



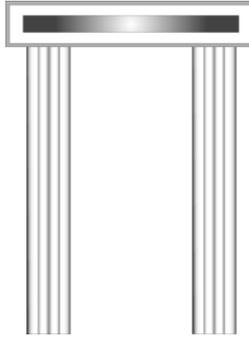
Sheila Lawlor

**Deal, No Deal?**

The Battle for Britain's Democracy

**POLITEIA**

A FORUM FOR SOCIAL AND ECONOMIC THINKING



## POLITEIA

### A Forum for Social and Economic Thinking

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The Battle for Britain's Democracy

Sheila Lawlor

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# Introduction and Summary

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The government's Chequers' proposals and White Paper for Brexit have cost it dear – two cabinet ministers, two junior ministers, two party vice chairmen. But more serious, they appear to have lost it the trust of many voters. Chequers would in practice oblige Britain to obey EU law for goods and side step the referendum decision. Ministers may hope that Brussels backs the plan and that, come the autumn the EU will be on board, related difficulties resolved by fine print, and this country scared into agreement by the Armageddon threatened as the alternative. But the new plan may not pass muster with British voters or with the EU, which has made clear its unambiguous rules from the start and may be hoping the UK returns to the bloc having botched its departure. The indications are that neither side will easily be taken in by the Houdini-like tricks to pull a 'Brexit that works for everyone' out of the hat.

Opinion polls here after Chequers revealed that by two to one those polled would prefer to leave the EU without a deal rather than follow the Chequers plan putting the UK for swathes of its economy under EU law, the Brussels rule book and the European Court of Justice after March 2019, after the country officially has left the EU. At issue is the accountability of government and parliament to the electorate over the question of sovereignty. MPs and government derive their authority, not from themselves, but from the voters. They expect their decision to 'take back control' to be honoured and for the democratic system they voted to save by their leave vote to be reinstated.

Failure to execute the referendum decision would, as this analysis explains, damage Britain's democratic system of government. It would probably do so in vain because the EU is pursuing the realpolitik of European integration having made clear the conditions under which it would agree a trade deal, while the UK's enemies of Brexit are unlikely to be appeased short of a quasi-return to the bloc. Both perspectives will be discussed here.

Failure will not only be morally and constitutionally damaging. Practically, it will undermine Britain's ability to play to its strengths, politically, legally and economically. For not only does a genuine Brexit matter in

itself, but it matters for other reasons, including restoring the UK's market economy to the framework of UK law, unfettered by being tied into the Single Market and Customs Union.

The leave vote implied that change, and prompted a battle between two visions of the UK, its constitutional sovereignty and interlinked economic model. One vision wants to keep as much of the status quo as possible for different reasons, political, ideological or because of its supposedly being the safer economic bet. It is accepted that the UK economy would be tied into and under the EU, that becoming a rule taker is the penalty to be paid for leaving the EU: the wish is to save as many of the trappings of EU membership as can be saved, with for some the hope of eventual return to the Union. This vision therefore favours an EU-centred orbit, under the aegis of which the UK would revolve legally and economically. The other vision looks to UK constitutional sovereignty, freedom under UK law, including for the economy and to trade with global partners under mutual recognition or other treaties. The UK could build on its strengths as a market-based, competitive economy, open to new entrants, encouraging nimbleness, entrepreneurship and innovation, secure in its law and the impartiality of normal dispute resolution mechanisms. This vision accepts the change will take time, effort and determination as this country adapts. But, given the UK's resourcefulness as the fifth richest economy in the world, there is much to work towards, much to play for.

Chequers and the White Paper went for a dose of each - the EU-centred vision for goods bound into EU law, and the autonomous UK vision for services with mutual access, regulatory flexibility, and enhanced equivalence for the financial sector. As a result, parts of the UK economy would be under EU law and so breach Brexit, there are doubts about the legal basis (e.g. the plan for a common customs area) which appear to breach international WTO law with respect to National Treatment (foreign goods requiring an extra tracking procedure than domestic ones), and the EU may put a different spin on things and demand more. As it stands therefore, the White Paper may not take off at home, or under international law, or with the EU, and there are good reasons to suppose a more realistic trade agreement may have to be reached.

One option would be a Canada EU (CETA) 'plus' agreement based on mutual recognition with enhanced equivalence for the financial sector trade. Were the EU to refuse such an option, trade would take place under international law and WTO terms. While it is true that coverage for services under the WTO General Agreement on Trade in Services (GATS) is incomplete, negotiations for services liberalisation remain ongoing and other options, such as the plurilateral Trade in Services Agreement (TiSA) may present themselves in the future. This is why the WTO is far from being the negative option painted for political reasons. WTO rules account for most of the world's trade and facilitate the conclusion of bilateral preferential trade agreements with other countries. Not only does their regulatory framework outlaw the kind of discriminatory action of blockades and non-cooperation, often claimed by antagonists, but it obliges members to continuity of arrangements for cross-border trade when there is continuity in respect of rules for outcomes.

This analysis will consider these matters in more detail, under the following headings each of which will be explored in subsequent chapters.<sup>1</sup> Readers will get a sense of each chapter from the outline summary of each that now follows:

**(1) A question of Sovereignty – Britain's Political Tradition** Achieving a genuine Brexit matters not only on its own account, but because voters made clear they want it. Unlike any other EU member state, Britain's political tradition has for centuries been built on the understanding that authority for the exercise of power derives from the people's will. When they decided to leave the EU in June 2016, voters were deciding to restore that basis for British democracy, 'to take back control', to restore the freedom to govern themselves, subject to their own laws, passed by a parliament and government accountable to them, and them alone. For four decades 'Europe', whether the political classes liked it or not, has been a matter of contention for British voters. For four years, from 2014 when UKIP topped the poll for the European Parliament elections

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<sup>1</sup> References and links will be given in the individual chapters.

and overall, Eurosceptic parties won around 50 percent of the vote, until the 2016 ‘in out’ referendum and since, it has been central. During that time, a prime minister, reinforced by an act of parliament, gave to the people themselves the decision on whether to remain in or leave the EU. He, most of his ministers, and most of the UK Parliament, commons and lords, the big banks and corporations, *bien pensant* newspaper and political elites and the international chum-ocracy backed ‘remain’. Would-be-leavers were threatened with the direst of consequences for their country and their livelihoods, public funds deployed shamelessly for political campaigning to sway the vote through official publications such as the treasury’s voluminous report (that missed out key measures and data), ‘independent’ forecasting from agencies in receipt of public (and EU) grants or the Bank of England’s governor. Voters took it on the chin. And, after one of the longest campaigns in the UK’s political history since the nineteenth century battle to repeal the Corn Laws, they turned out in large numbers, the highest turn out for national vote since the 1980s, and chose to leave the EU.

Recognising what was at stake, the incoming prime minister, Theresa May, pledged to honour the vote, spelling out in the months which followed what Brexit meant: ‘We will take back control of our laws, our borders and our courts’; ‘Britain will leave the EU, the Single Market and the Customs Union’ (ruling out, also ‘a [ie another] customs union’). Many ministers and parliamentarians who had formerly backed remain, followed her lead.

That the prime minister was seen to recognise what the vote meant and was intent on honouring it mattered for many reasons: not least because of the understanding over centuries that political power and the authority for making the laws that govern the people of this country, derive from the will of the people themselves. That constitutional basis for power matters as much today as it has done throughout the centuries. It means that, as UK political leaders prepare for exit, they must take account of a longer tradition of Britain’s constitutional and political arrangements that reflect and protect the basis for authority, and shape democratic government in this country today. Since 1918, it has brought great benefit, both in times of

stability as well as of radical change to honour the electorate's decision in three dramatic general elections results – 1922, 1945, 1989. The gigantic and unexpected change of course implied on each occasion was accepted by opponents, accommodated and absorbed by parliament and the country all of whom settled down, some begrudgingly so, to give the new course a fair wind. That tradition, understood for generations by Britain's leaders, matters as much as ever today. But it is being attacked by those who have sought to oppose Brexit.

**(2) Opposing Brexit: the EU** Since the referendum Brexit has been like a battleground, with Brexit's opponents in the EU and UK advancing to retake the territory conquered by the leave vote. Tactically the aim of the Chequers agreement and White Paper is to disarm the advancing armies in the EU and at home by proposing a treaty to concede some territory demanded, and conclude the war amicably by meeting EU demands and disarming its protagonists at home.

From the EU perspective, the breakaway UK must not be allowed to 'get away' with leaving the bloc; it must be worse off out of the EU than in it; it must be defeated and humiliated to show other disgruntled states that should they leave, they too will be brought to their knees. That strategy, masterminded in Brussels, shaped by the Franco-German architects of the project and by Michel Barnier, the chief EU Brexit negotiator, means complicating Britain's departure despite the legal framework for exit being relatively straightforward under Article 50, exploiting the Irish Border to prevent the Brexit for which people voted despite the UK's proposals for keeping the border soft being workable, and rendering the basis for UK-EU future trade a minefield despite the simplicity of standard mutual recognition precedents (such as the EU's Canada deal) or the 'most favoured nation' trade terms under WTO.

M. Barnier, a French centre-right politician whose ministerial career in promoting French political interests has been mirrored by his pivotal role in furthering EU integration through the Lisbon Treaty and reconfigured Single Market, the glue that holds the project together. Having intermittently exchanged the politics of ministerial office in Paris for those

furthering EU cohesion in Brussels since 1999, his has been a career crowned with success. He helped transform the Constitution for Europe rejected by French voters in their 2005 referendum to repackage it as the Lisbon Treaty, working with EU Commission President Jose Manuel Barroso and his top secret brains trust: it was later pushed through on autopilot without any popular mandate. Barnier's career - in Paris as a minister between 1993 and 2009 and Brussels, to which in 2009 he switched permanently initially as an MEP to become EU Commissioner for the Internal Market and Services in 2010, his second post as EU commissioner - has therefore been pivotal to realisation of the project.

From the outset Barnier has been determined that the decisive Brexit signalled by the referendum with its pithy aim 'to take back control' can not be permitted: it would be contrary to Franco-EU interests, contrary to the political goals of the French state and could damage the project of European integration initiated by the French in the European Coal and Steel Community under the Treaty of Paris in 1951 with Germany and the Benelux countries. Into that system Germany was harmoniously bound, and a line drawn under the invasion and defeat of France, three times since 1870 to give its western neighbour the security, economic, political and military, on which she was intent after the 1940s. That initial project has now developed into the familiar European Union. Its tightly controlled, centralised economy under Franco-German aegis stretches from the Atlantic to the Russian borders and southwards to the Mediterranean, bordering the vast continent that had been dominated in the east by the Soviet Union since world war two and Germany's Third Reich immediately before it. In this 'new Europe' the rehabilitated Germany co-operates with France and through cooperation, not war, has secured a unified Germany, and the economic hegemony with spheres of influence to the east to which different leaders at different stages of its history have aspired.

Brexit and the vision of political and economic autonomy it implies, must be obstructed for three main reasons. First, because Britain's market-based economy is the antithesis to the EU's centrally-directed system. Second, because Brexit is anathema to the Franco-German EU integration project.

And third, because the referendum poses one of its greatest threats to the troubled cohesion of the bloc, where voters and their governments increasingly resist the bonds of Brussels.

Thus for M. Barnier and France EU and Eurozone integration, the glue-ing of the bloc and its Single Market ever tighter together makes perfect sense and requires a 'bad' Brexit. Any deal must prevent the UK from being a competitor by binding its economy, big and small business into the EU system subject to EU rules. This will also serve to discourage rebellious member states or the French and German Eurosceptics prominent in the politics of both founder countries from following UK example.

Pitting the ruthless logic of his country's aims against the UK's desire to leave the EU amicably but decisively, Michel Barnier's agenda set the parameters for the Brexit talks and for the deal to be made in Brussels to French ends. Having boxed Britain into his own mindset of the EU position, he has made a genuine Brexit far more difficult to achieve than it should have been. This problem will be considered in (3) below.

**(3) Opposing Brexit - The forces at home.** Big business, corporations, banks, many in the 'higher end' media - have mounted obstructions in parliament and outside, seeking to play off the Euro-centred vision of 'the economy', against the voters' sovereignty and the consequent autonomous and internationally-focussed vision of the economy. The prolonged resistance to and attempt to obstruct a national vote in the UK is without parallel in recent history, though reminiscent of the far more quickly-dealt-with refusal by the house of lords to pass Lloyd George's ('people's') budget in 1909 since when the dramatic change of course for which people voted was accommodated and executed.

By contrast, opposition to the referendum decision has become more and more concerted, 'sanctioned' it seemed by the blessing of senior UK parliamentarians as they sought to prevent the bill for a genuine Brexit, The EU Withdrawal Bill, becoming law. Even at the eleventh hour, at the very closing stages of its passage, they sought to obstruct, and there were continued demands for the UK bind its future into the EU system, belong

to a Customs Union with the EU, or that it be in or access the Single Market, even though such arrangements would oblige the UK to be bound by EU rules. Citing concerns for the (often Euro-focussed vision) of the economy, sometimes on no more a basis than the ‘say so’ of entrenched bosses and their PR officers, Labour and Opposition MPs, ‘remain’ peers (some on the EU payroll), a handful of large corporations, from Airbus to BMW owned Rolls Royce and a sympathetic *bien pensant* media joined the same chorus.

In the lords and commons, a majority of peers, around half the MPs in the Labour and smaller opposition parties joined by Tory rebels, defied the electorate and went against the Labour and Conservative election manifestos, aiming to exploit parliamentary arithmetic to stop what ‘the Brexit people voted for’ (the phrase mentioned during a television analysis, *BBC Newsnight*, 13 July). Colluding on some amendments they also went against the spirit of the system of constitutional checks and balances provided by two separate houses.

Outside parliament some bigger corporations, vocal in their campaign against Brexit, stepped up the warnings to coincide with the Bill’s final stages. Airbus, the European competitor to the US giant Boeing, which on 22 June had threatened to move some operations to North America, China or elsewhere in the EU and abandon plans to build aircraft wings in UK factories because EU regulations might no longer apply after March 2019, following these with a campaign in the run up to the Chequers agreement, prompting a rebuke from one cabinet minister for its ‘inappropriate intervention’, though supported by another. At the same time BMW owned Rolls Royce warned that the wrong Brexit could oblige UK factories to close.

Throughout the extended post-referendum campaign, the opposition in and out of parliament had been reinforced by many members of a complicit *bien pensant* press, broadcasting media journalistic intelligentsia. The presumption was that leave voters were congenitally ignorant, belonging to a ‘sub species’ of the lower orders – the ‘non-graduate’ voters into which the BBC’s notorious referendum night ‘explanation’ of the

leave vote had put them, the decision being 'bad' for Britain's economy, the consequences dangerously 'chaotic' for the UK's chances with the EU while damaging to the stability of the Irish border.

**(4) The Negotiations, the EU, the UK - Official Positions:** Section 4 considers the differing positions of the EU and the UK. From the outset the EU position on a Brexit trade deal was clear: the UK cannot 'cherry pick' and must be worse off outside the EU than inside. Before talking trade however, the UK must fall in with the EU's agenda and timing for the talks beginning with the demands for a UK payment to the EU to concede the EU agenda on citizens' rights and to accept the EU approach to the Irish border. On trade, the EU has consistently maintained that the UK must be worse off outside the EU, that it must face greater obstacles once outside than inside. Moreover, a free trade deal would require the UK to be subject to relevant EU law, to be under the jurisdiction of the European Court of Justice and to face conditions more onerous than those left behind. The UK conceded on each of the initial demands (talks timetable, payment and Irish border), though contending that 'nothing is agreed until everything is agreed', persisted in its longer term aim to leave the EU and its institutions, the Customs Union and Single Market, and to negotiate trade deals with the EU and third countries to promote UK interests.

By March 2018 the UK's broad aims seemed unchanged. These were for free trade with the EU on the basis of mutual recognition for goods, mutual recognition in general for services with enhanced equivalence for financial services, and for as frictionless a border as possible. Regulatory standards would remain as high as the EU's on the basis of the same outcomes. If that is 'cherry picking, then every trade arrangement is cherry picking'. The UK moved subsequently to a more EU compliant position on goods trade in the White Paper and Chequers Agreement (July 2018) compromising both its constitutional and the trade aims, reflecting a 'half in half out' position for the UK though leaving the EU, its Single Market and Customs Union in March 2019.

**(5) The Chequers proposals and the White Paper** (July) envisage two very different futures for goods and services. For goods the UK would be

‘aligned with’ the EU and to all practical purposes ‘in’ it, subject to relevant law, and committed to future alignment for a range of goods, but ‘out’ for services with free trade and mutual access, recognition of each other’s laws for qualifications, regulatory flexibility with enhanced equivalence for the financial sector. Following ‘a common rulebook for goods and agri-food’ has been portrayed as a way to keep the Irish border ‘soft’, keep goods and orders on the move without obstacles or delay at UK ports and borders. A common UK-EU customs territory with the UK collecting EU-level tariffs (to be reimbursed for UK destined goods) would serve as a bespoke device to reinforce these. Giving the UK Parliament a say on whether in future to accept or reject rules is seen as providing a ‘lock’ on arbitrary EU power; agreeing to some European Court of Justice involvement as falling short of ECJ jurisdiction.

But the problems with the plan were evident from the start. Not only did M. Barnier pour cold water on the proposal for a common customs area but there were suggestions that it would be in breach of international law. It was feared that the European Court of Justice could command real judicial power, with EU law returning to the affected areas of economic life and with ultimate power to judge disputes, with some legal analysis suggesting the UK courts would be overruled. Moreover, the complicated track and rebate arrangement coupled with adherence to the EU rulebook could prevent the country moving to a free and open economy. Nor could the implied reassurances be taken at face value.

Allowing the UK Parliament in future to accept or reject the EU laws hardly inspired confidence, given how MPs and peers dedicated their recent energies to keeping the country ‘in’ the EU wholly or partially, while the prime minister herself had in the past judged similar arrangements to be ineffective for purposes of scrutiny. (Chequers Agreement and White Paper *The Future Relationship Between the United Kingdom and the European Union*, July 2018). The proposal to give ‘preference’ to EU nationals on immigration, could be seen as the mechanism of civil servants to put EU immigration or a version of free movement back into the frame.

**(6) The more realistic options** will be considered, given that it the latest UK (White Paper) proposal may founder. Chapter VI will outline the options that the UK should pursue: options that respect UK red lines and recognise that opposition to Brexit on both sides of the Channel is unlikely to end.

It will propose that for goods trade with the EU, the UK leaves Chequers behind with a hasty burial, and moves to a respectable replacement, on the basis of mutual recognition, the principle proposed by the prime minister on 2<sup>nd</sup> March, for which preparations were made in the DExEU draft for the White Paper. For services, the proposal for mutual access based on regulatory flexibility should stand, with mutual recognition for professional qualifications and some services and enhanced equivalence for the financial sector with legal underpinning of the arrangements agreed for mutual access. A blueprint and draft heads for an agreement have independently been prepared which provide a ready made template. The arrangement struck with Canada, CETA, offers a good starting model for the UK and EU. A CETA 'plus' would be simpler for the EU, simpler for the UK and simpler for international trade law to replace the byzantine complexity of Chequers with something that could work for everyone. If the EU is not willing to reach a CETA plus deal for goods and services with the UK, the alternative of trade under WTO rules offers a sound alternative, very different to what opponents contend and for which the preparations are already in hand. This could also disperse the obstacles strewn in the path of Brexit by the EU. The Irish border 'question' can be answered by the technological solution to cross border traffic with no further infrastructure and it will then be up to the EU and Ireland to match the UK's soft border proposals if they are really in earnest.

At the same time the government, rightly preparing for no agreement being reached with the EU, should accelerate arrangements for future trade under WTO rules. This would work well for both UK-EU trade, where both parties would be starting from the same basis, so there could be no question under international law of an entitlement to create discriminatory barriers to trade at its borders. Either course would respect the referendum decision and be in keeping with Britain's democratic and constitutional freedoms.

While economically, time may be needed for change to pay its way, or that work will be needed to prepare for trade under WTO rules and exploit circumstances to recalibrate the UK economy, these will be matters of execution, not decision. That decision was made following a prolonged, detailed, debate that considered the potential economic consequences.

**(7) Ireland – Playing The EU’s Green Card** Chapter VII will consider the malevolent exploitation of the Irish border to obstruct a genuine Brexit by EU and other opponents, why their claims have little bearing in the realities of the 21<sup>st</sup> century, politically, economically or internationally in Ireland or in the context of the EU’s shared borders with 19 other countries. It will explain that the UK’s proposals for a soft border using technology and in line with contemporary practice has already been proposed by an EU commissioned study. More to the point, there are compelling reasons why the UK should stand by its initial proposal for a soft border through technological solutions and why it should refuse to play any part in the EU’s cynical politicisation of a matter. By playing to the EU tune, not only could the UK irretrievably damage the strong ties between Britain and Ireland and its peoples, but it could damage its standing, integrity and role as one of the world’s leading democratic powers.

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The decision to leave the EU has been taken, a political and constitutional decision in line with Britain’s tradition of freedom under the law, including the right of people to decide how how and by whom they and the country are governed. That tradition precious in itself has been precious to generations of voters. It is one based on trust, backed by the ability to remove from power those who break faith with the voters. It has led to a system that has guaranteed not only freedom, but stability, order, the rule of law, protected property rights and provided for economic prosperity and done so even in the last century when the story from western continental neighbours was less happy, less stable and often less free. Politicians who play politics with it do so at their and the country’s peril.

# I

## A Question of Sovereignty – Britain’s Political Tradition

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One of the strengths of Britain is its political stability and the enduring relationship between politicians and people. In fact, its political identity rests on the view that the legitimate and successful exercise of power is founded on the people’s will: over centuries the executive and the legislature interpreted, anticipated, sought to shape and respond to that will. They conceded, often reluctantly, it must be executed (or appear to be executed), doing so sometimes under threat, and often in order to win or remain in power.<sup>2</sup>

By the nineteenth century and before the full extension of the franchise, parliament deferred to that reality as over the repeal of the corn laws in 1846, the measure which kept grain (and as a result most people’s staple food, bread) prices artificially high to the benefit of landowners. The Conservative prime minister, Sir Robert Peel, responding to a national movement to repeal the laws which had swept the country, drove repeal through with Whig support in the teeth of his own party and the landed interest, whose grain prices would fall if the tariffs on imported grain were lowered. Peel’s ‘conversion’ and its consequences became a legend. That legend has recently become topical, but though it is true that his decision split his party, it did so not at the behest of the ruling elites but in defiance of them; and, more important for the Conservative party, it taught it an important truth –about where political power and the authority on which it rested now lay. Within decades the party had transformed itself into the most successful, enduring and modern political party of any democratic system, one whose leaders had little difficulty in understanding and speaking to the national audience. That lesson was periodically to be re-learned as it was in the period of Liberal hegemony in the early 20<sup>th</sup> century, culminating in its scandal and crisis-ridden coalition with the last Liberal prime minister, Lloyd George. Those early days shaped the questions that would dominate the foundations of politics today as

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<sup>2</sup> This chapter draws on my earlier analysis *Ruling the Ruler: Parliament, the People and Britain’s Political Identity*, Politeia, 2016.

Conservative leaders grappled with the accommodation to be made during political life, between leading those on whose authority they held power and the pursuit of the policies of liberal economics, the national interest, the preservation of the constitution and the advancement of social reform.

They understood that this was a country in which politics and policies, the different ‘pitch’ made rival candidates had long been central. Reports of the hustings and political meetings in the nineteenth century had wide circulation in periodicals and news papers; they were backed by the literature of the modern election, pamphlets, fly sheets, ballads, and (in the case of Peel) mourning poems and subscription appeals for a memorial monument. These reveal a lively and extensive popular knowledge of and interest in the policy of politics, the protagonists and their failings, in which spectators often challenged, mocked, undermined the case of those seeking office. By the early twentieth century mass rallies were addressed by contending leaders from the top of a parked car before and after the hiatus of World War 1. Therefore, even before the extension of the full franchise after the war, voters had the sense that their MPs were accountable, knew what they were voting for, just as after it people knew what was at stake.<sup>3</sup>

Thus in 1922 they sent the last Liberal prime minister, Lloyd George and his besmirched coalition, packing; they made Labour the main party of opposition; one year later they voted for Britain’s first Labour government in 1924. Having thus shown an open-mindedness to Labour, they settled down to Conservative rule under two able, but relatively unknown, 20<sup>th</sup> century leaders, Bonar Law in 1922 and, when he got throat cancer, Stanley Baldwin in 1923, whose government brought to the policies of peacetime a mastery in social reform, from pensions and insurance schemes to house-building and local government that transferred the functions of the poor law guardians to the modern local authority. In that year also, on a true, but boring slogan of ‘safety first’, Conservatives lost to Labour which returned to its second time in office, forming after the

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<sup>3</sup> For the involvement and sense of accountability during the 19<sup>th</sup> and early 20<sup>th</sup> century, and an illustration from the 1850 Lambeth by-election, see my *Ruling the Ruler: Parliament, the People and Britain’s Political Identity*, pp 11-24. *ibid*.

financial crisis broke in 1931, a national government with Baldwin and his successors for the rest of the 1930s and after during the war years, mainly under Conservative leadership.

By contrast with its continental neighbours, as voters were often reminded throughout the inter-war years, Britain's system of government was stable and said to owe that stability to the political system which respected the freedom of voters to determine how they were governed. In a discourse that had its fair share of hyperbole, there was, nonetheless, a view to which both voters and their leaders willingly subscribed. It marked out a distinctive identity, a political system seen as unique to this country, based on a commitment to freedom by the free born over centuries, in which power was accountable and constrained by both the democratic system and the rule of law. Its fruits were seen to be stability, order and the protection given by the democratic system and the rule of law to life, liberty and property rights. By contrast, instability or totalitarianism seemed to mar the continental systems, bringing fascism, communism or violence that threatened life and property rights, and undermined democratic freedom.

Thus Britain's successful political leaders evoked during these years the sense shared by their listeners that their country was unique because they were the architects of their own and its destiny, and had been over centuries, fashioning a system of laws as free people in their parishes and councils, their parliaments and corporations, holding kings and tyrants to account. Their system was subject to the law, which even the government had to obey, a tradition that *Magna Carta is the Law, Let the King Look Out*<sup>4</sup>, and it was based on the authority of the popular will, as MPs used to be reminded by Baldwin, *It is the country that returns you, it is the country that will judge you*.<sup>5</sup> It also allowed for change, even the most dramatic change and for the other side a fair hearing and the chance to govern.

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<sup>4</sup> For the reference to Magna Carta, see title speech, Stanley Baldwin, *This Torch of Freedom*, London, 1935, p.12 (4th edn 1937).

<sup>5</sup> As Stanley Baldwin, who replaced Bonar Law as Conservative leader and prime minister, reminded MPs on 4 Dec. 1924, Stanley Baldwin, *On England*, p.73, London 1926.

That was the case when in 1923 the Labour Party came to government for the first time, and again in 1945 when it returned dramatically, ousting Churchill, the man who had won the war. On both occasions not only did the outgoing prime minister of the day facilitate, even anticipate the change, doing much to play fair in advance, but parliament cooperated in the smooth execution of change for which people voted. It was the case in 1979, when Margaret Thatcher was put in power to slay the dragons seen to have brought Britain to its knees and lives and livelihoods made wretched by the union barons, strikes, unemployment and inflation. On each occasion those who lost the popular vote stood aside and accepted that the people's decision must be accepted and its execution facilitated.

Today it matters as much as ever, that politicians recognise that their voters are often more savvy, often smarter, than they themselves and have a native political intelligence and an inherited understanding of duties and responsibilities of power. Such power as parliament has is not exercised independently, but, as earlier generations of MPs understood, derives from the people.

## II

# Opposing Brexit: the EU

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As the EU's Chief Brexit Negotiator, Michel Barnier has made clear that neither he nor the EU can tolerate the decisive Brexit signalled by the leave vote with its pithy aim 'to take back control'.

That would not be in EU interests. More to the point it would not serve the political and economic goals of the French state, European integration under French leadership and a centralised, tightly regulated economic system, to which Germany has been bound since the initial European Coal and Steel Community under the Treaty of Paris in 1951. France's desire for security – economic, political and military – against its powerful and irrepressible eastern neighbour may have softened in the decades since the Second World War ended. But the symbiotic relationship developed from French post-war aims and Germany's desire for political rehabilitation. The project to which it led now extends geographically to the Russian borders, the Mediterranean and stretches westwards from Greece to the Portuguese and Spanish Atlantic, but the aim of European political and economic integration remains as central today as at the start.

It is therefore paramount for M. Barnier, the Franco-German axis and the EU whose interests he so ably promotes, that that unity is not fissured. To this end Brexit must be the last breakaway, not the first – and the rebelliously minded from Athens to Italy, Hungary and Poland must not draw heart from the Brexit deal, nor be encouraged to follow suit. The same goes for voters in France and Germany, whether still loyal to traditional parties or moving elsewhere, who object to the EU's anti democratic and authoritarian system of centralised economic and political control.

It is also paramount that the UK economy, which poses a threat to the centrally controlled economy of the EU and France, should be restricted after Brexit to prevent its doing well or better after Brexit or competing with that of the France, its antithesis.

The French economy is politically centralised, directed, controlled and highly taxed. M. Macron's structural reforms, if they work, will help to streamline the model, not change it. Here is an economy which works in its own way, historically *dirigiste*, certainly since the seventeenth century, to serve the political aims of the French State, with high levels of state intervention, taxation, and direction. In many respects it is successful. High productivity in both services and goods tells a story of a high value, elite economy, epitomised by the training of elites, in the Grandes Écoles, engineers, financiers, administrators, among whom are both Emmanuel Macron, a former Rothschild investment banker, and Michel Barnier, a graduate of the Paris Business School ESCP Europe\* (École Supérieure de Commerce de Paris): a galaxy of crack performers in a system which nurtures and rewards talent. France pays its way through this expensive, *dirigiste* system by being and under-writing a rich, knowledge-based economy. But the cost is high, unemployment levels at c. 10 per cent are over twice the UK or German average, and the bleeding of talented able entrepreneurially minded citizens who abandon the Hexagon's punitive tax and controls, many for the UK to work as bankers, financiers and in the higher level professions (the French consulate estimating around 300,000-400,000 French nationals now live in London) underline the importance to the French of binding the UK's Brexit economy by the same constraints as the French.

To the official French mind, the UK's market economy appears an upstart, its very characteristics – competitive, entrepreneurial, flexible and cheaper – a fault. The principles on which it is built, protecting freedom, rewarding competition, are suspect and for many French eyes a euphemism for a barrow boy economy that undercuts and takes short cuts epitomised by its latest incarnation, the dreaded 'gig'. In short it is the antithesis to the regulated, directed and expensive French version. The trouble is, that like that its other bastion, the US, the model works. The City of London historically built on those strengths to emerge as one of the world's leading financial centres, rivalled only by New York, each a global centre, each underwritten by the common law, London a global magnet for legal and other professional services, for investing and attracting capital and for doing complex commercial deals, underwritten by British courts. It is no

accident that both have flourished, London for centuries, as a testament to the free market economy. Britain has led the world in shaping the international rules for trade in the sector, adopted or developed both in the EU and internationally, reflecting the same principles. But now, as the Eurozone prepares for closer political integration, the arrangements for monetary and economic union are following closely behind, and services, which have in general got away lightly, will now increasingly come under the EU rulebook.

Barnier's position on financial services is more complex. The 'dogma' of no cherry picking, a Single Market which the EU 'cannot ... let unravel' in which 'the free movement of persons, goods, services and capital are indivisible' and in which there could be 'no sector by sector participation' for third countries is seen as imperative to maintaining EU sovereignty, not only as 'a big market place ... [but ] also [as] a social and economic community community ... [with] common standards', and in respect of which 'third countries must accept [EU] autonomy to set the rules and adopt standards'.<sup>6</sup> Despite an emphatic French 'non' by France's finance minister to the UK proposal for equivalence, and his own assertion that there can be no 'cherry picking' as between goods and services (the position is discussed below, ch. IV), Barnier's position on the financial sector is more complex. As a former Commissioner for Services he recognises the importance of open markets for financial services and he believes in precedent, the article of faith by which the EU spiritually breathes (which he has been instrumental throughout in setting). The Single Market is, as he explains, open to third countries, with the 'free movement of capital' and relies on 'the regulation and supervision of [ie by] third countries or equivalence'.<sup>7</sup>

The big question to decide will be how 'equivalence' is agreed. He seeks to control the UK's legal framework to prevent it from being competitive. Already, he has cornered the UK into agreeing to EU demands, for the

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<sup>6</sup> EC speech 6 July 2017, European Social and Economic Committee, [http://europa.eu/rapid/press-release\\_SPEECH-17-1922\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-1922_en.htm)

<sup>7</sup> Speech to American Chamber of Commerce, 10 July 2018. The EU, as Barnier explained there, had adopted hundreds (200+) equivalence decisions covering 30 foreign jurisdictions including the US. [http://europa.eu/rapid/press-release\\_SPEECH-18-4452\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-18-4452_en.htm)

talks' timetable, over citizens' rights, for a payment not legally required and over the EU approach to the Irish border. Having set out that there will be penalties and restrictions for the UK outside the EU, he and the French are unlikely to change course. Not only is there too much at stake. The differences between the two parties could, quite simply, be irreconcilable.

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Michel Barnier, one of the most determined proponents of France's European project of ever closer integration, started life as a Gaullist member of parliament (now the Republicans) joining a political cause to promote the aims of the French state, politically centralised and economically *dirigiste*. A government and then cabinet minister by the 1990s, his dedication to that project led to a life alternating between Brussels and Paris since the early 2000s, as European Commissioner for Regional Affairs, then French minister for foreign affairs and after the French voted against the Constitution for Europe in their referendum in 2005, returned to Brussels as a special adviser to Jose Manuel Barroso on creating a European civil-protection force and to help rewrite the constitution treaty into the Lisbon treaty, returning to the French government as minister for agriculture in 2007 before becoming an MEP in 2009, evidently to be fast-tracked by Mr. Barroso to the EU Commissionership for Internal Market and Services the following year, a post he held until 2014.<sup>8</sup>

Barnier has been determined from the outset to play the Brexit talks to the French tune and has done so with, it seems, a German blessing. In the next round that Franco-German dynamic will dominate the forthcoming negotiations the emphasis on the French economic interest and that of its

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<sup>8</sup> Minister for the Environment (1993-95), Minister of State for European Affairs (1995-97); European Commissioner for Regional Affairs (1999-2004) Minister for Foreign Affairs (2004-05) Minister for Agriculture (2007-09); MEP (2009-10); EU Commissioner for Internal Market and Services (2010-14). He served as a special adviser to Jose Manuel Barroso on creating a European civil-protection force (2005-6) and member of the group rewriting the constitution to become the Lisbon treaty (2006-7); and as Special Adviser on European Defence Policy to Jean Claude Juncker (2015).

German partner. For the UK this means one thing. Their aims will not be reconciled with Britain's very different and older tradition of the accountability of ruler to ruled, in a democratic system and free economy under the rule of law. That must mean a Brexit, as President Macron and Mrs Merkel have made clear, in which the UK cannot 'cherry pick' or do better outside the EU than she would within. In short, the fragile status quo ante must be preserved after Brexit in so far as it can.

For Mrs Merkel, weakened internally in Germany and externally in the EU, her attempts to balance the power struggle between the individual member states, the EU's periphery, and the central bureaucracy in Brussels, may now be over, damaged beyond repair, especially by her own immigration policy. Though appearing to hold things together at home, quieting (for now) the criticism from the CSU, (the CDU's Bavarian sister party), defeating Martin Schulze's bid as former President of the EU Parliament and SPD leader for the chancellorship, the current SPD leader Andrea Nahles has not ruled out another election. Merkel has good reason to throw her weight behind the talks strategy, as the best way to hold the project of her lifetime together, one from which Germany is a beneficiary. Her economy, like that of France is expensive and highly productive. Its high productivity derives partly from the celebrated 'dual system' of training to result in a highly productive high value economy, both in the goods sector, from cars and electrical goods to pharmaceuticals and services. The Single Market and customs union provide a ready market on its eastern and southern front, borderless travel for its goods lorries, cheaper labour on its doorsteps, and the 'cheap' Euro contributing to benefits which outweigh the costs of the Eurozone and the political toll this takes.

For its Franco-German founders, the internally directed and protected Single Market is the glue which holds the EU together. Centralised economics have served the political goal of French unity and will continue to be the glue which binds the EU. To survive the fissures in the east, the economic misery in the south, new life must be breathed into it, overcoming, as President Macron intends, the obstacles to ever closer union, whether at home or within the EU's own borders.

Macron is a Euro-integrationist with purpose; he intends to return France to the driving seat out of which she has been eased by successive German chancellors, save the EU through a programme of reform, extracting compliance from the other 27, promoting the closer union and the tighter political and monetary union of the Eurozone. In short, M. Macron intends to be the saviour of the EU, adapting its design to promote Europhile driven integration, as indicated in a recent speech to French diplomats (Paris, 27 Aug 2018), to bring French *dirigisme* to the rescue of Brussels centralism poised and to take over when the current German chancellor, Angela Merkel, leaves the stage.

There are therefore two ‘red lines’ for the EU’s UK Brexit deal. There can be nothing in a UK-EU deal that widens the cracks in the integration project and everything in it to constrain the UK economy. But if the UK leaves without a deal, its future economic relationship with the EU must be made as expensive and full of friction as possible.

### III

## Opposing Brexit: the forces at home

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Nearer home in Britain groups hostile to the leave vote sought to impede its execution, in parliament and outside. They include a majority in the House of Lords, almost half the MPs in the House of Commons, voices in the business and industrial sectors and with sympathetic backing in the *bien pensant* media. The initial response on election night by the BBC highlighted what they saw as the problem: democracy and the democratic system may be ‘wrong’ because voters are insufficiently ‘educated’ to know what the right decision is that they should take. From that moment if they had their way, it would be only a matter of time until those opposed to Brexit overcame and possibly reversed, or at least essentially altered, the electorate’s decision. This was, therefore, unlike previous national votes for a dramatic change of course, such as the 1979 election putting Thatcher into power, or the 1945 victory for Clement Attlee’s Labour Party, which though distasteful for many, was accepted by opponents, who settled down to honour the vote and give the new government a fair wind. That did not happen after the referendum although both main parties’ election manifestos had pledged to honour the decision.

Here is not the place to consider how the developments unfolded in the wake of the referendum; rather a snapshot of the case made by opponents to a genuine Brexit during the final stages of the EU Withdrawal Bill in June 2018 will be highlighted. Hostility to Brexit was the leitmotif for attempts to amend the measure and change direction, backed on occasions by staged and rancorously militant street rallies, or tactically timed business intervention and disproportionately sympathetic reporting in the Brexit-hostile media. In Britain groups hostile to the leave vote sought to impede its execution, in parliament and outside.

During the passage of the measure peers and MPs opposed to Brexit advocated an arrangement that would in fact keep the UK in and under EU rules in the EU system, bound to, or into, or under ‘a’ or ‘the’ Customs Union and ‘a’ or ‘the’ Single Market. Or, if that could not be achieved by

specific amendments, then the final amendments would give parliament overall power to decide Brexit arrangements in the event of a no deal.

Throughout the rumpus the government held firm, determined to get the EU Withdrawal Bill through to the statute book. Had the Withdrawal Bill been amended by parliament as its dissenting perpetrators indicated, it could have had the makings of a constitutional crisis. But after protracted attempts to obstruct and circumvent the measure, the will of the voters was reluctantly recognised by both houses. The perpetrators, appeared to assume parliament's authority came from itself not the voters whose decision was treated as ignorant and worthy of contempt.

### **The Labour Party**

Although the Labour position throughout has been to be hostile to the government's aims and proposals, seeking to play the politics of opposition and attack the government's Brexit as 'hard', it has sought also to accommodate an extraordinary degree of ambiguity about what its Brexit policy is. It seeks to provide a home for a variety of positions in its own party, from the official manifesto commitment to accept the leave vote, to the pro-European desire for some sort of quasi membership of the Single Market and the (or 'a')-customs union, to Mr Blair's urging the British people to think again and reverse the decision in another referendum. Initially one prominent line was to oppose departure from the Single Market, but more recently it made much of wanting the same access to the Single Market after Brexit, without officially advocating (as some Labour MPs wanted) membership of the EEA. By the spring of 2018, it wanted the UK to stay in a customs union with the EU, keeping a common external tariff, maintaining the ability to make trade deals.<sup>9</sup> Though inconsistent and incoherent, there is enough there to keep the music chiming with that of the lords, big business and the Tory rebels and that would come to a head in the attempt to defeat the government right up to the end of the passage of the EU Withdrawal Bill.

In the House of Commons, Labour MPs focused on the potential economic future outside the EU, dire in their view, and – despite their manifesto

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<sup>9</sup> Jeremy Corbyn statement, Feb 2018

pledges – that Labour accepted the referendum result and that free movement would end (which amounts to an acceptance that the UK would leave the Single Market)<sup>10</sup>- the party officially and MPs individually changed policy to declare they would stay in a version of the customs union and strike a Single Market type deal. Lining up with peers and Tory rebels to defeat the government, they ignored their own electorates, many in largely leave constituencies.

The official line was set out by Keir Starmer QC, Labour's Brexit shadow secretary. He claimed that the economy and Ireland obliged the UK to being bound into the EU by 'a customs union with the EU and ... a strong Single Market deal based on shared regulations and institutions'. Such a deal was needed to protect 'our economy ... manufacturing ... [and] services sector' and honour the promise on Northern Ireland.<sup>11</sup> Hilary Benn, who chairs the Brexit Select Committee, warned of the damage 'for our future ... for the jobs, livelihoods and public services that depend upon ... economic strength' which was 'what we are debating'. He wanted to be in a customs union and would support being in the EEA, which would, he thought, be an option, he thought, though not a perfect one – and he and other Labour MPs recalled Barnier's announcing that he had accepted such an arrangement as a possibility.<sup>12</sup> Owen Smith, endorsing Starmer's point about Northern Ireland peace and the border and that to achieve it they must 'must effectively be in a Single Market and a customs union', suggested a 'concrete way' of preserving peace in Northern Ireland and being 'effectively ... in a Single Market and a customs union' was to be in the EEA; Chuka Ummuna thought we could be part of the the EEA; that

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<sup>10</sup> <https://labour.org.uk/wp-content/uploads/2017/10/labour-manifesto-2017.pdf>  
'Labour accepts the referendum result', p.24; 'Freedom of movement will end when we leave the European Union', p.28.

<sup>11</sup> Keir Starmer, speaking in the House of Commons on 13 June 2017.

[https://hansard.parliament.uk/commons/2018-06-13/debates/B2C7C836-6CAA-4356-9AC0-F405D5E08471/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/commons/2018-06-13/debates/B2C7C836-6CAA-4356-9AC0-F405D5E08471/EuropeanUnion(Withdrawal)Bill)

<sup>12</sup> Ibid. Benn added that his Committee had said an EEA/EFTA membership could be an alternative, and quoted from the committee's fourth report. He did not mention that the report was not supported by 6 of the 16 members voting, and was dismissed by one member as serving no useful purpose' and as an attempt 'to reverse the referendum result'.

though not a perfect model, it should be the starting point because both main parties want the ‘same benefits’ as the Single Market.<sup>13</sup>

Thus the most recent statements of Labour’s policy have proposed a number of options that would bind the UK in one or more ways to and under the EU system of laws and controls: in ‘a’ (or the) customs union, in the EEA, or with ‘full access’ to the Single Market, to enjoy current benefits. As the EU position on such benefits is clear, these proposals were inconsistent with the manifesto pledge.

### **Peers v People**

In the House of Lords, Anti-Brexit peers, including peers drawing pensions or other payments from the EU, had sought to obstruct, block or vote against a genuine Brexit, by amendments which would keep the UK in the (or ‘a’) Customs Union, the Single Market or otherwise in or under EU law. The former chancellor, Lord Lawson, had described one such attempt (on 19 Apr.) as ‘political debate ... dressed up as [but not] a trade debate’ and of ‘no economic merit’. By June, in the final stages of the passage of the Bill they sought to work with Labour MPs and Tory rebels to amend the bill so, that were the government to leave the EU without a deal, then power over Brexit would be transferred to parliament. Implied was the view that parliament derived authority to decide whether the UK would or would not leave the EU from itself, not from the voters.

Their speeches revealed a failure to recognise the constitutional basis for authority, to understand the limitation on legislative power, its separation from executive power and the power to make treaties. The leave vote was misrepresented, the importance to voters of sovereignty ignored and the electorate’s wish in restoring powers to the UK including the power of voters to hold their rulers to account for the laws made in their name, treated with indifference and non-comprehension. Some peers had earlier on implied contempt for the implied ignorance of the electorate by denying

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<sup>13</sup> Ibid. Owen Smith, MP for Pontypridd; Chuka Umunna, MP for Streatham, who noted that the EEA would mean the UK was without a vote on the EEA rules or the EU Council, a rule shaper on the committees drawing up those rules.

the referendum was decisive, and suggesting that voters may not have understood the implications of leaving, and had sleepwalked into the referendum vote which was 'at ... best an interim decision'.<sup>14</sup>

For such reasons, and because Brexit was a 'national calamity', Lord Hailsham, the former Conservative MP, Douglas Hogg proposed that 'the House of Commons should have a decisive say one way or another'. On 18 June he proposed the 'Grieve two' amendment that parliament should have the authority to intervene if MPs voted down the final UK-EU Brexit deal or if no deal were announced or reached by 21 January 2019. Claiming that the House of Lords was 'the High Court of Parliament and we are [they were] not party hacks', he moved the amendment to prevent a no deal scenario. If carried that would give parliament, lords and commons, the power to determine the future arrangements for the country. They would then have the power to determine the country's future in line with their inbuilt ideological majority for binding Britain to and under the EU in defiance of the electorate.<sup>15</sup>

The first step was to garner enough votes in lords (which they did) and commons (which they almost did) to by-pass the electorate in a putsch against the government and they could eventually oblige a renegotiation on such terms. Parliament could in this way keep the country under or bound to the EU system as it chose, directing the government's negotiation to prevent it rejecting a bad deal. Already the earlier raft of amendments indicated the desired destination: to tie the UK into some form of customs or other regulatory arrangement with the EU, in the manner of one or other of countries so bound to the EU system without being a full or formal part

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<sup>14</sup> Lord Hailsham did not accept that 'the referendum ... was decisive ... and requires the United Kingdom to leave the European Union, whatever the terms or in the absence of terms. The electorate did not—indeed, could not—know the outcome of the negotiations. At the very best it was an interim decision. [https://hansard.parliament.uk/lords/2018-04-30/debates/8EB87728-0FFE-47BB-A2CA-26C1498F1548/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/lords/2018-04-30/debates/8EB87728-0FFE-47BB-A2CA-26C1498F1548/EuropeanUnion(Withdrawal)Bill)

<sup>15</sup> Having 'had negotiations and talks with the Opposition Front Bench ... the Liberal Democrats and many Cross Benchers' he claimed 'we are no party hacks'. [https://hansard.parliament.uk/Lords/2018-06-18/debates/38C39823-F992-450D-AD1F-1A7A0FC6E706/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/Lords/2018-06-18/debates/38C39823-F992-450D-AD1F-1A7A0FC6E706/EuropeanUnion(Withdrawal)Bill)

of it - a scenario that had been rejected by voters.<sup>16</sup> The authoritarian, anti-democratic nature of that aim was to be rendered respectable by the claim of economic necessity, a theme developed in the commons by Labour MPs and Tory rebels.

The concerns for business, economic and trade concerns, though not economically persuasive, were deployed tactically in and out of parliament. The anti-Brexit business lobbies timed interventions, CBI's warning of 13 June was raised the same day in the commons as Starmer referred to its fears that without a customs union 'sectors of manufacturing ... risk becoming extinct'. The lobbying by two high profile corporate names, BMW-owned Rolls Royce and the multi-national Airbus, in the run up to the Chequers away-day threatened job losses, with inevitable retrenchment. Airbus had indeed already been a prominent player in the debate, warning that it might not, after all, build aircraft wings in British factories given concerns that EU regulations would no longer apply after Brexit and because of the uncertainty over customs procedures; that production might be transferred production to North America, China or elsewhere in the EU.<sup>17</sup>

In the end opponents of Brexit did not muster the numbers in the commons, and after protracted protests the lords gave way. The government's victory in getting the EU Withdrawal Bill through to the statute book is important, because The Withdrawal Act means that on exit day the European Communities Act of 1972 will be repealed. Britain will be out of the EU.

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<sup>16</sup> For example, see lords debates, 18 Apr. [https://hansard.parliament.uk/Lords/2018-06-18/debates/38C39823-F992-450D-AD1F-1A7A0FC6E706/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/Lords/2018-06-18/debates/38C39823-F992-450D-AD1F-1A7A0FC6E706/EuropeanUnion(Withdrawal)Bill)

<sup>17</sup> Interventions during the Withdrawal Bill finale and the run up to Chequers came from Tom Williams COO (22 June) and CE Tom Enders (6July). The firm was considering stockpiling billions of pounds of parts to prepare for Brexit disruption. Airbus, which directly employs 14,000 people at 25 sites in Britain and supports more than 100,000 jobs in the wider supply chain, also said a no-deal scenario would lead to "catastrophic" consequences, which could cost the company billions of pounds in delays.

## IV

# The Negotiations, the EU, the UK Official Positions and *the Draft Withdrawal Agreement*

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### **The EU Position**

The EU has been single-minded in pursuing its dominant aim: to prevent Brexit and the UK withdrawal from undermining EU and Eurozone integration. The benign nature of Article 50 of the 2017 Treaty on European Union to ‘negotiate and conclude an agreement’ with the withdrawing state,<sup>18</sup> belies the intensely political aim behind the Brexit negotiation, as outlined in the preceding chapter II. The EU must discourage potential rebellions elsewhere in its vast territories by imposing the terms of victor over vanquished. EU Realpolitik demands that the UK must pay the price of rebellion, and be seen to pay the price. Many EU citizens who pin their hopes on Britain are watching.

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<sup>18</sup> **The Lisbon Treaty** (2007) has two parts, *The Treaty on European Union* and *The Treaty on the Functioning of the European Union* and was to replace the Constitutional Treaty rejected by French and Dutch voters.

Article 50 of the TEU states:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218 (3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the Withdrawal Agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.  
A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

From the outset the EU called the shots, dominating how the talks would be orchestrated, what timetable would be followed, what the agenda would be. First, as the precondition to any trade talks the EU insisted that its staged timetable must be followed and its initial demands met. A substantial UK payment to the EU must be agreed, the UK must fall in with the EU approach to the Northern Irish border and meet EU demands on citizens' rights, before trade talks could begin.

The EU's red lines for trade were clear. There could be 'no cherry picking' by the UK. It must be worse off outside the EU than inside and would face trade barriers outside the Single Market and outside the Customs Union. By March 2018 the formal EU proposal for a free trade agreement for all sectors with zero tariffs and taking in services with reciprocal access to fishing waters was announced, with the caveat that greater obstacles would exist than now, a position set out in March in Donald Tusk's announcement (7 March), his formal *Article 50 Guidelines* (7 & 23 March),<sup>19</sup> the *Draft Withdrawal Agreement* (19 March) being a separate document. Not only would UK-EU trade 'not... [be made] frictionless or smoother' but it would be 'more complicated and costly'. The UK could not have the 'rights of Norway', but only 'the obligations of Canada' and it could not 'pick-and-mix' either the sectors of the Single Market or the

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<sup>19</sup> Donald Tusk's formal Article 50 guidelines, circulated on 7<sup>th</sup> March, published 23<sup>rd</sup> in close cooperation with the members of the European Council (<https://www.euractiv.com/wp-content/uploads/sites/2/2018/03/European-council-Art.50-23-March-2018-Draft-Guidelines.pdf>)

- For a Free Trade Agreement:
  - For goods there must be reciprocal access to fishing waters and resources.
  - For services the aim would be to allow market access to provide services under host state rules, including as regards right of establishment for providers, to an extent consistent with the fact that the UK will become a third country and not sharing a common regulatory, supervisory, enforcement and judiciary framework.
- For a satisfactory relationship to develop there must be robust guarantees which ensure a level playing field:
  - The UK must not enjoy 'unfair competitive advantage'.
  - This will require a combination of 'substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement mechanisms in the agreement as well as Union autonomous remedies ...'
  - The UK must allow the EU rights to fish in UK waters on reciprocal basis.

roles for the ECJ as it wished.<sup>20</sup> For a free trade agreement for goods, there must be reciprocal access to fishing waters, and for services the aim would be to allow market access to provide services under host state rules, to an extent consistent with the fact that the UK will become a third country not sharing a common regulatory, supervisory, enforcement and judiciary framework. There must be guarantees also to ensure 'a level playing field' if a satisfactory relationship is to develop. In particular, the UK must not enjoy 'unfair competitive advantage' and that would require 'substantive' rule alignment with EU and international standards, mechanisms for effective implementation, enforcement and dispute settlement in the agreement 'as well as Union autonomous remedies ...'.<sup>21</sup> The draft Withdrawal Agreement published the same month, followed a series of leaks, exchanges and disagreements on the text setting the arrangements for the wider agreement, on the full range of matters from citizens' rights to a protocol for the Irish border.<sup>22</sup>

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<sup>20</sup> Donald Tusk, President of the European Council, speaking on 7 March 2018 on the draft guidelines circulated to the EU 27 for comment on relations with the UK after Brexit, which were not formally published and not the final guidelines. The aim he announced was: *a trade agreement covering all sectors and with zero tariffs on goods and addressing services, in which for fisheries, reciprocal access to fishing waters and resources should be maintained. The agreement would not make trade between the UK and the EU frictionless or smoother. It will make it more complicated and costly than today ... the essence of Brexit ... The outcome of the negotiations must pass two key tests: that of the balance of rights and obligations, e.g. the EU cannot grant the UK the rights of Norway with the obligations of Canada and that of the integrity of the Single Market. No Member State is free to pick...those sectors of the Single Market it likes, nor to accept the role of the ECJ only when it suits their interest. By the same token, a pick-and-mix approach for a non-member state is out of the question. We are not going to sacrifice these principles. It's simply not in our interest.* <http://www.consilium.europa.eu/en/press/press-releases/2018/03/07/statement-by-president-donald-tusk-on-the-draft-guidelines-on-the-framework-for-the-future-relationship-with-the-uk/> Statement by President Donald Tusk on the draft guidelines on the framework for the future relationship with the UK.

<sup>21</sup> Ibid, Tusk *Guidelines*, 23 March

<sup>22</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691366/20180319\\_DRAFT\\_WITHDRAWAL\\_AGREEMENT.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf) The *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 19 March set out 'the arrangements for the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and from the European Atomic Energy Community'. It followed the EU Commission's version, 28<sup>th</sup> Feb 2018, reflecting the EU position (subsequently amended on 15 March). The areas of joint agreement (and others not agreed)

The *Guidelines* stipulated ‘substantive’ alignment with the EU of UK rules, mechanisms for effective implementation, enforcement and dispute resolution and [European] Union autonomous remedies. The Withdrawal Agreement elaborated that after the transition the UK must have ‘due regard for the relevant ECJ case law ... though ultimately the ECJ would rule on EU law’. Moreover Britain must have no ‘unfair competitive advantage’ and must allow the EU reciprocal rights to fish in its waters.

The UK would not, then, enjoy the fruits of freedom in 2019 under these proposals. The UK rulebook would remain aligned with EU and international standards with the EU deciding on its ‘adequate implementation mechanisms’ and ‘Union autonomous remedies’. The legal implications of such proposals have been the subject of detailed analysis by Martin Howe QC and of debate in Britain.<sup>23</sup>

Politically, for the purposes of this analysis, certain points should be highlighted. As the negotiations proceeded, it was clear that some EU demands envisaged arrangements inconsistent with the UK position, e.g.

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were highlighted in the amended text of 19 March and it or the Tusk Guidelines covered the fundamentals of the sort of Brexit envisaged by the EU.

- *European Law and the ECJ*. The UK during the transition would be subject to EU law and the full *acquis* (DAW 19 Mar) Barnier, 29<sup>th</sup> Jan.). After that, the UK must continue to have due regard for the relevant ECJ case law handed down, though ultimately the ECJ would rule on EU law.
- *Northern Ireland* during the transition would remain aligned with the EU bloc as the default position if no agreement has been reached. Afterwards, if no agreement has been reached, the EU wants a default position that Northern Ireland remains in a common regulatory area with the rest of Ireland for customs, VAT, energy, the environment, agriculture and other areas, under the EU and UK jointly, with the same customs arrangements. (DAW 19 Mar *Protocol on Ireland/Northern Ireland*).
- *EU-UK Trade after Brexit*. The transition arrangements (DAW 19 Mar) continued the status quo and the Withdrawal Agreement and Donald Tusk’s ‘Guidelines’, 23rd March, note 4 above the EU position for trade post Brexit in line with earlier EU proposals and approach. (The UK would face trade barriers outside the Single Market and the Customs Union. (M Barnier, 5<sup>th</sup> Feb).

The EU’s publication of the Withdrawal Agreement (TF 50 (2018)35-Commission to EU 27 can be found on [https://ec.europa.eu/commission/sites/beta-political/files/draft\\_agreement\\_coloured.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf)

<sup>23</sup> Martin Howe QC has in a series of legal opinions *Lawyers for Britain* ([www.lawyersforbritain.org](http://www.lawyersforbritain.org)) has advised on the legal implications of the respective proposals, providing a detailed assessment of the potential consequences for UK Courts vis a vis the ECJ and see also ch. V.

the demand that Northern Ireland remain part of an EU common regulatory area for customs and other matters and so be cut off from the new UK arrangements, or for trade that there must be a level playing field guaranteed, 'substantive rule alignment', Union autonomous remedies.

### **The UK position**

The government intends that the UK will leave the EU, the Customs Union and the Single Market in March 2019. But by March this year it appeared to blink, postponing a genuine Brexit in favour of continuing EU law for a transition period of 20 months. At the same time, however, it would focus on the final agreement, for which it envisaged UK legal, constitutional and political autonomy. It proposed an EU-UK free trade deal based on the principle of mutual recognition for goods and to which it aspired for services with enhanced equivalence for financial services trade. This will be discussed below (chapter IV) but it should be noted that the principle is consistent with the UK's political and constitutional aims and its tradition as both a Common Law country and free market economy.

To allow a transition it agreed to perpetuate current EU laws and obligations for a limited period, agree to a number of matters set out in the Withdrawal Agreement, while reserving its position on the Northern Irish dimension in the longer term. For 20 months after Brexit, the UK would continue to accept EU laws, free movement, the jurisdiction of the European Court of Justice and for the EU to retain fishing rights. Even so, throughout that time Britain would have next-to- no leverage or say over such decisions, no longer having the rights of a member state. On the balance sheet the UK has secured the 'right' to negotiate third party trade deals after March 2019, a right which legal advice suggests already exists even now.<sup>24</sup> For most important matters, therefore, the UK would, in effect, suspend Brexit for the transition period.

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<sup>24</sup> The transition terms agreed were set out in Part 4 'The Transition', *Draft Withdrawal Agreement* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691366/20180319\\_DRAFT\\_WITHDRAWAL\\_AGREEMENT.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf) The proviso was that 'Nothing is agreed until everything is agreed' mentioned in *Draft Withdrawal Agreement*.

Politically controversial at the time, the transition arrangements remain so. The UK would in practical terms, be ‘in’ the EU for the transition under most current EU powers and laws. It meant that to the EU’s ‘stage 1’ victory, the Union could add a second, the Carthaginian terms for the transition – Brexit suspended, EU law continued, ECJ rule supreme and the EU’s fishing rights, the UK’s obligations under the Single Market and for free movement continued, but worse, the future of Northern Ireland thrown into doubt. The government, however, treated the transition as temporary, pragmatic and worthwhile. Politically it would answer the campaigning demands of business lobbies for greater regulatory certainty and customs preparation, allowing the focus to be on the real prize of being ready to trade as an independent power. Thus by March there were concerns that the UK had been cornered into the EU’s mindset for the short term transition, softened up by the lobby groups and the parliamentary numbers to defer Brexit for the transition period.<sup>25</sup> The transition, however,

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- The UK would remain party to EU law with some exceptions, Article 122 *Scope of the transition*
  - Free movement would continue with citizens enjoying the same rights as before Brexit.
  - The European Court of Justice would continue to enjoy jurisdiction over matters relating to EU law, *Article 88 Ongoing administrative procedures*
  - Northern Ireland would remain in a ‘common regulatory area with the rest of Ireland’, with common customs arrangements after the transition if agreement were not reached, the ‘backstop’, *Protocol on Ireland/Northern Ireland*.

<sup>25</sup> In respect of the transition, there were at the time reports (unconfirmed but not denied) that cabinet office officials’ advice (in italics below) was designed to reassure ministers into accepting the transition extension of EU law as useful (prolonging EU law and obligations would facilitate preparations for customs), or it could be got around (e.g. immigration arrangements could be countered), or it might not come into effect (fish) or that permission to negotiate third country trade deals was a big win. Thus the transition:

- *Length*. Would be a time limited deal (20 months) to facilitate transition and cease when the transition period ends. (M. Barnier’s proposal was initially for 21 months). *Some officials may have advised extending it for longer, claiming extra time is needed for both sides to put in place appropriate customs arrangements, though the basis for this point is unclear.*
- *Immigration and Trade*. EU demands that the status quo continue for continued free movement were met *and though official’ advice mooted some possible scenarios to counter this violation of Brexit, the implication of what is proposed has not been affected (These scenarios are implicit in claims that the UK could register people coming into the country, but that is possible under the UK Treaties)*
- Negotiating trade treaties with third countries: The UK will be ‘allowed’ to negotiate, but not sign, trade treaties with third countries under the Withdrawal Agreement, *represented as a ‘win’, though legally permissible even now.*

was to be temporary and on the big question, the Brexit for which people voted, the UK's position held firm. Sights were fixed on the real prize, a free trade treaty for goods and services in general on the basis of mutual recognition grounds with enhanced equivalence for financial services, to reflect the common outcomes at which both the EU and UK aim.

The UK's broad aim set out by the prime minister on 2<sup>nd</sup> March for its economic relationship with the EU and for a free trade agreement seemed unchanged.<sup>26</sup> The aim was 'mutual access' with an 'independent arbitration mechanism' to resolve disagreement and 'regulators working together as happen[ed] internationally'. For trade in goods, the aim was as frictionless a border with the EU as possible, one without tariffs or quotas, to be achieved through 'a comprehensive system of mutual recognition'. UK law 'would not necessarily be identical to EU law but ... achieve the same outcomes'. For services mutual access was the goal, mutual recognition the principle, proposed for professional qualifications, to be explored for broadcasting or other services and with 'enhanced equivalence' for financial services (as the chancellor was to explain). A collaborative, objective framework, reciprocal, mutually agreed and permanent, and reliable for business was proposed and that both sides would maintain the same regulatory outcomes over time.

The UK's broad approach was to the point, and despite the anti-Brexiters view that it was vague, the prime minister's proposals covered the broad

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- *ECJ oversight and law*: The UK would under the transition deal find itself subject to the full *acquis* after Brexit for c. two years, and so would it be bound by EU law, obliged to adopt and apply future EU law during the period, be subject to ECJ oversight, without votes in the Council, nor MEPs nor a judge.
  - *Fishing rights*. In a controversial concession, the UK agreement to rights for EU vessels to fish in UK coastal waters was provisional. *Some advice implied it will come into practice only if there is a satisfactory final deal between both parties being agreed before Brexit in March 2019.*

<sup>26</sup><https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union> prime minister's speech, *Our future economic partnership with the EU*, 2 Mar. 2018. Answering the EU charge of 'cherry picking', she opened by explaining 'Every Free Trade Agreement has varying market access depending on the respective interests of the countries involved. If that is 'cherry picking, then every trade arrangement is cherry picking'. Mrs May referred listeners to the Chancellor's forthcoming statement for the services free trade proposals

principles on which both goods and services trade would take place, answered possible concerns about competition, market access and regulatory standards, keeping the Irish border soft and set out the framework for a free trade agreement that would reflect the UK's economic and trade aims and tradition.<sup>27</sup> She proposed:

- Competition and Market Access. There would be mutual access with binding commitments to ensure fair and open competition, an independent arbitration mechanism (as is common for FTAs) to resolve disagreements fairly and promptly, with regulators working together (as happens internationally) and arrangements for data protection. Free movement will end.
- Trade in goods would be with as frictionless a border as possible and without tariffs or quotas, with one set of approvals in one country for checking regulatory standards are met. 'To achieve this we will need a comprehensive system of mutual recognition. Our default is that UK law may not necessarily be identical to EU law, but it should achieve the same outcomes'.
- Regulatory standards would remain as high as the EU's on the basis of the same outcomes as under EU law, unless parliament otherwise decided.
- Trade in Services: the UK wanted to limit barriers to mutual access, mutual recognition for professional qualifications, and explore similar arrangements for providing other services such as broadcasting. For financial services, the goal was the ability to access each others' markets, based on each party maintaining the same regulatory outcomes, a collaborative and reciprocal objective framework, mutually agreed and permanent and therefore reliable for business. She referred listener's to the

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<sup>27</sup> Ibid, prime minister's speech, 2 March 2018, and Philip Hammond's HSBC speech, 7 March in which he followed on to discuss financial services, reiterating the proposals for a free trade agreement based on 'mutual recognition and reciprocal regulatory equivalence ...objectively assessed', <https://www.gov.uk/government/speeches/chancellors-hsbc-speech-financial-services>.

See also the chancellor's Bloomberg interview at Davos World Economic Forum, 25 Jan. 2018, <https://www.bloomberg.com/news/videos/2018-01-25/hammond-says-u-k-is-seeking-closest-possible-access-to-eu-video>

chancellor' forthcoming announce statement with detailed proposals, confirming UK would leave the passporting system intrinsic to the Single Market, of which it would no longer be a member and over the rulebook of which it would have no say. In his speech to follow on 7<sup>th</sup> March, the chancellor, who had already mapped out the UK's proposal for free trade for services, confirmed the proposal for mutual access based on an enhanced equivalence agreement, with the UK and EU maintaining the same regulatory outcomes over time, and a collaborative, objective framework that is reciprocal, mutually agreed and permanent.

- *Northern Ireland.* The Irish border would be soft, but the UK pledged to keep the union intact. The government's two alternative proposals for customs arrangements with the EU remained on the table: a 'customs partnership' (possibly where the UK 'mirrors' EU requirements on goods from around the world) or a 'streamlined customs arrangement', keeping the rules for cross border traffic simple, using technology, reducing risk of delays at ports, recognising 'trusted trader' schemes to do away with the need for customs checks, using automation and IT checks.
- *The European Court of Justice* jurisdiction in the UK would be ended, though EU law would continue to affect the UK, which would 'look at' ECJ judgments as it does for other countries courts' EU law where relevant or on matters affected by EU law.
- The UK would aim to explore remaining a member of the Medicines, Chemicals and Aviation Safety agencies, subject to parliamentary decisions.

The aims were unchanged, but the means were clear. The goal of free trade would be achieved through mutual recognition of respective laws for goods and services, achieving the same outcomes. The UK would take account of EU law where relevant or on matters affected by EU law as with that of other jurisdictions where relevant, but ECJ rule would end'.

# V

## The Chequers Proposals and the White Paper Trade for Goods, Trade for Services

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### **Why Chequers? Why the White Paper?**

Throughout the negotiations to date, the EU's timetable, phased discussion and demands – for payment of a significant sum not legally owed, for a 'soft' Irish border, for the transition arrangements, including continued EU free movement and preferential treatment for EU citizens, and for the postponement of trade talks – had each been conceded by the UK. But on trade, the prime minister's announcement for a free trade deal with the EU on 2 March 2018 had proposed 'mutual recognition' for goods, the same principle for services with the chancellor's proposed enhanced equivalence for the financial sector. That position seemed to have the backing of ministers from both sides of the referendum divide, and it emerged that a government White Paper was being prepared by DExEU to reflect it.

That was before the EU's *Guidelines* (7 and 23 March) on the EU principles for the future EU-UK economic and trade relationship. It was before the more general *Withdrawal Agreement* (19 March) covering the main issues – citizens' rights, the Irish question, the transition the UK divorce payment - but not really future trade other than for some minor tidying up.<sup>28</sup> It was also before the Easter break and the passage of the EU Withdrawal Bill through its final stages in parliament.

At that stage the political opposition to Brexit at home appeared to raise the stakes. Labour returned to its rainbow wish list, which would mostly involve the same laws and open borders as now. Although economical with the truth some Labour MPs were for keeping full Single Market status, some for being in the or a customs union, some for joining the EEA, in which, though the UK would not be making the rules, it could help to

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<sup>28</sup> The *Withdrawal Agreement* dealt with the wider issues, e.g. citizens' rights to Northern Ireland, though with some focus only on the economic and trade questions such as resolving the 'limbo' problem for goods in transit when the transition period ended or uncontentious matters such as Intellectual Property Rights.

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

'shape' them. That option was encouraged by Michel Barnier's timely guidance for the debate, welcomed by Labour MPs and peers, that the EU would 'allow' the UK join the EEA. Amendment after amendment was proposed, some carried in the lords, some almost carried in the commons with the support of Tory rebels, until the Bill finally passed into law on June 26 2018, but only then with the prime minister appearing to have bought off Tory rebel votes by her private assurances. Nonetheless, as explained earlier, this narrow victory ensured that Britain would leave the EU in March 2019. By then the full extent of the price to be paid to the opposition, both in the EU and at home in parliament, was becoming clear. The prime minister and her closest advisers prepared to launch the Chequers plan, tailoring UK proposals to Brexit's EU and UK opponents, to an ever louder chorus from Airbus and BMW's Rolls Royce.

Chequers and the White Paper envisage two very different futures for goods and services. For goods, the UK will be 'aligned' with, or to all practical purposes, in it, for goods, following the EU rulebook and committing to future alignment of laws. Following 'a common rulebook for goods including agri-food' has been portrayed as a way to keep the Irish border 'soft', keep goods and orders on the move without obstacles or delay at UK ports and borders. The UK Parliament in future will, according to these proposals, have a say over whether to accept or reject the rules, and this, it is contended, will give the UK control over its laws. There will be European Court of Justice involvement, but this is not supposed to amount to ECJ jurisdiction. There will be a common customs territory with the EU, where the UK collects EU-level tariffs (to be reimbursed for UK destined goods): this is intended to make for friction free trade and deal with the Northern Ireland problem.<sup>29</sup>

By contrast, for services a bilateral framework of treaty-based commitments and reciprocal recognition of equivalence is proposed.<sup>30</sup> The UK and EU will each recognise that the other's laws and rule books are

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<sup>29</sup> Chequers Statement, 13 July 2018, *The Future Relationship Between the United Kingdom and the European Union*, Cm9593, Presented to Parliament by the Prime Minister by Command of Her Majesty, July 2018, London HM Government.

<sup>30</sup> How this would work is set out in Barnabas Reynolds' proposals – reflected in the UK services plan, note 35 below.

equivalent and result in similar outcomes, with mutual recognition of business and professional services and professional qualifications. For the financial sector a greater variety of activities and businesses will be included with the aim of extending and giving greater security to businesses to plan ahead. The system is outcomes-based to reflect common UK and EU aims – for instance, to avoid potential ills such as systemic risk, money laundering, monopoly or cartels dominance.

What are the prospects for the two different sides of the proposals, and what are their implications?

The plan to bind goods and agri-food to EU laws is the most problematic element in the White Paper. ‘Free’ trade with the EU would come at a significant cost to UK producers were the UK bound to EU law and committed to future alignment with the EU rule book. The European Court of Justice and its jurisdiction would most likely be predominant, though the government is optimistic that that would not be so. UK freedom to strike new trade deals based on mutual recognition with countries such as the US would be hampered, as other countries’ imports would be in keeping with EU law. The proposed ‘Facilitated Customs Arrangement’ with a ‘combined customs territory’ in which the UK would act as tariff collector for EU destined goods crossing its borders, and remove the need for customs checks and controls on the UK’s EU borders, is unlikely to prove workable or be accepted, and may be incompatible with international law, specifically the National Treatment provision of the WTO’s General Agreement on Tariffs and Trade and possibly also the Agreement on Subsidies and Countervailing Measures.<sup>31</sup>

With regard to the proposals about services, reaching such a deal will depend on the negotiations and how successful they are from the UK perspective. In particular, it will require the EU to agree in principle and

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<sup>31</sup> Collins, D. *Negotiating Brexit: The Legal Basis for EU & Global Trade*, 4<sup>th</sup> edition, Politeia, July 2018 and forthcoming analysis, September 2018.

practice to a legal framework guaranteeing the mutual recognition arrangements for equivalence-based outcomes which respect the autonomy of each jurisdiction. Such legal protection is necessary for businesses to operate and plan ahead, confident that the system is stable and not subject to arbitrary unilateral change. With the right safeguards in place, mutual recognition and enhanced equivalence would be consistent with the UK's broad economic principles, bring advantages to both parties, the UK and EU and politically and constitutionally reflect the referendum vote by acknowledging the sovereignty of the UK. The laws for the sector would be made by the UK for the UK, would be subject to UK courts and allow for impartial dispute resolution procedures on the mechanics and predictability of equivalence declarations. These proposals also reflect the UK's global role in financial services. The City of London is rivalled only by New York as a global financial centre, and the UK is a global leader in shaping the international legal framework. More generally, but equally important, they would work with the grain of UK thinking, a preference for economic freedom under the law as the proven way to encourage incentive and competition, keep costs down and standards high and permit new entrants to challenge established providers while also being industry sensitive. And such a basis would facilitate the UK's other aims, including making new trade deals on mutual recognition grounds with other partners.

On the minus side, the line separating services from goods is a fine one: and even if the EU accepted that services trade would be on the basis of mutual recognition and co-operated on ensuring its secure foundations, nonetheless the free working of the system could to a greater or lesser degree be undermined by constraints through the back door of the EU rulebook for goods. The wording of the services arrangements is key. Subtle changes could turn a good deal into a very bad one.

The problem with the White Paper is that it tries to reconcile the irreconcilable: it seeks to reflect the UK referendum decision by leaving the EU formally in March 2019, but tries to meet EU 'red lines' for the goods sector by tying the UK to EU law after and committing to future EU law, most likely restoring the dominance of European Court. Britain would play no part in shaping such laws. The official line, that 80 per cent of the

deal has already been agreed and a deal will be reached in the remaining cycle of talks, by implication on the present basis, suggests the government has been boxed in by its EU opponents every stage of the negotiations and lost its nerve in face of UK rearguard action (to which some ministers are also sympathetic).

## VI

# A Brexit that Works for Britain

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### **A Beggar's Brexit?**

Few will pretend that the Brexit talks have gone well for the UK. Britain allowed itself to be boxed in to the EU's agenda, timetable, and wish list. It seemed to work its way to a position of weakness, succumbing to the EU's staged 'crisis' after 'crisis'. It agreed at the 11<sup>th</sup> hour to matters that under law needed no agreement. That was not just the beginning. Taxpayers' money was promised though not owed; the Irish question allowed, unnecessarily, to hijack Britain's exit; and a transition agreement proposed that would suspend Brexit for 20 months. All in all taxpayers had scant return for the sums they pay for government, around £770 billion this year, to get the business they vote for done. Nonetheless until March this year the government seemed to be in principle focussed on the target of the Brexit the people voted for - the prime minister proposing the principle of mutual recognition for trade, and the chancellor setting out the proposal for financial services trade on the basis of 'enhanced equivalence. Thus the UK would make its own laws and trade would be based on these leading to each party, the UK and the EU, having similar standards and outcomes.

Each party, therefore, would be governed by its own laws but each would recognise that the other's laws on goods and services led to similar standards and outcomes. Britain would therefore not only leave the EU in March 2019, but after the transition it would be well and truly out, poised for regaining sovereignty over its own laws, its justice system, its borders.

But developments since Easter have changed everything. The government appears to have panicked in face of the parliamentary opposition. Though it had got the EU Withdrawal Bill through to law, it may have given private assurances to anti-Brexit Tory rebels at home and promised more to the EU privately than the public statement in March indicated. The upshot was what had now become a very different proposal, revealed to ministers at Chequers on 13 July, the public the same night and with more explanation in the White Paper a week later (19 July), and reported to have been

cleared by the prime minister with the German chancellor before the cabinet's fateful Chequers meeting. This would commit a significant part of the UK economy, goods and agri-goods to EU law to follow the EU rulebook. There would be other concessions to the EU or Single Market rules e.g. in respect of 'free movement' and preferential treatment for EU immigrants, which, though not being considered in this analysis, appear to violate the spirit of the referendum decision.

Thus the future of the UK, its people, its prosperity, its economic direction were determined and shaped without full public debate and discussion, without the legitimacy of a manifesto behind it or even detailed deliberation by the relevant cabinet ministers, and against the democratic decision of a majority of voters. Instead, a plan bearing all the marks of a Whitehall civil service stitch-up, designed to conciliate Brexit's opponents, appease the EU and hoodwink the public – complex, utopian and impractical – was hatched behind closed doors and then rushed into the shop window as government policy. Britain's precious democracy was once again on trial.

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It is unlikely that the EU will accept the White Paper plan as a final position, having already made clear the fundamental differences at stake. But if in the short term a deal based on it were to go through, the consequences for the UK, its people and prosperity, its constitutional independence and democratic system, could not be more serious.

In practice the plan for goods would put a significant part of the UK - its law, economy and jobs - under the EU, second to EU interests, though doing so by Treaty. Britain's leaders would have committed the UK to have *no say* in many of the laws made in Brussels that would govern this country. Britain's prosperity could be sacrificed to the EU's, her manufacturers penalised with regulations, her people subject to higher costs, her trade the victim of EU politics. Despite being one of the world's historic trading nations and its fifth largest economy, she would find it difficult, if not impossible, to make mutual recognition trade agreements with major countries like the US or Canada. Legally, and despite what the

government contends, the European Court of Justice would have a dominant judicial rule under EU law on the UK's goods economy, its trade with third countries.

But worse, British democracy would have been violated, its proven system for protecting liberty under the law and preserving stability and freedom, flouted, the political authority derived from the people violated. It is important in itself that the people's decision should be honoured and put into effect. It also matters for Britain's democracy that the arrangements on which it rests for the electorate to hold to account those who make the laws under which they and their country are governed – are restored to their rightful place. That system's success has marked Britain's evolution as a mass democracy. It is *not* like other European democracies where the people's authority is flouted. Even in France, its nearest, and most similar continental neighbour, when voters rejected the European Constitution in 2005, the French government ignored their wishes refusing to respect the referendum decision, and subsequent demand to '*Respectez notre Non!*', as the banners urged. Instead they drove the Constitution's alter ego through parliament under a different name and format, the Lisbon Treaty.<sup>32</sup>

Any attempt to sidestep or modify the referendum decision, under whatever pretext, would be a victory for anti-democratic rule, a denial of people's freedom to determine the laws which govern the UK and hold to account those who make them. Persisting with the Chequers/White Paper plan un-revised may seem far less anti-democratic than pursuing one or other of the courses touted by anti-Brexit MPs, e.g. demanding a second referendum (to which the French President, Emanuel Macron, appears to have given support). But doing so would assist in the defeat of Britain's democracy and flout the authority on which the legitimate exercise of power rests, weakening a system not only valuable in itself, because the

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<sup>32</sup> The Constitution, as mentioned p. 20 above, had become the Lisbon Treaty with the help of Michel Barnier's redrafting. The EU barometer showed Euro scepticism continued to rise in France over the decade after the 2005 vote. CSA polling in 2015 suggested that around 67 percent of the French did not support the EU, and there was evidence that the refusal to accept the referendum vote played a significant part in the tenacity of Euroscepticism in 2014. In Ireland voters were told to vote again after the 2008 referendum when voters rejected the Lisbon treaty a second vote was driven through in 2009.

ideals for which it stands, but also proven for the benefits it brings.

The EU, having secured so much, would be unlikely to leave things there. Sooner or later, more and more would be demanded from Britain to keep the UK economy subject to the EU rulebook, to prevent this country from becoming a potential competitor or disruptor to the EU's settled rule.

In future years this country and its voters would have no control, no vote and no voice, over those laws and their shaping, having committed to a treaty to follow them. If voters or MPs sought to derogate the country would be thrown into a repeat of the anti-democratic groups' attempts to re-run and reverse the referendum vote, a taster of which we have seen since 2014. Britain's political life as a free country, its economic priority to build prosperity as the world's fifth largest economy would be held to ransom for generations to come, livelihoods and jobs threatened, often at the behest of big industries, including some EU supported multinational, French or German with UK interests, pressurising UK governments to bend to their interests, as the EU tightens the ratchet of its rule to promote the EU economy, production and vested interests. Ministers of the Crown, would become supplicants of Brussels seeking to change a commitment that damaged Britain's interests and those of its producers – farmers and fishermen, entrepreneurs, digital, robotic, scientific industries, small and big business alike – and the prosperity and the livelihood of its people. Laws made to favour the EU's interests and companies including those with UK plant vocal in the campaign to reject the referendum, and which would most likely continue the threats to close their UK factories or cut jobs. Britain and its industries would be subject to the ultimate say of the EU justice system and European Court of Justice, in a system established to underwrite the political aim of ever closer union. Having humiliated the world's fifth largest economy and oldest democracy the EU would have taught the other 27 states the lesson that it doesn't pay to leave the bloc.

## **A Genuine Brexit**

None of this need come to pass if the government reverses course to keep in line with the referendum decision. For goods, UK-EU trade would take

place on the basis of mutual recognition of each other's respective laws for goods. With regard to services the UK proposal for mutual access for services which retain regulatory autonomy can be formalised with mutual recognition of professional qualifications and 'enhanced equivalence' for the financial sector. Each side would meet to agree on arrangements and an independent dispute resolution mechanism. The basics for a mutual recognition legal framework are common for trade treaties between countries the world over, and recognised and used widely by the EU. The UK should, simultaneously, accelerate preparations for trade under WTO trade terms (the 'no deal' outcome).

Both outcomes would have the advantages of any normal international trade deal: autonomy, economic freedom, constitutional sovereignty retaining judicial independence, and a tried and tested system of law and independent dispute resolution. For a WTO-only arrangement, Britain would get the additional benefit of an economic boost from keeping both a significant portion of the £40bn payment to the EU (the 'divorce settlement' earmarked in the Brexit negotiations on a trade agreement), the continued contribution to the EU budget for the transition period, almost two years (20 months), and from the fact that the Brexit dividend would kick in earlier. The following paragraphs will highlight some of the benefits and disadvantages of each of the two options.

### **A Mutual Recognition Free Trade Agreement with the EU**

This sort of agreement would be relatively straightforward legally to achieve. For goods an 'off the shelf' model exists having been agreed for the Canada-EU trade agreement (CETA). But, because the UK would start with identical laws to the EU, it could propose a mutually-beneficial first-class agreement 'CETA plus plus'. For services and professional qualifications the UK should stick to the general principle of mutual recognition with mutual access, regulatory autonomy and the specific proposal for mutual recognition of professional qualifications with enhanced equivalence for the financial sector to cover the full range of activities on which the UK leads globally. The chancellor has made clear the UK would not be a 'rule taker' for the financial sector. There would also need to be in place a legally-binding system that recognised the

Autonomy of each party, the system for agreeing outcomes and the arrangements for independent dispute resolution, to be reflected also in the treaty. In this way an enhanced equivalence model with an agreed common outcomes framework would operate, and the system would not be destabilised by an EU insistence on one or other of its changes down the line.

*Next Steps.* Already much of the preparatory work has, it seems, been executed by DExEU for its White Paper. Current legal advice indicates that the areas which need agreement include goods and product standards, technical barriers to trade (TBTs), Customs Arrangements (including negotiation to cover supply chains with components originating in different countries), using the latest simplified customs procedures with technology, linked bar code scanning and pre-clearance self-assessments.<sup>33</sup> The land border with Ireland need not have physical infrastructure nor be an obstacle to a FTA, and Article XVIII of the GATT and Trade Facilitation Agreement of the WTO require members to minimise customs procedures, while Article XXIV, of the GATT envisages streamlined borders for borders and exemption for border traffic for borders such as that with the EU.<sup>34</sup> For services, the chancellor's proposals for services were anticipated by specialist legal analyses that provide a blueprint for both the EU and UK and detailed terms for the financial sector.<sup>35</sup>

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<sup>33</sup> Collins, D. *Negotiating Brexit: The Legal Basis for EU & Global Trade* (4<sup>th</sup> edition, July 2018). The author also explains the problematic basis for the White Paper, its 'dubious legality' with respect to the principle of National Treatment under the GATT, and its constraints on the UK vis a vis making free trade deals countries such as the US.

<sup>34</sup> *Ibid.*, Collins, *Negotiating Brexit*.

<sup>35</sup> Barnabas Reynolds (4 volumes, 2016-18),

*EU-UK Financial Services After Brexit: Enhanced Equivalence – A Win-Win Proposition*, (March 2018)

*The Art of the No Deal: How Best to Navigate Brexit for Financial Services*, (November 2017)

*A Template for Enhanced Equivalence: Creating a Lasting Relationship for Financial Services between the EU and the UK*, (July 2017)

*A Blueprint for Brexit: The Future of Global Financial Services and Markets in the UK*, (November 2016)

On the table therefore would be a 'Canada plus, plus' deal, one quicker and simpler to turn into a treaty, because the UK and EU start from the same position in law and regulation. A CETA type deal would have the advantage for the EU of being 'theologically' consistent with its own dogma, the blueprint having met its own criteria and been signed off with Canada. The UK government could sweeten the deal by releasing all of the £40bn payment earmarked in the event of reaching a satisfactory FTA. Britain and the bloc would each be bound by the treaty and relevant international law and each under its own law. Firms would have legal certainty for continued trade and investment without arbitrary change or uncertainty. Rapid agreement could therefore be reached if the EU has the political will.

### **WTO Trade – the 'No Deal' Alternative**

But the EU may not have the political will and it may refuse. If so then UK-EU trade would take place under WTO rules (Most Favoured Nation) - the 'no deal' scenario for which preparations have been accelerated since July. There would be quantifiable gain and some (mainly short-term) loss, with significant gain likely over the longer term: very different to the gloomy scenario conjured up by those politically opposed to Brexit. Provided the government is well prepared the gains should come sooner rather than later.

For goods, the changes would include paying WTO minimum tariffs on EU imports, helping firms to adapt to the change of rules and to exploit new opportunities, organising supply chains for industry including from non-EU sources. It would also involve accelerating work for the UK to take over the trade treaties with third countries and WTO schedules to which they are now a party as an EU member state, accelerating work on new trade treaties with interested fellow G7 countries such as the US, Canada and Japan and Commonwealth countries and make ready UK customs procedures. It should be noted that the image of lorries and goods being stacked up at British ports is a false one. Because the UK would be starting with identical laws to the EU, the EU, also a member of the WTO, would likely be in breach of the WTO's rules on conformity assessment

procedures were it to discriminate against UK goods arbitrarily.<sup>36</sup>

For services, though less comprehensively covered by the GATT, there would be a significant gain of the UK's being free to re-think its own financial centre rules for trade globally and with the EU, subject to UK law and the current international legal framework, thereby enhancing its attractiveness to overseas firms wishing to invest, trade or do business in the UK.<sup>37</sup> Britain's regulatory system leads the world for safety, high standards and effectiveness, and it is reinforced by the UK's position as a global financial centre and its having been a world leader in helping to shape the legal framework for the financial sector internationally and for the EU.

*The gains.* The UK as a sovereign state would be constitutionally and legally independent and trade with or without trade deals internationally under the WTO, and there would be a significant boost for the UK economy were no deal reached and the payments to the EU spent at home. Over time Britain could move as it decided in its own interests away from the EU goods rulebook after March 2019. Overall, by contrast with a supposed White Paper type deal, the benefits of WTO trade arrangements for goods are significant:

- The WTO system for trade is legally binding and subject to independent dispute resolution: unlike the EU's, the WTO rules and arbitration respect members' autonomy and sovereignty offering a 'table' at which countries can make legally binding trade deals and resolve disputes under its rule.<sup>38</sup>
- Under the WTO system, Britain would benefit from being free to apply its own law for standards internally and being free to strike mutual recognition treaties with other countries.
- For the financial sector, establishing the UK as its unfettered financial centre open for trade under its own law and the international legal

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<sup>36</sup> Ibid., Collins, *Negotiating Brexit*, pp 26-27

<sup>37</sup> The financial centre option is explained in Barnabas Reynolds, *A Blueprint for Brexit: The Future of Global Financial Services and Markets in the UK*, p. 6

<sup>38</sup> For a general introduction to the WTO and its international trade arrangements, see David Collins, *The World Trade Organization: A Beginner's Guide*, (Oneworld, 2015)

framework which the UK has been instrumental in shaping. It would be open to businesses to trade under the security of UK law, and the gains for EU as well as global firms keen to exploit the liquidity and expertise of the City of London could be great. It could strike equivalence deals with other countries as decided. Indeed the EU would most likely then be forced to declare equivalence unilaterally for the UK given its need to have access to the global financial markets.

- The UK balance sheet would have a significant boost from moving directly to WTO in March 2019 and being independent of financial payments to the EU. In the event of WTO Trade arrangements (the so-called 'no deal'), Britain need not pay all of the EU sums promised for a deal. As a result the UK would be better off by (i) a large portion of the £40bn payment that it would otherwise pay to the EU for a UK-EU trade deal. Withholding a large portion of the £40bn payment alone is estimated to raise UK GDP by around 1.4 per cent, household consumption by 3.5 percent and private investment by 3.5 per cent. Moreover, the Brexit dividend would kick in from April 2019 instead of January 2021, and be available to support the UK and its businesses and industry to adapt, so bringing forward the gains from the overall Brexit bonus to boost the UK economy.<sup>39</sup>

*Costs and preparations needed to overcome these:* For most goods the WTO tariff is around 2 or 3 per cent, though higher for cars and agricultural products. Some industries may need help to adapt to changes to regulation or supply chains. Work will be needed to put in place nationally the streamlined arrangements for new customs procedures. On services the international arrangements under WTO offer less legal certainty than a free trade deal with the EU, though that could be largely overcome by the UK's becoming a financial centre under its own law for which the blueprint already exists.<sup>40</sup> In particular:

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<sup>39</sup> Smith, D. B. *The Brexit Settlement and UK Taxes*, (Politeia 2018). A similar analysis can be applied if the payment for the 20 months of transition (Apr. 2019-Dec 2020) is withheld. Minford, P. *The Economics of Brexit: Getting the Best Deal for the UK*, (Politeia 2018) pp 15-17.

<sup>40</sup> Reynolds, B. *EU-UK Financial Services After Brexit, The Art of the No Deal, A Template for Enhanced Equivalence and A Blueprint for Brexit*.

- There would be some uncertainty for companies adapting to new conditions during a limited period while changes to the legal framework are introduced, with new pressures and some extra costs.
- Supply chains may be affected, raising concerns about maintaining production and markets. Preparations should start now to advise and support industry to adapt to the changes to regulation. New and alternative supply chains, for example for car parts, should be organised, with the DIT supporting affected industries and inviting them to join its pilot schemes.
- WTO terms for services may give less legal certainty for trade with the EU than currently exists, but its members (including EU) have made significant GATS commitments to the rest of the world. EU's 27 afford (much) better market access than what the GATS schedules would prescribe, and the UK could become a leaner competitive centre for the business, with the attractions of its deep expertise, pools of liquidity and strong legal underwriting. Indeed it is the EU which risks becoming a rule-taker since it would need to maintain equivalence decisions unilaterally in order to ensure its businesses have cheap access to the global financial markets.
- There would be additional public spending costs for the UK budget to prepare the streamlined customs system needed, in line with the best current arrangements, e.g. using technology, pre-clearance of paperwork and spot checks, with registered trusted trader schemes, and putting in place the physical infrastructure at its ports and airport entry points. To such costs must be added those of personnel, for training and employment of customs and excise teams to take over the operations for office-based clearance of technological procedures as well as the physical checks and spot checks.

Preparations should be readied for an April 2019 start. Though the costs should not be understated, it should be noted that today, documentary checks take place on around 3 per cent of non-EU imports, and there is no reason why the current proportion need change.

**Next steps.** WTO terms and the preparations needed are relatively straightforward. Tariff schedules must be prepared, the hand-over arrangements from the EU organised for taking on the UK's share of allocated subsidies, and taking over trade agreements with other countries which are already in force. These points are set out and discussed in *Negotiating Brexit* (see note 33).

The UK, as a founder member of the WTO, is now preparing to resume its seat at the table (suspended during its EU membership) of the most powerful trading organisation of the world. It can signal its intention of leading the world on free trade, and in particular promote and help shape the WTO's proposed arrangements for the liberalisation of services trade.

Preparing for a 'no deal' would strengthen the UK position and make clear to the EU that Britain, having proposed mutual recognition trade on the reasonable basis already accepted by the EU for Canada for goods with a similar basis for services, will, if that is refused, opt for WTO terms trade. WTO trade is light years away from the problematic scenario depicted by Brexit's political opponents in both the lords and the commons, who have substituted scaremongering for reasoned, balanced and informed analysis of existing international trade law.

The benefits of a WTO arrangement have been neglected and the disadvantages, which by their nature are short term and can be overcome with adequate preparation, have been portrayed as 'economic' though have no economic merit and in reality are in essence political points as pointed out by a former chancellor of the exchequer and clear from the assessment of a former governor of the Bank of England.<sup>41</sup> In fact, while a mutual recognition trade deal should be the first option, if that were refused, then trade under WTO Most Favoured Nation (MFN) terms (the 'no deal' option) will work very well for the UK, provided preparations are made. There would be nothing here to obstruct future developments, including the UK and EU reaching a free trade agreement in due course, if both parties wanted it. Such an option would be particularly attractive for the EU, while

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<sup>41</sup> See chapter III.

the UK would be in a stronger negotiating position than now and so more able to insist on its own terms,

For now, the public should be told in fair and dispassionate terms of implications of change in the short and long term both to the regulatory system and to tariffs levels, and of the cash injection to the public balance sheets. The contentious presentation of the no deal scenario should be stopped, and the preparations now being undertaken to support companies, to prepare UK customs procedures and to adapt to a WTO based trade arrangement, announced in matter of fact terms.

## VII

### Ireland – Playing the EU’s Green Card

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Great empires have been overturned. The whole map of Europe has been changed ... as the deluge subsides and waters fall, we see the dreary steeples of Fermanagh and Tyrone emerging once again... (Winston Churchill, *The World Crisis: The Aftermath*)

Churchill went on to contend that this quarrel was one of the few institutions that had not changed in the decades of the First World War and its aftermath. But today is not 1939, when Churchill was writing, and we live in very different times too from the decades that followed, when the Second World War broke out and many of the countries of continental Europe were invaded and defeated by Germany and the axis powers. Although liberated by 1945 those in the East were subjected to Soviet rule until the late 1980s. Since then there have been the same sort of momentous changes as Churchill had noted decades earlier, especially the disintegration of the Soviet empire, the removal of borders, barbed wire, sentry posts and checkpoints, most notably in Germany itself, and the emergence from the shadows of ancient nations co-existing peacefully and without oppression to the east and south east of Europe. In Northern Ireland too, the picture is different. The two communities co-exist politically, having moved with the changing socio-economic realities of the later 20<sup>th</sup> century. This is reflected in the Belfast Agreement between the Irish and British governments, recognising the political status quo and the embedding of the ‘peace process’.

It is hardly surprising, nonetheless, that the EU has used the Irish border to frustrate a true Brexit, given its overall political imperative of holding the project together.<sup>42</sup> Nor should it surprise that they have found a willing foot soldier in Ireland’s current Taoiseach, Leo Varadkar, who has done a ‘me too’ with Michel Barnier. Varadkar has clocked up some quick successes as leader of a fragile coalition, by playing politics with the most serious matters of policy. Brexit and the border now appear to be set for the same

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<sup>42</sup> See, e.g. Ray Bassett, *Brexit and the Border, Where Ireland’s True Interests Lie* (Politeia, May 2018).

treatment as his party Fine Gael, in coalition with Fianna Fail the more nationalist of the two governing parties, is narrowly hanging on to power, although they and Ireland's Labour party (whose seats have dwindled to 7) have lost support to Sinn Fein.

As with any political party today, there are a number of different opinions in Sinn Fein, but it no more credible that it will revert to militancy against a post-Brexit border than that it will disappear from Ireland's political landscape. Borders are no longer the sentry posts of earlier decades, not only in the former Soviet Russia and the unification of Germany but in Ireland. There the peace process, the Belfast Agreement and an agreement on power sharing involving all sides have become embedded with the support of both governments and the all-Ireland agencies and groups. Besides, the transfer by Sinn Fein to Dublin of its main operations, symbolises the remarkable success of the movement's newest and most potent 'weapon', politics, under Gerry Adams, now President of the only all-Ireland republican and socialist party – Ireland's answer to Jeremy Corbyn. Sinn Fein opposes Brexit for Northern Ireland, which it wants to keep in the EU, demanding 'a designated special status for the North of Ireland within the European Union', the position, he maintains, is endorsed by the Dáil along with the demand that the whole of Ireland should stay in the Customs Union, the Single Market and under the ECJ.<sup>43</sup>

The UK has no reason to support such a ploy: having committed to the peace process and the 'soft' border, it should be confident in the means it proposes to that end, the proposed technological solution to keep the the border 'soft'. The use of technology, bar codes and trusted trader schemes will facilitate cross border traffic, keep a 'soft' border and enable the flow of low value, high volume traffic and trade. It will be sensible, in line with current thinking for modern border arrangements, and it would be effective. Such arrangements have been recommended or endorsed in

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<sup>43</sup> Gerry Adams TD, Speech, 11 May 2017 on Michel Barnier's visit to the Oireachtas or Dáil Eireann.  
[http://www.sinnfein.ie/files/2017/Gerry\\_Adams\\_Brexit\\_Speech.pdf](http://www.sinnfein.ie/files/2017/Gerry_Adams_Brexit_Speech.pdf).

practice or in principle by a number of authorities, including the authors of an EU commissioned report.<sup>44</sup>

The EU can accept the UK solution, or it could refuse it and set up its own customs posts on the Irish side provided the Irish government is foolish enough to agree. But if the EU chooses to abandon the soft border strategy on its own side, it must be responsible for any consequences. Already the EU has many land borders - 8,190 miles of borders (13,454 km) shared with 19 non-EU nations. Some work. Others do not. Sometimes wider EU policy, foreign, or security, or immigration policy, seem to have been linked to flashpoints, conflagrations or even the emergence of war zones - an irony given the EU also aims through its dedicated schemes for borders with undeveloped economies to achieve 'stabilisation, security and prosperity'.<sup>45</sup>

The Irish border, is not an 'outpost border', such as the EU shares with an unstable or undemocratic or dictatorial powers, say Turkey, the former Soviet Union and Morocco. Here we have a small land border 310 miles long between two advanced western economies, with democratic governments on each side under the rule of law (both based on Common Law), with far more in common with each other than either has with the

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<sup>44</sup> *Smart Border 2.0. Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons.*

The EU Parliament Commissioned study confirms 'It is possible to implement a Customs and Border solution that meets the requirements of the EU Customs legislation (Union Customs Code) and procedures, with expected post-Brexit volumes of cross-border people and goods, if using a combination of international standards, global best practices and state-of-the-art technology upgraded to a Smart Border 2.0 or similar solution. '. The study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs 'provides background on cross-border movement and trade between Northern Ireland and Ireland ... identifies international standards and best practices... provide insights into creating a smooth border experience. The technical solution provided is based on innovative approaches with a focus on cooperation, best practices and technology that is independent of any political agreements on the UK's exit from the EU and offers a template for future UK-EU border relationships.

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL\\_STU\(2017\)596828\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU(2017)596828_EN.pdf); Basset, above note 42; Support for such an arrangement has also been given by bodies such as the Freight Trade Association.

<sup>45</sup> The purpose of its 'European Neighborhood Policy', [https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp\\_en](https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en)

EU. That the border and Northern Ireland are peaceful and stable continues to be a priority for both Dublin and London governments. Both states are agreed on avoiding a return to the borders of the past. That also makes sense given the deep historic, cultural, economic and social ties between both countries and peoples. Matters of north-south co-operation have worked well with procedures in place for mutual agreement - there is no reason that such mutual cooperation should not continue.

For its part, there is no reason for the EU to intervene in this border, so different from the outpost ones: a border with the UK, a future ally, friend, a rich and powerful G7 economy, which has pledged to work with and support its continental allies after March 2018. The UK and Irish governments, each a party to the Belfast Agreement (to which the EU *was not* a signatory), must be left to get on with things, rather than the EU seek to play politics with the border to its own anti-democratic ends.

Britain's world standing is based not only on its economic and political role as a G7 power, its global trading and ties with the Commonwealth and fellow European powers. Rather it retains a leadership because its international role is the consequence of a strong democratic tradition in a country where the exercise of political power owes less to patronage, money, favours or interests than to the authority vested in it by voters. Were it to violate the democratic mandate to appease the EU or others opposed to a genuine Brexit and do so on the pretext of Ireland, it would be making two ills instead of curing one. At a stroke it would endanger relations between the people of these islands and violate the trust of its own voters.

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The battle over how the UK will leave the EU is not just about trade and the economy. It is a battle for Britain's democracy. That democratic tradition protects voters' freedom to decide who governs and how, bringing benefits both in times of continuity and those of sudden change. It also allowed a majority to choose Brexit.

But, as Sheila Lawlor shows in *Deal, No Deal? The Battle for Britain's Democracy*, this convention has broken down. In and out of parliament and in the EU, the forces opposed to the decision have sought to obstruct it. The Chequers compromise capitulates to these anti-democratic pressures, says Dr Lawlor, because it allows goods trade to remain bound by EU rules, though would leave services free to flourish.

The government should now change course. It should believe in Britain's economy, the world's fifth largest, and propose a mutual recognition deal for goods as well as for services with the EU. Were the EU to refuse, the alternative WTO option is both proven and successful: trade under WTO terms already provides a solid base for around 96 per cent of global trade. Both options would restore the initiative to Britain. But more important, they would mean the government had respected rather than scorned the voters' decision, and with it the tradition of British democracy itself.

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