future, to veto the FAA.

Agreement of the WA on the EU side can be challenged by a Member State or an EU institution that considers that its terms are incompatible with the EU Treaties.<sup>2</sup>

The WA comprises six Parts and three Protocols.

- Part One: Common Provisions including the territorial scope, a requirement that the WA be given the same “direct effect” and “supremacy” in the UK as applicable to EU law in Member States,<sup>3</sup> and provides some definitions used throughout;
- Part Two: Citizens’ Rights. This essentially enables EU citizens resident in the UK and UK citizens resident in a Member State at the end to the transitional or implementing period (TIP) to continue to enjoy the bulk of the rights they presently enjoy. There are some exceptions.<sup>4</sup> A notable omission is that UK citizens to whom these

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<sup>1</sup> 72% of the Council representing 65% of the population. A minimum of 20 Member States.

<sup>2</sup> For example, where the compatibility of the WA with the EU Treaties has been question see Part Three B below. See also the written evidence of Professor Baudenbacher to the European Scrutiny Committee, [3 October 2018](#), page 4 in particular. Even if the CJEU considered the WA to be incompatible with the Treaties it has the power to enable it to continue in force in order for any incompatibility to be remedied. An EU institution (for example, the European Parliament) could request an opinion as to the draft WA’s compatibility with the Treaties pursuant to Article 218(11) TFEU. In that case, any incompatibility with the Treaties would need to be remedied before the WA could enter into force.

<sup>3</sup> See Part Three Section E below.

<sup>4</sup> Professor Steve Peers sets out these exceptions in “The Brexit Withdrawal Agreement: Overview and First Observations”, EU Law Analysis, [22 November 2018](#).

## —Legal note—not for general distribution—

rights apply will not enjoy free movement rights to other Member States;

- Part Three: Separation Issues, disentangling situations straddling Brexit;
- Part Four: Creating a transitional or implementing period (TIP) up to 31 December 2020 during which EU law essentially applies to the UK (to the extent it did) but the UK does not participate in the making of that law, nor in the agencies and bodies of the EU, and cannot participate in any new JHA/Schengen regime. The TIP is extendable by a mutually agreed decision of the Joint Committee, which must be made by 1 July 2020, for one further fixed period of either one year or two years. Such extension will entail a further decision of the Joint Committee on the financial arrangements applicable, and also entail (a) treating the UK as an ordinary third country in respect of EU programmes during any extension, and (b) capping UK agricultural support;
- Part Five: The Financial Settlement;
- Part Six: Institutional and Final Provisions, including requirements for interpretation of the agreement, the institutional structure of a Joint Committee and dispute resolution by arbitration. The governance provisions envisaged in the [Political Declaration setting out the Framework for the Future Relationship between the EU and the UK](#) are based on those found in this Part (the Political Declaration).
- The Protocol on Ireland/Northern Ireland which includes the “backstop” provisions intended to prevent a hard border.<sup>5</sup> Again the Political Declaration cites these provisions as inspiration for a long-term tariff free area underpinned by “ambitious customs arrangements”;<sup>6</sup>
- The Protocol Relating to the Sovereign Base Areas of the UK in Cyprus, making these parts of the customs territory of the Union, applying certain EU law (and CJEU jurisdiction) to them and specifying the checks to be made on persons crossing their external borders (other than with Cyprus);

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<sup>5</sup> See Part Three, Section C.

<sup>6</sup> Paragraph 22.

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- The Protocol on Gibraltar covering preparation for the application of the Citizens' Rights part of the WA, permitting EU law to be applied to Gibraltar Airport if the UK and Spain reach agreement, establishing cooperation between Spain and the UK on fiscal matters, environmental protection and fishing, and police and customs matters.

This note now focusses on the provisions of the WA which raise points of legal significance and the provisions which concern its governance (including dispute resolution). This note does not focus in detail on the [Political Declaration](#).

## Part Two: Summary of Key Legal and Governance Issues

### A Relationship between the WA and the Future Arrangements Agreement (FAA)

The performance of obligations under the WA is not conditional upon the agreement of an FAA. Parties must use their “best endeavours” to reach and ratify in good time such Agreement - on the basis of the Political Declaration which sets out a programme to facilitate reaching agreement by the end of 2020.<sup>7</sup>

### B Continued application of EU law

- EU law will apply during the TIP, but essentially without formal UK participation in its making;
- EU law will apply after the TIP to protect the rights of EU citizens in the UK. This could extend for some considerable period.
- EU law also will apply after the TIP in relation to the Separation Issues and the Financial Settlement. Again, this could extend for a considerable period.
- EU law will apply extensively, particularly in Northern Ireland, under the “Backstop” found in the Ireland/Northern Ireland Protocol.

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<sup>7</sup> Paragraphs 138 to 147. The Political Declaration remains non-binding.

—Legal note—not for general distribution—

- EU law in relation to goods, turnover taxes, agriculture and fisheries as well as veterinary and phytosanitary rules will apply in the Sovereign Base Areas of Cyprus.
- After the end of the TIP the CJEU will continue to determine the interpretation of EU law applicable under the WA by the mandatory reference procedure from the arbitration panel.

### C The “Backstop” arrangement to prevent border controls on the Irish border

The Backstop is the core of the Protocol on Northern Ireland (NI). The Protocol, including the backstop, is intended to be temporary and applies unless and until it is superseded in whole or in part by an FAA, which the parties will use their best endeavours to achieve by 31 December 2020.

Under the Backstop the UK will form a customs union with the EU (except for trade in fisheries and aquaculture products which await further agreement on fishing opportunities - which the parties shall use their “best endeavours to achieve by 1 July 2020).

The UK will conform to specific EU legislation on customs, including with respect to third countries. To provide a ‘level playing-field’ the UK commits to non-regression (from the law as it stands at the end of the TIP) on EU environmental protection, labour and social standards, state aid and competition and state-owned undertakings in respect of administration of tax.

This customs union would be a practical barrier to the UK entering separate trade agreements on goods with third countries.

On the UK side of the customs union, in the “United Kingdom in respect of Northern Ireland”, specific additional EU legislation applies on customs, certain VAT and excise, and certain technical standards relating to goods.

There will be unfettered movement for goods moving from NI to the rest of the UK and Union. The EU and the UK will use best endeavours to facilitate trade between Great Britain and NI with a view to avoiding controls at the ports and airports of NI.

UK authorities are responsible for implementing and applying EU law applicable under the Protocol but, additionally, where EU law continues to apply to the UK in respect of Northern Ireland the EU institutions and bodies shall have the same

—Legal note—not for general distribution—

powers as they have under the Treaties, CJEU jurisprudence will apply, and the CJEU shall have preliminary reference jurisdiction.

Union law applicable to the United Kingdom in respect of Northern Ireland can be amended or replaced. However, new EU legislation that is not listed in the Protocol but is in its scope would need to be adopted by the Joint Committee (or JC) – failing which the EU can take appropriate remedial measures.

The Protocol is subject to review and may be ended in whole or part by decision of the Joint Committee.

## D The Institutional Structure

This is based on a Joint Committee of representatives of the two parties, jointly chaired, which acts by consensus. It is the forum for supervision of the WA, and the Backstop. It has important powers including: amending within defined parameters the substantive provisions of the WA and bringing the Backstop to an end. It provides a forum to discuss and resolve disputes prior to invocation of any formal dispute resolution.

## E Dispute Resolution

Where invoked,<sup>8</sup> this is undertaken by an arbitration panel of 5, two nominated by each party and a chairperson from a list agreed by both. It is encouraged to act by consensus but can act by majority. Questions of interpretation of EU law must be referred to the CJEU for a binding ruling.

## F Supervision and Enforcement of the WA

Full EU supervision applies during the TIP. Thereafter there are areas where the EU institutions, particularly the Commission retain supervision powers. Failure of a party to comply with the WA can lead ultimately to a fine and/or to the injured party suspending either parts of the WA or parts of any other Agreement between them – most likely any FAA.

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<sup>8</sup> Experience of other international agreements indicates that formal dispute resolution is rarely invoked.

—Legal note—not for general distribution—

## G Court of Justice Jurisdiction

- The CJEU retains its full jurisdiction during the TIP, including on the interpretation and application of the WA. This bites notably on the Financial Settlement which is in force during that period. In this respect it is significant that the CJEU also retains jurisdiction after the TIP in respect of cases brought before then, so that a case brought before the end of the TIP continues afterwards (Article 86).
- The CJEU retains jurisdiction a binding jurisdiction to rule on the Citizens' Rights provisions for a period of 8 years from the end of the TIP.
- The CJEU retains jurisdiction to rule on those EU financial provisions which continue to apply after the TIP, in relation to the Financial Settlement.
- The arbitration panel must refer questions of the interpretation of EU law applicable under the WA to the CJEU and is bound by the CJEU ruling.
- The CJEU has jurisdiction in respect of EU legislation applicable to Northern Ireland during the backstop<sup>9</sup> (see section C) and to Cyprus.

## H Roll over of EU External Agreements.

During the TIP the UK is bound by the obligations to third countries in any external agreement which the EU has entered into (with or without Member States also having entered into them - although the precise extent is unclear in the WA) and any agreements entered into by Member States on behalf of the EU. The UK does not automatically gain the benefit of such agreements. During this period the UK may negotiate and enter into international agreements in the area of EU exclusive competence provided that they do not come into force. There is no mention of agreements covering areas of shared competence.<sup>10</sup>

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<sup>9</sup> See Part Three Section C.

<sup>10</sup> Where the EU has exclusive competence only it may act. Where competence is shared with the EU or the Member States may act, the choice is one of policy.

—Legal note—not for general distribution—

### Part Three: Key Legal and Governance Issues (Detail)

#### A Relationship between the WA and the Future Arrangements Agreement

The fulfilment by the UK of its obligations under the WA (for example making payments under the Financial Settlement) are not conditional on reaching a satisfactory FAA.

Article 184 provides for the Parties to

“use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the political declaration [to be specified] and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period”

This provision is reinforced by a duty, imposed by Article 5, of sincere cooperation requiring each party to the WA to assist each other in carrying out the tasks which flow from the WA, in full mutual respect and good faith.

Whilst these are legal obligations (at the international law level) they do not stretch as far as obliging the EU to enter into an FAA which it does not consider to be in its interest. If the UK wanted to try to enforce this obligation the legal route of recourse would be by complaint to the Joint Committee and ultimately dispute resolution – before the CJEU during the TIP or by arbitration after that.

In this respect it should be noted in relation to the financial settlement involving payment by the UK of £39bn or so that:

- There is not legal consensus how much might be owed, under international law, in any event;<sup>11</sup> and
- About half this sum relates to the UK still applying substantive EU law during the TIP.

The degree of detail in the Political Declaration affects the assessment of the risk of the lack of conditionality in the WA. The language of the Political Declaration varies. Some provisions are couched in firm language (with or

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<sup>11</sup> There is no compulsory system of determining and enforcing any sum that might be owing under international law.



## —Legal note—not for general distribution—

without conditioning words),<sup>12</sup> some are matters for “consideration”<sup>13</sup> or “exploring”,<sup>14</sup> or matters the parties “envisage” happening.<sup>15</sup>

## B Continued application of EU law

During the TIP, EU law applies including amendments and new legislation, but without UK attendance at meetings of the EU institutions or participation in their decision making; nor participation in decision-making and governance of EU bodies, offices and agencies.<sup>16</sup> Continued EU law is interpreted and enforced by the CJEU.<sup>17</sup>

During the TIP the UK may, exceptionally, be invited to participate (but not vote) in comitology committees, meetings of expert groups or meetings of EU bodies, offices and agencies if either:

- the discussion concerns individual acts addressed to the UK or natural or legal persons residing or established here; or
- UK presence is necessary and in the interests of the Union.<sup>18</sup>

EU law applies extensively after the TIP to protect the rights of EU citizens in the UK. It is clear from the following examples that EU law (as updated) and the influence of CJEU case law (see Article 158 below) could continue to apply in this field of Citizens Rights for some significant time after the end of the TIP:

- EU law will continue to apply protect the Free Movement rights of EU citizens residing in the UK and UK nationals residing in the other Member States before the end of the TIP. This is for the entirety of their lives (Article 39). Their family members resident in the host state by the end of the TIP are also covered. Any child born to these individuals within the scope of the WA is also protected if that parent

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<sup>12</sup> E.g paragraph 26; “The Parties will put in place ambitious customs arrangements....”

<sup>13</sup> E.g. paragraph 54: “The Parties agree to consider addressing social security coordination....”

<sup>14</sup> E.g. paragraph 55: “...the Parties will explore the possibility to facilitate the crossing of their respective borders for legitimate travel.”

<sup>15</sup> E.g paragraph 20: “The Parties envisage having a trading relationship on goods that is as close as possible ...”

<sup>16</sup> Article 7.

<sup>17</sup> Article 131.

<sup>18</sup> Article 128(5)



—Legal note—not for general distribution—

has sole custody<sup>19</sup>. [Professor Catherine Barnard](#) has illustrated this graphically by saying that if a family member born just before the end of the TIP then goes on to have a child late in life (say in their seventies), this could mean that the WA could have effect for approximately 150 years from the end of the TIP.<sup>20</sup>

- Regulations on social security including the main substantive Regulation 883/2004 for social security, as amended or replaced before the end of the TIP, (Article 31) will continue to apply to certain EU and UK citizens (and family members and survivors). Those persons will maintain their right to healthcare, pensions and other social security benefits. This would appear to enable qualifying EU citizens to continue to export child benefit out of the UK to the Member State where their children are residing.<sup>21</sup> In addition, the Joint Committee “will make sure” that UK law remains aligned with EU law. This appears to mean that the UK will have to accept amendments to those Regulations in respect of qualifying EU nationals, with consequential amendments being made to the relevant list of EU legislation in Annex 1, Part II of the WA.<sup>22</sup>

Another example of the potentially extensive application of EU law is contained in Citizens’ Rights, Part 2. Article 33 extends the same Part 2 protections to EEA and Swiss nationals resident in the UK prior to the TIP. [Professor Catherine Barnard](#)<sup>23</sup> questions whether this extension is compatible with the Article 50 TEU legal basis for the WA as this is framed in terms of the UK’s exit from the EU. Article 50 TEU does not mention the EEA.

EU law also applies after the TIP because of Separation Issues. In some cases, EU law could continue to apply for some considerable time after the end of the TIP. For example, in the case of:

- The processing of the data of EU citizens by the UK: EU law could apply beyond the TIP if a data adequacy decision is not adopted to

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<sup>19</sup> Article 10.

<sup>20</sup> Episode 51: The Draft Withdrawal Agreement, Law Pod UK, 1 Crown Office Row

<sup>21</sup> Articles 30 and 31.

<sup>22</sup> Article 36.

<sup>23</sup> See footnote 5.

## —Legal note—not for general distribution—

come into force before the end of the TIP.<sup>24</sup> Although the Political Declaration contains a commitment to ensuring UK data adequacy decisions are adopted by the end of 2020, that may not be achieved. However, it is worth noting that if a data adequacy decision is no longer applicable, perhaps revoked or suspended by the Commission as provided by the [GDPR](#)<sup>25</sup> or invalidated by the CJEU as in the case of the US adequacy decision in [Schrems](#), EU data protection law does not reapply to the UK. Instead the UK is to ensure that its domestic laws provide an essentially equivalent level of data protection for EU citizens' data.<sup>26</sup>

- Cross-border VAT transactions: VAT Directives will continue to apply to cross-border supplies involving the UK and the EU that were initiated before the end of the TIP.<sup>27</sup> Specifically, certain provisions in the 2006 Principal VAT Directive will continue to “apply in respect of goods dispatched or transported from the territory of the United Kingdom to the territory of a Member State, and vice versa” if the transport or despatch took place before the end of the TIP. (Similar provisions apply in relation to movements of goods which span the end of the TIP for customs purposes.) Moreover, the WA provides that the 2006 VAT Directive will continue to apply until 5 years after the end of the TIP to a “taxable person’s rights and obligations in relation to transactions with a cross-border element” between the UK and a Member State” which took place before the end of the TIP or which falls within Article 51. This will however be subject to a deadline of 31 March 2021 for applications for refunds of VAT under the Eighth VAT Directive.

Another potentially lengthy period of continued application of EU can be expected in relation to certain aspects of the Financial Settlement. For example:

- In the case of pensions, Article 142 requires the UK will pay its share of the funding of pensions and other employee benefits in respect of the members and staff of the EU institutions, accumulated by the end of 2020. The [National Audit Office](#) concluded in April of this year that

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<sup>24</sup> Article 71.

<sup>25</sup> Article 45(3) of the GDPR.

<sup>26</sup> Article 71.

<sup>27</sup> Article 51.

—Legal note—not for general distribution—

the UK’s obligation to contribute to the EU pension liability may last until at least 2064;

- Article 136 applies EU law “concerning the Union’s own resources, relating to financial years until 2020” after the end of the TIP. Effectively, this means that the rules governing the UK’s contributions to the EU budget for unpaid funding commitments as at 31 December 2020 will in principle continue to apply until the UK has fully paid off its share of those commitments. There is a non-exhaustive list of specific legislation which applies with amendments, irrespective of the date of their adoption, entry into force or application. This is set out in the [Government’s Explainer](#) at paragraphs 130-132.

After the end of the TIP the CJEU continues to determine the interpretation of EU law applicable under the WA by the mandatory reference procedure from the arbitration panel.<sup>28</sup>

During the TIP EU law is interpreted and enforced by the CJEU (possibly subject to a contrary decision on the specific matter by the Joint Committee).

EU law applies extensively in the event of the Backstop coming into force and to a lesser extent to the Cyprus Sovereign base areas.

## C The Northern Ireland “Backstop”

### *Relationship between the WA and the Future Arrangements Agreement (FAA)*

The key provisions of the Backstop will only come into effect if an FAA, which adequately replaces the terms of the Protocol, is not in place by the time the TIP ends.<sup>29</sup> All or some of the Protocol may be superseded by the terms of a FAA.<sup>30</sup> The parties must use their best endeavours to conclude a superseding agreement by 31 December 2020.<sup>31</sup>

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<sup>28</sup> Article 174.

<sup>29</sup> Whether or not the TIP is extended.

<sup>30</sup> Protocol Article 1.

<sup>31</sup> Protocol Article 2.

—Legal note—not for general distribution—

Whether or not an FAA adequately replaces the Protocol is a matter to be formally decided by both the UK and the EU (in the Joint Committee). If a positive decision cannot be reached, the Protocol will remain un-replaced.

The Protocol will cease to apply when the Joint Committee decides, by consensus, that it has been superseded by other agreement(s).<sup>32</sup>

### *Continued application of EU law*

#### *1. General elements*

Specified EU law continues to apply to both i) the UK as a whole; and ii) the UK in respect of Northern Ireland. Unless otherwise stated, where a reference is made to EU law, this should be understood as applying to the law as amended or replaced.<sup>33</sup>

UK authorities are responsible for implementing and applying the provisions of EU law. EU representatives may receive information about UK oversight, ask UK authorities to conduct checks and have their own powers of oversight.

Questions remain about how provisions about the rights of EU representatives will work in practice. In recognition of the need for more detail, the Joint Committee is to make a decision.

#### *2. The UK as a whole*

- The UK will ensure that there is no diminution of EU law that protects the “rights, safeguards and equality of opportunity” as provided for in the 1998 Good Friday Agreement;<sup>34</sup>
- For all trade of goods between the UK and EU and, where provided, with third countries, the UK agrees to operate by relevant EU customs rules;<sup>35</sup>

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<sup>32</sup> Protocol Art 20.

<sup>33</sup> Protocol Art 15. If the EU adopts new law that is not listed in the Protocol but is arguably within its scope, the EU will seek agreement via the Joint Committee, to include the law in the Protocol. If the UK does not agree the EU can, ultimately, adopt remedial measures.

<sup>34</sup> Protocol Article 4 and Annex 1. Laws relevant to protection from discrimination.

<sup>35</sup> This includes that: i) customs duties and charges having equivalent effect are prohibited; ii) the UK will align tariffs and rules for trade with third countries, to relevant EU rules; iii) the UK

—Legal note—not for general distribution—

- The UK will ensure non-regression of EU law as at the end of the TIP on good tax governance, environmental protection and social and labour protection;<sup>36</sup>
- Specified EU law on state aid, competition and state-owned undertakings in respect of administration of tax will continue to apply to the UK.<sup>37</sup>

As an exception, these rules will not apply to trade of specified fish and aquaculture products unless an agreement on access to waters and fishing opportunities is agreed.

The practical impact of these provisions is to link the UK's laws on customs, tax, environmental protection, labour protection, and state aid, substantially to EU law.<sup>38</sup> In most cases this is limited to EU law as at the end of the TIP. The requirements related to state aid are different as these apply to EU law as it continues to evolve.

Combined with the provisions on how the UK is to ensure national compliance with EU law, this represents a significant ongoing connection to EU law. It also effectively limits the UK's ability to amend existing laws in these areas after the end of the TIP.

### 3. *The UK in respect of Northern Ireland*

- Where goods are imported to NI from the EU, EU law prohibiting quantitative restrictions on imports and measures having equivalent effect, must be complied with;<sup>39</sup>
- From the end of the TIP, EU customs legislation will apply to the UK in respect of Northern Ireland.<sup>40</sup> However, fish products are treated differently. For these, the Joint Committee is to establish conditions for

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will harmonise its commercial policy with the CCP of the Union; iv) the UK and EU will cooperate on the apportionment of WTO tariff-rate quotas; and v) the EU's trade defence regime will apply to the UK.

<sup>36</sup> As listed in Protocol Annex 4 parts 1, 2 & 3.

<sup>37</sup> Protocol Article 4, part 4, and Annex 8.

<sup>38</sup> Paragraph 79 of the Political Declaration envisages an open and fair competition, building on the level playing field arrangements provided in the WA.

<sup>39</sup> Protocol Article 8; Arts 34 & 36 TFEU.

<sup>40</sup> As defined by article 5(2) of Regulation 952/2013.

—Legal note—not for general distribution—

import of fish products to the EU by vessels flying a UK flag and registered in NI.

No process is provided for what would happen if agreement in the Joint Committee were not reached, suggesting that the UK, which would have a clear interest in establishing these conditions, would be at a negotiating disadvantage;

- Specified EU law on VAT and excise, environment, electricity markets and state aid apply to the UK in respect of NI.<sup>41</sup>

Taken together the application of EU law to the UK in respect of Northern Ireland is a deeper application of EU law than to the rest of the UK.

The Backstop recognises that such an arrangement has the potential to lead to i) some form of friction in trade between NI and the rest of the UK; or ii) some form of distortion in trade. Hence Article 7 asserts that there should be an unfettered market for NI goods to Great Britain.<sup>42</sup> For trade between NI and Great Britain the UK and the EU must use their best endeavours to facilitate such trade and the Joint Committee is given a role to avoid, to the extent possible, controls at the ports and airports of Northern Ireland, as outlined below. This is aimed primarily at trade from Great Britain to NI.

### *The Institutional Structure*

The Joint Committee, operating by consensus, has a role throughout the application of the Protocol. It has some powers to supplement or amend the Protocol or take decisions in order to ensure its proper functioning. It will, for example:

- Determine how the provisions on maintaining aligned frameworks on good tax governance will be achieved;<sup>43</sup>

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<sup>41</sup> Protocol Articles 9-12 and Annexes 5-8.

<sup>42</sup> In response to a Question from George Freeman on 21 November 2018 the Prime Minister said: "... if we were in the situation where the backstop had to be in place for a matter of months, for example, it would be right for the United Kingdom to give the commitment that we would not be looking to diverge from regulations during that period and that we would ensure that we kept that free access for the goods from Northern Ireland coming into Great Britain, as we have committed in the withdrawal agreement—in the text that is set out—and as we had committed previously."

<sup>43</sup> Protocol Article 6 and Annex 4.



—Legal note—not for general distribution—

- Determine levels of financial support that the UK can provide for agriculture;<sup>44</sup>
- Adopt detailed rules for the trade of goods between the UK and EU;<sup>45</sup>
- Adopt decisions laying down minimum commitments for certain environmental standards;<sup>46</sup> and
- Adopt recommendations, if necessary, to avoid controls at ports and airports in Northern Ireland.<sup>47</sup>

It is an influential and important forum that has a real role in the practical delivery of the Protocol. Both UK and EU are represented on the Joint Committee, so no decision may be made without the UK's agreement.

This may not be the same thing as the two parties having equal power, as the aims of the parties will matter. If the Joint Committee is unable to reach a decision, in some circumstances, that will block next steps. The party that wants those next steps to occur, will then be at a practical disadvantage. By way of example, i) the Joint Committee sets the limits of state aid that can be authorised by the UK for agriculture. If limits are not agreed, state aid may not be authorised; ii) if the Joint Committee does not agree that the Protocol is superseded by the terms of a FAA, the Protocol continues to take effect.

The Joint Committee is supported by a Specialised Committee, established to support on the implementation of the Protocol.<sup>48</sup> Operating under the supervision of the Specialised Committee is a joint consultative working group. All three groups are made up of representatives of the UK and EU.

### *Dispute Resolution*

For the areas of EU law that apply to the UK as a whole,<sup>49</sup> the dispute resolution mechanism of the main WA will not apply to disputes about interpretation and application.<sup>50</sup> Alternative dispute resolution approaches include:

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<sup>44</sup> Protocol Article 12, Annex 4, Art 8 and Annex 9.

<sup>45</sup> Protocol Art 6.

<sup>46</sup> Annex 4, Article 2.

<sup>47</sup> Protocol Article 7.

<sup>48</sup> Article 165(c) WA; Art 16 Protocol.

<sup>49</sup> Article 6.

<sup>50</sup> Protocol Annexes 2 Article 6(1), Annex 3 Article 10, and Annex 4 Articles 1(5), 2(7), 4(2) & 24, disapplying Articles 170-179 of the WA.



—Legal note—not for general distribution—

- The EU may apply customs restrictions if it relates to the trade in goods from third parties;<sup>51</sup>
- The matter will be referred to the Joint Committee if it relates to import duties or customs rules.<sup>52</sup>

For environment, social and labour, and competition provisions there is no dedicated dispute mechanism with the EU. It is for the UK to enforce.<sup>53</sup> For state aid provisions the UK's new independent authority will cooperate with the European Commission.

If the functioning of the Protocol leads to serious economic, social, environmental difficulties, or diversion of trade, EU or UK may “unilaterally take appropriate measures”.<sup>54</sup> If those measures cause some imbalance, the other party may take ‘rebalancing measures’, with the Joint Committee involved in any such process.<sup>55</sup>

This framework does not, for example, i) establish more specifically how ‘difficulties’ or ‘diversion’ is to be measured, or thresholds of significance; or ii) the types of measures that may and may not be taken. Joint Committee involvement will therefore be crucial to navigating this and making progress.

### *Supervision and Enforcement*

Some elements of enforcement and oversight are currently only sketched out in the Protocol, with commitments to flesh them out. Agreement on those details will be made via the Joint Committee, an important role as ongoing enforcement will require striking a suitable balance between the interests of UK and EU.

UK authorities are responsible for implementing and applying the provisions of EU law that are made applicable by the Protocol. EU representatives will have ongoing rights to be informed about enforcement work and to ask UK authorities to carry out checks.<sup>56</sup> This role for the EU is arguably in lieu of an ongoing role

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<sup>51</sup> Protocol, Annex 2 Article 6(1).

<sup>52</sup> Protocol, Annex 2 Article 6(2), and Annex 3 Article 10.

<sup>53</sup> Protocol Annex 4, Articles 3 & 6. If the UK did not enforce the law effectively there is no explicit path but it may be assumed that the Joint Committee would become involved.

<sup>54</sup> Protocol Art 18.

<sup>55</sup> The procedure for taking measures is set out in the Protocol, Annex 10.

<sup>56</sup> Protocol Art 14.

—Legal note—not for general distribution—

for the CJEU and therefore represents a lower level of EU oversight than might otherwise have been the case.

To achieve this in practice, the UK will take various steps nationally including:

- creating a ‘dedicated mechanism’ to ensure no diminution of individual’s rights;<sup>57</sup>
- ensuring administrative and judicial proceedings to ensure effective enforcement and operation of environmental protection, and social and labour protection laws; and
- establishing a national system for oversight of environmental and state aid requirements, including an independent body with adequate powers to ensure compliance.<sup>58</sup>

Where additional EU law applies to NI:

- EU institutions and agencies will have their normal powers under EU law; and
- References can be made to the CJEU.

This is a higher level of engagement for EU authorities than for the UK-wide provisions, reflecting the greater connection with EU law for NI.

The Joint Committee is tasked with keeping any restriction on trade between NI and the rest of the UK, as a result of the Backstop, under review, and if necessary suggesting measures to alleviate these.<sup>59</sup> This is a broad authority that acknowledges that issues may occur. However, it does not explicitly allow for any of the Protocol requirements to be dis-applied, so the extent to which the Joint Committee would be able resolve issues is not entirely clear.

### *Court of Justice Jurisdiction.*

Where the Protocol refers to EU law, it is to be interpreted in conformity with the relevant case law of the CJEU.<sup>60</sup> There is no time-limit on this requirement,

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<sup>57</sup> Protocol Article 4.

<sup>58</sup> Protocol Article 6 and Annex 4, parts 2, 3 & 4.

<sup>59</sup> Article 7.

<sup>60</sup> Protocol Article 15.

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meaning that for as long as EU law is applicable under the Protocol, the UK will be obliged to interpret it in accordance with evolving EU case law.

Where EU law continues to take effect in the UK in respect of NI, in respect of EU law the CJEU shall have jurisdiction and power to interpret EU law and to hear cases where national remedies have been exhausted. In any cases before the CJEU the UK would be able to participate as if still a Member State.<sup>61</sup>

## D The Institutional Structure

The oversight of the WA is based on a Joint Committee and a system of specialised Sub-Committees. This comes into being as soon as the WA comes into force.

The JC is to be composed of representatives of the EU and the UK<sup>62</sup>, chaired jointly.

Its overarching remit is to be “responsible for the implementation and application of this Agreement” supplemented by a specific list of tasks which include to:

- “supervise and facilitate the application of this Agreement”;
- “seek appropriate ways and methods of preventing problems that might arise in areas covered by this Agreement or of resolving disputes that may arise regarding the interpretation and application of this Agreement” Should the “appropriate ways” be able to stretch to making a formal Decision that, in accordance with Article 166, would have the same legal effect as the WA itself there would be conflict with the jurisdiction of the CJEU during the TIP as conferred by Article 131;
- “adopt decisions and make recommendations as set out in Article 166...” This Article allows decisions to be made “for which this Agreement provides...”
- adopt decisions amending Parts Two, Three and Five of the WA (its substantive provisions). These powers end at the end of the fourth year following the end of the TIP and are limited to correcting errors, addressing omissions or other deficiencies or address unforeseen

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<sup>61</sup> Protocol Article 14.

<sup>62</sup> Presumably appointed by the Government.

## —Legal note—not for general distribution—

situations – provided that the amendments do not amend the essential elements of the WA; and

- take such other actions in the exercise of its functions as decided by the Union and the UK.<sup>63</sup>

The JC and its specialist Sub-committees operate by mutual consent. Annex VIII provides Rules of Procedure (which the Joint Committee can amend). These do not prescribe how many representatives from each side comprise the Committee nor the institutions from which, on the EU side they are drawn. This may be significant if it leads to institutional tension.<sup>64</sup>

Notably these initial Rules of Procedure do provide for:

- Chairmanship by a Member of the Commission on the EU side and at Ministerial level on the UK side. Their tasks include drawing upon the provisional agenda;
- Minutes to be drawn up, and a summary of the minutes which the co-chairs can decide to make public;
- Decisions and recommendations to be adopted by a written procedure consisting of an exchange of notes between the co-chairs;
- Meetings of the JC to be confidential unless otherwise decided by the co-chairs;
- A party to insist that information it provides to the JC be confidential or protected from disclosure by its laws to be treated as confidential; and
- (Subject to the previous bullet point) for each party to decide individually whether to publish JC decisions or recommendations.

The absence of transparency would impact on any proposal for Parliamentary scrutiny of the UK participation in the working of the JC.

Article 166 provides for the JC to adopt, by mutual consent, decisions in respect of all matters to which the WA so provides, and to make appropriate recommendations. Any decision of the JC has the same legal effect as the Agreement.

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<sup>63</sup> Article 164.

<sup>64</sup> For example: if the European Parliament is not represented and objects to a decision taken by the JC. During the TIP it may have recourse to the CJEU.

—Legal note—not for general distribution—

## E. Dispute Resolution

### Individuals

The WA and the EU law made applicable by it has “direct effect”.<sup>65</sup> This means that individuals can pursue a dispute based on the WA invoking the terms of the WA against the state or emanation of the state through the courts provided that the relevant provision meets the conditions for direct effect under the Treaties namely:

- the provision is sufficiently clear and precisely stated;
- it is unconditional and not dependent on any other legal provision; and
- it confers a specific right upon which a citizen can base a claim.

Direct effect applies principally to the provisions on Citizen’s Rights.

The WA requires this right to be enshrined in UK primary legislation.<sup>66</sup>

### Disputes between the UK and the EU during the TIP

During the TIP disputes between the parties are governed by Article 131. The CJEU has jurisdiction as provided by the Treaties as regards the interpretation and application of the WA. This principally affects the Financial Settlement as the other substantive Parts of the WA (on Citizens’ Rights, Separation Issues and the Irish and Cyprus Protocols) do not come into force until the end of the TIP.

It is unusual to give the courts of one party jurisdiction to resolve disputes concerning an international agreement. To date the Government has justified this as necessary to ensure that businesses and people will only be faced with one set of changes.<sup>67</sup> Whilst this could be considered as more justified in respect of EU law applied by the WA during the transition period this is less the

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<sup>65</sup> Article 4(1).

<sup>66</sup> Article 4(2). This does not require the entire WA to be implemented by primary UK legislation.

<sup>67</sup> See the [Government Response](#) to the Report of the European Scrutiny Committee Report *EU Withdrawal: Transitional provisions and dispute resolution*

## —Legal note—not for general distribution—

case in respect of other provisions of the WA particularly disputes arising between the parties to the agreement.<sup>68</sup>

### Disputes between the UK and the EU after the TIP

After the end of the TIP disputes between the UK and the EU arising under the agreement will be subject to a political phase of dispute resolution by the Joint Committee.<sup>69</sup> If not resolved within three months of there is an arbitration procedure.

The 5 arbitrators are picked from a panel of 25 established by the EU and the UK -10 nominations from the EU, 10 from the UK and 5 independent persons jointly nominated as able to act as chairperson by agreement. An arbitration panel shall consist of 5 persons, 2 from the list of EU nominations, 2 from the list of UK nominations and these shall elect a chair from the list of 5 joint nominations.<sup>70</sup>

The arbitration panel should take written submissions from the parties and conduct a hearing and reach its decision within 12 months of being established, or 6 months if it decides, on the application of a party, that the matter is urgent.<sup>71</sup>

The arbitration panel must try to take decisions by consensus, but can decide by majority.<sup>72</sup> This raises the prospect of a decision adverse to the UK on the view of the EU appointed panel members and the jointly appointed chairperson outvoting the view of the UK appointed panel members.

Where a question of interpretation of a provision of EU law referred to the WA arises, or a question whether the UK has complied with an CJEU judgment pre-dating the end of the TIP, the arbitration panel is bound to make a reference for a binding preliminary ruling by the CJEU. Whilst either side may request a preliminary ruling from the CJEU it is up to the arbitration panel to decide whether the matter does actually concern the interpretation of EU law referred to in the WA, or is indeed a question whether the UK has complied with an

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<sup>68</sup> The effects of Article 131 can extend beyond the end of the TIP. Under Article 86 the CJEU retains jurisdiction in respect of cases started before this date.

<sup>69</sup> Article 169.

<sup>70</sup> Article 171. In the absence of agreement on who should be chair the Secretary General of the Permanent Court of Arbitration shall choose by lot.

<sup>71</sup> Rules of Procedure at Annex IX of the WA. Article 171 and 172.

<sup>72</sup> Article 179.

—Legal note—not for general distribution—

CJEU judgment pre-dating the end of the TIP<sup>73</sup> This provision may come under scrutiny of the CJEU as deviating from its principle of the autonomy of the EU legal order under which it must be the final arbiter of questions of EU law.

It also raises the question how far this reference procedure perpetuates CJEU jurisdiction. The Government makes the point that this reference procedure does not represent “direct” jurisdiction for the CJEU. Experience of the reference jurisdiction indicates that a significant number of disputes (but not all) are effectively determined by the interpretation provided by the CJEU in response to a reference.

For enforcement of arbitration rulings see the next section.

## F Supervision and Enforcement

During the TIP the WA, insofar as it is in force, is subject to ordinary EU supervision, principally by the Commission, and enforcement by the CJEU - leading, ultimately, to a financial penalty.<sup>74</sup>

Thereafter supervision by the Commission (or other EU bodies, offices and agencies) or a Commission role in supervision by UK authorities, as well as enforcement procedures can be found in the following provisions of the WA:

- Commission powers to bring infringement proceedings to the CJEU under Article 87 in respect of breaches of EU law or Part Four of the WA occurring before the end of the TIP;
- Article 92 which provides for continuation of administrative procedures, for example a competition investigation, initiated before the end of the TIP;
- Article 93 permitting state aid procedures to be initiated up to 4 years after the TIP in respect of aid granted before the end of the TIP, and OLAF to similarly initiate investigation in respect of fact arising in the same period and customs debt arising 4 years from the end of the period for discharge;<sup>75</sup>

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<sup>73</sup> Article 174.

<sup>74</sup> Article 131.

<sup>75</sup> Decisions adopted in pursuance of the administrative procedures under Article 92 and 93 shall be binding and enforceable with the Commission able to monitor and enforce compliance – Article 95.



## —Legal note—not for general distribution—

- Article 159 requires the UK to set up an independent monitoring authority in respect of Citizens' Rights which shall inform the Commission annually on the implementation and application of Part Two of the WA (and *vice versa*);
- The Commission can bring infringement proceedings, possibly leading to fines against the UK, in respect of EU law applicable to the UK concerning EU own resources, applicable to EU programmes in which the UK continues to participate after the TIP in connection with the Financial Settlement; and
- Article 176 allows the arbitration panel, on written request to determine the time in which its ruling should be complied with, Article 177 allows it to rule whether there has been compliance and Article 178 permits it to impose a penalty for non-compliance which if not paid can lead to the complainant Party to temporarily suspend its obligations under the WA (except in respect of Citizen's Rights) or under any other agreement, likely the FAA. The proportionality of such retaliatory measures can be determined by the arbitration panel and the request of the respondent. This enforcement process is more similar to the provisions in international agreements cited in the White paper on the Future Relationship between the United Kingdom and the European Union. The later are tailored more to recompense than punishment.<sup>76</sup>

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<sup>76</sup> The White Paper on [The future relationship between the United Kingdom and the European Union](#) the cites, at page 94 the US and Australian free trade agreements as including provision for financial penalties. The Australian Guidance on the US-Australia agreement indicates the limits and the limited circumstances of the financial sanctions regime in that agreement: "An innovation introduced through this Agreement is the capacity of a government to choose to pay a monetary assessment in lieu of providing trade compensation (Article 21.11.5). This may prove a preferable policy option where:

- a breach cannot be rectified - where, for example, a state government measure is at fault and the Commonwealth has no constitutional capacity to intervene, and
- the Government does not consider it appropriate that traders in the broader economy should bear the burden of such a breach.

Such a monetary assessment will be set at fifty percent of the value of suspended benefits determined by the panel unless agreed otherwise by the governments (Article 21.11.5). The Joint Committee can agree that this monetary assessment be paid into a joint fund and expended on initiatives to facilitate trade between the United States and Australia (Article 21.11.6).

—Legal note—not for general distribution—

- The Protocol on Ireland/Northern Ireland contains a web of surveillance and enforcement provisions (see section C)

## **G Court of Justice Jurisdiction.**

### *During the TIP*

Under Article 131 the CJEU has the jurisdiction provided by the Treaties in regard not only to EU law referred to in the WA but also the application and interpretation of the WA itself. See section E.

### *After the TIP*

A wide variety of provisions preserve CJEU jurisdiction to a greater or lesser extent and in some cases for a fixed period of time:

- In cases commenced within 8 years from the end of the TIP in a UK court or tribunal that court or tribunal may make a reference to the CJEU for a binding interpretation on that Part of the WA;<sup>77</sup>
- The CJEU has jurisdiction to deal with infringement proceedings brought by the Commission and preliminary rulings in respect of the application of Union law concerning own resources relating to the UK and EU law relevant to the UK's continued participation in EU programmes and activities;<sup>78</sup>

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Where a Party is found to be in breach of its core commitment (not to fail to enforce effectively the Party's own laws) under the Environment or Labour Chapters (see Chapters 18 and 19), a dispute panel can impose an annual monetary fine, not exceeding US\$15 million, to be paid into a fund established under the Agreement for expenditure on appropriate labour and environment initiatives in the territory of the country that violated the Agreement, in a manner consistent with its law.

The Agreement makes specific provision for a review of the effectiveness of these compensation arrangements within the first five years, or following compensation being provided with regard to five separate complaints, whichever comes first (Article 21.14)."

<sup>77</sup> Article 158. There are some minor adjustments in the time limit in respect of the issuance of residence permits.

<sup>78</sup> Article 160.

—Legal note—not for general distribution—

- Any arbitration panel must make a reference to the CJEU in respect of any question as to the interpretation for an interpretation of EU law referred to the in the WA (see section E);
- Article 86 gives the CJEU continuing jurisdiction in respect of cases brought by or against the UK before the end of the TIP and for the CJEU to continue to interpret EU law in preliminary references made to it by UK courts before the end of the TIP. Such judgments are binding and enforceable under the Treaties.<sup>79</sup> Such proceedings may last several years;
- Article 87 provides for the CJEU to have jurisdiction in infringement proceedings against the UK in respect of any alleged breach of EU law or its Part 4 (Transition) obligations by the UK occurring before the end of the TIP. However, the Commission must bring those proceedings within four years of the end of the TIP. This applies equally to similar proceedings brought in respect of state aid; and
- The CJEU has extensive jurisdiction over elements of the Backstop (see section C).

Article 4 governs the effect of CJEU case law on UK courts by requiring that:

- provisions of the WA referring to Union law are to be interpreted in accordance with “the methods and general principles of Union law” and CJEU case law prior to the end of the TIP; and
- UK courts and authorities to have “due regard” to CJEU judgments after the end of the TIP for the interpretation and application of the whole of the WA.

Article 163 provides for dialogue between the UK’s highest courts and the CJEU.

## **H Roll over of EU External Agreements**

This is governed by Article 129. This provides that during the TIP the UK is bound by the obligations to third countries in any external agreement which the EU has entered into on its own, agreements entered into by the Member States

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<sup>79</sup> Article 89.

## —Legal note—not for general distribution—

on behalf of the EU<sup>80</sup> and agreements entered into “by the Union and its Member States jointly, as referred to in ....Article 2”.

Ordinarily, reference to agreements entered into by the EU and its Member States “jointly” would be understood as being “bilateral” agreements where the EU and the Member States are described as (or implicitly form) one party to the agreement and a third country is the other party, for example the Comprehensive Economic and Trade Agreement with Canada. These agreements can be contrasted with true multilateral agreements where the EU and its Member States are more distinct parties, such as the UN Convention on the Law of the Sea. However, Article 2 makes no mention of “joint” agreements – it applies to any agreement entered into by the EU whether jointly with the Member State or not. This creates some uncertainty as to the extent of the obligation on the UK to meet the obligations contained in EU international obligations. This may not cause problems in practice as the UK will likely be regarded as automatically taking over the entirety of the obligations imposed by multilateral agreements (including those that before Brexit fell upon the EU). The discrepancy in language between Articles 2 and 129 ought to be an issue picked up in the process of “legal scrubbing”.

The UK does not automatically gain the benefit of EU international agreements after Brexit. It relies on the agreement or acquiescence of the third country to accord the UK such benefits. However, that may raise issues of the legality of, or the process for, for third countries, to simply roll over their EU agreements, when that entails, legally, entering into new agreements.

In the absence of acquiescence or agreement by the third countries concerned, the UK will be relying on a footnote to Article 129 to the effect that “The Union will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements.” This does not have legal force as far as the third country is concerned.

During the TIP the UK may negotiate and enter into international agreements in the area of EU exclusive competence provided that they do not come into force. There is no mention of agreements covering areas of shared competence.

The absence of a reference to shared competence may not have significant practical impact because it is arguable that this provision is declaratory of the general proposition that that the UK would not be inhibited by the duty of sincere

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<sup>80</sup> Normally where the international agreement is only open to state parties.

—Legal note—not for general distribution—

cooperation (either in the TEU or in the WA) from negotiating agreements with third countries to come into force at the end of the TIP provided the process of doing so did not involve undermining the EU position.<sup>81</sup>

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Joanne Dee, Emily Unwin, Deputy Counsel for European Legislation

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<sup>81</sup> Given that the UK does not participate in EU matters during the TIP, including formulating the EU position in relation to international agreements, the potential for such UK negotiations to undermine EU negotiations with the same state is limited.