



European Foundation

WHY WE HAD TO LEAVE

Brexit and the Deepening Union

“The truth is incontrovertible. Malice may attack it, ignorance may deride it, but in the end, there it is.”

Sir Winston Churchill

What Is At Stake

Sir Bill Cash MP
March 2018

The answer to this question is part of our history. The British people have never been willing to let go of self-determination: this is our single most defining characteristic. It has been this recurrent fight for self-rule, democracy and for freedom of choice that has shaped our government and our parliamentary democracy.

The British people rebelled against Charles I when he tried to impose taxation without parliamentary consent; Cromwell did not improve on this, but from the 1660s, our modern form of government evolved into a sovereign parliament, with the emergence of modern parliamentary democracy in the eighteenth century. In the early nineteenth century Britain defeated Napoleon's project to conquer it, and the rest of Europe. The repeal of the Corn Laws in 1846 was followed by increasing global trade and prosperity; unlike the rest of Europe, our emerging parliamentary system avoided bloody revolution.

The time came when the people rightly demanded their own say. The vote for working men in the Reform Act of 1867 led to modern parliamentary government, followed by votes for women by 1928. In the twentieth century, this democracy provided the necessary political will to sustain our self-government and democratic freedom and prevail against Nazi Germany in the Great War. It was parliament which abandoned appeasement under Winston Churchill, enabling us to defeat Hitler from 1939-1945.

The postwar moves towards a more integrated Europe entangled the British people into our joining the European Community in 1972. The White Paper of the time stated we would not surrender our veto, as to lose it would endanger "the very fabric of the European Community". This promise turned out to be false. The Referendum in 1975 was conducted without the British people being made sufficiently aware of where it was leading. When the Lord Chancellor (Lord Dilhorne) gave his advice to the nation in 1962 about the consequence of joining the European Institutions, and repeated this advice as late as 1967, he stated that: "I venture to suggest that the vast majority of men and women in the country will never directly feel the impact of Community-made law at all. In the conduct of their daily lives they will have no need to have regard to any of the provisions of that law." Furthermore, even in 1972, during the enactment of the European Communities Act, the Minister responsible for the Bill, Geoffrey Rippon, dared to confidently predict that European Law would be brought in "only in exceptional circumstances".

It is now known that at least 12,000 regulations have been brought in since '73. What happened was that, treaty by treaty, we conceded more and more power over our government and our parliament – and therefore our right to govern ourselves – to the European institution. This was done and never properly exposed until the 1992 Maastricht Treaty, when Conservative Rebels drew a historic line in the sand and had a massive campaign for a Referendum on that Treaty – it was collusion between the front benches of the Conservative and Labour party that made the referendum necessary. However, by the time of the 2007 Lisbon Treaty, when there was a

Conservative Rebellion on the issue of Sovereignty – the origins of which can be traced back to June 1986 – the European dam was about to burst. The Conservative Party Leadership promised a Referendum but failed to deliver it. In 2011, on a three-line whip, 81 Conservatives faced down David Cameron to force a Referendum. The Conservative party accepted the game was up when the former Prime Minister made his Bloomberg Speech. This was followed by a series of Referendum Bills and then, following the 2015 General Election, the European Referendum Act itself, which came into force that year.

The referendum vote to leave was an instruction from the people to Parliament, which Parliament itself had authorised, to pass the necessary legislation, including the repeal of the European Communities Act 1972.

So let us pause for thought, and think again about what is at stake. If the speeches of Juncker, Macron, Merkel or Schultz had been made before the Referendum, the vote would have been far greater for leave. The pursuit of an “ever closer union”, which has been consistently at the heart of the European establishment, is now openly being championed, particularly by Germany but also France. It is also being increasingly challenged by the grassroots of public opinion throughout Europe as a whole. This more than reinforces the fundamental question with which we are now faced: how do we want to be governed?

The answer to this was given by the British people on 26 June 2016 and was the direct result of our sovereign parliament specifically authorizing, by act of parliament, an answer to the question by the people of the United Kingdom. This is democracy – on which all else depends.

The direction the EU has taken and continues to take collides with these fundamental instincts and our history. This is why we had to leave.

The Focus

This paper aims to elucidate, simply, why we had to leave the EU. It will demonstrate how the EU has held back the UK from fulfilling its potential – as the 5th largest global economy and a world-leading nation in technological innovation, environmental activism, the strength and reliability of its legal system, and military capability – and has done so through undemocratic, protectionist, one-size-fits-all regulations, whose end goal has been to achieve an “ever closer union”. Its four main sections will outline the core reasons for Brexit:

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The paper will demonstrate that the key to Europe’s political stability is not the EU, but the fundamental notion of democracy, as understood in its evolution through UK history. This means a more prosperous future outside the EU, and the economic and democratic opportunity for self-rule.

I. POWER

BRITAIN NO LONGER GOVERNS ITSELF

“Over and over again, I’ve asked at public meetings whether any members of the audience knew how the laws are made in the European Union. I have never been able to have anyone tell me. This applies to all law-making which is imposed upon us under the European Communities Act 1972. I don’t believe that anybody could possibly reconcile this with our own parliamentary democratic way of legislating.”

Sir Bill Cash MP

I. POWER - BRITAIN NO LONGER GOVERNS ITSELF

WHY WE HAD TO LEAVE – BREXIT AND THE DEEPENING UNION

(1) HOW THE EU GOVERNS US

- The fundamental purpose of Brexit is the re-establishment of democracy and self-rule

The fundamental purpose of Brexit is to re-establish the UK's parliamentary democracy. The inability of the UK to take sovereign decisions through its own Parliament stems from the EU's law-making procedure, which by superimposing laws – through the methods we will explain below – has severely limited our ability to influence, let alone block, measures affecting our national interest. The legislative and governmental machinery of the EU has relegated the UK to the second tier of an increasingly undemocratic European system. This system is also steadily more dominated by Germany. The inability of the UK to take decisions within the EU is clear in the following areas.

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(1.1) UK vs EU Law-making

Since the passage of the European Communities Act 1972, vast swathes of EU law (made by unelected officials behind closed doors) have been imposed on the UK because of its inclusion in the legal and institutional arrangements of the European Union. *The possibility to veto legislative proposals has long been eliminated, despite the promise in the 1971 White Paper (which preceded the European Communities Act 1972) to retain it, to protect the “UK’s vital national interests”.* Thus *55% of the laws that bind UK voters are imposed by the European Union.*

As a result, the ECJ has become the *de facto* “Supreme Court of Europe”, with judgments binding on all Member States and no right to appeal. *Yet EU law-making lacks the essential features of democracy:* democratic elections of the officials that hold effective power, rigorous legislative scrutiny, cross-examination of ministers and procedural transparency. Below, we outline the differences between the British Parliamentary system and the EU – to show why one is a democratic system, and the other is not:

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(1.1.1) Law-making procedures

United Kingdom

UK laws are passed by *elected Members of Parliament* who **introduce Bills**. These Bills go through First Reading, Second Reading, Committee Stage (where they are subject to amendments), Report Stage and Third Reading, in both the House of Commons¹ and the House of Lords.² When a Bill is approved by one chamber the other considers it. *Both the Commons and the Lords must agree* on the final shape of a bill before it can become law. Once approved, the Bill receives formal approval by the monarch (“Royal Assent”). The monarch always gives their approval on the advice of Ministers.

European Union

*The European Commission*³ (the unelected, administrative driving force of the EU) *is the only body that can propose legislation*. Its proposals have an inherent *bias towards furthering European integration*. Laws are passed in one of two ways:

The Ordinary Legislative Procedure is the most common law-making procedure, but is very labyrinthine. It is used to deal with policy areas such as employment, immigration, workers’ rights, the Single Market, free movement of workers, culture, agriculture and fisheries. The *European Parliament* (EP) and the *Council of Ministers* hold powers to amend proposals and both sides must approve the proposed law before it is adopted. The EP is not strictly a parliament: it cannot draft law (only the Commission can do that). It is often not consulted and can be ignored by the Commission. It is formed of 785 MEPs. In theory it can dismiss Commissioners with a two-third majority, but this has never happened. The Council discusses the policies drafted by the Commission. Who sits on it depends on the policy being discussed at the time. The Council passes EU legislation: in theory through qualified majority, in practice by consensus in private. Vetoes are now impossible. It meets in secret.

If both institutions have reviewed legislation twice without reaching agreement, a Conciliation Committee (with representatives of both the Council and EP) is set up to seek compromise. If it fails to reach agreement, *the Council can adopt legislation unanimously* without parliamentary assent, and the EP can only block legislation if it reaches an absolute majority.

The Special Legislative Procedure is used in those areas that are seen as so important to national interests that *supremacy rests with government representatives in the Council of Ministers*. There are two types

¹ The first chamber of Parliament composed of 650 members publicly elected by British citizens (and Commonwealth and Irish citizens legally resident). The Commons represents UK citizens’ interests and concerns.

² The second chamber of Parliament composed of 799 members. There are 684 Life peers, 91 Hereditary peers and 24 Bishops. The Queen appoints them on the advice of the Prime Minister, while the House of Lords Appointments Commission (an independent body), recommends some non-party-political members. The expertise of Lords members enables them to make a significant contribution to Parliament’s work.

³ Formed by 27 people overseeing a particular area. It is the only EU body that can propose legislation on its own initiative. It meets in secret: taking minutes is banned. No one is allowed in the Commission Room without the Commissioner’s permission.

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of special legislative procedures. The first type is *the consent procedure*, which grants the *EP with the possibility to either accept or reject legislative proposals by an absolute majority vote, but they cannot amend them*. This is required in very specific cases, such as new legislation on combating discrimination or to non-legislative procedures, such as international agreements and arrangements for withdrawal from the EU (e.g. the UK Withdrawal Agreement from the EU). The second type is *the consultation procedure*, which applies to exemptions and competition law and international agreements adopted under common foreign and security policy. It grants the *EP the power to approve, reject or propose amendments to a legislative proposal, but the Council is not legally obliged to take the EP's opinion into account*. However, the ECJ has established that the Council cannot take a decision without having received the EP's opinion.

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(1.1.2) Transparency

United Kingdom

Full transcripts of the debates that take place in the process of law-making are recorded and published by Hansard for the public. All debates in the *Commons*, the *Lords*, and in the *Committees* can be streamed live at parliamentlive.tv. *The system is fully transparent* and both arguments and amendments are recorded, followed by the names of the MPs that put them forward.

The European Union

The European Parliament

Decision-making in the EP is somewhat transparent, as representatives from the Council and Commission are present at Committee meetings; plenary debates are held in public; and committee and plenary votes are recorded.

The Council of Ministers

However, decision-making in the *Council of Ministers is secretive*. Council meetings on legislation are generally closed. Analysis of voting behaviour in the Council concludes that even where Qualified Majority Voting (QMV) is required, the Council does not vote formally and *prefers to reach a consensus*.

A *Votewatch*⁴ report found that during the period mid-2009 to mid-2012, 65% of Council decisions were taken by consensus, whilst other analysts have found that in around 80% of cases since 1993 decisions that could have been taken by QMV were taken without formal opposition. But consensus differs from unanimity as it indicates that nobody voices opposition, rather than that everyone agrees. However, as *opposition is not formally recorded* it is impossible to know how decisions were ultimately agreed, with consensus being reached behind closed doors.

COREPER

In the European Union the Council Working Groups and the Committee of Permanent Representatives (COREPER) function as the *preparatory bodies for the Council of Ministers*. With the exception of provisional agendas, *working documents* from COREPER and Working Group meetings are *not publicly available*. Thus it is not clear how agreement is reached before Council meetings, when, how or by whom pressure is applied, or what other elements affect ministers' behaviour.

⁴ An independent thinktank founded by two professors at the LSE.

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(1.1.3) Law-making power

United Kingdom

The Principle of Parliamentary Sovereignty

A fundamental tenet of the UK's unwritten constitution (unlike all the other 27 Member States, which have written constitutions) is the *sovereignty of Parliament*, making the *British legislature the supreme power of the state*, and passing the statutes that are the principal form of British law. *Parliament is sovereign because the British people elect it*, so its authority is founded on this democratic transfer of decision-making power that translates into binding laws.

The Legislative Primacy of the Commons

The House of Commons, as the elected chamber of Parliament, holds ultimate law-making power. A report in 2006⁵ stated that “*Commons primacy* rests on two things, the election of its members as the representatives of the people” and “power to grant or withhold supply” (i.e. taxation). The Lords “fulfil a different function” from the Commons and “defer” to the Commons “when there is a difference of opinion”. The Lords is “*a revising chamber* not a vetoing chamber”. Its role is “to scrutinise and revise legislation but not to operate in such a way that the democratic authority of the Commons was sabotaged.” In other words, the Lords does not have an ultimate right to say no. Indeed, the Parliament Act 1911 removed the Lords' veto power.⁶

European Union

The Legislative Primacy of the Council

Whilst the primacy of the Council is clear in the Special Legislative Procedure, the Ordinary Legislative Procedure seems to place the EP (representing European citizens) and the Council (representing European Governments) on an equal footing. Yet the EP's power to block legislation is weak. The block is seldom used, suggesting a belief that flawed legislation is better than no legislation.

The primacy of the Council in the legislative process is made clearer by the asymmetry of information between the Council and the EP. Whilst EP decision-making is relatively transparent, Council meetings on legislation are generally closed, so MEPs are dependent on Council members for information (so they receive an incomplete report of the Council's discussions). Also, while internal divisions in the EP are public, those in the Council are secret, which means the Council can exploit these divisions to attain its objectives, while the EP cannot. In addition, the *EP is disadvantaged* because it lacks the law-making expertise of the Council, which can draw upon ministerial knowledge of legislating.

⁵ The Joint Committee on Conventions Report, 2006.

⁶ Constitutional and Administrative Law by O. Hood Phillips and Jackson declares it to be a constitutional convention that “In cases of conflict the Lords should ultimately yield to the Commons.”

The De Facto Primacy of COREPER

COREPER seeks to reach agreement on the proposals the Commission forwards to it before they reach the table of the Council of Ministers. It has been estimated that 70-90% of the Council's decisions are clarified at the preparatory level and then *adopted by the Council of Ministers without further discussions*. The EP does not participate in the negotiations at this stage, but must reach agreement with the Council later.

COREPER sets the Council agenda and its members attend Council meetings as advisers to national ministers. The Council discusses A-points and B-points. A-points are decisions that COREPER has already taken and which can be adopted without further discussion in the Council. B-points are proposals which COREPER has not yet agreed and which need further discussion and possibly a vote. COREPER is unlikely to send a proposal to the Council if it is likely to fail following Council negotiations. This is shown by the fact that the majority of points passed to the Council for deliberation are "A points" on which no further discussion is needed.

Once COREPER has ensured that a decision will be adopted in the Council, the objective is to have it swiftly approved in the EP. As the ordinary legislative procedure is long and intricate (because of conciliation and the "option to reject" an already lengthy cooperation procedure), the loss of time is compensated for by *rushed decisions made by EP committees after one reading*, without any debates in plenary. Indeed, EU institutions are encouraged to *reach agreement at first reading* if possible.⁷

COREPER also liaises between the Council and EP if a legislative proposal reaches the Conciliation Committee. Overall, the primary preoccupation for COREPER technocrats appears to be the success of the decision-making procedure over all other concerns.

⁷ Under the 2007 Joint Declaration on the Co-decision Procedure (Article 11).

(1.2) EU Decision-making

The intrinsically undemocratic nature of EU institutions, principally the Council of Ministers, affects the UK especially.

(1.2.1) Decisions by consensus, behind closed doors, in the interest of the core Member States

In the Council of Ministers, countries are supposed to be able to protect their national interests, but the introduction of Qualified Majority Voting (which has **stripped nation states of their veto**) and the substantial expansion of EU membership (especially after the two main waves in 2004 and 2007) have meant that even large countries find it difficult to stand up for what is important to their electorates. For instance, *the UK's share of the vote is 8%* and its ability to influence, let alone block, measures, is decidedly limited. In practice, many key decisions are taken in private meetings between Prime Ministers and Presidents. The most important of these meetings involve the French President and German Chancellor.

Kenneth Clark (a pro-EU British Conservative MP)⁸ gave an accurate description of how decision-making in the European Council works in a speech in the House of Commons in November 2017:

“Under the Major Government, we introduced a process whereby parts of the European Council meetings were held in public. ... What happened was that each of the 28 Ministers gave little speeches entirely designed for their national newspapers and television, and negotiations and discussions did not make much practical progress. *When the public sessions were over, the Ministers went into private session to negotiate and reach agreement.* I used to find that the best business of the European Council was usually done over lunch... The dinners and the lunches tended to be where reasonable understandings were made. *There were very few votes, but Governments made it clear when they opposed anything. When the Council was over, everyone gave a press conference. It was a slightly distressing habit, because some of the accounts of Ministers for the assembled national press did not bear a close resemblance to what they had been saying inside the Council.*”

The result is that *decisions* in the Council are taken by consensus, behind closed doors, and *in the interests of a central core of rich countries* – backed by Member States which are economically dependent on them.

⁸ President of the Conservative Europe Group, Co-President of the pro-EU body British Influence, and Vice-President of the European Movement UK.

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(1.2.2) The UK is outvoted more than any other Member States

This undemocratic, majoritarian decision-making process leads to *the subjection of nations*. It is the UK, as one of the only Member States prepared to publicly vote against a majority, which is affected the most.

A series of reports by *Votewatch* demonstrated that between 2009-2015 there was a higher proportion of conflict within the Council of Ministers and *the UK was on the losing side on an increasing number of occasions*, more than any other Member State. It is also significant that *Germany was the least likely to vote the same way* as the UK, and most likely to vote against the UK. Thus a “deliberative” and effective style of governance has been replaced by a “competitive bargaining” approach, leading to an unacceptable transfer of resources from “losers” to “winners”.

(1.2.3) The Eurozone in-built majority

In addition, Eurozone members have a voting advantage over the UK in the Council of Ministers. From 1 April 2017 the “double majority” system became obligatory: the Council of Ministers can reach decisions only when approved by at least 55% of Member States comprising at least 15 States and including States representing at least 65% of the EU population. Thus if the Eurozone states vote as a caucus led by Germany, they represent 66% of the EU population, and would achieve the threshold of 65% of the EU population needed to adopt a proposal. *The Eurozone can therefore have “a permanent in-built majority”⁹* in the Council, which “could leave the UK consistently outvoted on measures with a profound impact on its economy and the City of London, simply because it is outside this new inner core”.

To restore the powers of its most important political institution, the UK must leave the EU, so that laws can be made in the UK, for the benefit of UK citizens, by democratically elected officials, in a manner that is procedurally effective and transparent.

⁹ V. Miller, J. Lunn - House of Commons Library – “The European Union: a democratic institution?” Research Paper 14/25 (26/4/2014)

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(2) THE BREXIT MANDATE

- More British people voted to leave the EU than for anything else, ever
- The House of Commons decision to trigger the Article 50 Act was passed by 498 votes to 114
- In the General Election, 85% of the vote went to parties that accepted the referendum

On 23 June 2016, 17,410,742 people voted to leave the EU – more than have voted in the UK for anything else, ever. This is the biggest democratic mandate any Government has had in the history of the United Kingdom. The 72% turnout was higher than for any election since 1992.

The referendum was authorised by Act of Parliament with a majority of six to one in the Commons. After the referendum, the decision to trigger the Article 50 Act was passed by 498 votes to 114, and was officially enacted on 29 March 2017. In the General Election, 85% of the vote went to parties accepting the referendum while *YouGov* polls show that over 70% of Britons now want government “to get on” with leaving the EU.

The European Union (Withdrawal) Bill will repeal the European Communities Act 1972, which gave effect to European Law in the UK. Theresa May brought in the Bill to Withdraw the UK from the EU in 2017, which passed the House of Commons on 17 January 2018. On 22 September in her speech in Florence, the Prime Minister confirmed that the objectives remain unchanged.

The core democratic reasons that explain why we had to leave are legally backed by a Referendum, numerous Acts of Parliament and UK Government public pronouncements: as a matter of democratic principle and law, the UK Government must deliver on Brexit. It is therefore important to understand what Brexit means.

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(2.1) Brexit means “Take Back Control”

Leaving the Single Market and Customs Union as well as the remit of the European Court of Justice (ECJ) is often mistakenly coined “Hard Brexit” (a name devised to sound extreme), while staying inside the Single Market and Customs Union and under ECJ jurisdiction is named “Soft Brexit” (suggesting a comfortable and harmonious future). In reality, leaving the Single Market (a system which *legally mandates the EU’s control over the UK’s borders* as part of the EU’s indivisible four freedoms, as well as EU budget contributions), the Customs Union (which *legally prevents the UK from negotiating its own trade deals*) and the ECJ (whose judgements are binding on the UK, with no right of appeal) simply amounts to “Brexit”.

This is because the “Leave Campaign” made a clear promise to the British people, which they voted for:

“Take back control of our borders, our money and our laws”

Indeed, this promise was endorsed by the Prime Minister in her speech setting out the government’s negotiating objectives for exiting the EU on 17 January 2017, when Theresa May stated: “Brexit must mean control of the number of people who come to Britain from Europe. And that is what we will deliver”; Brexit must mean taking back control of our money, because “we will no longer be members of the single market (and therefore) the principle is clear: the days of Britain making vast contributions to the European Union every year will end”; and Brexit must mean taking back control of our laws “because we will not truly have left the European Union if we are not in control of our own laws”.

A final agreement that preserves the UK’s adherence to any of these arrangements amounts to a failure to implement the clear outcome of the 2016 Referendum and the subsequent promises to pursue the objectives set by UK Government Ministers and the Prime Minister herself.

(2.1.1) Deals incompatible with the Brexit mandate

When the European Union (Withdrawal) Bill repeals the European Communities Act 1972, all the European Union treaties, which are now legally binding within the UK through being added as amendments to the European Communities Act itself, will cease to apply. This means that the UK will be automatically outside the EU Single Market and Customs Union.

Whether the UK should attempt to join the Single Market on different terms or create a Customs Union, rather than re-join *the* Customs Union, has featured in debates. There are a number of existing partnerships that the EU has agreed with non-EU Member States which would allow this to happen in principle. However, **some of these deals must be ruled out**, as they are incompatible with the Brexit mandate. Indeed, in her Lancaster House Speech, the Prime Minister said that Britain would seek “a new and equal partnership” with the EU Member States

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and stressed that this would not be “partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half out”. She also added that the UK Government would not “seek to adopt a model already enjoyed by other countries, nor seek to hold on to bits of membership”.

<p style="text-align: center;">European Economic Area Member and EFTA “Norway Model”</p>	<p style="text-align: center;">European Free Trade Association Bilateral Member “Switzerland Model”</p>	<p style="text-align: center;">Customs Union Member “Turkey Model”</p>
<p>Efta itself does not give Single Market access. This is in return for signing the European Economic Area (EEA) Agreement. The EU uses this agreement for one purpose above all – to harmonise Efta countries’ laws with Brussels. Norway has full access to the Single Market as a result of the EEA Agreement, but its Single Market membership means it must <i>submit to EU regulations, over which EEA Agreement states have no control. These EU regulations include both the “four freedoms”</i> and competition rules. This means that they have no control over migration from EU countries.</p> <p>The EEA Agreement also established the <i>EFTA Court</i> and requires it to follow the rulings of the European Court of Justice (due to the principle of “homogeneity”). Yet the European Commission still wants the Court “strengthened” further, to <i>“function as a mirror to EU authorities”</i>. It does not exist for divergence, but</p>	<p>Switzerland has negotiated bilateral agreements with the EU in return for access to the Single Market. These <i>take in some EU laws</i>, and in some cases <i>transfer competence to EU institutions</i> in supervising the application of the agreement and the relevant EU law (including the ECJ as per the Swiss-EU Air Transport Agreement). What access Switzerland receives is in return for accepting free movement.</p> <p>Switzerland is an EFTA member and the EU is currently pressing Switzerland in negotiating the so-called institutional framework agreement, which would require the automatic adoption of EU rules and the instalment of the ECJ as arbiter in disputes between the two parties.</p>	<p>Turkey has a customs union with the EU by virtue of the provisions set out in 1995 <i>Decision of the EC-Turkey Association Council</i>. They are extremely one-sided.</p> <p>The Turkey-EU arrangement requires Turkey to “align itself with Common Customs Tariff” (Article 13(1)) and also to “adjust its customs tariff whenever necessary to take account of changes in the Common Customs Tariff (Article 13(2)).</p> <p>In addition, <i>Turkey has no right to be involved in the EC’s decision on changing Tariffs (it has no vote on such legislation) but has only the right to be “informed” of such decisions (Article 14(1)). Turkey is also required to adopt EU Regulations</i> and ECJ case law in the area of competition law (Article 39(1)(a)).</p> <p>In relation to trade with non-Member countries, under Article 16 Turkey is required to harmonise its commercial policy (i.e. granting tariff free access to goods from a country with which the EU has negotiated a free trade</p>

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<p>harmonisation - ie ever closer union.</p> <p>The European Parliament itself notes that Efta countries “have little influence on the final decision on the legislation on the EU side.” They must also contribute to the EU budget.</p> <p>The EEA <i>was created for countries whose governments wanted to join</i> the EU but whose people were reluctant to.</p>		<p>agreement), but this does not automatically mean that Turkey will then get tariff-free access for its goods into the market of that non-Member state – this will be dependent on Turkey being able to negotiate a parallel trade agreement with that Member State. Indeed, <i>Turkey cannot negotiate its own free trade agreements with non-Member States.</i></p>
<p style="text-align: center;">Outcome</p> <p>This arrangement would not allow the UK to take back control of its borders, money or law</p>	<p style="text-align: center;">Outcome</p> <p>This arrangement would not allow the UK to take back control of its borders, money or law</p>	<p style="text-align: center;">Outcome</p> <p>This arrangement would not allow the UK to take back control of its trading borders and trading law</p>

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(2.1.2) Deals compatible with the Brexit mandate

WTO Rules “The US Model”	Free Trade Agreement “The UK Model”
<p>Trading under WTO rules means a multilateral trade regime with 150 members. As part of the EU the UK already trades under WTO rules with over 100 countries around the world, including the US (the UK’s largest single export market), as well as China, India, Brazil and Singapore.</p> <p>The rules of the WTO require each member to levy consistent tariffs on all its trade partners. Positive exceptions (lowering or eliminating tariffs for particular countries) must be made through specific bilateral agreements.</p> <p>A country specifies its tariffs in a “WTO schedule” – with the UK currently levying the EU’s tariff schedule, as Brussels represents all twenty-eight-Member States at the WTO. In a joint letter from the UK and the EU to the WTO, the two parties stipulated that in the period immediately after Brexit the UK will apply the same tariffs as the EU. This will be relatively straightforward, as the European (Withdrawal) Bill, once turned into binding law, will copy all existing classifications and rules into the UK legal system, meaning that HMRC will simply apply the same rates as it has done before Brexit.</p>	<p>As Prime Minister Theresa May said in the Lancaster House speech, the goal, or “end state” for the UK is a comprehensive, ambitious FTA with the EU.</p> <p>This should not be envisaged as Canadian-style deal (a goods-focused accord) but as a UK bespoke FTA (in David Davis’s words, “Canada plus plus plus”). The Special Trade Commission at the Legatum Institute have summarised the core requirements for such an arrangement in the seven following points:</p> <ol style="list-style-type: none"> (1) Zero tariffs and quotas; (2) Rules of origin based on substantial transformation and change of tariff classification, so that originating goods include goods produced in all countries where the EU and UK have trade agreements respectively; (3) Agreement on Technical Barriers to Trade (TBT) and sanitary and phytosanitary (SPS) measures; mutual recognition for product regulation, conformity assessment, and market surveillance (such mutual recognition agreements (MRAs) could exist outside the framework of a trade agreement); (4) A customs arrangement that ensures expedited customs clearance along the lines suggested above; (5) Regulatory coordination and coherence mechanisms to allow the UK and EU’s regulatory system not to impose barriers to each other’s trade; (6) Disciplines such as one would find in other trade agreements on intellectual property protection, protection of investment, liberalisation of service trade, and a comprehensive dispute settlement mechanism; and

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	(7) Bilateral agreements in other areas outside of trade. ¹⁰
<p style="text-align: center;">Outcome</p> <p>This arrangement is <i>the second-best option</i> available. However, it is important that the UK prepares for this option and is prepared to endorse it, as not doing so would weaken its negotiating position. Trading under WTO rules would allow the UK to take back control of its borders, money and law, as well as restoring its right to construct trade deals with non-EU countries, complying with the Referendum mandate. In addition, while it does not offer the UK an FTA with the EU at the outset, this does not preclude the possibility of striking a UK bespoke trade deal with the EU in the future.</p>	<p style="text-align: center;">Outcome</p> <p>A bespoke FTA with the EU is the UK government’s <i>best option</i>, and will allow the UK to take back control of its borders, money and law, as well as restoring its right to construct trade deals with non-EU countries as well as the EU. It is important to note that Switzerland does not have a “Norway style deal” nor does Turkey have a “Canada style deal” - <i>every single country has their own type of deal with the EU and therefore the UK will have a “UK style deal”</i>.</p>

¹⁰ Shanker A Singham, Dr Radomir Tylecote and Victoria Hewson “The Brexit Inflection Point: The Pathway to Prosperity” (Legatum Institute, November 2017).

(2.2) A Transition Period?

A Withdrawal Agreement negotiated under Article 50 and ratified before 29 March 2019 can include a transition period (necessary for the implementation of the Withdrawal Agreement), and now looks set to do so following the EU Commission’s publication of the draft Withdrawal Agreement in March 2018. The draft Withdrawal Agreement is made up of 168 Articles divided into six parts. Part Four of the draft Withdrawal Agreement includes a transition period, the terms of which have been fully agreed by the UK and the EU.

(2.1.1) The rationale for the transition period

Theresa May first proposed “a phased process of implementation” in her Lancaster House Speech on 17 January 2017, which means the UK Government has been consistent in its call for a transition period. The Government’s rationale for the transition period is that it will enable an orderly withdrawal: as the UK’s full withdrawal from the EU will lead to considerable changes for businesses, individuals, stakeholders and international partners, the Government believes that it is crucial that sufficient certainty and time is given for different groups to adapt to this change. The EU agrees with the UK’s position but insisted that if the UK were to remain part of the Single Market and Customs Union for the duration of the transition period, it would have to submit to its entire *acquis*, in accordance to the “no cherry picking” mantra.

What is clear from this reasoning is that a transition period only makes sense if it precedes the UK changing its status from an EU member state to that of a third country, so can only function properly if a clear vision of what future relationship between the UK and the EU exists (in accordance with the UK Government’s policy, the UK’s EU (Withdrawal) Bill, and what the British people voted for in June 2016).

(2.1.2) UK status during the transition period and its duration

The UK will leave the EU on 30 March 2019 (the date of entry into force of the Withdrawal Agreement) and thus become a third country, meaning that all EU treaties will cease to create binding legal obligations within the UK. However the transition period, starting on the date of entry into force of the Withdrawal Agreement and ending on 31 December 2020, will extend the EU *acquis* without EU membership to the UK. The end date of this transition period cannot be extended unless another clause is added to the Withdrawal Agreement to allow for it. The legal implications of a transition period are troubling however: during its time span the UK will adopt a *sui generis* role; it will be treated as an EU Member State in the application of Union law, but as a third country in its role in EU institutions, as it will be excluded from Union decision-making and retain no voting rights.

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(2.1.3) UK legal obligations during the transition period

Article 122 of the draft Withdrawal Agreement states: “Union law shall be applicable to and in the UK during the transition period”. This is a very broad provision. Article 2 of Part One, “Common Provisions”, defines EU law for the purposes of the Withdrawal Agreement (and has been agreed by both parties), and EU law means: all EU Treaties and the Charter of Fundamental Rights of the European Union, the General Principles of Union law and the acts adopted by the Union, the acts of the Member States meeting in the European Council or the Council itself, and declarations made in the intergovernmental conferences.

For the duration of the Transition Period, the UK will have to comply with all EU *acquis*, with just a few exceptions, namely: Protocol (no 15) containing certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, Protocol (No 10) containing the Schengen *acquis* integrated into the framework of the UK and Protocol (No 21) on the provisions of the UK and Ireland in respect to the areas of freedom, security and justice.

While the UK will have to comply with essentially all EU law, it will cease to participate in EU decision-making. Article 123 of the Withdrawal Agreement establishes that during the transition period the UK will be excluded from participating in EU decision making and attending meetings of the EU institutions Overall, UK involvement in EU decision-making during the Transition Period is only foreseen as follows: “where draft Union acts identify or refer directly to specific Member States’ authorities, procedures, or documents, the United Kingdom shall be consulted by the Union of such drafts with a view to ensuring the proper implementation and application of that act by and in the United Kingdom”. Thus, UK representatives or experts could be called to exceptionally attend meetings or parts of meetings, providing discussions concern individual acts addressed to the UK during the transition period, or the UK’s presence is deemed necessary and in the Union’s interest (particularly for effective implementation of Union law during the transition). The UK will have no voting rights and its presence will be limited to specific agenda items.

(2.1.4) Enforceability of EU law during the transition

In accordance with Article 122(6), the UK is to be included in all references to Member States in Union law made applicable by the withdrawal agreement. Thus during the transition period, Union law applicable to the UK shall produce for the UK the same legal effects as in the other Member States. Article 4a includes a good faith clause, which establishes that the parties shall assist each other in carrying out tasks which flow from the Agreement. However, the extent of protection here is questionable: are no substantive obligations attached to it and it will apply with no prejudice towards the EU principle of sincere cooperation. Thus the inherent bias of this principle towards the Union interest will enable it to take priority over the “Good Faith” clause. Union law is also to be interpreted in conformity with the relevant case law of the ECJ. There is

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still no agreement as to whether this means UK courts will need to follow post-Brexit ECJ judgments until the end of the transition period.

(2.1.5) Jurisdiction during the transition period

Crucially, Article 126 on supervision and enforcement further clarifies that during the transition all EU institutions, including the ECJ, will retain their powers in relation to the UK.

Under Article 153, the European Commission would be able to launch infringement proceedings against the UK if it considers it has failed to fulfill an obligation under the Withdrawal Agreement, including financial provisions. The ECJ would also be able to impose a lump sum or penalty payment on the UK if it found that it had failed to fulfill an obligation under the Withdrawal Agreement or had not taken the necessary measures to comply with a previous judgment, entailing a massive interference of the ECJ in the UK legal system. This is why the provision as it stands was only partially agreed. The UK Government, so far, has only agreed to “applicable Union law referred to in Article 129 and Article 131(1) or (2) of this Agreement.”

However, the Government has agreed to other controversial Articles. For instance, Article 153 allows Member States’ courts to refer a question concerning the interpretation of the withdrawal agreement to the ECJ for a preliminary ruling; the UK would be entitled to submit statements to the ECJ. However such rulings would also bind the UK courts (agreed in Article 154). In addition, the UK’s agreement to Article 155 allows the European Commission to participate in cases pending in the UK: the Commission will be entitled to submit, if it wishes, written observations to the UK courts or tribunals in pending cases where the interpretation of the Agreement is concerned, with regular dialogue and exchange of information between the ECJ and the UK’s highest courts. This risks further interference in the UK legal system.

The UK and EU have also agreed on the creation of a Joint Committee, responsible for the implementation, application and interpretation of the Withdrawal Agreement. Its decisions are envisaged to be binding on the Union and the UK, with the same legal effect as the Withdrawal Agreement.

Under Article 165, if the EU considers that during the transition period the UK has not fulfilled an obligation under Union law (as found in a judgment rendered pursuant to Article 126), and where the functioning of the internal market, Customs Union, or financial stability of the EU or Member States would be jeopardised as a result, the Union may suspend certain benefits deriving from the UK's participation in the internal market. The UK and EU have not yet agreed this controversial provision. The UK would be given just 20 days to follow the EU demands, which is clearly unacceptable.

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(2.1.6) UK trading rights during the transition period

Article 124 of the draft Withdrawal Agreement deals with specific arrangements between the UK and EU relating to the Union’s external action during the transition. The biggest victory for the UK in this area was to have the EU accept its ability to negotiate, sign and ratify international agreements, provided they do not enter into force or apply during the transition (unless the UK obtains permission from the EU). Article 124 also stipulates that the UK will have to accept all the obligations stemming from international agreements concluded by the EU, including free-trade agreements. However, the benefits stemming from these agreements are not guaranteed. While Article 124 stipulates that “the Union will notify the other parties to these agreements that during the transition period, the United Kingdom is to be treated as a Member State for the purposes of these agreements”, this notification may not be enough. As Michel Barnier stated: “Our partners around the world may have their own views on this.” However, the more likely scenario is that they would seek to negotiate more comprehensive trade deals that freed the UK from the constraints of EU membership. Ultimately, Article 124 stipulates that the UK will not be able to participate in any work of bodies set up by international agreements concluded by the Union.

However, the Union may “exceptionally invite the UK to attend meetings or parts of meetings of such bodies, as part of its delegation, where the Union considers that the presence of the UK is necessary in the interest of the Union, in particular for the effective implementation of those agreements during the transition period. Such presence shall only be possible where Member State participation is allowed under the applicable agreements.” The Article also stresses that “In accordance with the principle of sincere cooperation the UK shall abstain, during the transition period, from any action or imitative which is likely to be prejudicial to the Union’s interest.”

(2.1.7) UK fishing rights during the transition period

Article 125 deals with specific arrangements for fishing. During the transition period the UK will not be able to regain control of its fishing quotas, and the UK will only be consulted in respect of fishing “in the context of the preparation of relevant international consultations and negotiations”, and “the Union shall offer the opportunity to the United Kingdom to provide comments on the Commission Annual Communication on fishing opportunities, the scientific advice from the relevant scientific bodies and the Commission proposals for fishing opportunities for any period falling within the transition period.” However the Commission may still ignore the UK’s position. Furthermore, “the Union may exceptionally invite the UK to attend, as part of the Union delegation, international consultation and negotiations [...] to the extent allowed for Member States and permitted by the specific forum” (however the article freezes the catch allocations, meaning the UK has at least been able to prevent the allocation of new fishing quotas during the transition period).

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(2.1.8) Is a transition period necessary?

The UK has agreed to a series of controversial provisions that will operate during the transition period, once the Withdrawal Agreement comes into force. Overall, a transition that primarily moves the so-called “cliff-edge” from March 2019 to December 2020 (during which time the UK will have less power than it would as a EU Member State) must be said to present potential problems. The UK Government will have to be certain that the transition period serves the goal of an orderly withdrawal once the terms of the final UK-EU relationship are clear, then evaluate whether such a transition period is worth pursuing, in line with the principle “nothing is agreed until everything is agreed”.

Interim Conclusion I

The intrinsically undemocratic nature of the EU was the fundamental reason why we had to leave.

The EU referendum, numerous Acts of Parliament, and the subsequent UK Government guarantees are the facts: as a matter of democratic principle and of law, the Government must deliver on Brexit, through a Withdrawal Agreement negotiated under Article 50, or without one. In addition, now that the UK and the EU have reached agreement on a Transition period, which includes a series of controversial provisions, the Government must ensure that the ECJ does not obtain jurisdiction over the Withdrawal Agreement, as this would mean failing to “take back control” of our laws.

In sum, in the EU the UK found itself shackled to an undemocratic system and to policies that contravened the British national interest. This led to the emergence of a long series of ill-advised policies affecting our economy and industry – quite simply, to more and more bad law. The subsequent sections will analyse these developments in turn.

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(3) EU OR FREE TRADE: WE CAN'T HAVE BOTH

- The UK was *the* nation of free trade – from its unilateral removal of tariffs in the 1840s to its founding role in the World Trade Organisation
- But for over four decades, the UK has been unable to lead – a direct consequence of EU membership
- The costs to the UK of Single Market and Customs Union membership heavily outweigh the very limited benefits

The UK is unable to maximise the benefits that stem from its position as the 5th largest global economy because the un-competitive and over-regulated Single Market and Customs Union limit its enormous potential. The costs that the UK endures as a member of the Single Market heavily outweigh the very limited benefits it gains; this is partly because the UK is a service-oriented economy that holds a substantial trade surplus with non-EU countries, compared to a trade deficit with the EU. Even the UK's former European Commissioner Lord Hill, writing in the FT on 17 January 2018, said that “tying ourselves to a system we cannot control, and one that is already moving in a different direction, cannot be a viable long term economic strategy for an economy like ours.” This, combined with the UK's inability to strike trade deals and the impossibility of giving businesses access to the 93% of the world's population, 6.89 billion people, with whom trade is restricted by the EU,¹¹¹² means, simply, that we had to leave.

The following sections explain the flaws of the Single Market, the Customs Union, and of EU regulation of the financial sector, and elucidate why the UK should have great confidence in its ability to succeed outside the EU.

¹¹ Trading Economics, 2017. <https://tradingeconomics.com/european-union/population>

¹² CIA World Factbook, 2017. <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html>

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(3.1) The Single Market

The Single Market is an economic arrangement where most barriers to trade between Member States have, in theory, been removed. But this has been at the expense of the freedom of choice for the UK in respect of political and constitutional decision-making (it is the EU Commission that runs economic decision-making), and in freedom of trade. It abolishes tariffs (charges) and quotas (physical limits) on trade in goods between EU Member States; it also attempts to remove many non-tariff barriers (NTBs) to trade, such as differing technical specifications, safety standards or labelling requirements. In theory, this economic arrangement extends to trade in services (e.g. finance, accounting, law, insurance) where the UK has a significant competitive advantage. In practice, significant restrictions on trade in services remain, much to the UK's detriment. Overall, the benefits of the Single Market are widely overstated and do not outweigh the costs the UK must endure.

(3.1.1) The Single Market prevents the UK running its economic decision-making

As a member of the Single Market the UK must pay substantial costs and accept limitations on national sovereignty. It is bound to the EU's *acquis communautaire* of freedom of movement of goods, people, services and capital, and is therefore unable to control immigration flows. It is also *bound by European Court of Justice jurisdiction* (the ECJ is paid by the EU and fully committed to EU integration). This means the UK has lost its freedom of choice in decision-making, through the voting system in the Council of Ministers and the powers of the European Commission.

In addition, the UK must make multi-billion-pound annual payments to the EU. Since 1973, the UK has contributed the staggering figure of nearly half a trillion pounds to the EU budget. The House of Common briefing paper "The UK's contribution to the EU budget" (9 October 2017) shows that *Britain also pays more into the EU budget than what it receives*. If the UK had control over this money it would leave Government with more to spend on the UK's domestic priorities, including the NHS. Overall, the burdens of the Single Market outweigh its limited benefits.

Voting for "Remain" would not have preserved the "status quo" arrangement with the EU, however: more uncertainty would have emerged as the Eurozone continues its irreversible path towards political and monetary union. Because of the absence of a veto, the UK would have found itself in a bloc that it would not have been able to stop from *moving towards political union*.

(3.1.2) The Single Market is not designed to serve UK economic interests

The UK *does not owe its economic success to the Single Market*, because, while it has removed trade barriers for the movement of goods, the free market for services (which represents 78.8%

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of the UK economy) is far from complete. A European Commission staff report in 2007¹³ found “*little difference between trade (in services) between EU Members States and trade between the EU and third countries*”. Additionally, a March 2016 judgement by the European Court of Auditors (an EU-affiliated body) criticised the Commission for “a reluctance to launch legal proceedings against infringements by EU members unlawfully protecting domestic markets for services.”

The evidence supports this proposition. Services represent only 38% of UK exports to the EU despite it being the strongest sector of the UK economy. Indeed, the UK has a £78 billion trade surplus in services with non-EU countries, almost 6 times the services trade surplus it holds with the EU, despite being inside the Single Market. In 2015, the UK recorded a services surplus with the US of £32 billion, over £10 billion more than the services surplus it held with the EU. This matters because the proportion of jobs accounted for by services in the UK amounts to 83.4%.¹⁴ In addition, in recent years plenty of non-EU countries have seen more rapid growth in their exports to the EU than the UK – even though we pay a handsome membership fee to be in the Single Market. Despite being outside the stockade, the US has been able to increase its exports twice as fast.

It is therefore unsurprising that the UK runs a hefty and potentially destabilising £82.2 billion trade deficit with the EU27 (in goods and services), despite being a member of the Single Market; in contrast, Germany has a trade surplus of over £100 billion with the same 27. The UK’s export growth is by far the lowest of any long-term EU member (it has increased by just 0.9% a year, compared to a German figure of 2.6%).

(3.1.3) The adverse effect on SME businesses

Small and medium-sized British business suffer most from costly EU Single Market regulation. This is because 87% of the UK economy is domestic, meaning many industries spend to comply with EU regulations, without exporting to the EU. Indeed, the cost of EU regulation was estimated at 4 per cent of GDP by Peter Mandelson and at 7 per cent by Gordon Brown. By contrast, large businesses can lobby Brussels successfully and are big enough to bear the burden of regulation, without suffering the costs. They may even welcome intrusive Single Market regulation, which favours large incumbents and hinders smaller competitors. However, these big multinationals represent only 5% of business in Britain: their pro-Single Market arguments are economically rational only in their own short-term interests and are not driven by concern for the wider business community. John Longworth, who resigned from his position as Director General of the British Chamber of Commerce to speak out freely against EU membership, has

¹³ F. Ilzkovitz et al - European Commission Directorate-General for Economic and Financial Affairs “A contribution to the Single Market Review”, Economic Paper No. 271 (01/2007)

¹⁴ ONS:

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/january2018>

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argued that the vast majority of jobs in the UK are subject to the burdens that flow from being in the EU and that the UK will be better off outside the Single Market.

(3.1.4) The costs of an over-regulated EU financial system

The costs that the UK must suffer as a consequence of EU financial system regulations in the Single Market are severe.

The European System of Financial Supervision (ESFS), introduced in 2010, created three supranational organisations, each charged with overseeing different sectors. These have inevitably grown from small bodies to become sprawling regulators. For example, the European Securities and Markets Authority (ESMA) has grown from a staff of 30 to 270 people.¹⁵

This has already had profound effects on the sector's competitiveness internationally, and *since the Referendum, new Single Market regulation has been emerging*, demonstrating how vital it is for the UK to regain the freedom to run its own economic decision-making and business regulation. This year, two huge pieces of regulation come into force. The first, Markets in Financial Instruments and Derivatives II (MiFID II), contains 7,000 pages; the cost of implementation is estimated to be €2.5bn, with industry leaders such as Peter Harrison (CEO of Schroders) and Larry Fink (CEO of Blackrock) both commenting upon the scale of changes the new regulations are causing.¹⁶ It has also been estimated that this one regulation alone will cost business £400 million every year. MiFID II will also cause huge structural shifts in the market: one example is the shifting of oil futures contracts from the UK to the US.¹⁷ From just this one instance, we can see that, the UK's financial sector will lose business to other global centres.

Another example is the General Data Protection Regulation (GDPR), which deals with the way companies and individuals send their data. Not only will this put a roadblock in the way of the pioneering tech sector, it will also push most of the costs onto small businesses. Additionally, the restrictive way the EU decides to handle data is one of the factors that prevents it striking advanced trade deals.

(3.1.5) The UK should have confidence in its ability to succeed outside the Single Market

The United Kingdom is one of the world's leading trading nations. The total value of our trade with the rest of the world is equivalent to over half of our gross domestic product. The UK is the most popular destination for foreign direct investment (FDI) in Europe, and last year FDI created or safeguarded an estimated 108,000 new jobs. British companies' international reputation for quality and expertise have helped boost the total value of exports by around 14% in the past year to £617 billion. The UK's current success is built on a long trading tradition. From the UK's unilateral adoption of free trade in the 1840s to its instrumental role in founding the World Trade

¹⁵ <https://www.ft.com/content/fd1e3340-f14f-11e7-b220-857e26d1aca4>

¹⁶ <https://www.ft.com/content/ba243304-e224-11e6-9645-c9357a75844a>

¹⁷ <https://www.ft.com/content/999ab1c4-f648-11e7-88f7-5465a6ce1a00>

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Organisation, it has been at the heart of international, liberal trading innovations. However, for more than four decades, the UK has been unable to fulfil a leadership role, and this is a direct consequence of its membership of the EU and Single Market.

(3.1.6) Replacing Single Market Membership with a Post-Brexit FTA

UK-EU trade will continue when the UK exits the Single Market. Indeed, the world's leading economies all enjoy "access" to EU markets as long as their exports comply with the relevant regulations, and they pay relatively low tariffs (in 2016 exports of goods to the EU from the US, China, Russia and Japan totalled €247, €345, €119 and €66 billion respectively, and none of these countries has an FTA with the EU).

The UK can thus enjoy such "access" to the Single Market and potentially also strike an FTA with the EU (something that will in fact be relatively easy to negotiate as the two blocs currently have identical regulations operating within their economies). The EU represents 43.6% of UK trade, and indeed, just as trade with the EU is important to the UK, so UK trade is important to the EU. The UK's £82.2 billion trade deficit in goods and services with the bloc means that powerful German auto producers (Audi, BMW, Mercedes, and Volkswagen alone are over 25% of the British market, with the UK buying one million cars from Germany every year – WTO terms would involve a 10% levy on all car imports), French wineries and farmers (£3bn of French food and wine is exported to the UK), Polish manufacturers (Poland has a multi-billion pound manufacturing and electronics export market to the UK), for whom this deficit represents revenue and profit, want a deal to happen.

However, *if the EU was unwilling to strike an FTA it would still be unable to adopt punitive tariffs*, which would be against both WTO rules and the EU's own treaties (Article 8 of the Lisbon Treaty requires the EU to seek out collaboration with countries on its borders). As stated by David Davis: "In that eventuality people seem to forget that the British government will be in receipt of over £2 billion of levies on EU cars alone. There is nothing to stop us supporting our indigenous car industry to make it more competitive if we so chose. WTO rules would not allow us to explicitly offset the levies charged, but we could do a great deal to support the industry if we wanted to. Research support, investment tax breaks, lower vehicle taxes, there are a whole range of possibilities to protect the industry, and if need be, the consumer. Such a package would naturally be designed to favour British consumers and British industry. Which of course is another reason that the EU will not force this outcome."

(3.1.7) Post-Brexit Financial Sector

The City has, for the last 400 years, been one of the pre-eminent centres for global financial services. Its strength goes far beyond proximity and access to the EU; the reasons for this include legal, network, and infrastructure factors. Legally, the use of common law, applied with a straightforward judicial process, and experienced regulators, help explain the enduring strength of the City; skilled labour, language and geographic location connecting Eastern and Western

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markets all contribute to profound network effects. Finally, investment in financial infrastructure has put the UK at the forefront of the technological developments sweeping through financial markets, such as high-frequency trading, where the UK is an industry leader.

There can be no doubt that easing cross-border capital flows, such as with the widely-noted ‘passport,’ has given UK firms increased access to customers across the EU. However, the cost of this access has been blind acceptance of an increasingly constraining and prescriptive regulatory regime. Indeed, a financial services sector liberated from constricting regulations such as MiFID II will gain from Brexit. In addition, while most suppose that being in the EU guarantees more inward investment, the reality is that the biggest investment per capita in Europe is not in the EU at all. It is in Norway and Switzerland – even if you take out all the FDI that is based on oil, gas and financial services. Those countries also have the lowest unemployment, highest wages, and rather lower levels of inequality, which rather takes the edge off the claims for economic benefits in the EU.

There are two outcomes for financial services which are compatible with Brexit. The first involves establishing an FTA with the EU. The Italian Prime Minister Paolo Gentiloni at the World Economic Forum in Davos said that among the remaining EU states there was a “strongly prevailing position supporting the necessity of having a good deal with the UK”. Financial services “will be part of the agreement”, since excluding them “is totally unrealistic”. The German finance minister has said that the close commercial relationship of the UK and Germany will be protected. French President Emmanuel Macron suggested in a BBC interview that a deal could cover aspects of financial services.

However, were the UK and the EU unable to strike an FTA despite these positive signals, the second option would use a no-deal scenario to create a regulatory environment to allow the City to flourish despite this reduced access. We outline here how these options both offer environments for financial services to continue to flourish in the UK for another 400 years.

- [The Mutual Access Model](#)

The possibilities for free trade deals post-Brexit are focussed around the concept of *equivalence*. This is based on the desire of the international community to develop cross-jurisdictional supervisory standards for financial services in an age of ever-increasing global interconnectedness. Barnabas Reynolds defines the end goal as “having ascertained that the third-country's regulatory environment is sufficiently equivalent to its own, the EU trusts the third country to regulate and supervise its financial services businesses effectively.”¹⁸ *Outside the Single Market*, where regulations are imposed by undemocratic means, this can be achieved through “*mutual recognition*.” Unlike Single Market membership, this is compatible with the Brexit vote.

¹⁸ *A Template for Enhanced Equivalence: Creating a Lasting Relationship in Financial Services Between the EU and the UK*. Barnabas Reynolds, 2017

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Mutual recognition is currently being sought by the UK Government: continuing recognition of regulatory regimes means financial markets can have mutual access. This could be achieved either through “enhanced equivalence,” whereby non-EU countries employ laws and regulations in their home jurisdiction to achieve similar outcomes to those in the EU itself, or by a bespoke arrangement whereby the EU and UK operate autonomous regulatory regimes where a selection of agreed standards are met. This latter method of implementation, while providing more independence for the UK regulatory regime, would require substantial innovation in regulatory compliance and certainly changes to existing EU laws. While this option could be preferable, the scale of changes required to existing EU compliance arrangements mean that it could be politically difficult to implement.

However, the level of integration is central. Too much and such an FTA contravenes the Brexit vote and will also damage the City’s ability to operate effectively.

- [The Financial Centres Model](#)

In contrast to the regulatory alignment outlined above, a No Deal scenario allows considerable regulatory divergence, which could be a boon to the UK financial sector. A benign, low-intensity regulatory regime that enables, rather than discourages, trade outside the EU could provide the perfect opportunity for growth in areas with the most potential, such as in emerging markets.

In the media, the idea that the UK should embrace its free-trading roots regarding financial services is (somewhat disparagingly) known as the ‘Singapore model.’ However, Singapore’s evolution from poverty to prominent international finance capital has been the result of its recognition of the importance of a strong, simple regulatory environment for financial firms.

The opportunities arising from a ‘No Deal’ scenario are more than enough to offset any temporary loss of access to EU customers. It would also be far more damaging for business within the EU to lose access to the vast, deep pool of capital the UK can provide. This provides another incentive for a ‘Mutual Access’ arrangement, with specific provisions for financial services: this is what David Davis means when he mentions a *‘Canada Plus Plus Plus’ trade agreement*.

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(3.2) The Customs Union

The Customs Union is a highly protectionist EU economic arrangement that imposes a “Common External Tariff” on products entering the bloc from third countries, while *preventing the UK from cutting its own FTAs*. Thus, this arrangement precludes the UK from conducting an autonomous trade policy (at the expense of its national and economic interest) and is also forced to abide to EU rules and to ECJ jurisdiction.

(3.2.1) The basic features of “a” customs union

“A” customs union, by definition, requires its members to follow a set of common rules when exercising customs controls over goods coming from outside the union. These rules include the imposition of common external tariffs but also operate a vast range of non-tariff controls such as health, safety and other standards requirements on goods. The very nature of “a” customs union thus requires uniform application and interpretation of these rules, or else this would defeat the very purpose of such an arrangement, as goods could enter “a” hypothetical customs union through a member state which operates laxer controls and then circulate freely inside the markets of the other member states where the rules are instead enforced properly. For example, if the weakness involves failing to impose tariffs in a uniform manner, this would have economic and fiscal effects in allowing lower-cost imported goods in the market of the member states part of “a” customs union. This type of arrangement has severe constitutional and economic implications, heightened in the context of “the” EU Customs Union.

(3.2.2) The Constitutional Implications of “the”/“a” customs union: ECJ

The uniform interpretation and application of customs union rules necessitates a common monitoring institution and a system of adjudication. Within “the” EU’s Customs Union, the harmonisation of the rules and of their interpretation is carried out at the first level by the EU Commission, which operates the common tariff and gives legal and administrative guidance to national customs authorities. At the next level, the interpretation of the common rules is carried out by the ECJ on preliminary references from courts and tribunals of Member States. Once the UK leaves the EU this arrangement cannot continue as maintaining ECJ jurisdiction and an active role of the EU Commission within the UK would result in failing to re-establish the UK’s Parliamentary Sovereignty and thus would mean leaving the EU only in name – thereby defying the Referendum mandate.

This issue would not be resolved even if the UK was to join “a” Customs Union with the EU instead of “the” EU Customs Union itself. This is because if the EU and the UK were to agree to be joined under “a” Customs Union, for the reasons already explained, it would not be possible for the UK to diverge in tariffs or in the myriad of other matters subject to customs controls. Put simply, such divergence is not something the EU would be in a position to negotiate or agree to as it is forms the very essence of “a” customs union. Thus, if the EU was to modify or add to its custom union rules a mechanism would have to exist to maintain the application of harmonised

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rules within the UK. That therefore would entail either an explicit one-way-obligation for the UK to follow the EU (as is the case for Turkey) or a disguised compulsion to follow (like under the EEA Agreement where EEA members are effectively forced to follow changes made by the EU to internal market rules without being allowed a vote on them). In addition, from outside the EU the UK would lose all voting rights in relation to the creation or modification of customs union rules, thereby turning the country into a “vassal state”, as opposed to its already limited influence - the 8% of the vote the UK now has, and 1 of 28 ECJ judges. Thus, once the UK leaves the EU, it cannot be part of either “the” or “a” Customs Union with the EU as this would necessarily entail the curtailment of the UK’s power to govern itself as an independent state and would subject it to the jurisdiction of the ECJ.

(3.2.3) Limits on International Trade in “the”/“a” Customs Union

Both “a” and “the” customs union preclude the UK’s ability to negotiate its own trade deals. This is because the baseline requirement that each customs union member must have the same external tariff means that individual members cannot negotiate trade deals with non-member countries that would involve the reduction and the weaving of tariffs. Within “the” EU Customs Union, the obligation for member countries not to conclude individual trade agreements with non-member countries has been embedded in the EU treaties since the original Treaty of Rome. Thus, the EU holds “exclusive competence” over Britain’s trading arrangements. The UK has thus relinquished its seat in the WTO, the world’s principal forum for negotiating international trade, of which it was a founding member.

While this was less significant back in 1980, when the advanced economies accounted for 70% of global GDP, in 2013 that share fell below 50%, as the emerging markets surpassed the G7 and the rest of the Western world in overall economic size. Indeed, although the EU accounts for 43.6% of UK trade, trade with the EU has declined since 2002, reflecting rising trade with the rest of the world. The importance of securing international trade deals has been recognised by the EU itself: the EU Commission website has signalled that 90% of future global growth will happen outside Europe’s borders, which is confirmed by the International Monetary Fund. It makes sense for the UK to have the freedom to maximise its ability to trade with countries whose economies are growing fastest and take advantage of its position as the 5th largest global economy.

(3.2.4) Consumer costs as a consequence of customs union membership

As “a” customs union requires all its members to operate external tariffs which are identical, it means that each country must implement the common tariffs even when this is contrary to its economic and national interests. This is the case for the UK In the context of “the” EU’s customs union. Whilst “the” Customs Union’s Common External Tariff varies across different types of goods, all of the External Tariffs are set, by definition, higher than a regular WTO tariff, and thus acts as a protectionist wall around the EU.

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The external tariffs collected in each country are paid into a central fund, with some 80% of the fund going directly to Brussels. As the UK has a much higher share of non-EU trade than any other EU member, the Common External Tariff burden is particularly high. Indeed, *it is the British consumer who faces the higher price of import tariffs on non-EU products*, often to shield producers in other EU countries as the UK is forced to levy high tariffs on many kinds of products which are not grown in the UK. This drives prices to consumers up above world prices, without creating any benefits to UK producers. Prices of food in the UK are thus 17% more expensive than they would be were the UK outside both the Single Market and the Customs Union:¹⁹ as poorer families spend a larger share of their incomes on food, leaving the Customs Union would help low-income households.

If the UK left the EU, then put up no trade barriers whatever, the UK would receive a welfare gain of 4% of GDP, and consumer prices would fall by around 8%, with the price of food dropping by around 10%.²⁰ A reduction in food prices would mean a saving of £350 per household per annum, some £8.2 billion overall.²¹

(3.2.5) The EU's inability to strike FTAs

The EU finds it hard to cut meaningful trade deals not only because its processes are cumbersome and bureaucratic but also because the twenty-eight nations often have conflicting objectives. This can be seen in the problems encountered by the EU in finalising the recent Canada-EU Trade Agreement (CETA), which took nine years to negotiate and, at the time of writing, is yet to be ratified by all twenty-eight EU Member States and their parliaments: Romania and Bulgaria are frustrating the agreement in order to push Ottawa to make concessions in an unrelated dispute about visa-free access for Romanian and Bulgarian nationals. Negotiations to reach a trade deal between the EU and Singapore, for example, lasted nearly six years and the negotiations between the EU bloc and India went on so long they gave up. It is therefore unsurprising that despite years of trying, the EU has not agreed any FTAs with China, India, the US, Japan, Indonesia or Brazil.

Thus the claimed benefits from the EU bloc are completely outweighed by the complexity and dilution of dealing for 28 members. This can be proven by comparing the EU's performance to that of single countries. *New-Zealand (a solo-negotiator) managed to strike eight trade deals – including with China, Malaysia and Thailand – in the time it took for the EU to complete its South Korea agreement.* Chile, which has a third of the UK's population and a tenth of the UK's economy, *has managed to negotiate trade deals with the biggest economies in the world. It took Chile, without all the supposed influence of being a member of the EU, just 10 months to negotiate a deal with China, 9 months to negotiate a deal with Australia, 10 with Canada, 12 months with Japan and 24 months with the US.* Thus while the EU has trade deals with

¹⁹ B. Ramanauskas, TaxPayers' Alliance, "Why the cost of living is so high" Research Paper (10/2017)

²⁰ Minford et al, in *UK Agricultural Policy Post-Brexit*, Owen Patterson, 2017

²¹ ONS, 2015

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economies which have a total GDP of just £4.7 trillion, Chile has trade deals with £40 trillion-worth of countries: almost ten times more. Singapore, Switzerland and South Korea, negotiating their own trade deals and without the so-called ‘clout’ of the EU, each have FTAs with over £27 trillion-worth of countries. In addition, 90% of their trade deals include services, critical to the British economy (as the UK’s trade surplus in services is twice that of any other EU nation), as opposed to only 2 out of 3 of EU deals. It is thus unsurprising that 90% of the EU’s trade deals account for just 2% of UK exports.

While acting as a champion for free trade and open markets within the WTO, the UK will be able to strike deals more quickly and better fitting its commercial preferences – not least because there are large *emerging markets where Britain has a common*.

(3.2.6) Opportunities outside “the”/“a” Customs Union – UK trade surplus with non-EU countries

While EU membership allows the free movement of goods within the EU, the UK’s trade within the *Single Market is a minority of its exports*, and a share that is fast diminishing. In 1999, the EU share of British exports was 54.6%; by 2016 the proportion fell to 43.1%, and is expected to drop to about 35% of its exports by 2025. The point is that the EU market has been a declining factor for British exporters long before Brexit became a reality. Additionally, while 43.1% is still significant, the result is overstated because it includes goods shipped through the port of Rotterdam but bound for non-EU nations despite being recorded as going to the EU (a phenomenon called the “Rotterdam Effect”). Beyond the EU, Britain delivers £370 billion of exports (56% of all goods and services the UK sells abroad) and holds a £39.2 billion non-EU trade surplus.

As pointed out by Secretary of State for International Trade Liam Fox: “It is striking that our exports to the EU have grown by only 10 per cent since 2010, while UK sales to New Zealand are up 40 per cent, to the US 41 per cent, Saudi Arabia 41 per cent, to China 60 per cent, Japan 60 and South Korea 100 per cent. Those figures reflect the broader story that the lion’s share of growth is taking place outside the EU, and especially in the Asia-Pacific region.”

Only by leaving the EU can the UK reclaim its freedom to make trade deals that will create a truly international trade policy.

(3.2.7) The benefits of free trade with Commonwealth countries and non-EU Member States

Since the UK has joined the EU, trade as a percentage of GDP has broadly stagnated. It seems extraordinary that the UK should remain lashed to the minute prescriptions of a regional trade bloc comprising only 6 per cent of humanity – especially when it is not possible for the UK or any EU nation to change the trading rules on its own. Thus, Brexit is an opportunity for the UK to govern its own trade policy and rediscover its role as a great, global, trading nation. Since the Referendum, twenty-six states, from Australia to Uruguay, have indicated their keenness to sign

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commercial accords with a post-EU Britain and in her visit to China in January 2018, Theresa May secured a £9 billion trade deal with China.

The Commonwealth community can provide an alternative and more attractive trading bloc. In 2013, the combined global exports of goods and services from the fifty-three Commonwealth members (including Britain) were valued at \$3.4 trillion, or about 15% of the world's total exports in 2013.²² In contrast, total EU exports amounted to around \$2.2 trillion. Indeed, not only was the value of the total Commonwealth exports 50% larger than the EU's exports, but its growth was phenomenal: the combined total exports of goods and services of Commonwealth member countries almost tripled from \$1.3 trillion in 2000.

In addition, on a country-by-country breakdown, the largest single UK trading partner is the US, which takes 19.7% of UK exports and provides 10.9% of imports. The UK should thus prioritise the creation of an FTA with the US, forecasted to boost British exports by between 1.2 and 2.9% and benefit the British economy by £4-10 billion a year. US President Trump has been extremely positive about the chances of a bilateral deal with the UK (in direct contravention of Former-US president Obama's warning that if the UK was to leave the EU it would be "at the back of the queue" for a trade deal with the US, although there is in fact no queue as trade deals are handled in parallel – the US has a well-established fast-track process and signed 8 FTAs in 3 years recently). Indeed, in an interview with *The Times* Trump stated that: "I'm a big fan of the UK, we're going to work very hard to get a [trade deal] done quickly and properly. Good for both sides... we're going to get something done very quickly"²³. Meanwhile, US-EU trade talks have stalled, and Congress is instead looking at a bilateral treaty with Britain which, as the Speaker of Congress, Paul Ryan, says, will 'be easier to do' than a deal with the protectionist EU. Secretary of State for Exiting the EU David Davis stated that "it is highly likely that we would manage to negotiate an FTA with the US in about 3 years, well before TTIP is completed, and one which is far more tailored to our interests than TTIP will ever be.

In addition, under state succession rules all existing trade deals the EU had negotiated with non-EU countries would stay in place until either side wanted to renege them. Of the UK's top 10 non-EU trading partners only Switzerland and South Korea have FTAs with the EU at the moment of writing and neither country would repudiate the existing trade arrangement (the same principle applies to other trading nations who currently have an FTA with the EU such as South Africa and Singapore).

²² Commonwealth Secretariat "The Commonwealth in the Unfolding Global Trade Landscape: prospects, Priorities and Perspectives", November 2015

²³ *The Times* "Donald Trump interview: Brexit will be a great thing" available at <https://www.thetimes.co.uk/article/donald-trump-interview-brexite-britain-trade-deal-europe-queen-5m0bc2tns>

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(4) ABANDONING EU REGULATION

EU regulations are imposed upon the UK as a direct result of its EU membership. We outline here some of the most damaging and regressive examples. They include:

- The Common Agricultural Policy (CAP), which promotes inequality and corruption, and harms the global economy and UK environment
- The Common Fisheries Policy (CFP), which the UK has been trying to change since it joined the European Community, but which has caused overfishing, wastes millions of tonnes of fish, and has harmed the UK's fishing economy severely
- Free movement within the EU, which is a regressive, politically extreme and economically inefficient policy

The UK's membership of the EU has meant the imposition of large numbers of EU regulations. These include the Common Agricultural Policy (CAP), a system of agricultural subsidies which holds back productivity and impedes progressive environmental stewardship. Similarly, the Common Fisheries Policy, which sets quotas for each type of fish Member States are allowed to catch, has meant the UK has lost control over its national waters.²⁴

Meanwhile, the EU's Free Movement migration policy has meant the UK is unable to manage immigration, resulting in regressive, one-way immigration from poor to rich counties, placing pressure on UK services and lower-income British workers. These regressive policies present three clear examples that exemplify why we had to leave.

²⁴ Article 55 of the United Nations Convention on the Law of the Sea

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(4.1) The Common Agricultural Policy

A renaissance of the UK's liberal, internationalist and free-trading principles should start with the abolition of the protectionist Common Agricultural Policy (CAP). The CAP establishes the transfer of direct subsidies for land and crops, sets minimum prices for European produce, and imposes strict import tariffs and quotas for produce from outside the EU. It was originally envisaged as a regime of subsidised food production and employment protection, but since the reforms of Agriculture Commissioners Raymond MacSharry and then Franz Fischler, the subsidies have ceased to be tied to food production, moving to a regime of area payments which are increasingly untenable politically. They are costly and inefficient, promote inequality, attract corruption, and damage the health of the global economy and UK environment.

(4.1.1) The CAP's Costs to the UK

Whilst farmers represent only three per cent of Europe's population and agriculture generates just 1.6% of EU GDP, *the CAP amounts to 42% of the EU budget*. Despite the Commission's promise to cut spending by 15%, the bill rises by about 1 billion euros every year. As well as the £9.8 billion of UK tax paid towards the CAP, consumers endure inflated prices of agricultural goods due to costly regulations, which are estimated to add £398 per household per year to family food bills.²⁵ Overall, *the UK has contributed to the CAP more than three times what it has received*. This means that, unconstrained by the EU, the UK Government will be able to increase domestic rural payments where required and target funding more effectively to take into account the British industry and environment.

(4.1.2) The CAP's inefficiency

Compliance with EU regulations has harmed productivity and our competitiveness. CAP also means that global regulatory standards are outside our influence: the UK does not have a right to vote, to initiate standards or propose amendments, as these are all negotiated by the EU. This means that the UK is unable to safeguard the country's national interests and must conform to regulations that may not be suited to its geography and climate.

(4.1.3) The CAP and inequality

About *80% of CAP farm aid goes to about a quarter of EU farmers* – those with the largest holdings. Any romantic images of family-run, independent farms supported by these payments are misplaced; the biggest beneficiaries are mammoth multinational corporations like Nestlé and Campino. Paradoxically, as subsidies are granted per-hectare, money often goes to rich landowners, regardless of whether their main business is farming, making the CAP inefficient and a cause of income inequality. In the UK, a Greenpeace investigation showed that one in 5 of

²⁵ *UK Agricultural Policy Post-Brexit*, Owen Patterson, 2017

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the top 100 recipient firms are owned or controlled by billionaires such as the Duke of Westminster, Sir Richard Sutton and the Earl of Moray.²⁶

(4.1.4) The CAP's damage to UK landscapes

In 1995, the RSPB described the CAP as “the engine of destruction of the countryside”; under the CAP, the UK can protect its national parks from over-building, but not from CAP-fuelled intensive farming.

Britain's first government Countryside Survey in the early 1980s showed that 28,000 km of hedgerows were being removed annually, and noted the “general impoverishment of the landscape” that had resulted.²⁷ Indeed, without the CAP many of Britain's southern chalk downs and northern moors would still be intact: large tracts have gone needlessly under the plough, destroying rare plants, birds and mammals, a phenomenon reproduced all over Europe, because the CAP puts size of land holding ahead of good environmental practice.

Indeed, *getting rid of the CAP will have huge benefits for UK landscapes*. This can be demonstrated by looking at what happened in New Zealand when it abolished price supports for farming in 1989. Since then its countryside has been “dis-intensified”. New Zealand's former trade minister Sir Lockwood Smith explained that today the country produces a similar weight of lamb to that produced in 1989 (when the subsidy on the sheep industry had reached 90%) but from less than half the number of sheep; this in turn requires 23% less land and has led to a 19% reduction in greenhouse-gas emissions.

A 2017 report²⁸ points out that current EU-inspired farming approaches are degrading UK soil. The CAP's emphasis on food production leads to overproduction and has meant that soil has become steadily less productive, with soil not only less effective at sequestering carbon, but less fertile. The effect is most noticeable in what was some of the UK's most fertile land, in the Fens.

(4.1.5) Post-Brexit UK Agricultural Policy

The food chain contributes £85 billion per year to the UK economy, supports 3.5 million jobs, and provides 62 per cent of the food we eat. The food and drink sector is the UK's largest manufacturing industry – bigger than cars and aerospace combined, employing one in eight people. Many of these jobs are in rural areas, and UK policy must encourage the export of quality products. When the UK leaves the EU, it will reform its agricultural policy, and a new UK Agriculture Bill should be taken through parliament.

²⁶ L. Lawrence, C. Dowler – Greenpeace; “Common Agricultural Policy: Rich List receive millions in EU subsidies” 29/09/2016

²⁷ Dr R. Tylecote, Sir W. Cash MP: *From Brussels with Love*, Duckworth New Academia (2016), p. 85

²⁸ From Lord Deben's Committee on Climate Change and Adaptation Sub-Committee (June 2017)

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The UK can pay rural subsidies, but for the delivery of public goods (e.g. restoring ecosystems, preventing flooding downstream, providing clean water and bringing British people back into contact with the living world). This has been suggested by environmental and political activist George Monbiot and former Environment Secretary Owen Patterson MP.

In Switzerland, valuable plant and animal habitats receive direct ecological payments. Farmers are rewarded for meadow land, permanent flower meadows, preserving natural field margins, reed beds, hedges, copses and wooded river banks, amongst others. Swiss schemes also account for high animal welfare standards, encouraging the regular outdoor exercise of animals and animal-friendly stabling. By 2002, 30% of all animals were kept in such conditions, and 61% were regularly exercised outdoors. Organic farming is also rewarded, and between 1993 and 2002 the number of organic farms rose fivefold, to 6,000. There is also a separate programme to improve water quality.

The Lake District, the Peak District, and the mountains of Wales and Scotland are areas in the UK which are unsuitable for food production alone, but whose farming activity creates the conditions for a tourist industry worth £30 billion per year. Under the CAP, no mechanism exists to reward farmers and landowners for their work in maintaining and improving these precious environments. An independent UK will be able to do this. Given the floods of recent years, there would also be clear public support for rewarding farmers for water management and delivery of clean water.

In areas where a more radical approach is sustainable, the UK could follow New Zealand's example: in 1984 the government decided to cut farming subsidies completely. This has stimulated innovation and productivity – thirty-three years after farm subsidies were stopped, New Zealand's sheep industry (once subsidised up to 90%) produces a similar weight of lamb from less than half the number of sheep and is marketed across 100 different countries around the world – improving productivity 107%.²⁹ The lesson is surely that farmers must look for the opportunities that exist at home and beyond their borders. Fear of change is very often a difficult obstacle, but farming in accordance with comparative advantage allows the sector to adapt its production to suit consumer needs, and adjust production costs accordingly. Prioritising increased food production, freeing farmers from overbearing regulation and bureaucracy, and allowing them to embrace the latest technologies will undoubtedly encourage certain areas of the UK to become globally competitive.

It is important to remember that the benign British climate, the length of its days and its soil quality provide some of the most productive land in the world. Farming areas will continue to prosper once released from the constraints of the CAP and encouraged to embrace the global food market. Technological development can be encouraged once policy considers not only the

²⁹ Shanker A Singham, Dr Radomir Tylecote and Victoria Hewson "The Brexit Inflection Point: The Pathway to Prosperity" (Legatum Institute, November 2017)

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potential hazards of new technologies, but their benefits. The Government's Agritech Strategy, along with investment in scientific research, must be maintained and expanded.

Nonetheless, *the Government has pledged that the UK will match the £3 billion* that farmers currently receive in support from the CAP until 2022 (which will be easily achieved since UK contributions to the CAP are more than three times what it receives). It will also be able to direct this to the UK's own agricultural industry, landscape and environment.

The UK will also be able to retake a full seat on the world bodies that determine global regulation, instead of its current 1/28th of an EU vote. For instance, the UK will be able to join the WTO and the Codex Alimentarius Commission for collection of internationally recognized standards, codes of practice, guidelines, and other recommendations for food.

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(4.2) The Common Fisheries Policy

The Common Fisheries Policy (CFP) operates among EU Member States. It sets quotas for which Member States may catch how much of each fish species, while encouraging the fishing industry through market interventions. The UK has been attempting to change the Common Fisheries Policy since it joined the European Community.

The CFP is based on the principle of “equal access” to “community fishing waters up to the beaches”: this means that the UK seas are legally “European Fisheries” before they are anything else. Set up to “manage European fishing fleets and conserve fish stocks”,³⁰ it has resulted instead in massive overfishing, and has ruined the livelihoods of UK fishermen. Unsurprisingly, in the 2016 referendum regions with traditional fishing communities voted decisively to leave the EU.

(4.2.1) The CFP’s Costs to the UK

The CFP has caused the loss of nearly half of British jobs at sea.³¹ It has damaged the livelihood of those on land who sold and maintained fishermen’s boats, nets and bait, and resulted in British catches now being *only slightly above the levels of 1915 (when seas were warzones)*. Unemployment in the industry also adds £138 million in social security bills.³²

The quota system established in 1983 was based on catch statistics from the previous five years, and, in one of its most one-sided allocations, gives France 84 per cent of Channel cod compared to 9 per cent for the UK – a zone where national waters are divided roughly 50/50 between the two countries.³³ The EU catches 59% of its fish in UK waters, worth around £711 million, while the UK only catches 15% of its fish in other EU waters.³⁴

(4.2.2) Factortame Case

A stark example of the CFP’s damaging effect on the UK economy is the Factortame case. In the 1980s, Spanish fisherman developed a new practice: by registering their boats as British they were allowed a share in the British quota, despite sailing from Spanish ports. Parliament responded by passing the Merchant Shipping Act, so that to qualify for a British quota, a ship had to be at least 75 per cent owned by British citizens, or by companies where at least 75 per

³⁰European Commission: “Fisheries - The Common Fisheries Policy (CFP)”
https://ec.europa.eu/fisheries/cfp_en

³¹ Dr R. Tylecote, Sir W. Cash MP: *From Brussels with Love* Duckworth New Academia (2016) p 79

³² Clover, Charles: “The End of the Line: How Over-fishing is Changing the World and What We Eat” Ebury Press (2004)

³³ D. Charter “What has the EU ever done for us? – How the European Union changed Britain – what to keep and what to scrap” (2017)

³⁴ A. Hastings – Brexit Central: “The Government must commit to taking back control of Britain’s fisheries” (24/03/2017) available at <http://brexitcentral.com/government-commit-taking-control-fisheries/>

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cent of shares were in their hands. In response, Factortame, and other Spanish companies, brought a case against the British Parliament which stated that under Article 7 of the Treaty of Rome, Parliament had committed the crime of “national discrimination”. The case was ultimately decided by the ECJ, which ruled that the Act was not compatible with Community law. Thus a British Act of Parliament was struck down, and the Spanish companies sued the British Government (and taxpayers) for compensation for each of the 18 months they had been deprived of their rights to UK waters (amounting to about £55 million). They also won the unrestricted right to take up fishing quotas (provided the boats were managed from within the UK).

(4.2.3) The CFP’s depopulation of seas

The CFP has had a profound impact on the UK’s coastal communities, but its most severe impact has been on the sustainability of fish stocks. Managing seas in this way as “commons” simply does not work – because no one is ultimately responsible for their sustainability. Meanwhile, as fishing is the domain in EU policy-making of the fisheries commissioner, the environment commissioner has no real influence over the oceans. *Out of Europe’s major fish stocks, two thirds are now on the verge of collapse*; subsidised southern European fishermen are fishing 40% of stocks in the Atlantic, North Sea and Baltic Sea at unsustainable levels. As custodian of the fifth largest marine estate in the world, the UK has a responsibility to protect these unique and fragile environments.

By leaving the CAP the UK will be able to take back control of its waters and ensure the protection of the marine areas around its territory. *The UK will also be able to complete the “Blue Belt”*. Working with its Overseas Territories, the UK will create the world’s largest combined marine sanctuaries, as it aims to create over 4 million square km of protected seas by 2020.

(4.2.4) The CFP’s unsustainable fishing quotas

To make fishing sustainable, the CFP imposes fishing quotas on EU Member States, but this is an environmental policy with no connection to the realities of fishing. Firstly, these quotas are calculated according to ill-founded Maximum Sustainable Yield figures indicating the largest possible long-term catch under prevailing environmental conditions. But this is also based on information that is inaccurate by at least 50%, and often six months out of date.³⁵

Secondly, fishing quotas ignore the fact that when fishing fleets throw their nets, they cannot know how many fish and what species they will catch. As it is a criminal offence to land fish above the quotas, the only option for fishermen is to throw their dead catch back into the sea. Total CFP discards are now 880,000 tonnes annually, and in many areas more fish are dumped than landed.

³⁵ UK Fisheries Policy Post-Brexit by The Rt Hon Owen Paterson MP - All Souls College, Oxford (27 January 2017)

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(4.2.5) Post-Brexit UK Fishing Policy

The UK should withdraw from the EU with no adoption of the fisheries sections of the *acquis communautaire*, and re-claim full control over its Exclusive Economic Zone,³⁶ reverting to international law under the UN Convention on the Law of the Sea. In the words of the Scottish Fisherman’s Federation: *“More than half of our natural resources go elsewhere. That is unthinkable for another coastal state. Taking that back is not an act of regression, but of normality... This is a natural resource which belongs to us – and the law is on our side”*³⁷

The UK should also manage fish stocks as a renewable resource, converting the ill-founded fixed-quota system to an ‘effort control system’ where vessels are limited in their ‘days-at-sea’ in return for being able to land and record all catches in a ‘catch less, land more’ system, – as advocated by Fishing for Leave.

A UK-wide ‘Fisheries Institute’ should also be established, to enable fisherman and scientists to work together in a similar arrangement to the successful system created by Norway to produce accurate stock assessments. Using accurate real-time catch data will enable the rapid temporary closure of any fisheries in response to risks of excessive catches. The UK will also be able to join the North East Atlantic Fisheries Commission as an independent member, instead of trying to influence the EU negotiating position, then accepting EU decisions. It should aim to work with the Nordic nations in unbinding agreements to manage fisheries – and control all supply to the hungry EU market.

³⁶ A sea zone that stretches from the baseline out to 200 nautical miles from its coast prescribed by the United Nations Convention on the Law of the Sea over which a state has special rights regarding the exploration and use of marine resources.

³⁷ R. Watson “Scots fishing could double outside EU, says bosses” Scottish Daily Mail (20/12/2016)

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(4.3) Freedom of Movement

The referendum result is also a clear mandate for the UK government to “take back control” of its borders. This is because the steady enlargement of EU competences on immigration, with the record net migration that Britain has experienced since the late 1990s due to free movement within the EU, has changed the implications of the EU Freedom of Movement policy. Analysis clearly demonstrates why it is unsustainable.

(4.3.1) The origin of freedom of movement and its economic implications

Free movement of EU nationals within the territory of all EU Member States is a core element of the Union’s internal market. However, the expanded EU has changed the policy’s implications.

The origins of free movement date back to the beginnings of the European project, when, in 1951, the Treaty of Paris set up *the European Coal and Steel Community, allowing workers within these industries to move freely within the territory of its six founding Member States*. This evolved from an industry-specific policy which did not compromise the ability of sovereign states to control their borders, to a principle completely outside national control.

With the Treaty of Rome (1957), the right of freedom of movement was extended to all workers within the European Economic Community (at the time the EEC consisted of six wealthy, western European countries). The policy continues today across twenty-eight countries comprising over half a billion people, with starkly unequal social welfare standards and heterogeneous national economies. Thus while free movement could have been originally justified on the basis that it was able to maximize the economic gains of the “founding” EU Member States, EU enlargement and a stubborn determination towards *unregulated free movement of people has pushed the principle towards one-way, regressive, economic migration from poor to rich countries*, placing pressure on services and affecting the economic security of the poor across EU Member States.

(4.3.2) Freedom of movement today

With the Treaty of Maastricht (1992), freedom of movement and residence has become the cornerstone of European citizenship (found again in Article 45 of the Lisbon Treaty³⁸).

After living in an EU country for five years, EU citizens can also apply for permanent residency. Freedom of movement has been extended to other non-EU countries, namely, Iceland and Norway through the EEA Agreement, and partially to Switzerland through the Swiss-EU

³⁸ All provisions on freedom of movement were assembled in Directive 2004/38/EC on the right to move and reside freely.

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agreement (the UK has however kept out of the Schengen Agreement which abolishes passport checks on “internal” borders between twenty-six European Member States).

Free movement is an extreme and extremely inefficient immigration system. The machinery mandated by Article 46 of the Lisbon Treaty (obliging the European Parliament and Council to match supply and demand for jobs in such a way as to avoid threats to regions and communities) simply does not exist, and the outcome is that Member States have no control over immigration law and cannot impose limits and national preferences to prevent surpluses of labour in various sectors of the economy to prevent and manage social disorder.

(4.3.3) Pressure on EU Member States due to broad definitions

The free movement principle has been defined very broadly, and the precise legal scope of the right to free movement for workers has been shaped both by the ECJ and directives and regulations.

The ECJ case *Lawrie Blum* defines the term “workers” in the Directive: “The essential feature of an employment relationship is that a person performs services of some economic value and for and under the direction of another person in return for which he receives remuneration”. This definition was laid down so that the term “worker” includes job-seekers, those between jobs, those undergoing training in their own or another field, and sick, injured and retired workers. The court also held that the purpose of employment is irrelevant, so long as the work performed has some economic value: this includes both part- and full-time work. While remuneration is a necessary precondition, the amount is not important (it may be indirect *quid pro quo*, even board and lodging), and whether the worker requires additional financial assistance from the Member State into which he/she moves does not limit the principle of free movement in any way.

The definition of “family members” in the Directive includes not only direct descendants and dependant direct relatives, but also members of a household of the EU citizen. EU case law has also leant in a liberal direction and interpreted the relevant part of the directive in a way that includes extended family members (aunts/uncles, nieces/nephews). The *Metock* judgement (2008) has enabled third country nationals to gain free movement rights by marriage to EEA nationals, without ever having been lawfully resident in any Member State.

(4.3.4) Pressure on EU Member States due to immediate access to welfare benefits

There is a clear incentive for workers residing in poor EU nations and their family members to move to rich, economically successful EU countries, putting great pressure on particular Member States, especially since the ECJ³⁹ has found that EU citizens have a right to equal access to financial benefits intended to facilitate access to the labour market. This has eroded Member States’ ability to define who may and may not receive support from the taxpayer.

³⁹ In Cases C-138/02 Collins and C-22/08 Vatsouras.

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(4.3.5) The effect of Free Movement on the UK

Britain has been a natural magnet for immigration. While immigration grew steadily between the Second World War and the late 1990s, it did so at a relatively moderate rate. However, the *increase in the level of migration since the late 1990s was unprecedented in UK history*. In the 13 years between 1997 and 2010 net foreign immigration totaled 3.6 million, averaging 250,000 a year for the last ten years *or a new city the size of Birmingham every five years*. The UK population is set to grow by nearly ten million over the next 25 years if net migration continues at around current levels. This self-inflicted change was brought about by the extension of the freedom of movement principle through the Treaty of Maastricht in 1992, and more significantly through the extension of the Union to the east to include former members of the Soviet bloc in two main waves in 2004 and 2007, with Croatia also joining in 2013. A year since the Referendum net migration statistics showed a drop of 100,000, of which 80,000 was a reduction in EU net migration. However, there is still a net inflow from the EU of 100,000 and there are more EU-born workers in the labour market than ever before – over 2.4 million.

While there are compelling reasons from the perspective of poorly paid (or unemployed) workers in eastern and southern Europe to move to the higher wage UK, there is little incentive for British workers to move to these poorer Member States, where quality of life is lower and the minimum wage is as low as £1.36 per hour, where it exists at all. There is no sign that the incentives of higher wages and the greater availability of employment in the UK, which have led to record levels of EU net migration, have diminished. Romania's minimum wage is still a fifth of the level of the UK's, and the OECD predicts that there will be no convergence of UK and East European wages in the next 20 years. We could be looking at continued net inflows from the EU of well over 100,000 a year until the late 2030s.

This has resulted in a natural one-way migration flow of people from poorer EU Member States to the UK. Indeed, in the last five years membership the EU has not increased net employment in Britain but the UK has been creating jobs for EU citizens – around one million of them. Thus while Britain is the job creation machine, the EU is a job transfer machine. While more than half a million Poles have moved to the UK, only 764 British citizens have relocated to Poland. It is of course unfair to castigate Polish workers for following the economic logic of existing rules and moving to wealthier EU Member States. However, the objection to unregulated economic migration within the EU is not simply due to unevenness, but due to the effect of large flows of low-wage, low-skilled workers on the economic security of workers in Britain and on UK public services.

Thus, while a virtually limitless, low cost, ready trained workforce is attractive to big business (which is why establishment groups such as the CBI are firmly in favour of EU membership) there is no real evidence of benefits from EU migration into lower-skilled work and for the productivity of the UK. Over the last decade, productivity has barely grown despite the overall number of immigrant workers increasing by more than two million, and the migrant share of the

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workforce nearly doubling. Secretary of State for Exiting the EU David Davis therefore stated: “Since 2010, GDP per capita, a far better measure of people’s living standards than raw GDP, has grown at only just over half as quickly (or 6.5% over that period) as the economy as a whole because of immigration [...] it is increases in GDP per capita that support growth in jobs, in people’s wages, allows the country to invest in the future, and helps us pay for public services.” Therefore overall, for the wide majority who back Brexit, immigration concerns relate to economics and to the deployment of public services, not race.

(4.3.6) The costs of unrestrained immigration

A UCL study by Christian Dustmann and Tommaso Frattini on the fiscal impact of immigration to the UK in individual years from 1995 to 2011 found that, while a positive contribution was made by immigrants (from EEA countries) between 1995-2004, they then *observed a general downward trend over time in net fiscal contributions (especially after 2008)*.⁴⁰ Migration Watch have extended this original research and produced a study applying the same methodological principles to fiscal years 2014/2015. This extension suggested that the downward trend in the fiscal contribution of immigrants has continued, with the only sub- group making any positive fiscal contribution being people from the “old” EU countries (and Norway, Iceland and Switzerland). Overall, *the total expenditure on immigrants exceeded revenues by £16.8 billion*. Migration Watch concluded: “it was hard to see much support for the contention that immigrants – or even recent immigrants – as an undifferentiated group are helping to reduce the fiscal burden for native workers or contributing to reducing the UK’s fiscal deficit.”⁴¹

In addition, while the recent accession countries (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) are contributing less to the deficit than UK-born people, the UK-born “deficit” is accounted for by the cost of pensions: the immigrant group is in “deficit” even before creating pensions costs. Thus, in real terms, the working-age UK-born population is in fiscal credit, while the equivalent immigrant population is in fiscal deficit.

Thus, while taxpayers from Western Europe pay on average twice the amount of income tax as the average taxpayer for the whole UK, taxpayers from Eastern Europe pay only half as much as the average as they fall in the category of low skilled workers. Indeed, while highly skilled EU migrants may be vital for the British economy, 80 per cent of EU workers are not in the highly skilled categories. *Migration Watch UK* has estimated that in 2014/2016, *migrants from East European states have had a net fiscal cost to the UK of £1.5 billion* (i.e. they paid £1.5 billion less in taxes than they received in benefits and services). This is a substantial sum but it is not, of course, a criticism of migrants themselves. Many are hard workers but those who are low-paid obviously pay little in tax, so their fiscal impact is not a reflection of personal effort.

⁴⁰ C. Dustmann, T. Frattini, I. Preston, (2008) The effect of immigration along the distribution of wages. (Discussion Paper Series 03/08). Centre for Research and Analysis of Migration: London, UK)

⁴¹ The Fiscal Effects of Immigration to the UK 2014/2015 <https://www.migrationwatchuk.org/briefing-paper/381>

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For a long time commentators have suggested that migrants pay lots of tax, so the real problem is government allocation of the funds they contribute, not the weight of numbers coming here. But, in fact, all the research shows that overall migration leads to a significant cost to the taxpayer. This is a direct consequence of the ECJ's erosion of Britain's "Habitual Residency Test" used to run its welfare policy – held to contravene the EU citizen's right to equal treatment – which means the UK is unable to define who is entitled to financial support from the UK taxpayer.

Overall, as immigration numbers increases extra pressure is put on UK public services (with a visible impact in scarce housing, rising rents, increasing school sizes and pressure on GPs) but the extra money is simply not there to deal with these effects. These are the reasons why Lord Green (Chairman of Migration Watch UK) stated that "Immigration is only sustainable if it is managed for the benefit of the UK population. This means lower numbers and being far more selective about who we admit."

(4.3.7) British low-skilled workers suffer the most

The economic costs of unrestricted immigration mainly affect British low-skilled workers who experience higher job competition and wage depression. This phenomenon is confirmed by the Dustmann and Frattini (UCL) study,⁴² showing that for each 1% increase in the share of migrants in the UK-born working age population, there is a 0.6% decline in the wages of the lowest paid workers – but it also shows a slight increase in the upper part of the wage distribution. *In other words, uncontrolled immigration makes the poor poorer, and the rich richer.* Workers in lower-skilled roles make up nearly 70% of EU workers who arrived in 2010 or later. Migration Watch UK has also found that many employers are being subsidised by the taxpayer to employ migrants from the EU: working age benefits for EEA nationals cost the Treasury £4.4 billion in 2014/15, or about £12 million per day, which we do not hear about from major corporates.⁴³

(4.3.8) Post-Brexit UK migration policy

Brexit will result in a new, more accountable and fairer immigration system, managed by the UK Government and Parliament under a new Act of Parliament, not by Brussels.

Its objective will be to enable the UK to continue to attract international talent, but at a sustainable rate that can be absorbed while adding economic value. The premise that the UK is leaving the EU but not Europe remains intact: access to the UK should be as free as possible to EU tourists, family visitors, business visitors, students and some of the self-sufficient. The

⁴² C. Dustmann, T. Frattini, I. Preston, (2008) The effect of immigration along the distribution of wages. (Discussion Paper Series 03/08). Centre for Research and Analysis of Migration: London, UK)

⁴³ The Immigration Policy that we need after Brexit by Andrew Green <https://www.conservativehome.com/platform/2017/12/andrew-green-the-immigration-policy-that-we-need-after-brexit.html>

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present Youth Mobility Scheme⁴⁴ could be extended to EU citizens aged 18 to 30, who could stay for up to two years but with no extensions or access to public funds.

Work permits can also be made available for the high-skilled, to remain flexible enough to accommodate the needs of industry and scholarship. Those with intermediate skills could be admitted for a time-limited period, with a charge for employers to encourage training for local replacements. Indeed, Britain should take serious steps to expand the training of those already in the UK. 1.4 million people are unemployed, and around a million part-time workers want more work. Apprenticeships might be made compulsory for UK firms (as they are in Germany, Nordic nations and other countries), to ensure that the British workforce is trained to take up job vacancies.

Seasonal work permits should also be granted if the UK finds there is a shortage in labour (in accordance with the Universal Job Match system or the UK Work Coach Programme), once it is proven that UK nationals with the correct skills cannot be found (and that, as time goes on, they could not reasonably have trained people in the UK for these roles).

People allowed into the UK for work should also have no access to cash benefits or social housing for 5 years (or without a 4-year record of National Insurance contributions).

This new Bill will end unrestrained immigration and maximise the benefits of controlled immigration: filling skills shortages, delivering public services, and strengthening British businesses internationally.

⁴⁴ As suggested by Migration Watch Chairman Sir Andrew Green.

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Interim Conclusion II

The EU has limited the UK's potential as an international leader in global free trade, and numerous unsustainable and inefficient EU regulations hinder the British economy. The Single Market has meant that the UK is running a hefty £82.2 billion trade deficit with the EU (in goods and services) and our trade in the Single Market makes up a falling minority of exports.

The protectionist Customs Union has prevented the UK from being an independent trading nation, rendering it a rule-taker, bypassed in trade negotiations despite its position as the 5th largest global economy. The CAP, CFP, and the Freedom of Movement policy harm British industry and the workforce.

The UK has an intense competitive advantage: its legal structure, geographical location, human resources, and well-developed infrastructure are insurmountable barriers for European competition to overcome.

Once outside the EU, the UK must unshackle itself from these economic burdens.

III. UNIFORMITY

**A TIGHTENING STRAIGHTJACKET
AROUND NATION STATES**

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(5) EU TAKEOVER OF HOME AND JUSTICE AFFAIRS

- The Lisbon Treaty created EU police and judicial coordination – and in 2014 the UK government pushed thirty-five legal acts confirming this through Parliament, without the chance for scrutiny or amendments
- The European Arrest Warrant (EAW) was one of them – staying in the EU would also force the UK to sign up to the European Public Prosecutor’s Office (EPPO)
- Meanwhile Europol is becoming a “real police force” – with a role in national and cross-border investigations

While the UK holds what the Government has described as a “special status” in the realm of home and justice affairs within the Union – as it had been able to maintain relative control over the area by negotiating the right to “opt in” to EU measures – many EU provisions that operate within the UK never obtained adequate parliamentary scrutiny. This was because of how the EU legislates, and because these opt-ins were negotiated by the UK Government without involving Parliament.

In 2014, Parliament was faced with the decision of adopting thirty-five legal acts as one package, and was deprived of the possibility of scrutinising the provisions individually. Many should have been rejected due to their adverse impact on the UK. In addition, these provisions have an inextricable link to EU institutions (the ECJ and the European Commission), so instead of allowing Member States to cooperate with one another, they are shackled to a system under EU control.

The following sections will demonstrate the undemocratic nature through which EU Home and Justice provisions were brought into UK law, and the shortcomings of individual policies. Accordingly, *Brexit is a chance for the UK to operate an independent and better-governed set of policing and criminal justice policies outside the EU*, based on collaboration with other countries rather than EU control.

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(5.1) The UK’s position in the realm of EU home and justice affairs

Not until the Treaty of Lisbon came into force were police and judicial cooperation in criminal matters brought into the Community framework. These new measures are agreed through the Ordinary Legislative Procedure, so are adopted by Qualified Majority Voting in the Council of Ministers, and through agreement by the European Parliament.

Article 10(4) of Protocol No 36 of the Treaty of Lisbon gave the UK the option of withdrawing from all the provisions on police and judicial cooperation in criminal matters to which it had previously signed up; in 2014 the UK exercised this right and opted out of all of these legal acts. However, through Article 10(5) of Protocol No 36, the UK was entitled to notify the Council thereafter of its wish to participate in acts which under Article 10(4) had ceased to apply. Thus the UK renegotiated the application of thirty-five legal acts after the block opt-out⁴⁵. Since the Lisbon Treaty entered into force in December 2009, the UK has opted in to around 30 new police and criminal justice measures. The adoption of these was undemocratic however, and with adequate parliamentary scrutiny, many would not have come into force.

(5.1.1) Forced adoption of EU home and justice provisions through block voting

When in 2014 the UK Government decided to opt back in to thirty-five legal acts, Parliament was given a vote, but the Government took the view that these provisions constituted a “block” vote for all of them. *Parliament was driven into accepting all the legal acts*, without the possibility of amending them.

(5.1.2) ECJ Jurisdiction over EU home and justice provisions

The ECJ has jurisdiction over all EU home and justice affairs provisions, and the European Commission has the power to initiate infringement proceedings.⁴⁶ The inextricable link that these provisions have to the EU institutions is a reason in itself for the UK not to be part of them once it leaves.

⁴⁵ In accordance with Decisions 2014/857/EU and 2014/858/EU.

⁴⁶ Article 258 TFEU.

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(5.2) The European Arrest Warrant

The European Arrest Warrant (EAW) is one of the thirty-five legal acts the UK opted into in 2014 (although it was introduced in 2002 as a fast-track system for surrendering people from one European country to another to face trial or serve a prison sentence). It also replaced separate extradition arrangements between the EU Member States. Being subject to the jurisdiction of the ECJ, it is above our Supreme Court, with huge implications for the administration of justice in the UK. Whilst it was perfectly possible to have efficient extradition without it falling within EU competences, to speed up extradition between Member States this policy has removed many of the traditional safeguards and has already resulted in grave cases of injustice. Ultimately, *the policy poses a fundamental threat to the liberties of Britons and to the sovereignty of the UK.*

(5.2.1) Constitutional Implications

The EAW means that, unlike with any other extradition treaty, the extradition of UK citizens is no longer a matter exclusively of UK law. *Indeed, the EAW fundamentally cedes powers over who can be arrested in the UK to Brussels.* British courts are not allowed to examine the merits of an extradition request: once it has passed the procedural test they must endorse it, and cannot see whether it is supported by reliable evidence. Thus even before considering the administrative convenience of this particular form of extradition, it is clear that because of the EAW's formal ties with EU institutions, the UK can no longer be part of the procedure.

Were the UK to remain part of the EAW, it would also be forced to be part of the European Public Prosecutor's Office (EPPO), which the UK has already formally opted out of. This is because that public prosecutor (discussed below) will be able to operate the EAW with regard to financial crimes within the UK, and the UK's opt-out from EPPO would become ineffective.

(5.2.2) Mutual Recognition and variations between Member States

The EAW operates according to a "system of surrender" between judicial authorities, based on the principle of mutual recognition of criminal justice systems between members of the EU. A national judicial authority can issue an EAW to have a suspect extradited if accused of an offence incurring a custodial penalty of at least 1 year, or already sentenced to at least four months in prison. EU Member States no longer have the right to refuse to extradite one of their citizens on the grounds of nationality, nor need a political decision for a suspect to be handed over, despite the very variable standards of criminal justice across the EU. Repeated cases of injustice have now emerged as a result.

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(5.2.3) The EAW leads to unfair trials

EU Member States diverge strongly in their safeguards of the right to a fair trial. Whilst this right is embedded in the rule of law (and is one of the fundamental principles of the UK's unwritten constitution), and in Article 6 of the European Convention on Human Rights, not all EU Member States safeguard it. Several case studies from *Fair Trials International*⁴⁷ have shown that the EAW has led to suspects not being provided with legal representation and being convicted (often with lack of evidence) without understanding proceedings, or even the charges brought against them. For example, Edmon Arapi (a UK citizen from Staffordshire) was tried and convicted in his absence for the killing of Marcello Miguel Espana Castillo in Genoa, Italy in October 2004, even though he had not left the UK at all between the years 2000 and 2006.

Arapi himself first heard of the charges against him when arrested in June 2009 on a European Arrest Warrant from Italy; the English court subsequently ordered his extradition in 2010. As appeals had been exhausted in Italy (without Edmon attending them, nor even being aware that they were taking place) it was not clear he would be entitled to a full retrial, or whether his alibi evidence (that he was in the UK when the crime took place in Italy) would be admitted at any trial. He narrowly escaped his sentence when, on the day the High Court was due to hear his appeal against his extradition order, the Italian authorities decided to withdraw the EAW, admitting there had been an error, as Edmon's fingerprints did not match those at the crime scene.

The danger however is that, as an EAW means that *if one Member State makes a decision to have an individual extradited to face or serve a sentence, that decision must be respected and applied* throughout the EU, and British courts are denied with the possibility of refusing the extradition of a UK citizen, being dependent on procedure elsewhere.

(5.2.4) The EAW leads to degrading treatment

Unlike England and Wales (primarily through the Bail Act 1979), many EU countries have no legal maximum length for detention. In addition, many countries' culture towards detention features fundamental rights infringement,⁴⁸ so the EAW exposes UK citizens to degrading treatment due to the risk of lengthy pre-trial detention in poor conditions. This happened to Andrew Symeou, a 20-year-old British student with no previous criminal record, who, following an EAW issued by Greece, could not prevent extradition based on risk of mistreatment.

Andrew was charged with the killing of Jonathan Hiles in 2008 in a nightclub in Zante, despite having photographic evidence that proved that he was in a different nightclub on the night in question. The EAW meant that British authorities had no power to examine the evidence against Andrew. Andrew thus attempted to fight his EAW on the basis of risk of violation of Article 3

⁴⁷ An NGO campaigning for fair trials according to internationally recognised standards of justice.

⁴⁸ *Symeou v Public Prosecutor's Office at Court of Appeals, Patras, Greece* (2009) EWHC 897 (Admin) at para 65

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of the European Convention on Human Rights (prohibition of torture, inhuman or degrading treatment or punishment); the Committee for the Prevention of Torture (CPT) had reported the previous year that “persons deprived of their liberty in Greece run a real risk of being ill-treated”. Amnesty International and other human rights NGOs had also criticized Greece’s prisons in harsh terms. However, the court held that this was insufficient to bar his extradition, as he could not *prove* that he would be mistreated.

Andrew spent a harrowing 11 months on remand in custody in Greece, and his father Frank described some of the conditions he suffered in the Korydallos prison in his oral evidence to Fair Trials International. These included: “filthy and overcrowded cells, sharing cells with up to 5 others including prisoners convicted of rape and murder, violence among prisoners, violent rioting, cockroaches in cell, fleas in bedding, prison infested with rats and mice, shower room floor covered in excrement”. Following numerous delays due to prosecution errors, he was finally released pending trial in 2010. *The EAW made Andrew a victim of degrading treatment through a prolonged pre-trial detention and dire conditions*, all because of a crime of which he was ultimately acquitted by a Greek court – following a four-year ordeal.

(5.2.5) The UK should administer its own extradition policy

The UK has tried to take the matter into its own hands and has introduced its own national level reforms to the EAW, thereby demonstrating that extradition should be determined by national governments. An amendment to the Extradition Act was adopted in direct response to Andrew Symeou’s case, setting out a “human rights bar” which requires UK judges and extradition hearings to discharge the requested individual if they are of the view that execution of the EAW would result in a breach of the individual’s rights (but understood under the European Convention on Human Rights). However, the Home Affairs Committee still expressed concern, because the standard of proof needed to satisfy the position is extremely high: “the courts apply principles elaborated by the European Court of Human Rights which imposes virtually unachievable evidential and legal hurdles.” Overall, this lack of trust in the EU instruments (exemplified by the creation of additional national legislation to prevent the breaches of rights generated by the EAW), as well as the resulting variation in national practice, further undermines the idea of mutual recognition.

(5.2.6) Disproportionate use of the EAW

Former Detective Superintendent Murray Duffin of the Metropolitan Police Extradition Unit explained that: “*if we receive a request and it is certified and meets all the requirements, it is to be executed.*” The Director of Public Prosecutions explained that the Crown Prosecution Service also has no discretion over whether to execute an EAW request.

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Although the UK has established its own “proportionality test”,⁴⁹ so that the UK will only use the EAW where it is proportionate to do so, the majority of EU Member States do not have any system of filtering cases, so EAWs are issued automatically with no consideration of whether there is a less coercive method. The Home Affairs Committee has indicated that Poland, for example, operates under an “obligation to prosecute” principle, meaning that Polish authorities have no prosecution discretion. They explained that a large number of warrants are thus issued for relatively minor offences: in one case, a Polish schoolteacher living in Bristol was sought on an EAW for withdrawing money over his overdraft limit (despite having repaid the entire debt).⁵⁰ This disparity leads to the UK receiving disproportionately more warrants than it issues, and requests from other EU countries to extradite their own citizens living in Britain have risen fourfold. Between 2015-2016, 1,271 people were sent for trial in other EU countries by British courts under arrest warrants, while the UK issued only 150 warrants and had 112 people surrendered. This undermines credibility in the system and burdens UK courts, costing taxpayers around £27 million a year.

(5.2.7) UK-EU post-Brexit extradition arrangements

Once the UK leaves the EU it will have to re-negotiate its extradition arrangements with EU Member States. The UK could choose between three alternative options:

- (1) Relying on the European Convention on Extradition 1957;
- (2) Concluding an arrangement with the EU (as it has gained international legal personality under the Lisbon Treaty);
- (3) Concluding bilateral agreements with EU Member States.

As Fair Trials International argued, it is likely that “other Member States will continue to wish to engage in effective extradition arrangements with the UK, whether or not we remain a part of the EAW system”. As the recent White Paper made clear, the UK Government will look to negotiate the best deal it can with the EU to collaborate against crime and terrorism. The UK will seek a strong future relationship with the EU with a focus on operational and practical cross-border collaboration.

⁴⁹ The Crown Prosecution Service explained that the standard public interest test is applied before issuing a request: “a prosecution will only follow if the Full Code Test is met: namely that there is sufficient evidence for a realistic prospect of conviction; and it is in the public interest. The CPS applies the Full Code Test when deciding if an extradition request for a person should be prepared and submitted for a person who has yet to be charged with the offence.”

⁵⁰ Home Affairs Committee, Pre-Lisbon Treaty EU police and criminal justice measures: the UK’s opt-in decision, HC 615, 31 October 2013, para 16

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(5.3) Europol

Europol was established by the Europol Convention in 1995. This was one of the most ambitious aspects of the EU’s “Third Pillar” (on Justice and Home Affairs cooperation, agreed in the 1991 Maastricht Treaty), and among the most controversial. Europol became a full EU Agency when it came under the EU’s competence within the Lisbon Treaty (through Council Decision 2009/371/JHA), but its original task was to collect intelligence from regional or national police forces to make links between crimes, suspects and investigations, its operational powers limited to the collection and analysis of information, with a mandate limited to serious international crime. When exiting the EU, the UK should leave Europol, which is *slowly but steadily turning into a European FBI, but an unaccountable version* inextricably tied to EU institutions (under ECJ jurisdiction in particular).

(5.3.1) Europol and ECJ Jurisdiction

The ECJ has jurisdiction to settle disputes between Member States relating to Europol. The UK has opted out of this jurisdiction, but if Europol becomes an effective European police force (its main objective) then the UK will be forced into ECJ jurisdiction. Europol is not only turning into something highly undesirable for the UK, but UK membership of this body after Brexit would also mean contravening the referendum mandate.

(5.3.2) Europol is growing in size and mandate

Europol is slowly moving towards a “real police force”, but its ambitions are not matched by demand from Member States. It is now a well-resourced organization with over 1000 members of staff, and an operation budget of €116.4 million (2017). However, Europol has developed by default, slowly acquiring new powers to fulfill an expanding remit and establishing a “patch” in an already crowded terrain. Its competence has been expanded from five to forty-three forms of crime (almost all criminality), and all subject to “fast-tracking” under the European Arrest Warrant, while facilitating investigations into any criminal conspiracy that could be perceived to affect two or more Member States. Europol has also become more “operational”: as of Regulation 2016/794 which came into force 1st May 2017, it can request Member States to initiate an investigation, or become involved in joint investigations. It can also retain a potentially endless cycle of data on criminals, suspects, victims and their associates. *Statewatch* has suggested that as a result, Europol is being transformed from the “reactive” analytical agency into a “proactive” investigative agency. The recipe for Europol’s continuous expansion is the circular argument that Europol is unable to fulfill its potential because of legal constraints, and thus needs more powers.

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(5.3.3) Europol effectiveness issues

Europol is also a poor use of public money, hampered by the extent to which its reports provide “added value” to Member States. In addition, Member State police forces are often reluctant to collaborate with Europol, preferring to collaborate with each other through traditional bilateral channels. Indeed, the sensitivity of information and the way it is collected encourages services to prioritize strictly bilateral communication, as the wider sharing of resources would undermine source protection. As a consequence, Europol has never had broad support from governments, receiving information, for example, on only 2,000 of the foreign ISIS fighters known to individual EU security services (i.e. less than half). This information black hole is also a consequence of the current Europol provision, permitting the agency to exchange information obtained from EU Member States to third countries who may not have adequate data protection standards, with no veto for Member States.

(5.3.4) Europol is unaccountable and its expansion is not adequately regulated

The Europol Convention has been replaced with an EU Council decision, presenting an opportunity to amend Europol’s mandate and powers. This did not require ratification by national parliaments (as officially required under the Convention); decisions now entail a qualified majority in the Council (and a two-thirds vote in the Europol Management Board), while Member States have lost their veto over most implementing measures. The power of national parliaments to control the development of Europol has been significantly reduced, accelerating the development of Europol’s powers and competences, with controversial proposals subject to less scrutiny and less debate. Consequently, [Europol is moving to demand formal investigative powers, which are coercive as they allow Europol to conduct independent investigations in Member States](#). In addition, the Europol Management Board seeks to be designated the legislative authority for staff and financial regulations, rules governing relations with third parties, and analysis as well as confidentiality rules. This poses severe threats to the separation of legislative and executive powers.

(5.3.5) UK-EU post-Brexit shared intelligence arrangements

As part of its opt-in, the United Kingdom readopted only one legal act related to Europol, namely Decision 2009/JHA establishing Europol itself. The UK has not yet opted into the new Europol Regulation, so can withdraw from Europol by not adopting it. Instead, [the UK should seek a new shared-intelligence agreement excluding ECJ jurisdiction](#). The UK Government is confident that it will be able to reach an agreement based on collaboration not control, as EU Member States value the UK’s contribution to shared-intelligence. Indeed, the UK is the second biggest contributor to EU intelligence and the biggest contributor of intelligence in some of the most critical areas.

For instance, the UK intends to remain a member of the Schengen Information System (SIS), an electronic database enhancing security co-operation between participating countries. While the

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UK has opted out of the common border control and visa provisions applicable to the Schengen Area, through the SIS it permits competent authorities (e.g. police) to consult and enter alerts regarding people wanted for arrest, missing persons, and objects wanted for seizure or use as evidence in criminal procedures (six categories in total). The alert system also provides information once a wanted person or object is found. This enables SIS members to communicate with each other for security and crime prevention.

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(5.4) The European Public Prosecutor

The European Public Prosecutor’s Office is an independent body of the EU, whose legal basis is found in the Treaty of Lisbon (Art. 86) and which, following a Commission proposal in 2013, was adopted in the pursuit of “enhanced cooperation” by a group of EU Member States. The Lisbon Treaty states that any European Public Prosecutor's Office (EPPO) will be made “responsible for investigating, prosecuting and bringing to judgment... the perpetrators of... offences against the Union's financial interest” and will be empowered to “exercise the *functions of prosecutor in the competent courts of the Member States*”. The EPPO is envisaged to have EU-wide jurisdiction to investigate and prosecute “EU-fraud” and other crimes affecting the Union’s financial interest. The UK is one of the Member States that has rejected the Commission’s proposal. This should not become part of UK Home and Justice Affairs policy post-Brexit.

(5.4.1) The EPPO proposal breached the subsidiarity principle

The Parliamentary Under-Secretary of State for the Home Department at the time of the Commission’s proposal on the EPPO, James Brokenshire, said: “[the] EPPO proposal is fundamentally flawed on many levels, not least in failing to pass the subsidiarity test.” Indeed, EU Member States attempted to block the Commission,⁵¹ with national parliaments individually sending a “reasoned opinion” stating why the draft did not comply with the principle of subsidiarity. The number of complaints sent by Member States exceeded the one-third threshold to issue a “yellow card” on the EPPO proposal, mandating its review; however, EU institutions are only required to take account of the national parliaments’ reasoned opinions, and the Commission completely ignored the yellow card and decided to go ahead.

In normal circumstances, the Commission’s proposal would have required endorsement by the European Parliament and a *unanimous* approval by the Council (meaning the veto of one or more Member States would have been enough to stop the establishment of the EPPO). However under the Treaties, if the European Council is unable to find an agreement, nine Member States may establish “enhanced cooperation”. Thus, despite eleven EU Member States (including Cyprus, the Czech Republic, France, Hungary, Ireland, Malta, the Netherlands, Romania, Slovenia and the UK) sending reasoned opinions against the proposal, the Commission stated that “the national Parliaments of a clear majority of Member States have not issued reasoned opinions and can thus be counted among the probable participants to the EPPO”. The *non-participating states could not prevent the others going ahead with further integration*.

⁵¹ Through Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

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(5.4.2) The EPPO rejected by successive UK governments

James Brokenshire stated that EPPO challenges “some of the fundamental principles and aspects of our criminal justice system”, and the European Union Act 2011 resolved that creating EPPO would need a referendum and Act of Parliament. In addition, in February 2012, over 100 Conservative backbench MPs signed a letter to the Telegraph supporting an opt-out from the EPPO, writing: “We do not wish to subordinate UK authorities to a pan-European public prosecutor”. The Cameron-Clegg coalition Government agreement also stipulated: “Britain will not participate in the establishment of any European Public Prosecutor”. The creation of EPPO was considered in a Lords European Committee Report in 2012-13 on fraud against the EU finances, which also dismissed the Commission’s proposal.

(5.4.3) The EPPO’s Power Grab

The EPPO’s competences have extended to cases that could be dealt with by national authorities, constituting an EU power grab. Under the EPPO Commission proposal, in addition to having exclusive competence for all crimes affecting the financial interest of the EU, the EPPO would investigate and prosecute other offences “inextricably linked” to PIF offences if certain criteria were met. Dr Anna Bradshaw of the Law Society of England and Wales noted that the category of these financial crimes was “enormous”, adding: “if the EPPO is to have jurisdiction over ancillary offences as well, then the category becomes huge”. Indeed, Member State **criminal prosecution would slowly become a EU competence**. EPPO is thus being constructed in complete disregard of the different legal systems within the EU. The UK has made the right decision by opting out of this arrangement, and must stay out of it once outside the EU.

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EU policy of control rather than collaboration in Home and Justice provisions in particular has adversely affected the UK. Indeed, while the UK recognises the need to collaborate with other international partners to safeguard its own national security, operational effectiveness can be achieved through “ad hoc” bilateral or multilateral collaboration, pursuant to a Memorandum of Understanding between the UK and EU Member States (as well as non-EU countries), coupled, as necessary, with domestic legislation (or where an international legal basis is required, a treaty framework or instrument that is not supervised and enforced by the Commission and the ECJ). This will avoid re-creating the problems that emerged from the implementation of EU-wide straightjacket policies that have resulted, in the realm of Home and Justice policies, in inefficiency and injustice. Once again, these outcomes present clear justifications that explain why we had to leave.

Ultimately, pursuing independent Home Affairs policies would be in line with the most fundamental British Government priority for Brexit: that laws are to be made in Westminster not Brussels, and that those laws will be interpreted by the ECJ but by British Courts.

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(6) OPPOSING A SINGLE EUROPEAN ARMY

- Now that the UK is leaving the EU, Brussels has embarked on further integration of defence. But for an EU Army to exist, an EU federal state is being created

Although EU security and defence questions have been decided on an intergovernmental basis, treaty arrangements are now taking Member States far beyond the point of simple cooperation. Now that the UK is leaving the EU, the EU has embarked on further integration of defence, with a core of countries no longer disguising their ambition to create a Single Army for the EU. What is still kept hidden (although is increasingly clear) is that for an EU Army to exist, an EU federal state must be created.

The unacceptable prospect of having UK military forces drawn into a European Army, with defence policy led by Brussels, is a central reason that leaving the EU is necessary. The UK referendum vote was a vote against “ever closer union”, which, unless somehow stopped, will entangle EU Member States into a project with serious geopolitical consequences.

(6.1) Member States sleepwalking towards a European Army

The first modern attempt to combine European military forces dates to the 1950s, when the European Defence Community was proposed, but ultimately could not be ratified by the French Parliament, despite having been signed by all six founding Member States, since when shared security and defence questions have been decided at an intergovernmental level. However, EU treaty arrangements have deeply influenced this field, and behind the scenes, the EU Commission has laid the foundations for continent-wide military control. The Treaties have created the legal basis for a common defence policy, gradually stretching EU competences by giving binding legal effect to common EU policy, justiciable by the ECJ, and creating an independent European Defence Agency. Thus, *while Member States’ armed forces appear to be separate and distinct, policy, finance and intelligence are more and more controlled centrally.* This multi-layered EU centralisation has also seen mergers in force structure and command. Most recently, the launching of the Permanent Structured Cooperation (PESCO) amongst 25 EU Member States means that even equipment purchasing will be increasingly amalgamated, forming an economic lure for further political participation.

The clearest pronouncement of the desire to create an EU military force was articulated by the president of the European Commission himself, **Jean-Claude Juncker**, in his ‘State of the Union’ address in September 2017: “*we need a new approach to building a European security union with the end goal of establishing a European army.*”

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(6.1.1) The foundations for a Common Defence Policy in the Treaty of Maastricht

The first significant initiative towards the creation of a European Army was the Treaty of Maastricht in 1992, when the EU structure was organised under the three pillars, the second being a **Common Foreign and Security Policy (CFSP)**. This laid the foundations for a common defence policy for the EU. The Treaty of Amsterdam (1997) then codified joint action plans for Western European Union states (with the scope of potential humanitarian, peacekeeping and peace-making operations), setting out the *legal basis for future common EU defence* and security operations.

(6.1.2) The St Malo Summit and its consequences

President Mitterrand and Prime Minister Tony Blair launched the EU's Common Security and Defence Identity at the Anglo-French St Malo summit in 1998. This was a French-inspired initiative to promote the EU "on the world stage" and to encourage EU nations to spend more on defence, for "autonomous EU military operation" (i.e. independent of NATO). However, Blair reassured the British people that he would not support German-led plans for an independent European Defence Headquarters, and that he would oppose any EU defence plans threatening the supremacy of NATO, which he described as the cornerstone of European security and peace. (In response to the St Malo Summit, President Clinton's Secretary of State Madeline Albright, warned the EU about the dangerous "three D's" that would threaten EU Member States were a European Army to be created: wasteful "duplication" of military structure without adding value; "discrimination" against non-EU members of NATO; and "decoupling" of European and US security policy.)

Yet the Treaty of Nice of 2001 (arguably a direct consequence of St Malo) provided for the development of the Union's military capacity, the *creation of permanent political and military structures* and the incorporation into the Union of crisis management functions. US President Bush made his support conditional on Tony Blair's own assessment to him of what the Treaty of Nice meant. Blair assured Bush that "European defence would in no way undermine NATO". But this was not an accurate interpretation of the Treaty of Nice.

Both President Bush and the British people were deceived: Nice established a committee with the authority to take military action in international crises, a **European Defence Agency** was created in 2004, and since then Blair himself has publicly called for the creation of an EU army, in 2016.

(6.1.3) The Lisbon Treaty's legal attack on NATO

With hindsight, it is possible to see that the British people and the US were further deceived with the signing of the Lisbon Treaty in 2007 – a simple repackaging of the rejected European Constitution. Lisbon gave the EU its own version of Article 5 of the NATO Treaty: the Article 42.7 "solidarity clause", which states that if a member of the EU is the victim of "armed

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aggression on its territory”, other states have an “obligation of aid and assistance by all the means in their power.”

However, while NATO Article 5 on “collective security” means that an attack against an ally is considered an attack against all allies, it does not create an *obligation* to intervene – it is a commitment. Therefore even when Article 5 is invoked it remains essentially voluntary. This is because the Article’s purpose is to render the voluntary use of force by an ally in defence of another ally legal, by lifting the prohibition of the use of force under international law through the exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations. Article 42.7 however creates an obligation with binding legal effect justiciable by the ECJ, making it superior to the commitment in NATO’s Article 5. As Article 42.7 trumps Article 5, the creation of a European Army would create (in both practical and legal terms) a new permanent rival to NATO: the EU itself.

The Lisbon Treaty has also left *EU Member States no veto over EU foreign and defence policy*, with its obscure but deadly provision for “permanent structured cooperation”, a framework by which a group of Member States can decide to forego their veto power and further integrate their defence policy, operating under Qualified Majority Voting (QMV).

(6.1.4) Permanent Structured Cooperation (PESCO): a few steps from a European Army

On 11 December 2017, the European Council established the Permanent Structured Cooperation (PESCO), a euphemism for a core “EU Defence Union”. This is a legally binding cooperation framework that does not require all EU states to agree or participate.

With 25 Member States participating (without Denmark, Malta and the UK), these Member States have committed to take part in the main European military equipment programmes and to provide combat units available to the Union for immediate action. Moreover, the participating Member States will carry out measures such as harmonising identification of their military needs, pooling of assets, cooperation in the areas of training and logistics, and identifying common objectives with a “review of national decision-making procedures” for the commitment of forces.

Decisions under PESCO will be taken through QMV. Thus a subgroup of EU Member States will act in the name of the EU in European defence and foreign policy, and cannot be stopped by Member State vetoes.

(6.1.5) Germany will push for the creation of a European Army

The creation of a European Army is backed by both Germany and France, so QMV now makes this project a certainty, as it results in the creation of policy by rich countries backed by Member States which are economically dependent on them (as outlined in Section (C) of this paper).

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Indeed, Germany has already attempted to establish a European defence policy. At a COSAC (Conference of Parliamentary Committees for Union Affairs) meeting in Rome, the German delegation formally proposed a Defence Commissioner and a Defence Council of Ministers and reiterated the idea of an EU military headquarters. Sir Bill Cash, as Chairman of the European Scrutiny Committee, argued against this, and the British delegation was able to defeat the proposal. The German delegation insisted however that “it will have to be put back on the agenda at the next conference”, adding that “Great Britain will simply not be able to maintain their line.” Germany’s periodical re-launches of its vision for a European Army recall Bismarck’s words: “I have always found the word Europe on the lips of those who wanted something from others which they dared not demand in their own names.”

More recently, during the UK referendum campaign, a *leaked draft proposal from Chancellor Merkel’s government* set out details of a joint European command headquarters with widespread *cross-border “sharing” of military units and equipment*. Officials tried to keep the plan secret until after the Referendum to avoid inflaming Eurosceptic sentiment among voters. Yet the UK would indeed have been forced to join the initiative had it not voted to leave the EU.

(6.2) Why combined defence won’t work

The UK has consistently opposed European defence policy becoming a matter of EU “exclusive competence” and has tried to stop the creation of a European Army, which will not only mean a huge increase in EU funding, but a unified foreign policy in Europe.

(6.2.1) A European Army requires a federal state

The ambition of creating a European Army is part of the overall aim of a fully-fledged political union. But *a European Army cannot exist without a federal state*, as it requires corresponding parliamentary powers and political oversight to be transferred from Member States’ sovereign parliaments to supranational EU institutions. This is because deploying armed forces requires political legitimacy. One must wonder, however, how such ideas would work in practice, as the 28 (soon to be 27) Member States have different security interests that are difficult to reconcile. This means a centralised EU would be able to pull Member States into conflicts in which they do not wish to participate.

In addition, while EU Member States have given up a substantial portion of their sovereignty so that the EU may speak with one voice on the international stage, *there is no consistent EU foreign policy approach*. The crises in Libya, and questions of the level of sanctions against Syria and Russia, have shown that it is unlikely for the EU to speak with one voice. In fact, even Mr Juncker has conceded that the EU common foreign policy is not working. Without this however, an EU Army would be paralysed. However, Juncker has also stressed the need for “a stronger Europe”, where defence will be used as an instrument of European integration for its own sake.

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(6.2.2) The EU cannot pay for an independent Defence Policy and its own army

As the UK leaves the EU, the process of European integration, in terms of defence and thus of political union as a whole, has accelerated. This poses a threat to the security of EU Member States. The EU's contributions to NATO demonstrate this. Only 6 of NATO's 29 members meet the 2 percent defence spending target (the UK is one of them) and the US pays 75% of NATO military expenses. EU contributions to NATO have been slashed since the financial crisis hit the continent and have fallen each year since. This means that even if the EU chooses to create its own army it will still need NATO to protect its territorial integrity. British MEP Geoffrey Van Orden summed up the point: "if our nations faced a serious security threat, who would we want to rely on – NATO or the EU? The question answers itself."

However, if the EU chooses to pursue an autonomous defence policy, they cannot expect US commitments to NATO to remain unchanged. President Obama in an interview with the Atlantic magazine said there had been a growing move in the United States against European 'free-loading', and had the British government not committed to the 2% pledge on NATO spending, the special relationship would have been affected: a rather more important warning than on Brexit. Ultimately, EU and American interests could force each side into opposing camps, with grave implications for competing defence policies.

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(6.3) The EU undermines NATO

Direct competition with NATO would lead to wasteful duplication of military structure without adding value, discrimination against non-EU members of NATO, and decoupling of European and US security policy. Challenging NATO could have dangerous geopolitical consequences, principally because it was NATO, not the EU, which has brought peace to Europe.

(6.3.1) NATO, not the EU, brought peace to Europe

Although no one can deny that the EU was created to preserve peace in Europe, *that peace has been kept by NATO and the combined forces of trade, travel and investment*. The UK has decided to focus on these forces and detach itself from a Union that is over-regulated, protectionist and intrinsically political. Indeed, the EU's purpose of "ever closer union" has created resistance from an increasingly resentful population. Fuelled by the mass unemployment and social dislocation caused by the Euro, extremist parties are on the rise across the EU from Greece to Sweden. Even in Germany the increasingly radical Alternative für Deutschland (AfD) has become the third-largest party, winning 12.6% of the vote in the German elections (2017), which means 94 seats in the Bundestag.

(6.4) Post-Brexit UK Defence and Foreign Policy

The referendum result does not advocate disengagement from the UK's European allies. While the UK has no intention of being drawn into an EU defence policy, the Government seeks to continue to collaborate with the EU at a bilateral level (something that already happens extensively). Indeed, in her Florence Speech, the Prime Minister has reiterated the UK's commitment to the security of Europe. The strength of the UK's military capability means that the EU will welcome collaboration, but the Prime Minister should be concerned about whether the UK can ensure that decisions over Britain's defence policy are taken in Westminster in accordance with parliamentary sovereignty. Ensuring that UK defence policy is separate from the EU is a guarantee of Britain's independence.

(6.4.1) The impact of Brexit on UK military capability

Given that the EU's collective military capability depends on contributions from Member States, the main defence impact of leaving the EU would be on the capability of the EU itself, rather than that of the UK. The UK had the sixth largest defence budget worldwide in 2016 (IISS figures) and is one of only six of NATO's 29 members forecast to meet the 2 percent defence spending guideline in 2017. The UK Government has committed to raise the defence budget by

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0.5 percent a year in real terms and invest £178 billion in defence equipment over the next decade (an additional £12 billion compared to previous plans).

The House of Commons Library has suggested that: “In terms of military power and projection, therefore, the UK’s withdrawal is more likely to place the EU at a disadvantage, with fewer assets and capabilities at its disposal. This is particularly true of certain strategic assets such as tactical airlift and intelligence, surveillance and reconnaissance assets. From the UK’s standpoint, its ability to project military power would be largely unaffected”.

(6.4.2) The UK must undo its ties to an over-centralised EU Defence Policy

Between November 2016 and June 2017 however, the UK signed up to five EU defence integration agreements. They cover centralised procurement, wide-ranging financial plans, a wide expansion and centralisation of intelligence procurement policy, battle groups, and *an EU military headquarters* (which the UK could only manage to rename a “capability”). These would leave Britain committed to supporting a single military, shared intelligence and a common procurement policy (which could even force the UK to build warships abroad) until the end of a Brexit transition phase or perhaps even longer. In addition, despite the UK’s effort to change the HQ’s competences after agreeing them, the HQ will have growing strategic, operational, advisory and command functions, with the ability to immediately tap Member States’ military resources, *even directly controlling assets that Member States will soon designate as ‘jointly owned’*.

Signing up to wide-ranging and long-lasting defence agreements without parliamentary approval or scrutiny once again would undermine the principle of parliamentary sovereignty, defying the UK Referendum result. Brexit means that decisions over the deployment of armed forces must be taken in Westminster, not Brussels. In the Brexit negotiations, the Prime Minister must therefore resist the EU’s defence plans, and not negotiate away control of Britain’s defence policy in exchange for control over borders or trading policy.

(6.4.3) A return to Sir Robert Walpole’s “Let sleeping dogs lie”

When the UK leaves the EU, it should conduct an independent foreign policy that promotes global free trade and alliances with countries around the world (with particular emphasis on EU Member States and Commonwealth countries), while avoiding being entangled in EU affairs.

The UK can thus return to the policy of Great Britain’s *de facto* first Prime Minister, Sir Robert Walpole, who opposed members of his own Whig party, who favoured a more aggressive foreign policy, in favour of his own personal motto “Let the sleeping dogs lie.” The eighteenth-century essayist Charles D’Avenant shed light on this: “As the Earth is now divided into several Kingdoms, Principalities and States, between ‘em Wars will happen, but the Weaker fortified themselves by Alliances with the Stronger; so that (unless some Great Oppressor rises up to

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disturb the World with his Ambition) we have many more years of peace than of War; whereas in Universal Empires every day had its different Calamities.”

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Interim Conclusion IV

The EU is unwisely moving towards a Common Defence policy, a Single EU Army, and with them the creation of one federal state.

This project has the potential to undermine NATO, which has given Europe its umbrella of peace for nearly 70 years, because the EU is using defence as an instrument of European integration for its own sake. These are clear and fundamental reasons that explain, in this case, why we had to leave.

Outside the EU, the UK will remain committed to the security of Europe, as it has done historically. Indeed, over the centuries the UK has fought to prevent Europe from falling under the dominance of a single power, without which Europe would have been united long before – but not in a democratic system. Once again, the value of democracy is central: no two democracies have in fact ever gone to war. Thus when the UK leaves the EU it must ensure that it untangles itself from an undemocratic and over-centralised EU defence policy and is able to conduct an independent defence and foreign policy with decisions taken democratically in Westminster rather than Brussels.

In Conclusion

This paper has outlined the essential reasons why we had to leave the EU.

Democracy is the central factor in all these questions: lasting economic stability can only be achieved through democracy, and democratic legitimacy is required as the basis of any political decision.

The British people have made a democratic decision in line with the Parliamentary traditions of the United Kingdom, and a vision of Britain that seeks to preserve its state of liberty and democracy. In doing so they have also outlined a model for a free and prosperous Europe. They have done so because they observed that the direction the EU has taken collides with those values.

The decision that the British people took in June 2016 was the right one. This truth may currently be attacked by malice, derided by ignorance, but in the end, there it is.

APPENDICES

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APPENDICES

The following three appendices deal with two crucial issues that emerge as a consequence of Brexit, namely: (1) the Northern Ireland border with the EU; (2) Citizens' Rights; and (3) the post-Brexit role of the Charter of Fundamental Rights.

APPENDICES

WHY WE HAD TO LEAVE – BREXIT AND THE DEEPENING UNION

APPENDIX 1: DEALING WITH THE NORTHERN IRELAND BORDER

Brexit changes the external borders of the EU: the border between Northern Ireland (NI) and the Republic of Ireland (ROI) will become the only land border between the UK and the EU. This new border and how it will operate formed a central part of the debate during the referendum campaign and was one of the three main areas of discussion in the first phase of the Brexit negotiations. Managing this correctly is vitally important because a return to a hard border in Ireland could compromise the Belfast Agreement that ended decades of sectarian violence (the EU has acknowledged that the success of the peace process should not be jeopardized by Brexit) and could also diminish trade, damaging the economies of both the EU and the UK.

The EU and the UK have expressed their support for upholding the Belfast Agreement, maintaining the Common Travel Area and avoiding a hard border. The EU wants to ensure that any arrangement that achieves these high-level principles is compatible with EU law, which is why it has suggested: “flexible and imaginative solutions will be required.” This section sets out a comprehensive and flexible way to address these unique circumstances.

APPENDICES

WHY WE HAD TO LEAVE – BREXIT AND THE DEEPENING UNION

Aim 1: Upholding the Belfast (“Good Friday”) Agreement

- The Good Friday Agreement

The Belfast or “Good Friday” Agreement of 1998 (signed by the UK Government, the Republic of Ireland Government, and eight of the Northern Ireland political parties, and endorsed by a treaty between the UK Government and the Republic of Ireland Government) establishes UK obligations under international law to another sovereign state in respect of Northern Ireland. It was endorsed in parallel referendums in Northern Ireland and the Republic of Ireland and provides the foundations for the devolved arrangements in Northern Ireland. It is formed of three Strands: Strand 1 sets out the internal governance of Northern Ireland, Strand 2 details relations between Northern Ireland and the Republic of Ireland (“North-South cooperation”) and Strand 3 focuses on relations between the UK and the Republic of Ireland (“East-West cooperation”).

- The Good Friday Agreement as a safeguard for peace

The Good Friday Agreement successfully manages Northern Ireland’s divisions. It confirms Northern Ireland’s position as part of the UK in accordance with the principle of consent by the people of Northern Ireland for changes in constitutional status. Crucially, this reference to consent refers to whether Northern Ireland remains part of the UK or becomes part of a united Ireland, not to Northern Ireland’s position inside or outside the EU (as confirmed by the High Court in Belfast in October 2016 and the UK Supreme Court in January 2017).⁵² It also confirms the permanent birthright of all the people of Northern Ireland to choose to hold British or Irish citizenship, or both.

- UK and EU public commitments to uphold the Good Friday Agreement

The UK and the EU have publicly committed to upholding the Good Friday Agreement. The UK Prime Minister has stated: “There is no reason to believe that the outcome of the referendum will do anything to undermine the absolute rock-solid commitment of this Government and the people of Northern Ireland to the settlement that was set out in the Belfast agreement.” The EU Council negotiating guidelines confirmed this commitment: “The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance.”

- Realising Aim 1

⁵² While the agreement assumes continuing EU membership for both the UK and Ireland (as evident from the preamble) it binds neither explicitly to maintain that membership.

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To uphold the Good Friday Agreement the UK Withdrawal Agreement must formally recognise the citizenship rights of the people of Northern Ireland as laid down in the Agreement: following the UK's departure the people of Northern Ireland will continue to be able to identify themselves as British, Irish or both. The UK Government, the ROI Government and the EU must also affirm their ongoing support for the peace process. This includes continued commitment of resources to support PEACE (the EU programme for Peace and Reconciliation in Northern Ireland) and INTERREG (providing support for economic development in the Border Regions), which have been crucial in diminishing border conflict, and have improved cross-border transport links.

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Aim 2: Maintaining the Common Travel Area and associated rights

- The Common Travel Area

The Common Travel Area (CTA) is a special border-free zone comprising the UK, the Republic of Ireland, the Channel Islands and the Isle of Man. It dates to the establishment of the Irish Free State in 1922 and predates the UK and the Republic of Ireland's membership of the EU in 1973, which means that the reciprocal rights for Irish and British citizens operate separately and alongside EU citizens' rights. Indeed, CTA rights have led to the enjoyment of additional rights for UK and ROI citizens beyond those associated with EU membership.

CTA rights give special status to the UK and the Republic of Ireland, including the right to enter and reside in each other's state without having to obtain permission, the right to work without obtaining permission, the right to study, eligibility to vote and stand for election, and eligibility for certain welfare entitlements.

The rights of Irish citizens in the UK were first codified in 1949 when the Republic of Ireland left the Commonwealth, with the CTA put on a statutory footing in the UK by the Immigration Act 1971. Under the Republic of Ireland's immigration law, British citizens are outside the definition of 'non-national' and are therefore exempt from immigration law.

The Common Travel Area is therefore of paramount importance in the context of the peace process and relations on the island of Ireland. It facilitates the vast number of people who commute across the border for work, business, trade, education, health, family or other reasons.

- EU and UK public commitments to maintain the Common Travel Area

The UK and the EU have publicly committed to maintaining the Common Travel Area. The UK Government stated: "We want to protect the ability to move freely between the UK and Ireland, north-south and east-west, recognising the special importance of this to people in their daily lives." David Davis, when addressing the House of Commons during the passage of the European Union (Notification of Withdrawal) Act 2017, further emphasised the Government's guarantee "without any qualification whatever", of the retention of the CTA. The EU Council negotiation guidelines confirmed this commitment: "Existing bilateral agreements and arrangements between Ireland and the United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised."

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- Realising Aim 2

Continuation of the CTA (already recognised by the Amsterdam treaty) would be compatible with EU law, as there is nothing to stop EU and non-EU states establishing a border-free zone among themselves, as shown by the Crown Dependencies being outside the EU but within the CTA.

However, for the CTA to continue to be compatible with EU law post-Brexit it is of paramount importance that the Republic of Ireland remains outside the Schengen area. Irish Ambassador Dan Mulhall, giving evidence to the Lords EU Committee⁵³ stated that the Republic of Ireland is under no pressure from other EU Member States to join Schengen, as they understand the unique circumstances of Northern Ireland.

Both the UK and the Republic of Ireland should also remain part of the Schengen Information System, to be able to share all data on who has entered their territories and enable the CTA alongside EU immigration policy.

Finally, the UK should allow EU nationals to enter the UK visa-free, as doing otherwise would not be enforceable by Republic of Ireland border authorities who would still be bound by the EU freedom of movement principle (something likely to happen anyway as this privilege has already been granted to other states such as Barbados, Georgia, Tunisia, Uruguay, Swaziland, Senegal and Kiribati). This would be compatible with an independent UK immigration policy, as issues of legality would only arise if EU visitors try to stay longer than the period covered by the visa-free arrangement: the enforcement of ensuring that people do not over-stay cannot take place at the border, but is done via mechanisms such as regulating access to social security and the job market.

Border checks from a purely security perspective are already in place: since the UK and Ireland are not in Schengen it therefore seems likely that the UK could continue to rely on the Republic of Ireland to enforce the CTA border for security. Indeed, Republic of Ireland officials have acted under UK delegated authority since the 1950s and could thus process people arriving in the ROI who wish to transit into the UK. The effectiveness of such checks would depend on bilateral cooperation. Thus the British-Irish Intergovernmental Conference and the British-Irish Council (both established under the 1998 Good Friday Agreement) will be an essential forum to strengthen post-Brexit UK-ROI bilateral relations and allow the CTA to continue.

⁵³ Lords EU Committee, *Brexit: UK-Irish relations*, 12 December 2016, HL Paper 76 2016-17, Q4

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Aim 3: Avoiding a Hard Border for the Movement of Goods

- The Irish border

The Irish border is 310 miles long with nearly 300 formal crossing points and many informal ones. A large volume of trade crosses the border. Until the UK leaves the EU, both the UK and the Republic of Ireland are part of the EU Single Market and Customs Union, removing the need for customs checks on goods at the border. The central question for negotiations is thus how the wish of both the EU and UK to avoid a hard border can be reconciled with the fact that the Irish border will become an EU customs border after Brexit.

The Republic of Ireland is by far the most exposed EU Member State to Brexit as the UK is its biggest trading market, and a hard border would be disruptive to trade. According to the Irish Exporters Association, two thirds of the major exporters in Ireland ship goods via Britain on their way to European and global markets, as transiting through Britain allows Irish companies to take advantage of short sea crossings from Ireland, extensive UK motorways and the Channel Tunnel. A hard border would mean increased costs and delays for these businesses, which could damage an Irish economy that still bears the scars of the financial crisis. In its report on the Government's negotiating objectives, the Exiting the EU Committee said: "Much of Ireland's business, particularly its agri-food sector, was closely integrated between north and south, and operated on the basis of seamless cross border movement. There was a fear that any customs requirements would introduce costs and delays and disrupt this business."

A hard border could also provide an opportunity for those who aim to disrupt the peace settlement by arguing that the Good Friday Agreement was being undermined. There are close economic ties between Northern Ireland and the Republic of Ireland and disrupting these could be destabilising.

The UK and the EU have publicly committed to avoiding a hard border for the movement of goods. The UK Government stated: "We will work with the Irish Government and the Northern Ireland Executive to minimize frictions and administrative burdens and to find a practical solution that keeps the border as seamless and frictionless as possible." The EU confirmed this commitment: "Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order."

- Realising Aim 3

As customs are an exclusive responsibility of the EU (not Member States) a purely bilateral agreement between the UK and the ROI is not possible: it is for the EU and UK to resolve the customs issue (although the ROI can make proposals). Because this issue is part of the future

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trading relationship between the EU and the UK, full agreement on the Northern Ireland issue could not be settled in Phase 1 of the negotiations.

In the Brexit negotiations the EU appears to have suggested the unity of the United Kingdom and the future of the Good Friday Agreement depends on the continuation of the free circulation of goods on the island of Ireland, which in turn depends on negotiating a Customs Union. What is important to note however is that con the/a Customs Union alone does/would not deliver the free circulation of goods. In order to do that there must be no difference in regulation (hence no need for checks) which emanate from Single Market rules. Single Market rules are created by EU members and enforced by the ECJ. Once outside the EU the UK will have no vote in the creation of these rules and no representation in the ECJ. Thus, any form of customs arrangements, including a customs partnership, means continuing curtailment of UK capacity for independent trade and self-government, plus ECJ jurisdiction even if mirrored by an EFTA Court-type institution, applying harmonized rules and regulations across the domestic UK economy; and also mean external tariffs and abiding by future changes to this, but without a vote.

Thus, what the EU is actually arguing is that the unity of the United Kingdom and the future of the Good Friday Agreement actually depends on nothing less than an agreement equivalent to, if not worst than, EU membership. As Lord Trimble stated, it is “Rubbish that Brexit will undermine the Good Friday Agreement”. The Good Friday Agreement was about dealing with constitutional issues, ending terrorism and bringing peace, not economic matters and in fact contains only a passing reference to the EU. The deal that Britain struck with the EU in December which established that Northern Ireland would remain in the Customs Union and the Single Market unless “the UK Government can convince the rest of the EU that it has a workable alternative which preserves an open border with the Irish Republic”, other than not being legally binding, is in direct contravention of the Good Friday Agreement itself as one of its main tenets is that that there would be no constitutional change to Northern Ireland without majority consent – which at present does not exist.

As the only way the Prime Minister can deliver on the Government’s Brexit policy, is if, as just stated above, we are outside any kind of Customs Union; and seeing that Northern Ireland of itself cannot be part of a Customs Union without breaching the principle of Constitutional Integrity of Northern Ireland within the United Kingdom, which is inherent in the existing framework of the Good Friday Agreement itself, it is obvious that any kind of Customs Union cannot be logically invoked as an answer to the border issue with Northern Ireland. As respects suggestions that any kind of infrastructure or apparatus at the border will attract acts of terrorism or civil disruption, this is no more likely than present day to day surveillance for a variety of reasons that already exist within the framework of the Common Travel Area, which has been the state of affairs since 1922.

The truth is that the EU is completely out line in using the issue of Northern Ireland in order to undermine the British negotiating position on Brexit. There are some Member States who are

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now resisting the extent to which the Northern Irish issue is being used to undermine the negotiations and thereby jeopardizing the interests of those Member States themselves. Furthermore the EU in the past has been prepared to adopt flexible attitudes towards difficult frontier issues such as, as between East and West Germany and Southern and Northern Cyprus and in respect to Algeria in 1962. Instead the EU is insisting we adhere to its legalist doctrine rather than helping us find and implement a practical solution. Indeed, Lord Trimble said he was “astonished” to hear the EU Chief Negotiator Michel Barnier’s claim that a hard border was “inevitable” if the UK left the EU single market and customs union. Indeed, the fact that Barnier failed to give any concrete reasons for why he claimed this was “inevitable” and thus avoiding publicly discussing the details is because the EU’s underlying intentions are ultimately to do just that.

The reality is that it is only “inevitable” if Brussels imposes restrictions. The British Government clearly stipulated that it is not going to put any infrastructure on the border, and has referenced identifying ways in which tariff collection and any other border checks necessary can be done “smartly” without the need for physical infrastructure at the border itself. Jon Thompson, Chief Executive and Permanent Secretary of HMRC, affirmed that he was confident that there wouldn’t be any requirement for physical infrastructure between Ireland and Northern Ireland “whatever happens” when giving evidence to the Exiting the European Union Select Committee last November. Lord Trimble, is confident that the border issues can be resolved. Furthermore, MacsSwiney in evidence to the Treasury Select Committee stated: “The EU has agreed that the objective of the talks should be no tariffs and no quantitative restrictions. Arranging customs under the WTO framework is what should be done and indeed what the rest of the world does. The EU has no cause to threaten chaos by refusing to cooperate.”

Ultimately, whether or not the EU and the UK negotiate an FTA or revert to WTO rules, they will still require that customs controls take place at the border, because customs authorities enforce not only tariffs, but are also concerned with regulatory enforcement: they check that goods passing between territories respect the health and safety regulations and environmental regulations as well as countering money-laundering and counterfeited goods. Indeed, even if a UK withdrawal agreement were to establish a new customs partnership that would mirror EU arrangements for goods destined for the EU, UK and Irish governments would have the right to carry out inspections for anti-counterfeiting, as they do now.

As it would not be practical to check every consignment crossing from Northern Ireland (even during the height of the Troubles in the 1970s it was never possible to impose checkpoints across the entire frontier) the only practical alternative is for the UK and ROI to go for the “maximum facilitation option” – a technological approach to pre-clear almost all goods, allowing trucks to cross without stopping. Pre-sealed trucks carrying Authorised Economic Operator status (an internationally recognised quality mark indicating that your role in the international supply chain is secure, and that your customs controls and procedures are efficient and compliant) can be checked by Automatic Number Plate Recognition technology at the border. The vast majority of UK-EU customs clearance post-Brexit would thus be done in advance through pre-registration

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and trusted trader schemes, and monitoring can be conducted in each country (small business can be exempted), as under the North American Free Trade Agreement (NAFTA). Indeed, more goods cross the US-Canada border each year than the EU’s external border – and with no delays.

He also argues that the negotiation stance of the Commission (which judged this option as “impossible”) is driven by the fact that they believe that our Parliament might force the Government into a customs union. Indeed, the EU is ignoring its own negotiating guidelines. These stipulate that “the unique challenges of Ireland will require flexible and imaginative solutions.”

Checks and inspections, when required, will take place at dedicated zones away from the land border, with UK checks recognised by the Republic of Ireland and vice versa. Overall, adapting to leaving the Customs Union involves one-off costs and, as technology is enhanced, the investment will result in falling variable costs.

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Brexit Negotiations for the Withdrawal Agreement

Phase 1 of Brexit negotiations for the Withdrawal Agreement has already established that the Common Travel Area will continue to apply without impacting the Republic of Ireland's obligations under EU law with respect to freedom of movement. The commitment to the Good Friday Agreement from both sides has been re-stated. Paragraph 49 of the Withdrawal Agreement states that, should a deal not be achieved, the UK will "propose specific solutions" to address the unique circumstances on the island of Ireland. This will include maintaining "full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement". This is to be interpreted as "alignment of aims" rather than "regulatory alignment", as the entirety of the UK will be leaving the EU, and thus the Single Market and the Customs Union. In essence, the agreement gives the Northern Ireland Assembly, when restored, a block on any new trade barriers between Northern Ireland and the UK, in absence of a UK-EU FTA after March 2019.

In accordance with the principle that "nothing is agreed until everything is agreed", the deal reached in Phase 1 is "informal", but sets out political commitments that will be very relevant to the formal legal process of drawing up the Withdrawal Agreement between the UK and the EU. These commitments will therefore become legally binding (upon the UK and EU) if and once the UK accepts the final Withdrawal Agreement at the end of the Brexit negotiations.

More recently, the draft Withdrawal Agreement of 19 March 2018 which the EU has presented contains an unacceptable proposal, purporting to establish "a common regulatory area comprising the Union and the UK in respect of Northern Ireland", which would "constitute an area without internal borders in which the free movement of goods is ensured and North-South cooperation protected".

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Conclusion

In March 2019 the border between the ROI and Northern Ireland will become the border between the UK and the EU. Both the EU and the UK are committed to upholding the Good Friday Agreement and intend to maintain the CTA. If a hard border were established it would come from the EU, as the UK has no intention of building this physical infrastructure. Ultimately, the UK and the EU should revert to a technology-based solution for customs controls.

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APPENDIX 2: CITIZENS' RIGHTS

On 8 December 2017 the UK and EU negotiators issued a Joint Report on progress during Phase 1 of the Negotiations between the UK and the EU, which dealt with Citizens' Rights. The draft Withdrawal Agreement of 19 March 2018 builds on the Joint Report, and also includes a section on Citizens' Rights (Part Two of the draft), which was entirely agreed by the EU and the UK.

- **Scope of the Rights**

The draft Withdrawal Agreement of 19 March 2018 firstly establishes that citizens' rights are reciprocal: they will cover both EU27 citizens in the UK and UK citizens in the EU27. It then indicates that the agreement covers citizens who have "exercised free movement rights by the specified date" (that date was agreed to be the end of the transition period), thereby applying to those resident on that date but also to those who had previously been resident but departed briefly from the country in which they were living, in accordance with EU free movement law. The agreement covers those who seek to be joined by family members after Brexit day, rules on residence status, and equal access to health care and social assistance.

The scope of this provision reflects the EU position on citizens' rights, as it delayed the end of freedom of movement between the EU27 and the UK by extending the deadline by which EU citizens living in Britain can claim a special residency status to the end of the transition, 31 December 2020. Consequently, the UK would not be able to introduce new immigration controls on EU migrants before 2021. This means that those who arrive after Brexit but within the transition period will have a pathway to permanent residence.⁵⁴

- **Enforceability**

The UK will bring forward a Bill (the Withdrawal Agreement and Implementation Bill) to fully implement the citizens' rights provision into UK law. Once the Bill has been adopted, the provisions on citizens' rights will have direct effect in primary legislation and prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future. Thus, similarly to the European Communities Act, UK courts will be given the (otherwise constitutionally impossible) power to set aside conflicting Acts of Parliament (as implied repeal of that Act by later Acts of Parliament is not possible). The principle of parliamentary sovereignty is safeguarded by the fact that express repeal of the Act remains a possibility and that government envisages establishing a "declaration of incompatibility" procedure similar to

⁵⁴ Migration Watch UK has estimated that up to a million people (together with certain relatives) could acquire a right to settle in the UK as a result (this was supported by a BBC analysis) – and the majority of those arriving during the transition would be those with the most to gain financially from staying on, i.e. people from Eastern Europe.

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the one that exists within Section 4 of the UK Human Rights Act 1998 which merely gives Courts the power to declare a law incompatible (in this case to the European Convention of Human Rights), but the power to change a law declared incompatible rests with Parliament. Crucially, and unlike the European Communities Act, this power will only apply to the specific field of citizens' rights, not to the entirety of EU law. This should therefore not present a major problem, as the Prime Minister and the Leave campaign guaranteed fully-acquired rights for UK citizens living in the EU27 states.

Nonetheless, this asks what would happen were the UK to expressly repeal the Act. The UK Parliament, in accordance with the principle of parliamentary sovereignty, will retain the right to repeal the Act, but this is likely to incur international responsibility, as it would count as a breach of the Withdrawal Agreement between the UK and EU. However, as citizens' rights are reciprocal, the UK would only seek to repeal the Act and thus alter the rights of UK citizens in the EU27 if a fundamental change in circumstances (that would affect the nature of the citizens' rights provision themselves) was to emerge; this would exempt the UK from international responsibility.

Ultimately however, the matter would have to be resolved under the dispute settlement provisions of the Withdrawal Agreement, which the UK and the EU have yet to agree. To safeguard the principle of parliamentary sovereignty, disputes over the Withdrawal Agreement must not fall under ECJ jurisdiction (where the UK will have no representation after Brexit). It is in fact unheard of in international relations that a sovereign state who enters into a treaty with another sovereign entity is forced to accept as binding the ruling of the court of the other party to the treaty. Nor is there any precedent in treaties between the EU and other non-Member States to be bound by rulings of the ECJ. Allowing this to happen would cross the UK Government's "red line" concerning the power of the ECJ to interfere with UK law after Brexit.

- **Jurisdiction**

Article 4 of the draft Withdrawal Agreement on the methods and principles relating to the effect, the implementation and the application of the Withdrawal Agreement establishes that Union law is to be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union, in conformity with the relevant case law of the ECJ handed down before the end of the transition period, and that UK courts must have due regard to relevant case law of the ECJ handed down after the transition. However, the EU and the UK have yet to agree on whether UK courts will be required to follow post-Brexit ECJ judgments until the end of the transition period.

The Withdrawal Bill before the UK Parliament provides that Parliament, the executive, or supreme court, might decide to depart from such "retained" case law, thereby **retaining the UK principle of parliamentary sovereignty**. As discussed above, these departures will be limited as regards citizens' rights provisions. However, the draft Withdrawal Agreement goes further than

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the Withdrawal Bill, as it states that UK courts will have “due regard” to ECJ judgements issued after Brexit Day (rather than “taking account” of the judgements).

Article 151 of the draft Withdrawal Agreement also creates the possibility for the UK to ask the ECJ to give a “preliminary ruling” on a provision of the Withdrawal Agreement concerning citizens’ rights if there is no clear case law on the issue. The draft states that this will be effective if a case is brought to a UK court within 8 years of the “date of application” of the citizens’ rights provisions (i.e. the end of the transition period). The following paragraph was added in the 19 March draft Withdrawal Bill, but did not feature in the previous drafts: “where the subject matter of the case before a court or tribunal in the United Kingdom is a decision on an application made pursuant to Article 17 paragraphs (1) or (4) or Article 17a, a request for a preliminary ruling may be made only where the case has commenced at first instance within eight years from the date from which Article 17a applies.” Article 17 concerns issuance of resident documents and Article 17a concerns issuance of resident documents during the transition period. This will be made possible through a mechanism analogous to Article 267 TFEU for preliminary reference, and such preliminary rulings would have the same legal effects in the UK as preliminary rulings given pursuant to Article 267 TFEU in the Union and its Member States, hence the UK courts would be bound by them.

Crucially, although this procedure is “voluntary” for the UK, EU Member States remain obliged to refer a case to the ECJ for a preliminary ruling on a point of EU law if that issue has not already been decided by the ECJ. Thus due to the principle of “due regard” of ECJ case law to which the UK must conform once it has left the EU, it could find itself indirectly bound by “preliminary rulings” given to the EU27 by the ECJ. This would make the preliminary ruling provision agreed “voluntary” only in name. Additionally, as these provisions will form part of the new treaty, nothing will have been interpreted by the ECJ previously, meaning that most if not all points of law will be open to ECJ interpretation. Clearly, this is a power-grab attempt by the ECJ to have jurisdiction over citizens’ rights, and thus over the Withdrawal Agreement. **The UK Government must find a way to curtail ECJ jurisdiction and prevent this model** (which currently only applies to the specific field of citizens’ rights) to be used as a template for the transitional rules and a future relationship.

Under Article 152, the UK has also agreed to set up an Independent Authority to monitor the implementation and application of citizens’ rights, which would have “equivalent powers to those of the Commission acting under the Treaties to conduct inquiries on its own initiatives concerning alleged breaches of Part Two of this Agreement by the administrative authorities of the United Kingdom to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries.” This Authority would have the right to bring a legal action before a competent court or tribunal in the UK in an appropriate judicial procedure, with a view to seeking an adequate remedy. In addition, a specialised Committee on citizen’s rights on the implementation and application of Part Two of the draft will be created, and both the Commission and the Authority shall inform annually that Committee. At the end of the transition the Independent Authority will be dissolved.

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APPENDIX 3: DEALING WITH THE CHARTER OF FUNDAMENTAL RIGHTS

The Charter of Fundamental Rights was created to establish the supremacy of EU law by consolidating into a single EU document the substantive and procedural rights derived from the constitutional traditions of Member States (guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms), other human rights conventions (the Social Charters adopted by the EU and by the Council of Europe) and the case law of the ECJ and of the ECHR. It is to be applied whenever EU law is implemented. It has been rejected by successive UK Governments however, including the current Government. Most recently, an amendment to the European Withdrawal Bill tabled by Conservative rebels attempts to incorporate the Charter into UK domestic law. It proposes⁵⁵ “to allow the Charter of Fundamental rights to continue to apply domestically in the interpretation and application of retained EU law”.

There are procedural, substantive and political reasons why the Charter cannot be part of UK law once the UK leaves the EU.

Procedural Reasons

- The Charter was created to apply only when implementing EU law

The Charter cannot become part of UK domestic law because the Charter itself prescribes that it applies only when implementing EU law. Article 51(1) of the Charter, which deals with the scope of the instrument, reads: “the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*” (emphasis added). Thus, the Charter would therefore have no basis for application, as EU law will cease to apply to the UK once it leaves the Union.

- The Charter would apply to domestic UK law

If the Charter were to be brought into UK law only to apply only to “retained EU law”, it would be impossible to stop its operation on UK domestic law. This is because the legal status of

⁵⁵ European (Withdrawal) Bill;

Clause 5 (4): The Charter of Fundamental Rights is not part of domestic law on or after exit day;

Clause 5 (5): Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

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“retained EU law” will be that of UK domestic law generally: thus, there will be no effective way of distinguishing which type of law is “retained EU law” and which is not, especially as time passes and “retained EU law” is amended by Parliament. Effectively, this means that the Charter would apply to UK domestic law in general (more on this below).

This argument is reinforced by the fact that it is already difficult to stop the operation of the Charter operating within Member States’ domestic law where there is a clear-cut distinction between EU law and National law (as their legal status is different) because the presence of even a peripheral or tangential element of EU law is quite sufficient to justify its application.⁵⁶

- [The UK’s legal obligations would be more extensive than those of the EU Member States](#)

The Charter should not become part of UK law because no EU Member State has incorporated the Charter in its own national law and indeed, no EU Member State is bound by the Charter when applying its own domestic law. The Charter was never meant to operate when implementing domestic law – as evident from Article 51 setting out the scope of the Charter itself (“only when they are implementing Union law”). As Professor Paul Craig argues: “the Charter does not create justiciable rights as between private individuals”. It would thus be absurd for the UK to be forced to apply and incorporate the Charter to its own domestic law once outside the EU. The retention of the Charter in UK law would even result in the conclusion that the UK’s legal obligations being more extensive after leaving the EU and more extensive than the obligations of remaining Member States themselves.

Substantive Reasons

- [The UK does not need the Charter because it does not create new rights](#)

The Charter does not create new rights, but was self-consciously drafted to be declaratory of existing rights. This is reflected in the Preamble, which states: “This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe

⁵⁶ This has been demonstrated by the Case C-617/10 Åklagaren v Hans Åkerberg Fransson, 26 February 2013, where the fact that some elements of substantive tax law had been harmonised by VAT directives justified the expansion of EU law to cover the general procedures by which Member States enforce the payments of taxes. Unsurprisingly, Solicitor Mr Martin Howe (when submitting written evidence to the European Scrutiny Committee on the Application of the EU Charter of Fundamental Rights in the UK) described this ruling as “nothing short of a naked grab of territory by the ECJ”.

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and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.”

Indeed, “the Charter does not create justiciable rights as between private individuals” because the source of these rights does not originate from the Charter. Charter rights are provided for in pieces of legislation that are already part of UK law; many rights are provided in international instruments to which the UK is a party. In fact, most of the provisions contained in the Charter come from the European Convention of Human Rights, which has been converted into UK law through the Human Rights Act. The Charter’s rights have also been expanded through EU directives and regulations which will be converted into UK law through the European (Withdrawal) Bill. Thus the purpose of the Charter is only to establish the supremacy of EU law by elevating already existing rights to the same level as EU treaties (as per Article 6(1) TEU as amended by the Lisbon Treaty giving the Charter “the same legal value as the Treaties”).

- [The Charter was created to establish the supremacy of EU law and cannot apply to the UK once it leaves](#)

The Charter ensures the supremacy of EU law because it ensures that when EU law is implemented, it is interpreted in accordance with an EU legal instrument (the Charter itself), not a set of rights in national constitutions (i.e. their own domestic law). The Charter therefore cannot apply to the UK once it leaves the EU, as this would contradict the UK principle of parliamentary supremacy and the referendum result – as the Charter would remain a supreme legal instrument.

- [The Charter would result in an extension of ECJ jurisdiction in the UK](#)

Incorporation into UK law will result in the retention of the mechanisms to enforce Charter rights, which are imposed by the EU to ensure the unity and autonomy of EU law. Thus UK courts would be unable to depart from ECJ judgements when applying the instrument: this would be a serious problem, as when the ECJ interprets the Charter rights, as with all other EU law, it pursues the “integrationist agenda” of the EU (because the internationalist agenda is in the very treaties, and the judges appointed to the ECJ must swear an oath before the Court to respect them). This is clearly incompatible with the referendum result.

In addition, as the ECJ after Brexit will become a wholly foreign court with no British judge or Advocate-General, it cannot have jurisdiction (direct or indirect) in the UK. This would be contrary to international and established EU practice. There is no other trade or association agreement between the EU and a non-Member State in which the non-Member State accepts the binding jurisdiction of the ECJ. In fact, there are only two instances where non-EU States accept (indirectly rather than directly) the case law of the ECJ: the EEA States under the EEA Agreement, and Turkey under its Customs Union agreement with the EU. These are cases where the States concerned have agreed to sign up to a growing body of rules (the EU’s internal market

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rules in the case of the EEA Agreement, and the EU Customs Union's rules on tariffs, quotas and other matters in the case of Turkey). Neither of these instances is relevant to the adjudication of Charter rules.

Ultimately the effect of the Charter, whether applied to UK laws made before or after Brexit, cannot be predicted as its operation would be dependent on the rapidly evolving and expansionist case law of the ECJ which the Referendum vote and the Conservative Manifesto pledged to end.

- [The Charter would give excessive powers to UK unelected courts thereby subverting parliamentary sovereignty](#)

One of the fundamental aspects of this Charter is that it professes to give the right to set aside Acts of Parliament when they are in breach of these particular responsibilities. Unelected judges could thus use the vague content of Charter rights to strike down or invalidate legislation made by the elected MPs, compromising parliamentary sovereignty and democracy itself. It is fundamental to our Constitution that Acts of Parliament cannot be set aside by the Judiciary because “the ultimate control in a democracy should be in the hands of the elected representatives”. In a debate on the Charter in the House of Lords (during the Report Stage of the European Union (Withdrawal Bill), Lord Keen of Elie, the Advocate General, said that such striking down would: *“be one the greatest Constitutional outrages since 1689. It would also indicate a total abdication of responsibility by this Parliament ...what happened to the Mother of Parliaments? What happened to the concept of the Sovereignty of this Parliament?”*

The Charter cannot become part of UK law because it would expand effectively political decision-making by unelected judges. The vague content of Charter rights could be used to strike down or invalidate legislation made by the elected MPs, compromising parliamentary sovereignty and democracy itself.

The implication is profound: since the Glorious Revolution (1688), parliamentary sovereignty means Parliament can make laws concerning anything, and that an Act of Parliament cannot be questioned by a court of law. The words of Lord Bingham are pertinent to this point: “the principle of Parliamentary sovereignty has been recognised as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it.”

Overall, those who criticise the European (Withdrawal) Bill for empowering the executive to change the law without (they say) adequate scrutiny should note that through the Charter they would give much broader powers to courts, with much less scrutiny and with no sunset clause, irrevocably altering the way the UK constitution functions.

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Political Reasons

- The Charter has been rejected by successive governments, including the government of the day

The Charter has no democratic legitimacy in the UK as it has been opposed by successive UK Governments.

It was first raised at the time of the Nice Treaty and was opposed by the UK during the Constitutional Convention that led to the failed EU Constitutional Treaty. When in opposition the Conservative Government opposed to the inclusion of the Charter in the Lisbon Treaty. Lord Goldsmith, Tony Blair's advisor on the Lisbon Treaty in relation to the strained every sinew to keep the UK outside it.

Lord Goldsmith, who was in 2000, Tony Blair's personal negotiator in Brussels on the charter, was clear the CFR should not be legally binding:

"The draft charter now makes it clear that it is not intended to give Brussels any new powers. If new rights are to be created that must be done through the normal mechanisms, and not through this declaratory charter."⁵⁷

Rt Hon Ken Clark MP in 2000 at the time of the EU Constitution stated:

"I do not think much of this charter of human rights; it is quite unnecessary. It is a needless diversion, and I hope that we can get rid of it in every effective way."⁵⁸

The White Paper on the British Approach to the European Union Intergovernmental Conference, July 2007, stated:

"The Government sought to ensure that nothing in the Charter of Fundamental Rights would give national or European courts any new powers to strike down or reinterpret UK law, including labour and social legislation. This has been achieved."⁵⁹

Rt Hon Dominic Grieve questioned the purpose of the Charter of Fundamental Rights in 2008:

"What is the purpose of the charter of fundamental rights? If it is innocuous, as he says it is, why have the Government negotiated a protocol that will supposedly make it ineffective?"⁶⁰

⁵⁷ Guardian, 1 August 2000: <https://www.theguardian.com/politics/2000/aug/01/uk.eu>

⁵⁸ Hansard 23 November 2000: <https://www.theyworkforyou.com/debates/?id=2000-11-23a.481.2&s=charter+speaker%3A10115#g485.1>

⁵⁹ UK Govt 23 July 2007: <https://www.gov.uk/government/publications/the-reform-treaty-the-british-approach-to-the-european-union-intergovernmental-conference>

⁶⁰ Hansard, 5 February 2008 Cm 799 and 806: <https://publications.parliament.uk/pa/cm200708/cmhansrd/cm080205/debtext/80205-0006.htm#08020538000729>

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Despite this it was of course adopted as a legal text in the Lisbon Treaty. According to the documents released by the EU's legal service,⁶¹ on 21 June 2007 in the privacy of the **European Council the UK Government** decided not to argue for an opt-out after all:

“Following this morning’s meeting with Mrs. Merkel, it now seems that a UK opt-out from the Charter is not going to be proposed by the Presidency

The Labour government insisted on a protocol stating that the Charter created no new rights justiciable in the UK. However, although many believed that the UK (and Poland) had secured this opt-out (due to their concern that the Charter would increase the ability of Europe to strike down national laws), this turned out to be false.

On 25 June 2007 **Tony Blair** told Parliament:

"It is absolutely clear that we have an opt-out from both the charter and judicial and home affairs. Those were the reasons why people like the right hon. Gentleman were saying that they wanted a referendum."⁶²

Indeed, their opt-out (“Protocol”) said: “The Charter does not extend the ability of the Court of Justice of the European Union, to find that the laws of the United Kingdom are inconsistent with the principles that it reaffirms.” This was described by Blair as a recognition of the UK’s will not to be bound by the Charter’s provisions. However, Tony Blair wrongly claimed that he had an opt-out on the Charter as in the end the ECJ made no such concession, stating that the Protocol was just a “comfort clause”, not an opt-out.⁶³ The Charter applies in the UK, Poland, and all Member States. The opt out was thus merely a clarification that the Charter would only be used to interpret and potentially strike out EU law. However, the scope of EU law has been extended to include those related to implementing EU law and obligations in the UK leading to a wide range of UK cases using the Charter.

The European Scrutiny Committee has also recommended introducing primary legislation to amend the European Communities Act 1972, “to exclude, at least, the applicability of the Charter in the UK”.

Crucially, Conservative MPs also made a promise in the 2017 Conservative Manifesto: “We will not bring the European Union’s Charter of Fundamental Rights into UK law”.

- [The incorporation of the Charter into UK domestic law through the European \(Withdrawal\) Bill is an attempt to subvert Brexit](#)

The incorporation of the Charter into UK domestic law appears to be an attempt to subvert Brexit into an anti-Parliamentary constitutional revolution. Any Amendment designed to reinsert the

⁶¹ <http://www.citizenhouse.eu/images/stories/Ombudsman/4.03.2013/JUR20073.pdf>

⁶² Hansard, 25 June 2007:

<Http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070625/debtext/70625-0006.htm>

⁶³ N. S. (C-411/10) v Secretary of State for the Home Department.

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Charter in UK law post-Brexit should be understood as a political move to invert the Brexit process. Indeed, the fact that senior Law Lords and Members of the Supreme Court (such as Lord Hope of Craighead and the former Lord Chief Justice, Lord Judge, the Advocate General for Scotland Lord Keen of Elie, and other eminent members of the Judiciary such as Baroness Butler-Sloss, Lord Brown of Eaton-under-Heywood and Lord Mackay of Clashfern) argued against the inclusion of the Charter during the debates on the European Union (Withdrawal) Bill demonstrates that by any reasonable standards, in terms of legal eminence and weight, those who spoke and voted against the Charter of Fundamental Rights convincingly won the argument in spite of losing the vote.

The true purpose of any such amendment is not to safeguard UK citizens' rights (which exist irrespective of the Charter). Instead it is designed to deprive the UK of the right to rule itself, by legitimising the supremacy of EU law by opening of a back door into UK domestic law through which ECJ jurisdiction can creep. Meanwhile, this directly denies: (1) the purpose of the Bill itself, i.e. to repeal the European Communities Act 1972 to reestablish Parliamentary Sovereignty; (2) the referendum result; (3) the UK Acts of Parliament that have translated the democratic decision into binding law; and (4) the subsequent government commitments to deliver on Brexit.

It is essential for Members of Parliament to resist any Amendment to the European (Withdrawal) Bill which would allow the Charter to be reinserted in UK law and to fight against these undemocratic distortions.

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Conclusion

The Charter of Fundamental Rights does not safeguard any rights that are not already protected by the UK domestic legal system. Its true purpose is in fact to ensure the supremacy of EU law and the ECJ. The UK Government has rejected the Charter and should not allow it to be brought into UK domestic law once it leaves the Union. This would create a constitutional crisis, continuing ECJ jurisdiction in the UK and granting excessive powers to UK unelected courts (both of which would usurp the principle of parliamentary sovereignty), with the consequence that the UK's legal obligations would become *more* extensive after leaving the EU, and more extensive than those of the Member States themselves.