The Brexit negotiations: Steady as she goes or heading for the rocks?
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Introduction

The Brexit negotiations have reached their half-way point in time. After six months of often difficult negotiations, the outlines of a divorce agreement have been reached. The parties are now discussing provisions for the transition and after March 2018 will move on to the future UK-EU relationship. This is a good moment to assess how the negotiations have gone so far and what the prospects are for what remains to be done.

This paper was prepared for a joint seminar between Regent’s University London and the Senior European Experts group in February 2018; it is being published as a contribution to debate.

The negotiation and agreement process

In the UK the procedure began with legislation authorising the Government to trigger Article 50 on 29 March 2017 following a ruling of the Supreme Court that this decision could not be taken using the royal prerogative. The decision to trigger Article 50 came despite the fact that the Government had not clarified its intentions in the negotiations. During the passage of the European Union (Notification of Withdrawal) Act 2017, the Government undertook to ensure that Parliament would have a “meaningful vote” on any deal with the EU.

The Prime Minister established the Department for Exiting the European Union (DExEU) in July 2016 together with a Cabinet committee under her chairmanship to co-ordinate UK policy.1 A further Joint Ministerial Committee was established to enable the leaders of the devolved administrations in Scotland, Wales and Northern Ireland to be consulted over the making of UK policy, not least because aspects of the divorce agreement would be likely to require the consent of the Scottish Parliament and the Northern Ireland Assembly.2 Subsequently, the UK’s chief negotiator, Oliver Robbins, was moved from DExEU to the Cabinet Office, a move which brought Mr Robbins and his team closer to the Prime Minister and her advisers.

On the EU side, the process began with the adoption by the European Council on 29 April 2017 of guidelines on the negotiations, in effect its negotiating mandate.3 These were

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1 There is a main Cabinet committee, the European Union Exit & Trade Committee, and four sub-committees: see HM Government, List of Cabinet Committees, 16 November 2017
2 See the Legislative Consent Memorandum, European Union (Withdrawal) Bill, tabled by the Scottish Government on 17 September 2017, which sets out its belief that the Bill requires the Scottish Parliament’s consent and why the Scottish Government is recommending that consent is not given at the present time
3 European Council, Special meeting of the European Council (Art. 50) (29 April 2017) - Guidelines, XT 20004 2017 INIT, 29 April 2017
provided for the chief negotiator, Michel Barnier, who was nominated by the European Commission, and whose work is monitored by the General Affairs Council. The guidelines were important because they represented the unanimously agreed views of the other 27 Member States on the issues in the negotiations. They also agreed, in procedural terms, to separate the issues around the UK’s departure under Article 50 (the divorce agreement) from those about the future UK-EU relationship. Article 50 provides for discussion of a framework for future relations; detailed negotiations about that relationship will have to be conducted after the UK has left and under a different Treaty article. The negotiations are therefore being conducted in two parts.

With these preparations completed, time was however lost (Article 50 allows two years to complete the divorce proceedings; this can be extended if the leaving country and the other Member States unanimously agree) because of the decision to hold a general election in the UK.

An election intended to give the Prime Minister a mandate to negotiate Brexit on the terms of her Lancaster House speech in January 2017 and the UK’s Article 50 authorisation letter had an uncertain outcome and provided no clear mandate. The Conservative Government lost its majority but remained in power through a confidence and supply arrangement with the Democratic Unionist Party in Northern Ireland. Instead of the Government’s hand being strengthened by the election, it was in fact weakened and the time available for negotiations reduced.

Negotiations began in June 2017 in Brussels with both sides agreeing to treat as a priority the three main issues identified by the EU guidelines as needing to be addressed before the talks could move on to the future relationship.

The divorce negotiations: the issues

The European Council’s guidelines had identified these three main issues, and a number of subsidiary ones, as being:

- citizen’s rights – ensuring that the rights of EU citizens in the UK and UK citizens in the EU are properly protected after Brexit;
- Northern Ireland – maintaining the peace that has followed Good Friday agreement by avoiding any action that restores a “hard” border in Ireland;
- the UK’s financial obligations to the EU – important to the EU because much of the UK’s contribution up to 2020 and beyond has been budgeted for, and politically important in the UK because of the commitments made by the Leave campaign in 2016 to end payments to the EU and to use the contributions for other purposes.

In addition, the guidelines identified a number of mostly technical but important issues that would need to be resolved in the divorce agreement concerning trade in goods, contracts and other legal matters (including European Arrest Warrants outstanding at the point of Brexit).

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The withdrawal agreement: progress so far & issues to be resolved

The December agreement

In the early hours of 8 December 2017 the European Commission and the UK reached detailed agreement on the first part of the negotiations. On that basis, the Commission recommended to the EU-27 that satisfactory progress had been made, and the European Council agreed on 15 December to move to the next stage of the negotiations. The negotiators in their joint report stated that following the EU’s declaration in its guidelines for the Brexit negotiations that “nothing is agreed until everything is agreed, and individual items cannot be settled separately”, the provisions of the December agreement are dependent on the final outcome of the talks. However, with one or two exceptions noted below, it is likely to form the basis of the divorce agreement in the three main areas set out in the European Council guidelines. The European Council guidelines stated that “negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full and translated faithfully into legal terms as quickly as possible”. This is now underway. It remains possible, however, that no overall agreement will be reached with the EU, in which case the elements in the December agreement will need to be revisited.

The main areas of agreement in December 2017 are considered below.

Citizens’ rights

The section on citizens’ rights runs to 36 paragraphs. The key points are:

- the base point for determining citizens’ rights will be the day the UK leaves;
- EU citizens in the UK and UK citizens in the EU on exit day will retain their current rights, including protection against discrimination on grounds of nationality;
- they will continue to be able to bring in close family members (including those from third countries) but the rules applying to new relationships after exit day will be national and not EU ones;
- it will be made administratively easier for EU citizens to prove their right to residency in the UK, even after Brexit day;
- a national independent authority will monitor the implementation and application of EU citizens’ rights in the UK;
- the UK accepted that the European Court of Justice (CJEU) is “ultimate arbiter” of the meaning of EU law and that UK courts will have “due regard” to its decisions after Brexit but based on the case law as it stood on exit day; in addition, UK courts and tribunals will be able to refer cases relating to citizens’ rights to the CJEU for eight years after leaving.

Some issues were left unresolved, notably the precise procedure for EU citizens to confirm their residency rights in the UK; the scope and functions of the new UK independent

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5 European Commission, Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union, TF50 (2017) 19, 8 December 2017

6 European Council, European Council (Art. 50) meeting (15 December 2017) - Guidelines, XT 20011 2017 INIT, 15 December 2017
monitoring body; and the inter-action with the rest of the divorce agreement, notably the parts of it which will deal with the governance of the agreement.

Northern Ireland

The section on Northern Ireland had proved to be the most fraught, with the first draft of the agreement having to be amended after objections from the Democratic Unionist Party. The main points of this section of the agreement are that:

- both parties affirmed their support for and commitment to the Good Friday/Belfast Agreement of April 1998 and agreed that it must be protected during Brexit; they recognise the extent to which North-South co-operation “relies to a significant extent on a common EU legal and policy framework”;
- the UK made clear its respect for Ireland’s membership of the EU and the rights and obligations that entails, including Ireland’s place in the Single Market and the customs union;
- agreement in this section does not pre-determine the outcome of the wider negotiations on trade in goods and services and other matters;
- the UK “remains committed to protecting North-South co-operation and to its guarantee of avoiding a hard border” and if no other arrangements can be found that are compatible with this statement, then the UK will maintain “full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South co-operation, the all-island economy and the protection of the 1998 agreement”;
- the UK has promised not to set up any new regulatory barriers between Great Britain and Northern Ireland unless they are consistent with the Good Friday/Belfast Agreement and have been approved by the Northern Ireland Executive and Assembly;
- the Common Travel Area (the passport free travel zone) will continue to operate.7

It is not surprising that the text of the section concerning Northern Ireland gave most trouble to the Government. A majority of voters in Northern Ireland voted to remain in the EU in the 2016 referendum and the prospect of a return to a “hard border”, that is, one with physical customs and immigration controls, could jeopardise the hard-won 1998 Good Friday/Belfast Agreement. The effective suspension of the Northern Ireland Executive and Assembly during 2017, because of disputes between the political parties, has heightened tensions. In addition, the outcome of the 2017 general election, which left the Conservative Government dependent on the DUP’s 10 Westminster MPs for its survival, further complicated matters as the DUP is the largest party in the Stormont Assembly but is opposed to the UK staying in the EU.

The agreed text is a form of words which will need a lot of work in part II of the negotiations to turn them into practical and legally binding form. And it will be heavily dependent on what can be agreed in the future trade agreement between the UK and the EU. Outside the EU’s

7 The Common Travel Area covers the UK, the Republic of Ireland, the Channel Islands and the Isle of Man; it has existed since 1922 and therefore predated the EU
Single Market and customs union, some kind of border controls between north and south in Ireland will be needed. The decision to allow for regulatory alignment on the island of Ireland if no overall agreement can be reached, reflects that fact but this will not of itself remove the requirement for border controls as they are needed for immigration and other purposes as well as the enforcement of trade rules. Although Ireland’s border will be the external border of the EU, the UK will also have to decide the extent to which it wishes to police the UK side of that border, for example, to prevent “back door” illegal migration and fraudulent trade.

Of all the sections of the December Agreement, this is the one with the greatest potential to unravel during or at the end of the part II negotiations.

Financial settlement

After a long period of dispute between the parties, and following the Prime Minister’s Florence speech in which she accepted that the UK would have to pay more than the €20 billion it had previously offered, the December Agreement sets out in detail a methodology for determining the financial settlement. In UK political terms, the significant issue is how large the final bill will be (now estimated at £35–£40 billion), and over what period it will be paid, but the agreed methodology is important. The main points are that:

- the UK will contribute to the EU’s budget up to 2020 in accordance with previously agreed plans and with the UK continuing to receive its rebate on that contribution;
- the UK will contribute its share of outstanding liabilities at the end of the current multi-annual financial framework (MFF) in 2020; this could be as much as €23 billion over time;
- the UK will also contribute its share of other liabilities, receiving a proportionate share of assets if money is recovered in the future; these liabilities will be limited in various ways including to actual spending on programmes and to those parts of EU policies that the UK has participated in; the UK will only pay liabilities that it would have paid if it remained a Member State;
- for payments beyond 2020 the UK’s share will be calculated as the average of UK contributions in percentage terms of the total between 2014 and 2020; the calculation will be based on published information and audited by the European Court of Auditors;
- the UK may wish to participate in some EU programmes after Brexit as a non-Member State.

In addition to these issues, the December Agreement provides for the UK to receive a refund of capital held in the European Investment Bank in annual instalments over 12 years. Similarly, the UK’s capital in the European Central Bank will be repaid. The UK will contribute to the non-EU budget programmes (support for refugees in Turkey and the European Development Fund), the latter until 2020. The UK will not be expected to meet the relocation costs of the EU agencies based in the UK.

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8 For example, veterinary rules as livestock often crosses the Anglo-Irish border
9 Discussed in Matthew Keep, The UK’s contribution to the EU budget, House of Commons Library Briefing Paper CBP-7886, 18 December 2017, p. 14
10 The detail of this is contained in paragraph 76(b) of the Agreement but it is set out more clearly in the Commission’s memorandum to the European Council: European Commission, Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union, COM (2017) 784 final, 8 December 2017, p. 11
In the UK, it will be necessary for the Government to obtain the agreement of the House of Commons to the financial settlement, as the Brexit Secretary has admitted. Procedurally, this means the House passing a money resolution alongside the Withdrawal Agreement & Implementation Bill that will enable the final divorce agreement to be incorporated into British law. The need for a money resolution at Westminster could prove a major headache for the Government because it does not have a majority in the House.

Other issues
A short section at the end of the December Agreement refers to a number of outstanding issues yet to be fully resolved. Some of these are considered below, as they link to the subjects in the part II negotiations, but three points are worth mentioning:

- principles have been agreed for the UK’s withdrawal from the Euratom Treaty, including a commitment from the Government they will adopt a nuclear regime that “provides coverage and effectiveness equivalent to existing Euratom arrangements”; it remains to be seen if this will be sufficient to enable existing trade in nuclear materials, including for medicinal purposes, to continue without new controls;
- the parties agree that the CJEU will remain competent to rule on cases involving the UK which began before exit day;
- although there is a “general consensus” on co-operation in civil and commercial law, no final agreement has been reached.

The future UK-EU relationship
The UK has made clear its desire for a “deep and special partnership” between the UK and the EU, one that would be “bespoke and ambitious”. It envisages that this would encompass more than just trade but a broader relationship that includes agreements on crime and justice policy, foreign affairs and security and research and innovation. If such an agreement was reached it would be the broadest the EU has ever reached with a third country. That is part of the reason why the EU institutions and many of the 27 other Member States have repeatedly expressed scepticism about such a bespoke model of agreement and suggested instead that the UK can expect to be offered, at least in terms of trade, something far more limited.

In this section we consider the issues that will need to be covered in Part II of the negotiations, which range well beyond trade matters, beginning with the proposed transitional period. The reality is that the negotiations for a post-Brexit agreement will be complex, will not be completed in all their aspects by March 2019 and are unlikely to be completed either by the end of the two years of the proposed transitional agreement.

A transitional period
The December Agreement does not deal with a transitional period as this has yet to be negotiated as part of part II of the negotiations. There is however an emerging realisation that the transitional period will essentially be one in which the UK remains bound by EU rules and procedures, including

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11 HC Deb 13 November 2017, vol 631, col 36
12 Words used by the Prime Minister in HM Government, supra n. 4, and then following a Cabinet discussion about the UK’s future trading relationship with the EU: ‘May tells ‘Brexit war cabinet’ UK must aim high in trade talks’, Anushka Asthana & Peter Walker, The Guardian, 18 December 2017
13 ‘UK cannot have a special deal for the City, says EU’s Brexit negotiator’, Jennifer Rankin, The Guardian, 18 December 2017
the jurisdiction of the CJEU, whilst being outside any of the EU’s political and governance structures. That is what Prime Minister May proposed in her speech in Florence when she said that “the framework for this… would be the existing structure of EU rules and regulations”.14  

In its memorandum to the European Council, the Commission set out this view of the transitional period and said that the normal budgetary requirements of the EU would also apply.  

Two key questions about the transitional period to be decided in the part II negotiations are: how long would it last and could it be extended? The EU has repeatedly talked about a transition as “limited period of time” and two years has often been informally suggested. This raises the serious possibility that there will be a second potential cliff-edge for business and others if, at the end of any transitional period, the treaty on the future relationship is not in force and the transitional agreement cannot be extended. In such circumstances the UK would be outside the Single Market, the customs union and the regulatory agencies of the EU and be trading on WTO terms whether it wished to or not.  

Another complication of an effective transition will be the continuance of the free movement of people during that period and therefore for the agreement in December as regards the status of EU citizens.  

**The final end-state relationship for trade in goods and services**  
There are broadly speaking four existing models of EU trade agreements:  

1. the European Economic Area (EEA) – to which Norway, Iceland and Liechtenstein belong; in this arrangement the EU and the three countries are all part of the Single Market but not the customs union; agriculture and fisheries are excluded but otherwise the four freedoms of goods, capital, labour and services apply; while applying EU rules, the three EEA countries do not have a say in them;  

2. a network of bilateral agreements similar in content to the EEA. This is the Swiss model;  

3. a bilateral economic and trade agreement with a third country – they may also contain some element of labour mobility and of political co-operation. A recent example was that with Ukraine (known as the Deep & Comprehensive Free Trade Agreement as it covers foreign policy co-operation as well). The Canada and South Korea agreements cover a range of goods and enable lower levels of duties, mutual recognition of at least some standards and limited access for services;  

4. association agreements – these are generally offered by the EU to countries wishing to be considered as future Member States and involve the third country adopting EU standards in many economic sectors and a high degree of political co-operation.  

Of these four models the last is clearly not relevant to a departing Member State. The EEA model would require the UK to be in the Single Market, which the Prime Minister said in her Lancaster House speech it could not be because that would require the UK to retain the free movement of labour. The second (Swiss) model is also ruled out by the government on the same grounds and is unlikely to be contemplated by the EU. That leaves the model most

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14 The Prime Minister used slightly different language in her statement after the December 2017 European Council: the UK would propose that during the transition period that “our access to one another’s markets would continue as now”. See HC Deb 18 December 2017, vol 633, col 746
recently expressed in the EU-Canada Comprehensive and Economic Trade Agreement (CETA), which took five years to negotiate and two further years to ratify.

Three factors will influence how the trade negotiations proceed:

1. while it is true that the UK is the sixth largest economy in the world and has a trade balance in the EU’s favour, these factors do not significantly increase UK leverage. The UK exports about 44 per cent of its goods and services to the EU but they export less than 10 per cent of theirs to the UK;

2. the EU will be determined to ensure the integrity of the Single Market and its four freedoms including the free movement of people; it will not allow the UK to pick and choose which sectors it wishes to include in the agreement and it will not allow the UK to have as good a trading relationship with the EU outside as it currently has as a member; we should not underestimate the political determination in the EU27 to hold that line;\(^\text{15}\)

3. how far the UK is prepared to go in terms of regulatory convergence and a dispute resolution procedure with the EU; the EU negotiating guidelines state that the final agreement: “must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices”; the EU clearly does not favour any British attempt to obtain competitive advantage outside the EU by having significantly lower business taxes and weaker regulation.

**Goods**

Before the negotiations over goods, the UK will have to make some important domestic policy decisions, for example over the level of its farming subsidies, its employment regulations and the food and environmental standards that it wishes to adopt after Brexit. The closer these rules and standards are to the EU model, the easier it will be for the UK to retain good access for its goods exports. Conversely, being closer to the EU’s regulatory standards may deter third countries from negotiating trade agreements with the UK after Brexit. This was apparent in the remarks of the US Commerce Secretary, Wilbur Ross, at the CBI conference in London in November 2016 when he called for the UK to move closer to US regulatory standards in areas such as food and vehicle safety.\(^\text{16}\)

By contrast, the head of the European Commission’s negotiating team, Michel Barnier, spelt out in some detail the importance to the EU27 of the UK remaining close to the EU’s regulatory model. In November 2017 he talked of the need to build the future partnership with the United Kingdom “on common ground rules”. He pointed out that this would be more difficult since this would be the first negotiation with a third country that would be “less about encouraging regulatory convergence than about containing divergences”. He said the UK would need to decide whether to “still adhere to the European model” because EU regulation involved “societal choices”. He went on to give examples including the social

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\(^{15}\) This can be seen in paragraph 9 of the supplementary negotiating directives recommended by the European Commission: Recommendation for a Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, COM (2017) 830 final, 20 December 2017, p. 5

\(^{16}\) See ‘Even our best friends have to play by the rules: US Commerce Secretary calls for Britain to fall in line with American standards post-Brexit’, Oscar Williams-Grut, *Business Insider*, 6 November 2017
market economy, health protection, food safety, and “fair and effective financial regulation”. But he went further, adding that, “there will be no ambitious partnership deal without common ground on fair competition, State aid, guarantees against tax dumping and social and environmental standards”. These remarks demonstrate that those that portray the EU27 as in some way obliged to give the UK generous access to its market after Brexit or as needing to do so for the sake of their own economies, misunderstand the politics involved. The EU will fight hard to preserve the integrity of the Single Market and the clear division between the benefits of membership and the disadvantages of being outside.

Some of the problems about regulation after Brexit will relate to rules of origin. At present, UK manufacturers rely on frictionless supply chains that stretch around the EU as no rules of origin apply within the Single Market. But UK goods exported into the EU in future will need to meet any EU requirements for the percentage share of a product made in the home country (the UK). It is likely that many manufacturers in the UK do not meet that requirement now. If they are not able to source parts within the UK at a competitive price production here may become uneconomic. In any event, new procedures will need to be put in place at the UK-EU borders to verify rules of origin and to collect duties paid; and these processes will necessarily affect frictionless trade between the UK and the EU.

A key question is how regulatory alignment between the UK and the EU is defined. Closer alignment will make it easier for the UK to reach an agreement that maximises access to the Single Market. A policy of UK regulatory divergence could lead to the opposite situation. Regulatory alignment is a broad term covering many fields of economic policy, including non-tariff barriers to trade (such as product standards), food safety regulation, competition laws and rules of state aid. Partial regulatory alignment, such as the UK Government appears to favour, may not be acceptable to the EU.

UK negotiators may propose that the trade agreement makes provision for the mutual recognition of regulations and this will be equally relevant to services. This can be an effective way of dealing with the need for cross border regulation but for it to be effective it requires a supportive infrastructure including enforcement mechanisms, administration and a dispute resolution procedure that can ensure a good degree of regulatory consistency over time.

Much will depend on whether the EU insists that any regulatory divergence could result in the suspension of the agreement or other sanctions against the UK. This is the way in which the EU-Switzerland agreements operate. When the Swiss voted to end the free movement of people in a referendum, the EU acted swiftly to end some of that country’s privileges under the EU-Switzerland agreements, only withdrawing those measures after the Swiss had made changes to regulations applying to migrants in a way acceptable to the EU.

An additional difficulty is the interaction between a UK-EU trade agreement and the existing EU FTAs (including the EEA). Some of these contain clauses preventing the EU from offering better terms to third countries without offering the same terms to the country that is party to the FTA. Related to this is need to share out quotas for duty free or reduced duty imports into the EU between the UK and the EU27 after Brexit. This process has begun with proposals from the UK and the EU which have already been challenged by a number of countries at the WTO.

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17 European Commission, ‘Speech by Michel Barnier on German Employers’ Day (Deutscher Arbeitgebertag) 2017’, SPEECH/17/5026, 29 November 2017
A number of sectors are currently subject to individual regulatory regimes in the EU which enable the free flow of trade and services. These include, non-exhaustively, sectors which are among the UK’s top export earners to the EU such as financial services, chemicals, pharmaceuticals, aviation and energy. It is likely that special arrangements will need to be made for such sectors to avoid significant harm to businesses based in the UK.

**Services**

The service sector is 80 per cent of the UK economy and, while we have a trading deficit with the EU in goods we have a surplus in the export of services. Maintaining this trading advantage is of great importance to employment and prosperity in the UK, crucially affecting the level of tax revenues.\(^\text{18}\) The UK has benefitted disproportionately from access to the services markets of other EU Member States. This is because of the dismantling of non-tariff barriers in the EU, in order, for example, to enable professional qualifications from another Member State to be recognised. Losing this privileged access as a result of leaving the Single Market is likely to have a major impact on UK prosperity.

Ministers have been keen to emphasise that any trade agreement with the EU should cover at least significant parts of the services sector. The difficulty with this is that it may not be the interests of the EU27 to allow the UK generous access to their service markets given the success of the UK in this field.

**UK Balance of Trade with the EU (£billion)**

\[\text{Source: Office for National Statistics}\]

**Mobility of labour**

One of the domestic decisions that the UK will need to make is what access to allow EU citizens to work in the UK after Brexit. The UK has become highly dependent on EU migrants and the potential reduction in skilled labour in healthcare, higher education, financial services and the tech sector, as well as the potential loss of unskilled labour in the

\(^{18}\) For example, financial services contributed £71.4 billion in tax in 2015/16, 11.5 per cent of the UK’s total tax receipts: ‘Finance sector paid £71.4bn in tax’, BBC News, 6 December 2016
hospitality, food and farming sectors, would be serious. With almost 90,000 vacant nursing posts in the NHS in England alone, any further reduction (net migration has fallen since the 2016 referendum) in the numbers of EU migrants would be serious.

Between the late 1940s and 2011 the UK had a seasonal workers scheme for the agricultural sector, in common with many developed countries. It was wound up because of the availability of EU migrants; it may well need to be reintroduced.

The EU’s concerns

In addition to the over-arching issue of regulatory convergence versus divergence discussed above, the EU has concerns about practical issues around health and safety, phytosanitary controls and the environment that will need to be addressed.

Security & justice

Both the European Council Guidelines and the Prime Minister’s Lancaster House speech made clear there is a mutual desire to maintain extensive co-operation in crime and justice policy after Brexit. A UK Government White Paper set out the objectives of the UK and considered the various precedents for co-operation with the EU in this area. These include arrangements between third countries and EU agencies, agreements to share certain data both about crime and to deter it, and agreements on judicial co-operation. The UK paper concluded that none of these established models suited the circumstances and it called instead for a different type of agreement that would go far further than previous EU co-operation with third countries in this field. This agreement would cover extradition (currently operated via the European Arrest Warrant scheme), operational co-operation including real-time sharing of data and other intelligence and the ability to update such an agreement as EU justice and home affairs policy evolves.

This is an ambitious proposal and given the absence of available alternatives in many areas of current co-operation after Brexit, it will be a critical aspect of the part II negotiations. There will be technical, budgetary and institutional implications. The Government’s “red line” concerning the CJEU playing a role in the UK after Brexit is a complicating factor. The EU is likely to insist on a dispute resolution procedure which gives a continuing role to the CJEU as there are important individual rights issues involved in crime and justice co-operation.

Research & universities

Maintaining collaboration in science and research was one of the Government’s aims set in the Prime Minister’s Lancaster House speech in January 2017. A White Paper published in September 2017 set out the Government’s ambitions in greater depth. It acknowledged the wide variety of arrangements for co-operation in this field between the EU and third countries and expressed a desire to explore “forging a more ambitious and close partnership with the EU than any yet agreed between the EU and a non-EU country”.

The White Paper said that the UK wishes to maintain participation in the key EU programmes in science, research and higher education. It has committed to contributing

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19 HM Government, Security, law enforcement and criminal justice: a future partnership, 18 September 2017
20 HM Government, Collaboration on science and innovation: a future partnership, 6 September 2017, p. 8
financially to these programmes and the White Paper noted the “close regulatory alignment” between the UK and the EU in this field.

Foreign policy, defence & development

The third of UK Government’s White Papers on the future partnership dealt with the questions of foreign policy, defence and development. As with the two other papers, this one sought an ambitious new partnership beyond the scope of any that has gone before. The UK will want to participate in discussions over future EU foreign and security policies but it will not be able to participate discussions at meetings of the Foreign Affairs Council after Brexit.

Gibraltar & UK Overseas territories

The issues facing Gibraltar are in two different groups: those relating to its special status within the EU, which will lapse on exit day; and those relating to its future relationship with the EU after Brexit. In addition, paragraph 24 of the European Council’s Brexit negotiation guidelines give Spain a veto over any post-Brexit agreements between the UK and the EU if they apply to Gibraltar.

Britain’s overseas territories in the Caribbean and the Pacific have benefited from the ACP agreements and the privileged access they give to the Single Market for their exports; again, this was not mentioned in the December Agreement. There is also the question of EU development aid schemes, some of which benefit British Overseas Territories.

Future developments

Withdrawal agreement

The issues to be contained in the withdrawal agreement now need to be finalised and formalised in legally binding texts. As noted above, the December Agreement marks considerable progress on citizens’ rights and the UK’s financial contribution. But there is much more work to do on the Northern Ireland/Ireland border question.

Assuming it is possible to reach agreement, ratification in the UK will require primary legislation and in the EU the agreement of the European Council and the Parliament. In the UK, ratification poses considerable political problems for the Government as it does not have a majority in the House of Commons and is vulnerable to disagreements within its own party. It will need to have been incorporated into domestic legislation before exit day.

Future relationship

It will not be possible to complete negotiations on the future relationship by exit day. The Government’s aim will be for a framework setting out in principle what the two sides agree should be in the final agreement and an outline timetable. This paper will have to indicate how the UK will move from transition to its new relationship with the EU. The reluctance of the Government to state in detailed terms what kind of trading arrangements it wants with the EU has hampered the negotiations. Part of the problem has been the tendency of UK politicians to approach the negotiations in a transactional way, believing that the EU will be unwilling to make economic or financial sacrifices in order to maintain the principles of the Single Market and its regulatory framework. This is wishful thinking; the EU27 will not drop
their insistence that no country outside the EU can have as good a relationship with them as those who are members of the EU. The negotiations about the future partnership will be at least as difficult as those about the withdrawal agreement, probably more so, and an agreed outcome certainly cannot be guaranteed.

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Senior European Experts

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